



2021

REPORT ON HUMAN RIGHTS VIOLATIONS AND LEGAL ADVICE



POZİTİF-İZ ASSOCIATION
2021 REPORTING OF VIOLATIONS
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MEDULA TAKES THE BISCUIT!

2021 REPORTING OF VIOLATIONS POZİTİF-İZ ASSOCIATION

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POZİTİF-İZ ASSOCIATION

FOREWORD

Today, living with HIV means taking medication only once a day and living a life like everyone else. However, prejudice, stigma and discrimination make life difficult for people living with HIV. At Pozitif-iz Association, we have been providing peer counseling for years, listening to each other as people living with HIV, learning from each other, and becoming stronger through learning. Through peer counseling, we see that discrimination and stigma are more harmful than HIV.

This report is the 2021 summary of that process. Each year, we report on the rights violations faced by people living with HIV. Each year, we provide you with a picture of the rights violations people living with HIV face. We cite numbers and say what needs to be done to ensure equal and fair lives. But the stories we deal with are much more than numbers and rights violations.

The story of anyone diagnosed with HIV or who comes to us with a suspicion of having HIV becomes a part of our story. When we witness stigma, we are worried, and at times get angry together, but we immediately focus on resolution. We know that we are stronger when we are together. We experience this beyond knowing.

We seek our rights. We use all means to pursue our rights, and we tell our stories. This is exactly why we report rights violations. This report you are holding in your hand or reading on your screen is written so that no new reports of violations need to be written again next year. With the dream of a world without rights violations, we strive to make those violations visible.

And we are succeeding.

We may not yet have succeeded in eliminating stigma, discrimination or inequality, but as people living with HIV, we are growing stronger every day. We are finding each other. We are becoming informed. As we become informed, we overcome the walls of fear and anxiety that are placed upon us.

People living with HIV: you are not alone. We are here. The first moments HIV enters our lives may seem complicated. The rights violations you will read about in this report may hit you hard. However, our lives are not made up of these violations. And we support you when violations are committed against you. HIV is just a manageable disease, and you have rights just like anyone else. Contact us if your rights are being violated. Let's fight together.

Health care workers; in this report you will read many violations on the right of access to health care. It is in your hands to prevent violations, instead of causing them. We invite you to provide an equal service by being equipped with the right information.

Lawmakers; people living with HIV and everyone else are equal and should have the same rights. It is in your hands to abolish laws, legislation and practices that lead to discrimination and stigma.

Civil society organizations; the fight for equality for people living with HIV is a fight for social equality. If we work together, we can succeed.

We dream of a brighter future. We invite you to share in this dream...

Pozitif-iz Association



REPORT SUMMARY

This study anonymized and used as data the applications received by the Pozitif-iz Association in 2021 and reported on the rights violations faced by 140 counselees in 2021.

With the partial persistence of pandemic conditions in 2021, the impact of the COVID-19 pandemic on people living with HIV continued. Rights violations, particularly in the area of health, continued to increase.

In addition to the current problems, the Circular of the General Directorate of Service Provision of the Social Security Institution of the Republic of Turkey dated 16/08/2021 sent to the provincial directorates prevented requests for restriction of access to the Medical Messenger (MEDULA) system by personal application/email. Even requests for restricted access made before this circular were disregarded, with full access given to health care providers. This situation heightened the concerns of people living with HIV regarding stigma, prejudice, and discrimination. While the launching of the MEDULA system constituted an institutional violation of rights related to the protection of personal data, it also led to new violations of rights such as the prevention of access to the right to health care.

About 20 of the 55 requests for legal assistance for the protection of personal data received by the Association were related to requests for information on rights such as the right to privacy, the right to work, and the protection of personal data due to the availability of the MEDULA system to health care providers and access to the system by occupational physicians.

The Personal Data Protection Act provides many avenues of protection related to data security and confidentiality. However, some regulations introduced in addition to the articles of this law have led to numerous violations on the privacy of many people, including those living with HIV, for public health reasons.

There is no medical or legal barrier to HIV-infected health care workers practicing their profession, regardless of their specialty. Nevertheless, health care workers living with HIV were most affected by the launching of MEDULA.

Health care workers living with HIV were unable to contact the infection control service at the facility where they worked for fear of disclosure, stigma, and discrimination. They had to go to another hospital or even a facility in another city for their treatment and follow-up visits.

In 2021, as in 2020, the diagnosis and follow-up of people living with HIV was also largely interrupted due to the COVID-19 pandemic. In this process, people were unable to go for testing and find out if they had HIV because Voluntary Counseling and Testing Centers (VCTs) were closed down during certain periods and also due to avoiding COVID infection in health facilities. As a result, there have been delays in accessing treatment. It has become almost impossible to make appointments with infectious disease physicians, monitor the success or failure of treatments, and obtain information about health status. The news about COVID-19 medications-HIV medications, especially in the early months of the pandemic, lack of a clear statement from the Ministry of Health about whether people living with HIV were in the risk group against COVID-19, and the fact that while people with chronic health conditions were considered on administrative leave, people living with HIV were kept in the dark, have made 2021, like 2020, particularly challenging for most people living with HIV. In the end, the pandemic was a new excuse, among dozens of prejudicial reasons that have no scientific or legitimate basis, for usurping the rights of people living with HIV.

In 2021, overshadowed by the launching of the MEDULA system in violation of the protection of personal data as well as the obstacles around HIV testing and the initiation of treatment during the pandemic, the Pozitif-iz Association reported the rights violations faced by 140 counselees.

The right of access to health care was violated for 44% of the counselees. The second category with the most violations was the right to work with 25%, while the third category was the violation of the protection of personal data with 16%.

Looking at the distribution of the 140 applications by province, the number of applications from Istanbul was the highest. This cannot be interpreted as the highest number of violations taking place in Istanbul. The fact that Pozitif-iz Association is based in Istanbul may have contributed to the fact that most of the applications came from Istanbul. In addition to Istanbul, multiple applications were received from İzmir, Ankara, Kayseri, Antalya, Adana and Bursa. There were 36 applications from other provinces and 2 applications from abroad.

Applications from foreign nationals have increased compared to previous years. The right to access to medical resources for counselees, most of whom had citizenship of Turkic states such as Turkmenistan, Uzbekistan and Kyrgyzstan, was violated due to the closure of the General Health Insurance (GSS) systems. The fact that all of the applications received by foreign nationals were limited to the right of access to health care does not necessarily mean that the discrimination and rights violation experienced by these individuals worsened only in this respect. Unfortunately, foreign nationals living with HIV also faced with the same violations in daily life as Turkish people living with HIV, and this often manifested itself with more devastating effects due to the fact that they were foreigners. However, the fact that the applications made by foreign nationals living with HIV were limited to the right of access to health care can also be explained by the fact that the policies in Turkey regarding this intersectionality are insufficient and non-inclusive even at the first step of the pyramid of needs. Unfortunately, many foreigners who cannot access treatment in



their countries of origin and have no possibility to return to their countries from Turkey are systematically and institutionally prevented from accessing to the right to health care. The need for the GSS system to cover foreigners diagnosed with HIV was one of the most important issues we realized during the study.

In the continuation of this report, the quality and quantity of the applications received by the association in 2021 and the types of rights violations experienced will be analyzed. At the end of the report, we will also try to include findings and recommendations on why violations related to HIV have become entrenched despite the fact that Turkey has a patient rights legislation which naturally covers people living with HIV, how there are obstacles to seeking rights for people living with HIV in Turkey, why people living with HIV have difficulty in taking action against violations, and what NGOs and the state can do about all these.

In the second part of the report, we have included legal analyses and case summaries for the applications in the hope that they would be of particular use to lawyers working in this field.



INTRODUCTION

As part of this study, we conducted retrospective reporting of legal violations and legal analyses based on applications received by the Pozitif-iz Association in 2021. This report aims to show how the recent past affects the current reality of HIV-related rights violations in Turkey. Thus, while creating a roadmap for Turkey's response to HIV, it will also highlight the journeys of people living with HIV.

The beneficiaries of this study are HIV activists, lawyers and all legal advocates working in the field of sexual health, individuals who have been victims of rights violations due to being HIV positive, and NGOs and bureaucrats who play a critical role in Turkey's response to HIV. The main conclusion that can be drawn from the study is the systematic nature of discrimination and stigma. Another conclusion is to see the reality that violations occur in a variety of social relations and in different areas of law, sometimes in complicated ways. Along with the cases, it is concretized that rights violations are experienced routinely, so to speak.

As stated in the study, rights violations are so commonplace from the individual to the state, at every level, in every structure, that the legal basis for actions that cause these violations is almost never questioned. For this reason, it would be most beneficial for those affected by rights violations to pursue the process with the assistance of an attorney. It should be clearly and directly stated that the legal processes of individuals who are exposed to rights violations due to living with HIV must be undertaken by a lawyer, to prevent them from being exposed to legal violations again during court proceedings.

In the legal resolution of the cases in the study, reference was made to treatment options and developments related to HIV as today's concrete reality. For this reason, it is necessary to mention this reality even briefly in this section. Firstly, regarding the ways of transmission of HIV when the necessary precautions are not taken; "Unprotected sexual intercourse with an HIV-positive person who is unaware of their HIV status or whose HIV status is not 'Undetectable=Untransmittable (U=U)' because they have not yet started HIV treatment; sharing needles, syringes, and other injection equipment with an HIV-positive person by not following general sterilization and barrier rules; infants born to HIV-positive pregnant women who are not treated before birth, during birth, or while breastfeeding; Injury to health care workers with needles or sharp tools containing HIV-infected blood; uncontrolled blood donations" pose a risk for HIV transmission. The ways to prevent HIV transmission can be listed as "safe sexuality, pre-exposure prophylaxis



(PrEP), regular testing and initiation of HIV treatment, continuation of treatment without interruption, not using shared syringes, post-exposure prophylaxis (PEP), etc.”

Among the developments, perhaps the one that has the greatest impact on today’s reality and that all scientific authorities (CDC: Centers for Disease Control and Prevention - U.S. Centers for Disease Control and Prevention, UNAIDS - Joint United Nations Programme on HIV/AIDS, WHO - World Health Organization) agree on is the concept of “Undetectable=Untransmittable” (U=U), meaning “HIV-positive people who are on regular HIV treatment and take their medications every day can live as healthy and long lives as anyone else. Regular daily use of antiretroviral (i.e., HIV-suppressing) medications reduces the amount of HIV circulating freely in the blood to an undetectable level, and the goal is to maintain the amount of HIV at that level by regularly continuing treatment. An undetectable viral load (i.e., the amount of HIV in the blood) ensures that the person remains healthy and precludes the possibility of sexual transmission of HIV. In summary, HIV-positive people who receive regular treatment cannot sexually transmit HIV. On the basis of the U=U concept, HIV-positive people can have HIV-free babies naturally, which also makes an important contribution to public health.

Although 140 cases were analyzed in our study, the number of applications received by the association was much higher than this. The reason why some of the applications could not be included in the study is that the reported cases did not represent a concrete violation of the rights, and people did not take steps to claim their rights for fear of discrimination. Specifically, it was found that many counselees feared being discriminated against in the hiring process and therefore did not even go for an interview. This shows us that the fear caused by HIV discrimination and stigma prevents people living with HIV from claiming so many of their rights.



METHODOLOGY

In this study, the rights violations faced by counselees who contacted the Pozitif-iz Association by phone, social media, and email in 2021 were compiled and anonymized by the association's volunteer peer counselors based on their records taken upon communicating with the counselees. Since the study also includes analyses of previous rights violations, the statements made by the counselees at the time have been retained as much as possible, as have the statements made by the association's consultants, who dealt with the case at the time and took notes. This method is intended to remind readers of the report that each case is also an example of experience transfer/peer solidarity. In analyzing cases that contain legally ambiguous terms, we have attempted to cover all the relevant meanings of a word.

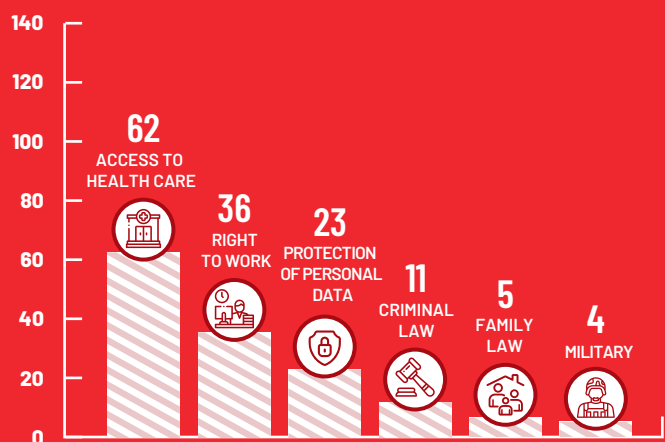
The association's peer counselors referred some cases to the association's volunteer attorneys at the request of the counselees. The applications are listed in chronological order, beginning with the distant past. The legislation that can be used to legally resolve the cases is listed in the "Legal Basis" section, and the "Legal Grounds" section explains why the specific event constitutes a violation of the rights, by which legislation the violated right is protected, and which legislation provides a remedy for resolving the violation that is the subject of the application. At the end of the study, under the title "Findings," we present what the cases that are the subject of our report have shown us in terms of health services, working life, public institutions and organizations, legislative activities, and legislation, and under the title "Recommendations," we present our recommendations on these findings.



CLASSIFICATION OF APPLICATIONS BY TYPE OF VIOLATION

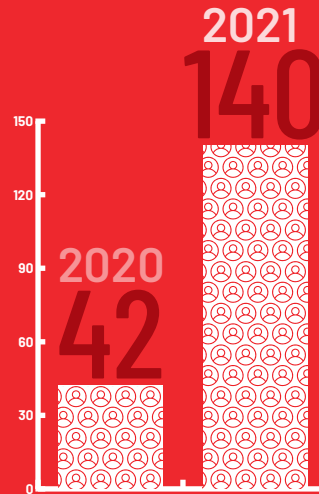
In 2021, the Pozitif-iz Association received a total of 140 applications from counselees regarding rights violations. The rights violations faced by these 140 counselees can be legally classified as follows: rights violations based on legislation on the right of access to health care, rights violations based on legislation on the right to work, rights violations based on legislation on military service, rights violations based on the law on the protection of personal data, rights violations based on criminal legislation, rights violations based on legislation on family law. According to this classification, rights violations based on legislation on the right of access to health care affected 62 out of 140 counselees, rights violations based on legislation on the right to work affected 36 counselees, rights violations based on legislation on the protection of personal data affected 23 counselees, rights violations based on criminal legislation affected 11 counselees, rights violations based on legislation on family law affected 5 counselees, and rights violations based on legislation on military service affected 4 counselees.

Distribution of 140 applications by type of violations was as follows:



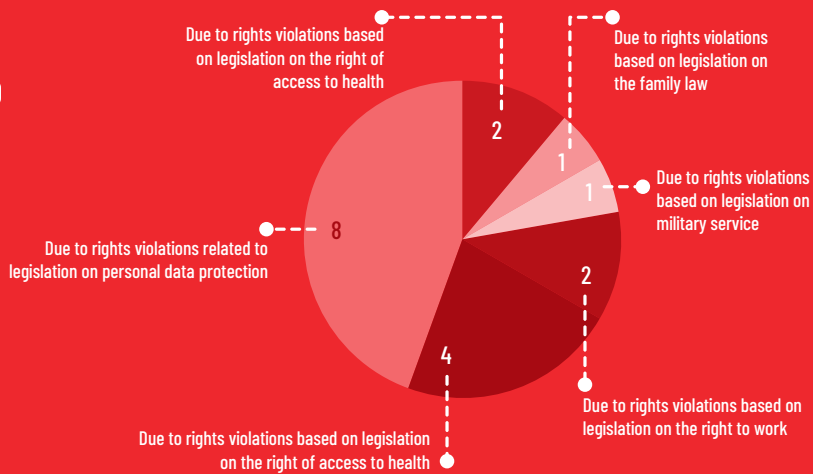
It is also important to note that with many of these violations, multiple rights were violated simultaneously. These multiple rights violations most often took the form of violations of legislation on the right to work and violations of legislation on the right of access to health care.

The number of applications submitted by HIV-positive people to the Pozitif-iz Association regarding legal issues tripled in 2021 compared to 2020.



As a result of the counseling provided by the Pozitif-iz Association with regards to 140 applications received, 18 counselees sought legal remedies. Of these 18 counselees, 2 appealed to the association for rights violation based on criminal legislation, 1 for rights violation based on legislation on family law, 1 for rights violation based on legislation on military service, 2 for rights violation based on legislation on the right to work, 4 for rights violation based on legislation on the right of access to health care, and the remaining 8 for rights violation based on legislation on the protection of personal data.

Distribution of those who took legal action



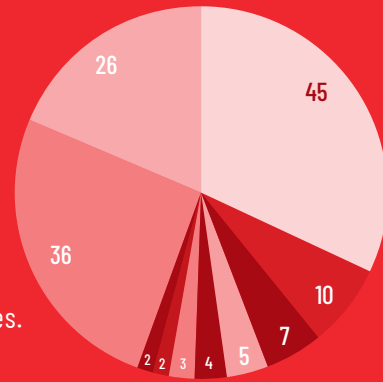
The 140 applications were received from the following provinces: 45 from Istanbul, 10 from İzmir, 7 from Ankara, 5 from Kayseri, 4 from Antalya, 3 from Adana, 2 from Bursa, 2 from abroad, 36 from other provinces, and for the remaining 26 applications, no province was indicated by the counselees.



Distribution of Counselees by Provinces

Of the 140 applications;

- 45 were from İstanbul,
- 10 were from İzmir,
- 7 were from Ankara,
- 5 were from Kayseri,
- 4 were from Antalya,
- 3 were from Adana,
- 2 were from Bursa,
- 2 were from abroad,
- 36 were from other provinces.
- The provinces where the remaining 26 counselees resided were not disclosed.





VIOLATIONS BASED ON LEGISLATION ON THE RIGHT OF ACCESS TO HEALTH CARE

The right of access to health care is one of the basic human rights protected for all people by both international regulations to which Turkey is a party and the Constitution. The most commonly used international and national legislations on the right of access to health care in Turkey are as follows:

- European Convention on Human Rights
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine
- Universal Declaration of Human Rights
- Constitution of the Republic of Turkey
- Patients' Rights Regulation
- Medical Deontology Regulation
- Code of Medical Ethics
- Public Health Law
- Social Security and General Health Insurance Law
- Turkish Pharmacists Deontology Code
- Law on the Practice of Medicine and Medical Sciences
- Turkish Pharmacists' Association Law

The right of access to health care is a right that includes 3 fundamental rights. These rights can be broadly described as entitlement to preventive and protective health care services, access to medical resources, and patients' rights.

As mentioned earlier, **62 of the 140 applications are related to violations of the right of access to health care. Of these 62 applications, 18 were for violations of the right to access to medical resources, and the remaining 44 were for violations of patients' rights.**

Of the **18 counselees** whose rights to access to medical resources were violated, **15 were foreign nationals, while the remaining 3 were citizens of the Republic of Turkey.**

The applications received by the Pozitif-iz Association in 2021 from counselees who were not citizens of the Republic of Turkey were due to violations of both the right to access to medical resources and the right to access to health care. These counselees were advised on both matters.



Two of the foreign counselees did not have a legal right of stay in Turkey, but were asylum seekers. The other 15 counselees were mostly from Turkic countries and had the right to stay in Turkey. These counselees did not have access to treatment due to having no General Health Insurance (GSS). Exclusion from GSS coverage is possible only if they were diagnosed with their chronic health condition before they acquired the right to reside and work in Turkey. The reason why these counselees had no GSS was that their chronic diseases, which they had before they were covered by the GSS, were not covered by the GSS and therefore their treatment costs were not met.

Three of the counselees who had a right to legal residence received the necessary legal support to apply to the relevant social security institutions, two of them had their application for access to treatment accepted, and another counselee's application to the institution is still pending.

It should be noted here that, in addition to the above-mentioned legislation, the Law on Foreigners and International Protection and the Temporary Protection Regulation also contains regulations for foreign nationals. The number of applications from foreign nationals has increased significantly compared to previous years, and as we have already explained, most counselees are nationals of Turkic countries such as Turkmenistan, Uzbekistan and Kyrgyzstan. The fact that all of the applications received by foreign nationals were limited to the right of access to health care does not necessarily mean that the discrimination and rights violation experienced by these individuals worsened only in this respect. Unfortunately, foreigners living with HIV face the same violations faced by Turkish people living with HIV in daily life, and most of the time, such experiences have more devastating effects due to their foreign nationality. However, the fact that cases reported by foreign people living with HIV are limited to the right of access to health care only can be attributed to the inadequate and non-inclusive nature of intersectionality policies made in Turkey even in the first step of pyramid of needs.

Of the 62 applications received on the grounds of violation of the right of access to health care, **47 were from counselees who were citizens of the Republic of Turkey, and 17 of these 47 applications were the result of the refusal of treatment by the physician, other health care personnel or health institution due to the HIV status of the counselee.** As a result of unjust and illegal abstention from treatment, dental treatment of 5 counselees was left unfinished, appointment of 3 counselees from the ear-nose-throat department was cancelled, and the other 9 counselees were not operated on. Only 4 of these 47 counselees reported rights violations they faced through the Presidency's Communication Center (CIMER).

Physician's abstention from treatment due to the HIV status of the individual is unfortunately one of the most common rights violations in the field. It must also be noted that COVID-19 pandemic was used as a "legitimate and valid reason" to avoid operating people living with HIV in particular. In the official letter titled "Delay of Elective Procedures and Other Precautions to Be Taken" which was sent to the governorates of all cities by the Ministry of Health at the beginning of the COVID-19 pandemic, the instruction was to "postpone non-urgent elective surgical procedures to a later date as much as possible, postpone non-urgent dentistry procedures as much as possible, etc.". Although this situation has decreased compared to 2020, it is still a barrier to accessing treatment for people living with HIV.

The most common attitudes faced by counselees living with HIV: The counselee was initially told that the surgery/treatment was urgent and needed to be done as soon as possible; then, when it became known

that the counselee was living with HIV, the treatment was denied, citing the relevant official letter; an exorbitant fee was requested based on the disclosure of the patient's HIV status; the surgery was constantly postponed, etc. In this case, there is undoubtedly a violation of law. However, the chaos caused by the pandemic, the urgency of the situation, and similar reasons prevented the counselees from pursuing a legal course other than administrative (complaint to CIMER, notification to the Ministry of Health, etc.) procedures. In this case, the priority is for the counselee to urgently find a physician/hospital to provide treatment.

When analyzing the cases related to the right of access to health care, **it appears that health care personnel and health facilities are the biggest source of rights violations against people living with HIV.** In the case of HIV, it has been shown that health care personnel and support staff do not apply even the most basic rules of the Biomedicine Convention, which is the main piece of legislation on general patients' rights and the right of access to health, and to which our country is a party.

This shows us that even professional groups that should know best about HIV can be the source of violations due to prejudice. Also, in the context of the right to access to health, the lack of respect for the right to privacy of people living with HIV in health facilities and organizations, whether public or private, and thus the violation of the right to privacy, has been identified as one of the main problems. As can be seen from the cases, a large majority of counselees does not know what mechanisms they can turn to when their right to respect for private life and privacy is violated. In addition, for many years, the Ministry of Health has made HIV status, which is a private piece of information for people living with HIV that requires special protection because of the high level of discrimination and stigmatization, accessible in various e-health applications (MEDULA/E-NABIZ, etc.) even for health care personnel who are not directly involved. It is also noted that the options for restricting those who access these systems are not known.



VIOLATIONS OF RIGHTS RELATED TO THE PROTECTION OF PERSONAL DATA

In 2021, the most important development in terms of violations of rights related to the protection of personal data was the launching of the Medical Messenger System (MEDULA) to all health care providers.

The Circular of the General Directorate of Service Delivery of the Turkish Social Insurance Institution dated 16.08.2021 sent to the provincial directorates prevented requests to restrict access to the Medula system made by personal application/email. In addition to this, even requests for restricted access made before this circular dated 16.08.2021 were disregarded, with full access given to health care providers.

As is well known, the reporting of chronic health conditions, the prescriptions related to this reporting, or the retrospective recording of health care services used is done through a system called Medical Messenger (Medula), to which health care providers have access and in which the medicines/medical devices/health care services prescribed/reimbursed by the Social Security Institution are recorded.

However, the fact that such sensitive records containing information about chronic conditions are accessible to unrelated health care workers creates a number of problems in accessing treatment. In particular, people with HIV, hepatitis or other infections, psychiatric and neurological conditions have problems regarding this system that is accessible for many people.

For example, by entering the T.R. identity number of a person living with HIV in a query by the health care personnel/pharmacist/reporting secretariat, all reports, medications taken, and hospital visits can be accessed through the MEDULA system.

Since January 1, 2021, **approximately 20 of the 23 personal data protection legal assistance requests sent to the association's email address are related to requests for information on rights such as the right to privacy, the right to work, and the protection of personal data in connection with the launching of the MEDULA system for health care providers and accession to the system by occupational physicians.**

It can be seen that easy access to this system by unrelated third parties entails a number of rights violations, even though it may seem useful for access to health data. For example, it is believed that

the inspection of reports of HIV-infected individuals by occupational physicians during regular examinations of private sector workers can lead to stigmatization, discrimination, and even termination of employment contracts due to easy access to the Medula system.

In addition, the fact that physicians, especially primary care physicians, lack knowledge on the subject, abstain from treatment, and discriminate against patients is a major barrier to access to health care for people living with HIV.

In previous years, access to the system could be restricted to third parties by the citizen filing a petition with the relevant department of the provincial directorate of the Social Security Institution to which they belonged, provided that the right to access prescriptions and health care services was reserved. Now, people do not have such opportunity. The article referred to in the circular in question states that requests to restrict access to the system in question cannot be made with a signed petition, but can only be restricted by a court decision.

The action for nullity with a request for the stay of execution filed by the Positive Living Association with the relevant department of the State Council to annul the article referring to this circular is still pending. In addition, many of our counselees living with HIV have filed lawsuits in the administrative court, and most of these lawsuits have been dismissed by the court.

Regarding the lawsuit filed by the Positive Living Association, we continue to work with other peer associations throughout 2022 to seek solutions to issues such as the execution of the litigation process, having exchanges with the association's legal department to resolve the issue in question.

It is also clear from the legal aid requests submitted to our association that the rights violations experienced by HIV-infected health care workers in particular have led to even greater problems with the launching of the system.

In response to our association's legal aid requests, a sample petition for filing a lawsuit and the circular appendix were sent to counselees who applied for legal aid, some of whom took the matter to court.

In summary, the retrospective launching of the system for health care providers has caused many problems, a lawsuit has been filed with the relevant department of the State Council requesting a stay of enforcement, and investigations into the case are ongoing.

As can be seen, rights violations based on the legislation on the right of access to health care account for the highest percentage of applications received by the association. **Compared to 2020, the number of claims for rights violations has tripled, and with the pandemic and the launching of the Medula system for health care providers as mentioned above, a new era has dawned for rights violations.**



- An example of this is the complaint filed by an individual with the Ombudsman Institution against a physician as the physician disclosed the individual's HIV status to his girlfriend without his consent. The first paragraph of Article 6 of the Personal Data Protection Law (PDPL) No. 6698 titled "Conditions for the processing of sensitive personal data" reads:
- - "Data relating to race, ethnic origin, political opinion, philosophical belief, religion, sect or other beliefs, appearance and dressing, membership of associations, foundations or trade unions, health, sexual life, criminal convictions and security measures, and biometric and genetic data is exclusive personal data."
- - The second paragraph reads, "It is prohibited to process sensitive personal data without the explicit consent of the data subject."
- - "The third paragraph reads, "Personal data other than health and sexual life listed in the first paragraph may be processed without the explicit consent of the person concerned in cases stipulated by law.
- - Personal data relating to health and sexual life can only be processed by persons or authorized institutions and organizations under the obligation of confidentiality for the purposes of protecting public health, preventive medicine, medical diagnosis, treatment and care services, planning and management of health care services and financing, without seeking the explicit consent of the person concerned."

On this basis, the application was rejected with reference to the relevant article of the Personal Data Protection Law, stating that the HIV status of a person could be processed without consent, citing public health. So, there was no violation by the physician in terms of patient rights and patient privacy.

Whether HIV positive or not, it is obvious that people will get unfair treatment by having their health status considered within the scope of the Personal Data Protection Law and under the guise of "public interest". The most important source of this situation is that the society and the state are not sufficiently informed about HIV and there is no special regulation on HIV. In fact, according to current statistics, Turkey ranks first in the world in terms of the increase in HIV infections, and accordingly, the prejudice of the society and the fact that the laws are too open to interpretation make HIV-positive people even more vulnerable.



RIGHTS VIOLATION BASED ON LEGISLATION ON THE WORK LIFE

In Turkey, the legal sources used vary according to the violations faced by private and public sector employees. The most commonly used international and national legislations for rights violations based on legislation on the work life in Turkey are as follows:

- European Convention on Human Rights
- Constitution of the Republic of Turkey
- Universal Declaration of Human Rights
- Labor Law No. 4857
- International Labor Organization (ILO)- ILO codes of practice on HIV/AIDS and the world of work
- Civil Servants Law No. 657
- Turkish Armed Forces Health Competence Regulation
- Law Enforcement Sanity Requirements Regulation
- Bazaar and Neighborhood Watch Entrance Exam Regulation

There is no legal provision in our national law that would prevent the hiring or firing of people living with HIV; however, in the public sector, HIV infection is a barrier to a career as per the health regulations for the police, military, and neighborhood watch. In addition, existing national regulations for the pilotage profession reference international regulations, and current legislation around the world creates an unclear basis for allowing people living with HIV to enter the pilotage profession.

In 2021, the increase in right-to-work violations manifested itself in an increase in examinations required during continued employment and **with the launching of the Medula system access to the person's health history during routine checks has become easier; and this has led to a widespread perception that it is legitimate for people's health records to be accessible to everyone.** This has led to an increase in the number of routine tests, especially in workplaces, and the inclusion of every conceivable and desirable health data among these tests.

Although the International Labor Organization's "ILO codes of practice on HIV/AIDS and the world of work" explicitly states that "HIV/AIDS examinations should not be requested from people who apply for work or are currently working", the perception that there is a public interest in collecting this health data has made it difficult for people to oppose these routine HIV tests on the grounds that they are unlawful.



Of the 36 violations related to working life, 12 of them occurred during the commencement of employment when a candidate worker was unjustly and unlawfully requested to take an HIV test. During the consultancy provided to all counselees, the legislation provisions related to the tests that might be requested at the commencement of employment were explained in detail.

Rights violations arising from these unfair and unlawful tests requested at the commencement of employment are a major problem especially for health care personnel. In particular, in such cases, mobbing and not being hired were the main violations.

Legislation stipulates and restricts the professions that persons diagnosed with HIV cannot perform. These are the professions related to law enforcement such as police, military, watchmen, etc. Apart from these, there is no clearly defined obstacle in the legislation for professions such as piloting or private security.

Except for the above-mentioned occupational groups, in our opinion, there is nothing unlawful in the candidate employee's making false statements in the face of the employer's unlawful questions and demands during recruitment. "The misleading answers that the candidate employee may have given about his HIV status, which does not have any connection to or form an obstacle to the work he will do and which is his private life, do not constitute a violation of the rule of honesty. As a matter of fact, the employer who asked a question against the law and owns the force in the power relation between the parties is the one that caused this situation by exercising misconduct. As a consequence, while there is no circumstance that prevents the continuity of the work relationship, it will not be legally possible for the employer to gain a right (righteous/valid right of termination of the employer) based on misleading information obtained due to their own misconduct."

20 of all 36 cases reported to Pozitif-iz Association due to violation of rights experienced during employment occurred when a statement was requested from the counselees as to whether they had a chronic health condition or not and/or a test was requested against the law under the name of routine test. The profession groups which have a clear regulation on requests for a routine test during employment are defined and few in number; the tests that can be requested in each of such professions have been regulated clearly.

Pursuant to "ILO codes of practice on HIV/AIDS and the world of work" issued by International Labor Organization to which Turkey is a party, it is expressly stated that even when a routine test is to be made, mandatory HIV test must not be among these tests. The counselees were informed that request of such a test or a responsibility statement such as "I have no chronic diseases" by the employer is against the law. Their rights against such a situation were explained.

Majority of the counselees did not remind their employers about their legal rights concerning the matter. Counselees tried to get rid of the problem by telling the rights violations they suffered to their physicians or occupational physicians or, so to say, saving the moment.

Of the counselees who contacted the Pozitif-iz Association for termination without cause or suspension from duty, 1 is a police officer, 2 are military personnel, 1 is a military student, the remaining 16 are employed in the private sector with a majority of these 16 counselees working in the health sector. As we mentioned earlier, living with HIV is considered a reason for dismissal for counselees such as police

officers and military personnel who are law enforcement officers or candidates, for the reasons established by the legislation. 4 counselees have been made aware of this situation, 1 counselee has appealed, and the process is ongoing.

16 private sector workers, most of whom learned against their will that they were living with HIV, were bullied and discriminated against, and as a result their employment was terminated by wrongful termination or they were not hired.

As is seen, in case of termination of employment, counselees have the motivation to take legal action when possible. The most important reason of this motivation for taking legal action to be in stark contrast to the motivation for not taking legal action during the recruitment and employment stages, as mentioned above, is the disappearance of employer's domination upon termination of the work relationship.

Presence of a judicial opinion is another important reason behind the higher rate of legal actions against rights violations concerning the right to work as compared to other right violation groups. The mentioned judicial opinion is related to whole of violations that start with wrongful termination of employment by the employer. Presence of a decision by Constitutional Court on this matter makes the counselees feel strong when mostly taking legal action in the stage after termination of employment.



RIGHTS VIOLATIONS BASED ON LEGISLATION ON MILITARY SERVICE

Special laws regulate how this duty will be performed, or in what circumstances it will be considered as performed. It must be noted that HIV is a reason of absolute exemption from military service, which is not based on requests or consents of individuals.

The most commonly used legislations in rights violations related to military service in Turkey are as follows:

- Constitution of the Republic of Turkey
- Military Recruitment Law
- Military Recruitment Regulation
- Turkish Armed Forces Health Competence Regulation

This section covers the violations suffered by counselees that applied to the association by stating that they were exposed to rights violations due to mandatory military duty. As mentioned above, **4 of the cases are related to military service processes. All 4 of these cases are about exemption from military duty.**

2 of 4 counselees were diagnosed with HIV while performing their military service. Both counselees had problems because it was never clarified how the exemption procedures would be performed. One of these 2 counselees was put on sick leave, and when the leave period was over, they were warned verbally by the superiors saying “we still haven’t learnt how to proceed, do not come for a while longer”. But then, they were treated as if they were deserters because they didn’t turned back to their units when the leave period was over. Counselee was advised to turn back to their unit and complete the term of service there so as not to experience problems. Counselee was then able to talk to the company commander and initiate the exemption process.

Other counselee was also diagnosed with HIV during the military service. The counselee completed the exemption process rapidly after talking to superiors within the military.

Other two counselees wanted to get the certificate for exemption from military service during the roll call stage. They did not know what would happen at their workplace after receiving such certificate for exemption, so they were concerned that their status would be disclosed. Both counselees were informed about the procedure of getting the certificate for exemption, as well as the provisions specified in the certificate.

The reported cases show that **it is not predictable for people living with HIV what would happen during the military recruitment process**. Predictability on legal procedures that individuals might be subject to is ensured by legal regulations in states of law, and Turkish law clearly states that people living with HIV are exempt from the military service. However, the legal predictability expected from a legal regulation is not still ensured due to policies that do not consider the daily life of people living with HIV, the risks they are subject to and eventually their chronic concerns on opening up or disclosure, i.e. policies that do not involve people living with HIV. Another result of such shortcoming is the regulations prepared by denying the reality of HIV, and ignorance of the enforcers of these regulations about HIV. Under the clear legal regulation, there is no other way to explain the state of enforcers who were hesitant on how to proceed for a long time about two counselees diagnosed with HIV during their military service, and even treated an individual that was exempt from military service like a deserter.



RIGHTS VIOLATIONS BASED ON LEGISLATION ON CRIMINAL LAW

The number of infringements in this area has increased significantly compared to the previous year: 11 counselees reported rights violations in this area. However, it should be noted that almost all of the counselees filed appeals as a result of the violation in question.

It should be noted here that these are applications concerning the violation of the fundamental rights of individuals, such as the right to life, the right to privacy, the prohibition of ill-treatment, the right to a fair trial, the right to freedom of thought and expression, within the framework of the Constitution, the Turkish Penal Code and international legislation. The common subject of the applications in the criminal area is the unauthorized obtaining and disclosure of HIV status against the person's consent.

For example, most of the applications in question took the form of the partner with whom the counselee had an emotional relationship presenting this situation as a threat and exerting psychological pressure on the counselee to the point of blackmail, with this threat being continuous.

The person with whom the counselee had an emotional relationship, tried to blackmail the counselee's surroundings and family with the disclosure of his status after the situation became known; despite the fact that the counselee repeatedly stated that their action constituted a criminal offense, the violating party continued to use and disseminate the counselee's personal data without permission and continued their threats and blackmails; a criminal complaint against the suspect was filed with the competent prosecutor's office, and the investigation proceedings are still ongoing.



RIGHTS VIOLATIONS BASED ON LEGISLATION ON FAMILY LAW

Although there is no direct provision for people living with HIV in the legislation on family law legislation, the same mechanisms for divorce, marriage and reproduction are in place as for persons not infected with HIV. **There is no legal obstacle preventing people living with HIV to get married and have children in Turkey.** However, especially the divorce process is much more troublesome for people living with HIV than it is in any divorce case.

In 2021, a total of 5 applications were made to the Pozitif-iz Association in this field, 2 of these 5 applications were for divorce, 1 for custody and the remaining 2 for marriage.

In one case, the counselee was being threatened by their spouse with whom they were about to divorce for disclosing their statuses to the people they know. With the other application, the spouse's family objected to the situation and forced a divorce through pressure. Both of the counselees were informed that HIV status is a kind of personal data, disclosing it to others without the person's consent would constitute a crime, and they could file a criminal complaint against the other party if they wanted. However, one of the counselees stated that although they felt under a lot of pressure, they "did not think it was appropriate for them to file a criminal complaint against their own family". The other counselee, on the other hand, filed a contested divorce case with legal guidance, and obtained an uncontested divorce after the necessary explanations were made to the other party.

It is a well-known fact that divorce is generally and mostly challenging for everyone. Especially in contested divorce cases, hearing the witnesses, and involving the children, families, neighbors, friends of the parties into the process may be quite exhausting. When one of the parties has a story that would trigger the social prejudices and lead to stigmatization, the divorce process which is difficult in nature will be more worrisome for the relevant party. In the case of people living with HIV, the fact that one of the parties of the divorce case is a person living with HIV can be misused even by the closest ones, and turned into a piece of threat. **People's HIV status may be found in the defense statements prepared by the attorneys of the other party using a hatred language and insults in a manner that exceeds legal demands.** Since there are not many works conducted on the ethics of defense in Turkey, like all groups that are open to stigmatization, people living with HIV are open to being traumatized many times both verbally and in writing throughout the divorce process. Unfortunately, such conduct can be justified under the principle of defense immunity. Therefore, it is important and necessary especially for the attorneys not to identify themselves with their client, i.e. not to put themselves in the shoes of client, and to be objective, avoid discriminative and stigmatizing language in their verbal and written statements, and try not to overlook the fundamental human rights.



LEGAL ASSESSMENTS

In this part of the report, based on the statements of the counselees, we will suggest some considerations concerning whether Turkey has a legislation focusing on people living with HIV, the difficulty experienced by the people living with HIV when using mechanisms of judicial right to legal remedies, the obstacles against the legal remedies for people living with HIV in Turkey, and the cases where people living with HIV may use judicial mechanisms.

A- Glimpse on the Legislation for People Living With HIV in Turkey

- One of the common questions encountered when discussing HIV and law is whether there are legal regulations protecting the rights of people living with HIV in Turkey. Unfortunately, there is no legislation specific to HIV in Turkey. However, the laws cover people living with HIV in general, including mainly the entire legislation on patient rights. Besides, some ambiguous expressions (public morality, public decency, public health, etc.) in Turkish laws that are quite criticized especially by the disadvantaged groups certainly provide a suspicious ground for the people living with HIV, too.
- As we observed in last year's report, absence of a specific law on HIV and presence of a huge gap concerning HIV in the legal legislation cause such gaps to be filled against people living with HIV in practice. As also stated by the European Court of Human Rights, HIV is still among the most biased subjects across the world, and a great reason for stigmatization. Absence of legal regulations specific to HIV in Turkey combined with HIV phobia in the country leads to legal gaps to be interpreted and filled against people living with HIV during trials. The lawyers working in the field have a great responsibility to enable such gaps to be interpreted based on human rights during trials. Yet, this is certainly not sufficient. Rights of a group that is quite vulnerable to stigmatization must be regulated by laws, without giving the initiative to law enforcement personnel, and sanctions must be expressly imposed on discrimination and stigmatization. Otherwise, even the judicial opinions and scientific developments will be unable to prevent the discrimination suffered by people living with HIV.
- A large part of the legislation on HIV has been prepared pursuant to secondary regulations such as by-laws, circular letters, communiques rather than primary resources such as laws. This,

unfortunately, not only makes it difficult for people living with HIV to learn about their rights but also complicates the understanding on what is legally right in our country where the culture of research is quite poor. We would like to exemplify this issue with a discussion that was present on social media in 2020 : Whether there was a legal basis for requesting mandatory HIV test among tests made before marriage was discussed on social media for a long time, and the individuals arguing that HIV test was not one of the marriage tests and there was no legal ground for the municipalities to request an HIV test, as well as people living with HIV were pointed as targets during such discussions.

Article 136 of the Turkish Civil Code specifies that “the health certificate showing that there are no impediments to marriage” is one of the documents to be submitted to the marriage registry office during the application for marriage. There was a reference to “Regulation on Marriage Examination” in the Marriage Regulation No. 2169 about what procedures and principles are to be taken as a basis when issuing the health certificate. Regulation on Marriage Examination specifies how the marriage examination will be performed, and makes a reference to the Public Health Law about diseases that pose an impediment to marriage stating that “The doctor cannot issue the health report in case they believe that the individual is disabled due to one of the diseases stated in Article 123 and 124 of Public Health Law, keeps the document in the folder, and notifies the government doctor about the issue”. The relevant articles of Public Health Law (Articles 123 and 124) list the diseases that pose an impediment to marriage as syphilis, gonorrhea, chancroid, leprosy and advanced infectious tuberculosis apart from pathological mental diseases. In such cases, the law states that a report can be issued to prove that there is no impediment to marriage after treating the health problem.

As may be seen by the ones that follow such a “complex” way, HIV is neither an impediment to marriage nor one of the mandatory conditions to be checked in the examination for health certificate before marriage. Nonetheless, majority of the municipalities in Turkey ask for a mandatory HIV test from the couples applying for marriage. When this issue was discussed on social media, prejudices related to HIV could be seen everywhere based on arguments aiming to justify the situation using concepts such as “public health, public morality”, which, actually, we would rather not repeat here to make them spread. Eventually, who is able to access to accurate and up-to-date information to what extent remains as a mystery.

B- Few Number of Legal Actions in Rights Violations Related to HIV and Relevant Considerations

Among 140 counselees that applied to the association with the claim of a right violation in 2021, only 18 stated that they would take legal action. Although this number is proportionally no higher than in previous years, the rate of exercise of the right to complain about rights violations has increased, particularly in the area of criminal law.

- After people are diagnosed with HIV, there are quite few physicians that inform them about their rights or refer them to institutions where they can learn about their rights. Some of the physicians establishing the diagnosis inform the people only about what they cannot do any more (you cannot do military service, etc.), but fail to specify what they can do in rights violations that



they may be exposed to in Turkey, a country where prejudices related to HIV are very intense. At this point, it would be useful for the diagnosed person to be introduced to a social worker or peer consultant to get information.

- As general surveys done in Turkey suggest, the trust in public officials including mainly police force is decreasing day by day. Since it is very rare to see public officials facing trials due to crimes they have committed on duty throughout the history of our country, counselees think that there will not be a penalty when they encounter such a violation.

Resolution of rights violations against HIV-positive people, the complaint mechanism and its functioning, protection of personal data; the functioning of the complaint-filing mechanism under the Turkish Penal Code and the mechanisms to be applied in case of a violation, violation of health rights, the launching of the Medula system, which is one of the current problems in general, to be accessed by unrelated health care workers/organizations based on the articles mentioned in the SGK Circular dated 16.08.2021 and accordingly, in particular, the problems encountered in the labor and recruitment process, violation of access to health care, its confidentiality and the legal mechanisms used to address it, in particular the violations caused and created by the system, and how the system should be updated have not been resolved yet even though other associations working in the same field have made legal applications to the relevant department of the Council of State on this matter.

Another problem in this regard is that although the Personal Data Protection Law seems to be useful in terms of storing individuals' personal data, vague expressions such as public health and public interest, make people living with HIV even more vulnerable.

- The fact that trials last a long time in Turkey and the possibility of losing the support mechanisms in that long period concern the counselees. "Delayed justice" that manifests itself in cases such as criminal complaints kept in the cabinets of police station/prosecution office for months, failure to file an indictment in time, hearings scheduled at intervals of very long periods creates a deterrent effect when added to the challenges that must be endured during such a timeframe.
- Ignorance and prejudice of public officials about HIV experienced during trials also keep people from starting such a process. For instance, a counselee that had to go to the police station or prosecution office for a problem avoided filing a complaint thinking that their private life will be picked to pieces, information might be given to their family or close ones about their HIV status, and questions might be asked/prejudicing might be made about their sexual orientation/sexual identity.
- Especially in discrimination cases, difficulty of evidencing the violation is one of the reasons for counselees not to use means of finding a remedy. For instance, a counselee whose application to a job is denied due to their HIV status is informed about the reason in a face-to-face interview made with the representative of employer alone. Or an ill treatment of a physician occurs in a bilateral discussion due to the nature of patient-physician relationship, and there is no witness. In such cases, counselees believe that judicial mechanisms will come to a dead end since they



have no evidence to prove their claims, and there is no law that protects the people living with HIV and stipulates statement of the disadvantageous person to be taken as a basis to start an investigation.

- Especially in violations of access to health care services, some counselees thought that physicians were also going through a hard time due to COVID-19 pandemic, and complaining about a physician would be seen as “impertinence” in such a period.

C- Considerations on the Cases Where People Living with HIV Used Their Rights to Legal Remedies

- It was seen that counselees were more willing to resort to jurisdiction if there was no possibility to see/speak to the person they complained about again.
- Awareness of counselees about their rights, their attendance to “advocacy, capacity development and peer training sessions” of the HIV associations, and having no prejudices related to HIV cause them to be more agile in realizing that they are exposed to a right violation and claiming for their rights.
- It becomes more easier to take action to eliminate the violation if the counselees are in communication especially with their peer counselors from the association and believe that they won’t be alone during the jurisdiction process, and think that they will be supported in solidarity and make their voices heard if they are exposed to a right violation during the trial process.
- Cases with landmark decisions such as unjust termination of the contract of employment by the employer, violation of privacy by the physician are more likely to be submitted to judicial mechanisms since they constitute a presumption that a conclusion can be received from the application.



CONCLUSION

In fact, as we emphasized in the entire report, the only difference between the violations in the report “POZİTİF-İZ ASSOCIATION / 2020 REPORTING OF RIGHTS VIOLATIONS” published last year and the violations communicated to the association in 2021 is that, with the effects of the pandemic, personal health information was made accessible to health care providers by citing Personal Data Protection Law as a basis and the legal applications on this issue have not yet been resolved.

Steps to be taken immediately following the above-listed considerations are as follows:

The personal health data of people living with HIV should be considered within the scope of all other personal data.

- All people living with HIV should be granted the right to free treatment regardless of their citizenship status, including asylum seekers and refugees, in cooperation with the Ministry of Health, the Social Security Institution, the Turkish Medicines and Medical Devices Agency, the United Nations, the World Health Organization and the European Union.
- The Social Security Institution should make the necessary arrangements for foreigners living in Turkey to benefit from HIV treatment and follow-up opportunities when they are covered by the GSS after they are diagnosed with HIV.
- District Governorship Social Assistance and Solidarity Foundations should reorganize the requirements for the green card and base it solely on the individual’s own income.
- “HIV/AIDS Diagnosis Treatment Guide” must be distributed by the Ministry of Health to all branches that do not perform HIV follow-ups apart from the infectious diseases.
- With the support of the Ministry of Health, local governments should increase the number of Voluntary Counseling and Testing Centers (GDTMs) in Turkey. All GDTMs should provide pre-test and post-test counseling services.



- The General Directorate of Public Health of the Ministry of Health should ensure that the “Turkish HIV/AIDS Control Program 2019 - 2024” published by the Ministry of Health is implemented and closely monitored in all hospitals.
- The Ministry of Health should educate health care workers in all hospitals and family medical centers about respecting the privacy of patients who are vulnerable to stigmatization, especially those living with HIV, and train health care workers to ensure the confidentiality and security of personal health data.
- A consensus must be established by the Ministry of Health in all health institutions about explanation of the HIV diagnosis by a specialist doctor and/or psychologist.
- The Ministry of Health should reconvene the National AIDS Commission and make it functional. It must ensure the active participation of non-governmental organizations in the planning and implementation of the HIV/AIDS country program.
- The Ministry of Health and local governments should carry out all necessary activities to achieve the 95-95-95+95 Global Targets* of the Joint United Nations Programme on HIV/AIDS (UNAIDS).

In the UNAIDS 95-95-95 Global Targets aiming to stop spread of HIV, the aims are as follows: First 95: 95% of people living without knowing they are infected with HIV to be tested and diagnosed, Second 95: 95% of the diagnosed people to start and continue treatment, Third 95: 95% of the people that started treatment to have their viral load suppressed and reach the Undetectable level.

In addition to 95-95-95 Global Targets, there is now another 95 in the agenda. The forth one draws attention to how many of the HIV positive individuals that are diagnosed, receive treatment and are at “Undetectable=Untransmittable (U=U)” level, should live without being stigmatized, without being exposed to discrimination, and in a way that is deserving of human dignity.

- HIV/AIDS monitoring and evaluation system must be established by the Ministry of Health immediately, and data must be shared transparently.
- The Ministry of Health should take necessary measures to ensure that the treatment of people living with HIV is not interrupted during crises affecting the health system, such as pandemics or disasters. In such international crises, necessary protocols and agreements must be made for access of those that are stuck abroad to medication.
- Primary Care Physicians should inform applicants for marriage regarding HIV and share the information that being HIV positive is not an obstacle to marriage.

* 95-95-95 Global Targets of UNAIDS must be taken into consideration because these targets aim for zero new HIV diagnosis by 2030 after performance of each step.



- Problems concerning the access of convicts and prisoners to medication and treatment must be eliminated by the Ministry of Justice.
- Voluntary HIV test and consultancy practices must be performed by the Ministry of Justice for convicts and prisoners.
- Isolation of convicts and prisoners living with HIV must be prevented by the Ministry of Justice.
- Training about HIV must be provided by the Ministry of Justice, in prisons for changing the discriminative attitudes and bad behaviors of the employees of the institution or other prisoners aimed at convicts and prisoners living with HIV.
- Training must be given by the Ministry of Justice to police forces and members of the judiciary in order to increase the perception of privacy in legal proceedings.
- Collaboration must be made by the Ministry of Justice with non-governmental organizations for people living with HIV to use their rights to remedy as well as to strengthen access to justice.
- Request for an HIV test at recruitment stage as well as termination of contract of employment due to HIV status must be prevented by the Ministry of Labor and Social Security in addition to the following:
- Planning and practice guides must be prepared and spread for development of a workplace policy about HIV infection in line with the ILO standards.
- Special needs must be identified for groups that are exposed to multiple discrimination such as women living with HIV, children and LGBT+ individuals by the Ministry of Family and Social Services, and they must be taken into consideration while developing policies related to HIV.
- The Ministry of National Education should include up-to-date and comprehensive HIV information in the curriculum at all levels of education and training institutions.
- The Ministry of Culture and Tourism should produce public service announcements containing up-to-date information on HIV, referring to HIV testing, mentioning treatment opportunities, and preventing discrimination and stigmatization.
- Most importantly, all ministries should collaborate to establish a legislation to ensure, maintain and monitor these standards and to impose sanctions on those concerned in case of failures/negligence. "Health status" must be added to the article of Constitution that regulates equality before law, and then necessary arrangements must be made in all relevant laws.

CASE SOLUTIONS

2021 CASE SOLUTIONS

APPLICATION NO. 1: A counselee was going to have an eye operation in a private hospital, and informed their physician about their status. When the hospital got back to the counselee, they postponed the operation, stating that there was only one operating room and that the operating room would have to be closed for three days if the operation was to be performed. The counselee applied to the association to find out what they could do about this issue legally.

LEGAL GROUNDS: Constitution art. 17, art.20, art.56; ECHR art.8; UDHR art.25; PRR art.6, art.8, art.11; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.5; Regulation on Private Hospitals; Regulation on Private Health Institutions for Outpatient Diagnosis and Treatment.

LEGAL JUSTIFICATION: The Regulation on Private Hospitals regulates the characteristics of private hospitals and the personnel working there. In this regulation, the eligibility requirements and the materials required for the medical procedure to be performed are regulated in detail. In addition to all regulations, the obligation to meet these eligibility requirements is imposed on these businesses. In this regard, the eligibility requirements for private hospitals are not based on the type of infections of the patients, but on the type of medical procedures to be applied and the department to apply them.

Thus, these centers violate the prohibition of discrimination by rejecting the HIV-infected counselee who applied to them for a procedure at their facilities. According to Article 6 of the Patients' Rights Regulation, the counselee has the right to receive health care services according to law and equity. Pursuant to Article 8 of the said Regulation, the patient has the right to choose the health care facility and organization and to receive health care services provided in the health care facility of their choice, provided that the procedures and conditions provided for in the legislation applicable to them are complied with. According to Article 11 of this Regulation, the patient has the right to request diagnosis, treatment and care in line with their medical needs. Since these 3 rights of the counselee have been violated, the counselee can make a written application to the patient rights unit that all health centers are obliged to establish. The counselee can also file a report with and make a complaint to the Patient Rights Board within the Provincial Health Directorate and ALO 184 SABİM (Ministry of Health Communication Center) regarding the violated rights. The counselee may also apply to the Human Rights and Equality Institution of Turkey since Article 3 of the Law No. 6701 of Human Rights and Equality Institution of Turkey explicitly states that no discrimination can be made on the grounds of health status and Article 5 states that private persons who provide health care services cannot discriminate while providing these services. It should be noted here that, pursuant to paragraph 2 of Article 17 of the said Law, it is necessary to make a written application to the discriminating organization before applying to the Human Rights and Equality Institution of Turkey. If the institution determines that the prohibition of discrimination has been violated as a result of its investigation, it will impose an administrative fine on the organization.



APPLICATION NO. 2: The counselee was a newly diagnosed military personnel. They contacted the association about what might happen if the institution found out that they were living with HIV.

LEGAL GROUNDS: Article 72 of the Constitution; Article 6 of the Turkish Armed Forces Health Competency Regulation, Article 52 of the annex to the list of diseases and disabilities of the relevant regulation.

LEGAL JUSTIFICATION: Paragraph b of Article 6 of the Turkish Armed Forces Health Competency Regulation states that “those who are not eligible for military service: are those whose diseases and disabilities are included in the (B) and (D) sections of the List of Diseases and Disabilities.” In the list of diseases and disabilities in the annex of the Regulation, in Article 52 of the Infectious Diseases section, HIV infection proven by verification tests is included among group D diseases. Therefore, it is clear that people living with HIV are exempt from military service, in other words, they are not eligible for military service. HIV is a reason of absolute exemption from military service, which is not based on requests or consents of individuals. Since the counselee is a Turkish Armed Forces personnel, if it is found out that they are living with HIV, they will be discharged from military service and their contract will be terminated.

APPLICATION NO. 3: The counselee was a health care worker who learned about their HIV diagnosis as a result of the health report required for employment and applied to the association to find out what they could do legally about this issue, claiming that they were not hired due to their diagnosis.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; ILO codes of practice on HIV/AIDS and the world of work; Labor Law art.5; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.6; Article 9 of the Regulation on the Establishment, Duties and Working Principles of Provincial and District Human Rights Boards; TPC art.117; Regulation on the Duties, Authorities, Responsibilities and Training of Occupational Physicians and Other Health Care Personnel.

LEGAL JUSTIFICATION: Among the tests that can be required from the counselee at the time of recruitment, there is no HIV test requirement according to the “Form for Recruitment Examination/Periodic Examination” annexed to the Regulation on the Duties, Authorities, Responsibilities and Training of Occupational Physicians and Other Health Care Personnel. The International Labor Organization (ILO), one of the specialized agencies of the United Nations of which Turkey is a member, has also introduced regulations for working life through the “ILO codes of practice on HIV/AIDS and the world of work”: “HIV/AIDS examinations should not be requested from people who apply for work or are currently working.” In light of these regulations, it is clearly unlawful to require a job applicant to undergo HIV testing. The counselee shared information about their HIV status with their employer, even though they were not legally required to do so, and was not hired. In this case, the employer’s refusal to hire the counselee after learning that they were living with HIV, on this ground alone, would violate the prohibition of discrimination in both the international conventions to which Turkey is a party and national law. Again, this unfair behavior of the employer constitutes a violation of the equal treatment obligation of the employer regulated by Article 5 of the Labor Law. The candidate worker can apply to the Human Rights and Equality Institution of Turkey for the discrimination they experienced in recruitment due to their living with HIV, since Article 3 of the Law No. 6701 of Human Rights and Equality Institution of Turkey clearly states that discrimination cannot

be made due to health status and Article 6 specifically states that such discrimination cannot be made in recruitment. It should be noted here that, pursuant to paragraph 2 of Article 17 of the said Law, it is necessary to make a written application to the discriminating organization before applying to the Human Rights and Equality Institution of Turkey. If the Human Rights and Equality Institution of Turkey discovers a violation of the rule of prohibition of discrimination in the course of its investigations, it shall impose a fine on the employer. Again, the counselee who was discriminated against in the hiring process because they were living with HIV may appeal to the human rights commissions of the province or district in which they live. According to Article 9 of the Regulation on the Establishment, Duties and Working Principles of the Provincial and District Human Rights Boards, these boards are responsible for implementing the necessary measures to prevent any kind of discrimination. The Boards, which examine the violations reported to them, report this violation to the Prosecutor General's Office or the relevant administrative authorities and follow up on the results. This unfair and unlawful attitude of the employer will violate the freedom to work, which is recognized and protected in the Constitution and international texts, and will also constitute the crime of violation of freedom of work and labor in accordance with Article 117 of the Turkish Penal Code No. 5237. The employee candidate may also exercise their right to file a complaint against the employer on the basis of the aforementioned provisions for discrimination based on living with HIV.

APPLICATION NO. 4: The counselee was diagnosed during the marriage procedures and the physician told the prospective spouse that they should never have intercourse without a condom and that they could have a child only with the sperm washing method. The counselee applied to the association to find out what they could legally do about this issue.

LEGAL GROUNDS: Constitution art.17, art.20; Biomedicine Convention art.10; ECHR art.8; PRR art.5, art.11, art.21; CME art.5, art.24.

LEGAL JUSTIFICATION: Medicine is a field where learning never ends and scientific developments must be followed continuously. Article 5 of the Code of Medical Ethics: "The primary duty of the physician is to protect human life and health by trying to prevent diseases and to cure patients by fulfilling scientific requirements. It is also the primary duty of the physician to observe human dignity during professional practice. In order to fulfill these obligations, the physician closely monitors developments." It is the most natural right of patients to expect physicians working in a field such as HIV, where new scientific information is constantly obtained, to be aware of these developments. It is a scientific fact that people living with HIV can have children naturally if certain conditions are met. Even if a physician working in this field does not know this information, it is certain that they should investigate the patient's question and inform the patient without acting with prejudice. It is against the rules of Code of Medical Ethics for a physician to mislead their patient due to their prejudices or concerns that are not in line with scientific developments. Likewise, since the patient sees the physician as an expert, they may be hopeful or disappointed by what the physician says. Article 24 of the Code of Medical Ethics "Use of Influence on the Patient" states that "The physician cannot use their influence on the patient for purposes other than medical purposes." In addition to all these ethical rules, Article 11 of the Patients' Rights Regulation regulates that the patient has the right to request diagnosis, treatment and care in accordance with the requirements of modern medical knowledge and technology. In the light of this information, considering that the physician a-) did not follow the scientific developments in their field and/or b-) did not provide the correct information to



their patient due to prejudice, the legal means that the counselee can use are to file a complaint against the physician to the Turkish Medical Association and to apply to the patient rights unit of the hospital where the physician works.

APPLICATION NO. 5: The counselee, who was diagnosed 1 year ago, wanted to get a medical report for employment, but the relevant physicians and the administration insisted on writing the diagnosis in the medical report, despite the request of the counselee not to have the diagnosis written in the medical report. The counselee applied to the association to find out what they could do legally about this issue.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; ILO codes of practice on HIV/AIDS and the world of work; Labor Law art.5; Regulation on the Duties, Authorities, Responsibilities and Training of Occupational Physicians and Other Health Care Personnel; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.6; the Regulation on the Establishment, Duties and Working Principles of Provincial and District Human Rights Boards art.9; TPC art.117.

LEGAL JUSTIFICATION: Article 5 of the Patients' Rights Regulation clearly lists the principles to be followed while providing health care services and includes treating patients humanely among these principles. In this context, the counselee can file a complaint with the hospital's patient rights unit, as they have been subjected to prejudices and stigmatizing/discriminatory attitudes by the relevant physician. They can also file a complaint with the Provincial Health Directorate and make a complaint to ALO 184 SABİM (Ministry of Health Communication Center). This situation also violates Article 2 of the Medical Deontology Regulation and Article 21 (respect for patient rights) of the Code of Medical Ethics. In this case, the relevant physician can be reported to the Turkish Medical Association.

APPLICATION NO. 6: The counselee has been subjected to discrimination and mobbing by a workplace official who asked the counselee for their identity information under another pretext, and learned about their HIV diagnosis. The counselee applied to the association to find out what they could legally do about this issue.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; ILO codes of practice on HIV/AIDS and the world of work; PDPL art.6; TPC art. 117, art.134, art.136; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.6.

LEGAL JUSTIFICATION: The counselee's HIV status data is health data and is considered special categories of data under Article 6 of the Personal Data Protection Law. In this context, in accordance with paragraph 2 of the same article, the processing of the above data cannot, as a rule, be carried out without explicit consent. According to paragraph 3 of the same article, the processing of health data without explicit consent is subject to very strict and specific conditions. What is meant by data processing is defined in Article 3 of the above-mentioned law, titled "Definitions". Any activity related to personal data, from collection to deletion/destruction/anonymization, falls within the scope of processing activity. The action of the branch manager who learned about the counselee's HIV status, which is their health data, by bullying the counselee, and

disclosed it to other colleagues constitutes unlawful processing. Even if the counselee voluntarily disclosed their HIV status, their consent does not satisfy the requirement that express consent be based on free will and does not include consent to disclosure to other colleagues. At the same time, the disclosure of HIV status, which is related to the private life of the counselee and concerns sensitive data, to other colleagues by the branch manager against their consent violates the right to privacy and the right of protection of personal data protected by Article 20 of the Constitution. The same acts also lead to numerous criminal offenses under the Turkish Penal Code. In this context, the said acts that violate privacy under Article 134 of the Turkish Penal Code naturally also constitute the crime of unlawful disclosure or acquisition of data under Article 136 of the Turkish Penal Code. In this context, the aforementioned actions of the branch manager will also result in criminal liability. The counselee who was discriminated against by the branch manager on the basis of their health condition and sexual identity/orientation may appeal to the Human Rights and Equality Institution of Turkey, as Article 3 of Law No. 6701 of the Human Rights and Equality Institution of Turkey clearly states that discrimination on the basis of health condition is not permitted, and Article 6 explicitly states that such discrimination is not permitted in employment and working conditions. It should be noted here that, pursuant to paragraph 2 of Article 17 of the said Law, it is necessary to make a written application to the discriminating organization before applying to the Human Rights and Equality Institution of Turkey. If the Human Rights and Equality Institution of Turkey determines that the prohibition of discrimination has been violated as a result of its investigation, it will impose an administrative fine on the employer. Likewise, the International Labor Organization (ILO), one of the specialized agencies of the United Nations, of which Turkey is a member, also includes “ILO codes of practice on HIV/AIDS and the world of work” among its regulations on working life. According to the relevant codes; “There can be no justification for asking job applicants or employees to provide personal information about HIV. Furthermore, employees cannot be under any obligation to provide such information to their coworkers.” In light of these provisions, it is clearly against the law to try to find out the reason for the health reports the counselee received and to share them with other employees. The counselee did not terminate their employment contract by resigning, due to the systematic mobbing they were subjected to by the branch manager at the workplace, the discriminatory and stigmatizing attitude of the person in charge towards them, and the unlawful acts of the branch manager, which were also criminal in nature. The counselee was forced to terminate their employment contract as a result of the aforementioned acts and mobbing he was exposed to at work. For this reason, the counselee, who is the party forced to terminate the employment contract, will be able to claim compensation rights granted to them by the law from the employer on the grounds that the counselee terminated the employment contract for a just cause. Forcing the counselee to terminate the employment relationship will also give rise to the crime of violation of freedom of work and labor within the scope of Article 117 of the Turkish Penal Code.

APPLICATION NO. 7: The counselee stated that in the research hospital where they were being followed up, the infection physician shouted “You all have HIV anyway” at the door of the outpatient clinic, and that on certain days he wrote the name and HIV treatment on the patient call screen, saying that everyone was positive anyway. The counselee applied to the association to find out what they could legally do about this issue.

LEGAL GROUNDS: Constitution art.17, art.20; Biomedicine Convention art.10; ECHR art.8; PRR art. 4, art.5, art.14; MDR art.2; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.5; CME art.7; TPC art.257.



LEGAL JUSTIFICATION: In Article 4 of the Patients' Rights Regulation, patients' rights are defined as "the rights of persons who need to use health services, which are guaranteed by the Constitution of the Republic of Turkey, international treaties, laws and other legislation, and which they have simply because they are human beings." Article 5 of the regulation explicitly lists the "prohibition of discrimination" as one of the rules to be observed in the provision of health services: "In the provision of health care services, race, language, religion and sect, gender, political opinion, belief, economic and social status and other differences of patients shall not be taken into account. Health services shall be planned and organized in such a way that they are easily accessible to all." (Article 5/c) Article 2 of the Medical Deontology Regulation also refers to the prohibition of discrimination and reads as follows: "The physician and the dentist shall exercise the utmost care in examining and treating the patient, without regard to the patient's sex, race, nationality, religion and belief, moral convictions, character and personality, social status, standing and political views." In the Code of Medical Ethics, the prohibition of discrimination is enshrined in Article 7. Article 7 lists the prohibition of discrimination as follows: "The physician is obliged to perform his duties in all cases, regardless of political opinion, social status, religious belief, nationality, ethnic origin, race, sex, gender identity and sexual orientation, age, social and economic status, and similar differences among his patients" and explicitly prohibits discrimination based on sexual orientation and gender identity. As can be seen, discrimination is prohibited in many sources of law that establish patients' rights and physicians' professional rules. In this regard, the counselee may file a complaint with the hospital's patient rights office, the provincial health directorate, and the Turkish Medical Association. In addition, the counselee can turn to the Human Rights and Equality Institution of Turkey. The purpose of the institution is explained in the Law of the Human Rights and Equality Institution of Turkey as follows: "To establish the Human Rights and Equality Institution of Turkey to protect and improve human rights based on human dignity, to guarantee the individuals' right to equal treatment, to prevent discrimination in the enjoyment of legally recognized rights and freedoms, to act in accordance with these principles, to effectively combat torture and ill-treatment, and to fulfill the role of a national preventive mechanism in this regard, as well as to regulate the principles of its organization, functions and powers." It should be noted here that, pursuant to paragraph 2 of Article 17 of the Law of the Human Rights and Equality Institution of Turkey, it is necessary to make a written application to the institution (in the concrete case, the hospital) that committed the discrimination before applying to the Human Rights and Equality Institution of Turkey. In addition, a criminal complaint can also be filed based on Article 257 of the Turkish Penal Code titled "abuse of office"

In addition, Article 21 of the Patients' Rights Regulation is titled "Respect for Privacy" and states within the scope of the right to privacy that "medical evaluations regarding the patient's health status are carried out in confidentiality and the examination, diagnosis, treatment and other procedures requiring direct contact with the patient are carried out in an environment of reasonable confidentiality". For this reason, it is clearly unlawful to write the HIV status of the counselee on hospital documents in a way that all hospital staff and even other people can see. In such cases, hospital staff should be warned, and if the violation continues, a complaint should be filed immediately with the patient rights unit and the Ministry of Health.

APPLICATION NO. 8: The counselee was a foreign national living with HIV and did not have a work permit. The counselee requested information from the association on whether the HIV status constitutes an obstacle for foreign nationals to obtain a work permit in Turkey.

LEGAL GROUNDS: Constitution art.16, art.48, art.49; ECHR art.8; UDHR art. 23; International Labor Law art.9, art.21.

LEGAL JUSTIFICATION: According to Articles 48 and 49 of the Constitution, everyone has the right to work. The right to work, which applies to everyone, has been differentiated for foreigners under Article 16 of the Constitution, with permission granted for certain types of work and restrictions for others. Under the provisions of the International Labor Force Act and the regulation on the execution of this law, foreigners who need a work permit are not required to obtain a health certificate in order to apply for a work permit. In addition, the worker's HIV status is not an obstacle to their participation in the labor force, and preventing their participation in the labor force for this reason would constitute a discriminatory measure. Article 9 of the International Labor Force Act regulates the grounds for rejecting applications for work permits from foreigners. Although the counselee does not have to be notified separately, the fact that the application authority learns the applicant's HIV status does not lead to the rejection of the work permit application. The provision "foreigners whose work in Turkey is unfavorable to public health" regulated under the grounds for rejection is not a provision that covers HIV when considering the modes of transmission of HIV and its ineffectiveness in working life as the material facts. Consequently, the HIV status of the counselee does not require a different evaluation and procedure than other foreign workers. It is a violation of the prohibition of discrimination if the counselee is subjected to different measures than other applicants for a foreign work permit only because of their HIV status. If a rejection decision is made, the counselee may appeal to the Ministry of Family, Labor and Social Security within thirty days from the date of notification of the rejection decision in accordance with Article 21 of the International Labor Force Act. If the appeal is rejected, administrative legal action may be taken.

APPLICATION NO. 9-10-11-12: Counsees who are not citizens of the Republic of Turkey have problems accessing medication. The counselee applied to the association to find out whether foreigners are covered by general health insurance and what to do if they are covered.

LEGAL GROUNDS: Constitution art.16, art.56; UDHR art.25; LFIP art.3, art.89; Social Security and General Health Insurance Law art.60, art.64; TPR art.27.

LEGAL JUSTIFICATION: According to Article 3 of the Law on Foreigners and International Protection, a foreigner is a person who has no citizenship ties with the Republic of Turkey. If the entry, presence and exit of foreigners within the borders of Turkey is realized through legal means, it will be referred to as regular migration, and if it is realized outside of legal means, it will be referred to as irregular migration. The presence of foreigners in Turkey through regular migration movements and the presence of foreigners in Turkey through irregular migration movements result in separate statuses under Turkish legislation. Those coming to Turkey through irregular migration movements and meeting the eligibility criteria, can be granted international protection status under the Law on Foreigners and International Protection. In addition to international protection statuses, the Law on Foreigners and International Protection also establishes a temporary protection status for mass migration movements. States subject their citizens and other foreigners due to their status to different regulations within their sovereignty in accordance with international conventions and principles. One of these regulatory differences concerns the right to health. The right to health is a human right that is protected for everyone both by international regula-



tions to which Turkey is a party and by the Constitution. The right to health is a right that includes 3 core rights, expanding therefrom to cover other additional rights. These core rights can be generalized as the right to preventive and protective health services, access to medical resources and patient rights. In fact, the Constitution and international regulations that recognize the right do not create a difference between foreigners and citizens. Article 56 of the Constitution gives the state the duty to establish a general health insurance by law in order to ensure the widespread provision of health services. The purpose of the general health insurance established within this scope is to ensure that all members of the society benefit from health services in an equal, accessible and effective manner against the risk of diseases that may arise, regardless of the economic power and desire of individuals. General Health Insurance is regulated by the Social Security and General Health Insurance Law No. 5510. Article 60 regulates who is covered by the general health insurance. International protection applicants or status holders and persons recognized as stateless are considered insured. In the same article, foreigners with residence and work permits who arrived in the country through regular migration, who are not insured in their home countries and whose legal residence in Turkey exceeds 1 year will be considered insured as of this date. Health services provided to foreigners under temporary protection status are also regulated by Article 27 of the Temporary Protection Regulation. The regulation introduced by Article 64 of Law No. 5510 for foreigners insured under general health insurance causes major problems in practice. With the aforementioned article, chronic diseases of foreign nationals that existed before the date they were deemed given a general health insurance or a dependent of a person with a general health insurance are not covered within the scope of general health insurance. In accordance with Article 89 of the Law on Foreigners and International Protection, international protection applicants and international protection status holders and their dependents can benefit from general health insurance for 1 year. Considering the specific case of HIV, the economic burden on the individual due to excluding the treatment from the scope of insurance and limiting the insurance period to 1 year is enormous. Likewise, the main purpose is to eliminate the applications from persons with chronic diseases at the time of application, since asylum cannot be realized due to health reasons. However, as a result, in practice, people living with HIV have difficulties in accessing health care in addition to the existing problems that may justify an international protection request. In this case, the reasons for requesting international protection should be clearly shown and the persons should be covered by insurance. As per Article 89 of the Law on Foreigners and International Protection, persons who are excluded from the scope of general health insurance after 1 year may be exempted from the 1-year limitation either by applying to the Provincial Migration Administration by proving that they have special needs as defined by the same law, or by applying to be one of the persons that the Directorate General of Migration Administration deems beneficial to be considered insured. The applications that the Directorate General of Migration Administration deems beneficial to grant insurance are treatment processes that will make a significant change in the health of the person and leave a great burden on them. When considered together with HIV, the Directorate General of Migration Administration should use its discretionary authority in favor of deeming the person insured. Ultimately, an annulment action can be filed before the administrative court against the decision to exclude the counselee from the scope of general health insurance. In conclusion, whether the counselee is in Turkey as a result of regular migration or irregular migration, they should benefit from the right to health like everyone else in accordance with the Constitution and international conventions to which Turkey is a signatory.

APPLICATION NO. 13: The counselee started job interviews as a nurse in a hospital. The counselee, who was diagnosed with HIV as a result of the tests required for employment, was not hired for this reason. They received counseling from the association on how to proceed in this regard.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; Biomedicine Convention art.10; PRR art.23; CME art.9; PDPL art.6, art.11, art.13; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.6; TPC art.136. m.137. 73 2018-2019 REPORTING AND LEGAL SOLUTIONS OF RIGHTS VIOLATIONS

LEGAL JUSTIFICATION: The data on the counselee's HIV test and the resulting HIV status is health data. According to the Personal Data Protection Law, health data belongs to the special categories of data and their processing is subject to very strict conditions. The disclosure of the counselee's HIV status, which is related to their private life and so constitutes sensitive data, by the responsible physician to the hospital management against their consent and the subsequent disclosure to the entire hospital staff violates the right to privacy and the protection of personal data, which are protected by Article 20 of the Constitution. Since the relationship between the physician in question and the patient is a patient-physician relationship, information obtained as a result of the provision of health care services is generally treated as confidential in accordance with Article 23 of the Patients' Rights Regulation. According to Article 9 of the Code of Medical Ethics published by the Turkish Medical Association, the secrets that the physician learns in the course of performing their profession must not be disclosed. In this respect, sharing the HIV status of the counselee by the relevant physician will give rise to professional liability on the part of the relevant physician. At the same time, the aforementioned actions of the relevant physician will give rise to the crime defined in Article 136 of the Turkish Penal Code, "Unlawful disclosure or acquisition of data". Article 137 of the Turkish Penal Code states that the aggravating factor for the offense of "Unlawful disclosure or acquisition of data" is to benefit from the convenience provided by a certain profession. The relevant physician will also be criminally liable in this context. In addition to all these, what is meant by data processing is defined in Article 3 of the aforementioned law titled "Definitions". Any activity related to personal data, from collection to deletion/destruction/anonymization, falls within the scope of processing activity. In this context, every action taken by the employer hospital management from learning about the HIV status of the counselee, which is the health data of the counselee protected under the right of privacy, to sharing it with other employees will be considered as data processing. In this context, the counselee may request their employer to terminate this unlawful processing activity in accordance with Article 11 of the Personal Data Protection Law. If a satisfactory solution is not offered by their employer, the counselee can exercise their right of complaint to the Personal Data Protection Board in accordance with Article 13 of the aforementioned law. At the same time, employers are obliged to provide a work environment where their employees are not subject to discrimination and stigmatization. In this context, since Article 3 of the Law No. 6701 of the Human Rights and Equality Institution of Turkey explicitly states that discrimination cannot be made on the grounds of health status and Article 6 specifically states that such discrimination cannot be made in employment and working conditions, they will be able to apply to the Human Rights and Equality Institution of Turkey. If the Institution determines that the prohibition of discrimination has been violated as a result of its investigation, it will impose an administrative fine on the employer.



APPLICATION NO. 14: In the hospital where the counselee continues their treatment, their HIV status is clearly and prominently written on the tests requested from them as well as on the documents kept about them by health care workers. The counselee received information from the association on what they could do against this discriminatory and stigmatizing intervention.

LEGAL GROUNDS: Constitution art.17, art.20; Biomedicine Convention art.10; ECHR art.8; PRR art.21.

LEGAL JUSTIFICATION: Article 21 of the Patients' Rights Regulation is titled "Respect for Privacy" and it states that the right to privacy includes cases where "medical evaluations regarding the patient's health status are carried out in confidentiality and the examination, diagnosis, treatment and other procedures requiring direct contact with the patient are carried out in a reasonably confidential environment." For this reason, it is clearly unlawful to write the HIV status of the counselee on hospital documents in a way that all hospital staff and even other people can see. In such cases, hospital staff should be warned, and if the violation continues, a complaint should be filed immediately with the patient rights unit and the Ministry of Health.

APPLICATION NO. 15: The counselee was asked to take an HIV test during their job application. As a result of the test, the counselee learned that they were living with HIV and the job interview was terminated by the company they applied for. The counselee requested legal information from the association about the relationship between HIV and the recruitment process.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; the Labor Law art.5; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.6; the Regulation on the Establishment, Duties and Working Principles of Provincial and District Human Rights Boards art.9; TPC art.117.

LEGAL JUSTIFICATION: If the HIV status of the counselee is discovered during the recruitment process and the counselee is not hired, the employer's failure to hire the counselee upon learning that they are living with HIV violates the prohibition of discrimination in both international conventions to which Turkey is a party and domestic law. Again, this unfair behavior of the employer will be in violation of the employer's obligation of equal treatment regulated under Article 5 of the Labor Law. In proving the discrimination suffered by the candidate worker due to living with HIV and the violation of the employer's equal treatment obligation, the burden of proof is on the candidate worker who alleges a violation pursuant to Article 5 of the Labor Law. However, the burden of proof of the candidate employee is lightened as in other cases of discrimination. The burden of proof will shift to the employer after the prospective employee proves with evidence that they were not hired because they were living with HIV and that they have been discriminated against for this reason. In this case, the employer will either try to prove that they did not hire the employee for another justifiable reason and that the fact that the candidate worker was living with HIV was not related to the non-employment or that the fact that the candidate worker was living with HIV was incompatible with the objective reasons and directly with the work performed and that they had not been discriminated against for this reason. The candidate worker will be able to apply to Human Rights and Equality Institution of Turkey for discrimination in recruitment due to the fact that they are living with HIV, since Article 3 of the Law No. 6701 of the Human Rights and Equality Institution of Turkey clearly



states that discrimination cannot be made due to health status and Article 6 specifically states that such discrimination cannot be made in recruitment. If the Institution determines that the prohibition of discrimination has been violated as a result of its investigation, it will impose an administrative fine on the employer. Again, the counselee who was discriminated against in the hiring process because they were living with HIV may appeal to the human rights commissions of the province or district in which they live. According to Article 9 of the Regulation on the Establishment, Duties and Working Principles of the Provincial and District Human Rights Boards, these boards are responsible for implementing the necessary measures to prevent any kind of discrimination. The Boards, which examine the violations reported to them, report this violation to the Prosecutor General's Office or the relevant administrative authorities and follow up on the results. This unfair and unlawful attitude of the employer will violate the freedom to work, which is recognized and protected in the Constitution and international texts, and will also constitute the crime of violation of freedom of work and labor in accordance with Article 117 of the Turkish Penal Code. The employee candidate may also exercise their right to file a complaint against the employer on the basis of the aforementioned provisions for discrimination based on living with HIV.

APPLICATION NO. 16: The counselee went to a private clinic for dental treatment. Upon disclosing their HIV status, the private clinic refused treatment. The counselee contacted the association about what they could do in the face of discrimination.

LEGAL GROUNDS: Constitution art.56; UDHR art.25; Regulation on Private Health Care Facilities Providing Oral and Dental Services, PRR art.6, art.8, art.11, Law of the Human Rights and Equality Institution of Turkey art.3, art.5.

LEGAL JUSTIFICATION: The private clinic where the counselee sought dental treatment falls under the Regulation on Private Health Care Facilities Providing Oral and Dental Services. The relevant regulation regulates in detail what eligibility requirements these clinics and the staff working there must fulfill, as well as the prescribed equipment for the procedures. Among the aforementioned regulations, there is no separate provision on HIV. For this reason, the clinic's intervention, forcing the counselee to undergo a different procedure to other patients for an unjustified and invalid reason or preventing them from exercising their right to choose, constitutes a violation of the prohibition of discrimination. According to Article 6 of the Patients' Rights Regulation, the counselee has the right to receive health care services according to law and equity. Pursuant to Article 8 of the said Regulation, the patient has the right to choose the health care facility and organization and to receive health care services provided in the health care facility of their choice, provided that the procedures and conditions provided for in the legislation applicable to them are complied with. In accordance with Article 11 of the same regulation, the patient has the right to request diagnosis, treatment and care in accordance with medical requirements. Since these 3 rights of the counselee have been violated, the counselee can make a written application to the patient rights unit that all health centers are obliged to establish. They can also file a complaint with the Provincial Health Directorate and make a complaint to ALO 184 SABİM (Ministry of Health Communication Center). Again, the counselee may also apply to the Human Rights and Equality Institution of Turkey since Article 3 of the Law No. 6701 on Human Rights and Equality Institution of Turkey explicitly states that no discrimination can be made on the grounds of health status and Article 5 states that private persons who provide health care services cannot discriminate while providing these services. It should be noted here that, pursuant



to paragraph 2 of Article 17 of the said Law, it is necessary to make a written application to the discriminating organization before applying to the Human Rights and Equality Institution of Turkey. If the Human Rights and Equality Institution of Turkey discovers a violation of the rule of prohibition of discrimination in the course of its investigations, it shall impose a fine on the employer.

APPLICATION NO. 17: The counselee was dismissed from their job after they shared their HIV status with the workplace official. The counselee requested legal information about the process.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; Labor Law art.17, TPC art.117, art.134, art.136.

LEGAL JUSTIFICATION: The employer may terminate the employment contract with the employee under the conditions and methods specified in the labor law. The fact that the counselee was living with HIV will not give the employer the right to unilaterally terminate the employment contract based on justified or valid reasons. Article 18 of the Labor Law classifies workers within the scope of the labor law as workers covered by labor-job protection and workers who are not covered by labor-job protection. In order for employers to terminate the employment contract of employees granted labor-job protection, there must be a valid reason arising from the competence or behavior of the employee or the requirements of the business, workplace or company, as stated in Article 18 paragraph 1 of the Labor Law. The termination due to the fact that the employee is living with HIV is considered in the context of "race, color, gender, marital status, family obligations, pregnancy, birth, religion, political opinion and similar reasons" as clearly stated in subparagraph d of paragraph 3 of the same article, and as such does not constitute a valid reason. In the case of employees who are not subject to labor-job protection, the employer is not obliged to give any reason for the termination of the employment contract. However, this freedom is limited by the prohibition of abuse of the right of termination regulated by Article 17 paragraph 4 of the Labor Law. In this context, in the objective reality that the fact that the employee is living with HIV will not have any effect on the continuation of the employment relationship, the termination of the employee's employment contract for this reason will be considered as an abuse of the right of termination. Another way that the employer can use when terminating the employment contract with the employee is the immediate termination of the employment contract for just cause in accordance with Article 25 of the Labor Law. Although employers usually try to include the fact that the employee is living with HIV among the health reasons within the scope of this article, in today's world, it is not possible to include the HIV status of the person among the justified health reasons within the scope of the article. Within the scope of the same article, failure of the employee to share their HIV status with the employer during the employment negotiations or misinforming the employer cannot be considered as making a misleading statement about essential matters in the employment relationship within the meaning of the paragraph 2 of Article 25 of the Labor Law, and will not lead to immediate termination of the employment contract for just cause. As a result, there is no situation that prevents the execution of the employment relationship, and it will not be legally possible for the employer to obtain a legal right based on a misleading information obtained through their own fault. As questions asked to find out about the HIV status of the candidate employee will be unlawful questions unless an objective connection is established with the work to be performed, and the employee will not be obliged to answer and will not be obliged to answer correctly. Of course, the employer must investigate whether they can find other solutions before terminating the employment



relationship. Terminations contrary to this principle, which is referred to as the principle of last resort, will also be unlawful. As a result, it will be unlawful for the employer to terminate the employment contract with the employee, whether the employee is covered by labor-job protection or not, solely on the grounds that the employee lives with HIV. In this case, the employee will be able to use their rights of reinstatement, go to the court for determination of invalid termination, as well as make use of compensation rights granted to them under the law. Data on the HIV status of the counselee is health data. According to the Personal Data Protection Law, health data belongs to the special categories of data and their processing is subject to very strict conditions. The employer's disclosure of the job counselee's HIV status, which is related to his private life and is his sensitive data, against his consent violates the rights to privacy and protection of personal data protected by Article 20 of the Constitution. Again, the same acts will give rise to many crimes under the Turkish Penal Code. In this context, the said acts that violate privacy under Article 134 of the Turkish Penal Code naturally also constitute the crime of unlawful disclosure or acquisition of data under Article 136 of the Turkish Penal Code. The dismissal of the counselee for this reason would also give rise to the crime of violation of freedom of work and labor regulated under Article 117 of the Turkish Penal Code.

APPLICATION NO. 18: The HIV status of the counselee was disclosed by an unidentified user on a dating application. The counselee contacted the association about what they could do legally in this situation.

LEGAL GROUNDS: Constitution art.20; ECHR art.8; TPC art.134, art.136.

LEGAL JUSTIFICATION: Since the HIV status of a person constitutes a health status, it is a "sensitive personal data". In other words, it has superior protection status. It is a crime to share personal data with third parties. Again, HIV status is information related to a person's private life and disclosure of HIV status is a violation of the right to privacy. For these reasons, the counselee may file a criminal complaint against the person who disclosed their HIV status within the scope of TPC 134 (Violation of privacy) and TPC 136 (Unlawful disclosure or acquisition of data). In their petition to the prosecutor's office, the counselee may state that they cannot access the identity information of the person and request the identification of the perpetrator and the initiation of an investigation. It should be noted that the majority of dating apps do not have a data center in Turkey and/or do not share such data due to the Personal Data Protection Law. For this reason, it is possible that the prosecutor's office will not be able to identify the perpetrator.

APPLICATION NO. 19: When the counselee went to the family physician to get a medical report for new employment, he refused to give the report, saying "you cannot work, how dare you come and give tests" upon seeing the medication use reports. The counselee requested information from the association on what they could do legally concerning this attitude of the specialist physician.

LEGAL GROUNDS: Convention art.17, art.20; Biomedicine Convention art.10, ECHR art.8, the PRR art.5, MDR art.2, CME art.21.

LEGAL JUSTIFICATION: No one is obliged to disclose their HIV status unless it is medically necessary (unless the procedure or procedures to be performed have consequences related to HIV status). Steri-



lization procedures applied by health care personnel while providing any health service are standard and health care personnel are obliged to apply this for everyone and take the necessary precautions. No additional precautions and sterilization are required for people living with HIV. In other words, the counselee did not have to tell the ENT doctor that he was living with HIV, nor would he be putting anyone at risk if he did not. In the concrete case, the physician's attitude is far from scientific reality, and is discriminatory and stigmatizing. Article 5 of the Patients' Rights Regulation clearly lists the principles to be followed while providing health care services and includes treating patients humanely among these principles. In this context, the counselee can file a complaint with the hospital's patient rights unit, as they have been subjected to prejudices and stigmatizing/discriminatory attitudes by the relevant physician. They can also file a complaint with the Provincial Health Directorate and make a complaint to ALO 184 SABİM (Ministry of Health Communication Center). This situation also violates Article 2 of the Medical Deontology Regulation and Article 21 (respect for patient rights) of the Code of Medical Ethics. In this case, the relevant physician can be reported to the Turkish Medical Association.

APPLICATION NO. 20: The counselee's physician informed the patient that HIV medication was highly side-effective and frightened him. After learning about the scientific developments on this issue, they requested information from the association on what they could do legally against the act of the physician who provided false information.

LEGAL GROUNDS: Constitution art.17, art.20; Biomedicine Convention art.10; ECHR art.8; PRR art.5, art.11, art.21; CME art.5, art.24.

LEGAL JUSTIFICATION: Article 24 of the Code of Medical Ethics "Use of Influence on the Patient" states that "The physician cannot use their influence on the patient for purposes other than medical purposes." In addition to all these ethical rules, Article 11 of the Patients' Rights Regulation regulates that the patient has the right to request diagnosis, treatment and care in accordance with the requirements of modern medical knowledge and technology. In the light of this information, considering that the physician a- did not follow the scientific developments in their field and/or b- did not provide the correct information to their patient due to prejudice, the legal means that the counselee can use are to file a complaint against the physician to the Turkish Medical Association and to apply to the patient rights unit of the hospital where the physician works.

APPLICATION NO. 21: The counselee needed urgent surgery to remove a stone in their gall bladder. When their HIV status was found out in the tests performed before the surgery, they were called by the relevant physician and informed that the surgery would not be performed on the grounds that it "posed a risk to them due to their HIV status". The counselee applied to the association for counseling on the discrimination they were subjected to.

LEGAL GROUNDS: Constitution art.10, art.56; UDHR art.25; Regulation on Private Hospitals; Regulation on Private Health Institutions for Outpatient Diagnosis and Treatment; PRR art.6, art.8, art.11, LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.5.

LEGAL JUSTIFICATION: The determinations on the above issues within the medical centers are regulated by the Regulation on Private Health Institutions for Outpatient Diagnosis and Treatment. Both regulations lay out the qualification requirements and the materials required for the medical procedure to be performed. In addition to all these regulations, the obligation to meet these qualification requirements is imposed on these entities. There is no separate regulation on HIV with regards to required qualifications for aesthetic procedures in both regulations. As such, the Center violates the prohibition of discrimination by initially accepting and then wrongfully rejecting the counselee who was living with HIV and applied for surgery at the Center. The counselee has the right to receive health care services according to the principles of justice and equity, according to Article 6 of the Patients' Rights Regulation. Pursuant to Article 8 of the said Regulation, the patient has the right to choose the health care facility and organization and to receive health care services provided in the health care facility of their choice, provided that the procedures and conditions provided for in the legislation applicable to them are complied with. In accordance with Article 11 of the same regulation, the patient has the right to request diagnosis, treatment and care in accordance with medical requirements. Since these 3 rights of the counselee have been violated, the counselee can make a written application to the patient rights unit that all health centers are obliged to establish. The counselee can also file a report with and make a complaint to the Patient Rights Board within the Provincial Health Directorate and ALO 184 SABİM (Ministry of Health Communication Center) regarding the violated rights. Again, the counselee may also apply to the Human Rights and Equality Institution of Turkey since Article 3 of the Law No. 6701 on Human Rights and Equality Institution of Turkey explicitly states that no discrimination can be made on the grounds of health status and Article 5 states that private persons who provide health care services cannot discriminate while providing these services. It should be noted here that, pursuant to paragraph 2 of Article 17 of the said Law, it is necessary to make a written application to the discriminating organization before applying to the Human Rights and Equality Institution of Turkey. If the Human Rights and Equality Institution of Turkey discovers a violation of the rule of prohibition of discrimination in the course of its investigations, it shall impose a fine on the employer.

APPLICATION NO. 22: The counselee disclosed their HIV status to their partner. Thereupon, they were constantly harassed by their partner that their HIV status would be disclosed. They applied to the association to find out what they could do legally if their partner made this issue public.

LEGAL GROUNDS: Constitution art.20; ECHR art.8; UDHR art. 12, law no. 6284 art.5, TPC art.134, art.136.

LEGAL JUSTIFICATION: The legal mechanisms that the counselee can use before disclosure of their HIV status and the legal mechanisms that the counselee can use after disclosure are different. The counselee can apply for protective and preventive measures under law no. 6284 to prevent the disclosure of HIV status. Law no. 6284 sets out the procedures and principles for measures to protect women, children, family members, and victims of unilateral stalking who have experienced violence or are at risk of violence, and to prevent violence against them. The law defines violence as "all types of physical, sexual, psychological, verbal, or economic conduct and actions occurring in the public or private sphere, including actions that result or may result in physical, sexual, psychological, or economic harm or suffering to the person, threats and pressure to that end, or arbitrary prevention of liberty." In this context, the counselee may seek legal remedies in order to benefit from the preventive measures listed in law no. 6284. The preventive



measures listed in the law that the counselee may request are listed in article 5 of the law. With these measures, the counselee can obtain a court decision that the ex-partner who constantly harasses them will not use words and behaviors that include threats of violence, insults, humiliation or degradation; will be immediately removed from the shared home or residence; will not approach the counselee's home, school and workplace; will not approach the counselee's relatives, even if the counselee may not been subjected to violence; will not approach witnesses and children, without prejudice to cases involving the establishment of a personal relationship; will not damage the counselee's personal belongings and household items; will not disturb the counselee through means of communication or otherwise, etc. As can be seen, according to the law, a decision can be made to prevent the perpetrator of violence from making threats and communicating with the counselee and their immediate surroundings, including their family. The injunctions to be taken out under this law may be requested from the judge of the family court in the most expeditious and easily accessible place, from the local authority or from the law enforcement agency. No evidence is required for an injunction; it is sufficient to file an application duly explaining the events. In addition, injunctions taken out are time-limited; if the threat of violence has not ended despite the expiration of the time limit, it may be extended upon renewed application. Injunction is served on the parties, and if the perpetrator of violence violates the decision after it is served, imprisonment is imposed. If the HIV status of the counselee is disclosed by their partner without their consent, criminal charges may be filed in accordance with the relevant provisions of the Turkish Penal Code. Since the HIV status of a person constitutes a health condition, it is a "sensitive personal data". In other words, it has superior protection status. It is a criminal offense to disclose personal data to third parties. Again, HIV status is information related to a person's private life and disclosure of HIV status is a violation of the right to privacy. For these reasons, if the HIV status is disclosed by the counselee's partner, the counselee may file criminal charges for violation of privacy under Article 134 of the Turkish Penal Code and unlawful disclosure or acquisition of data under Article 136 of the same code.

APPLICATION NO. 23: The counselee was subjected to discrimination and stigmatization by a physician at a public hospital because of their gender identity. When the counselee was told that this was unlawful, they wanted to know what they could do legally in relation to the treatment they had been subjected to at the public hospital.

LEGAL GROUNDS: Constitution art.17, art.20; Biomedicine Convention art.10; ECHR art.8; PRR art. 4, art.5, art.14; MDR art.2; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.5; CME art.7; TPC art.257.

LEGAL JUSTIFICATION: In Article 4 of the Patients' Rights Regulation, patients' rights are defined as "the rights of persons who need to use health services, which are guaranteed by the Constitution of the Republic of Turkey, international treaties, laws and other legislation, and which they have simply because they are human beings." Article 5 of the regulation explicitly lists the "prohibition of discrimination" as one of the rules to be observed in the provision of health services: "In the provision of health care services, race, language, religion and sect, gender, political opinion, belief, economic and social status and other differences of patients shall not be taken into account. Health services shall be planned and organized in such a way that they are easily accessible to all." (Article 5/c) Article 2 of the Medical Deontology Regulation also refers to the prohibition of discrimination and reads as follows: "The physician

and the dentist shall exercise the utmost care in examining and treating the patient, without regard to the patient's sex, race, nationality, religion and belief, moral convictions, character and personality, social status, standing and political views." In the Code of Medical Ethics, the prohibition of discrimination is enshrined in Article 7. Article 7 lists the prohibition of discrimination as follows: "The physician is obliged to perform his duties in all cases, regardless of political opinion, social status, religious belief, nationality, ethnic origin, race, sex, gender identity and sexual orientation, age, social and economic status, and similar differences among his patients" and explicitly prohibits discrimination based on sexual orientation and gender identity. As can be seen, discrimination is prohibited in many sources of law that establish patients' rights and physicians' professional rules. In this regard, the counselee may file a complaint with the hospital's patient rights office, the provincial health directorate, and the Turkish Medical Association. In addition, the counselee can turn to the Human Rights and Equality Institution of Turkey. The purpose of the institution is explained in the Law of the Human Rights and Equality Institution of Turkey as follows: "To establish the Human Rights and Equality Institution of Turkey to protect and improve human rights based on human dignity, to guarantee the individuals' right to equal treatment, to prevent discrimination in the enjoyment of legally recognized rights and freedoms, to act in accordance with these principles, to effectively combat torture and ill-treatment, and to fulfill the role of a national preventive mechanism in this regard, as well as to regulate the principles of its organization, functions and powers." It should be noted here that, pursuant to paragraph 2 of Article 17 of the Law of the Human Rights and Equality Institution of Turkey, it is necessary to make a written application to the institution (in the concrete case, the hospital) that committed the discrimination before applying to the Human Rights and Equality Institution of Turkey. A criminal complaint can also be filed under Article 257 of the Turkish Penal Code, entitled "abuse of office".

APPLICATION NO. 24: The counselee has been accepted for a job in a company and has contacted the association about whether their HIV status constitutes a legal obstacle to the establishment and continuation of the employment relationship and what remedies they can apply in case of violation of their privacy against coworkers.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; Labor Law art.17, art.18, art.25; PDPL art.6; TPC art.117, art.134, art.136.

LEGAL JUSTIFICATION: The employer may establish and terminate the employment contract with the employee under the conditions and methods specified in the labor law. The fact that the counselee is living with HIV will not give the employer the right to unilaterally terminate the employment contract based on justified or valid reasons both at the time of employment and during the continuation of the employment relationship. Article 18 of the Labor Law classifies workers within the scope of the labor law as workers covered by labor-job protection and workers who are not covered by labor-job protection. In order for employers to terminate the employment contract of employees granted labor-job protection, there must be a valid reason arising from the competence or behavior of the employee or the requirements of the business, workplace or company, as stated in Article 18 paragraph 1 of the Labor Law. The termination due to the fact that the employee is living with HIV is considered in the context of "race, color, gender, marital status, family obligations, pregnancy, birth, religion, political opinion and similar reasons" as clearly stated in subparagraph d of paragraph 3 of the same article, and as such does not constitute



a valid reason. In the case of workers who are not subject to labor-job protection, the employer is not obliged to show any reason when terminating the employment contract, but this freedom is limited by the prohibition of abuse of the right of termination regulated by the paragraph 4 of Article 17 of the Labor Law. In this context, in the objective reality that the fact that the employee is living with HIV will not have any effect on the continuation of the employment relationship, the termination of the employee's employment contract for this reason will constitute an abuse of the right of termination. Another way that the employer can use when terminating the employment contract with the employee is the immediate termination of the employment contract for just cause in accordance with Article 25 of the Labor Law. Although employers usually try to include the fact that the employee is living with HIV among the health reasons within the scope of this article, in today's world, it is not possible to include the HIV status of the person among the justified health reasons within the scope of the article. Of course, the employer must investigate whether they can find other solutions before terminating the employment relationship. Terminations contrary to this principle, which is referred to as the principle of last resort, will also be unlawful. As a result, it will be unlawful for the employer to terminate the employment contract with the counselee, whether the employee is covered by labor-job protection or not, solely on the grounds that the employee lives with HIV. In this case, the counselee will be able to use their rights of reinstatement, go to the court for determination of invalid termination, as well as make use of compensation rights granted to them under the law. Data on the HIV status of the counselee is health data. According to the Personal Data Protection Law, health data belongs to the special categories of data and their processing is subject to very strict conditions. The employer's disclosure with other coworkers of the counselee's HIV status, which is related to his private life and is his sensitive data, against his consent violates the rights to privacy and protection of personal data protected by Article 20 of the Constitution. Again, the same acts will give rise to many crimes under the Turkish Penal Code. In this context, the said acts that violate privacy under Article 134 of the Turkish Penal Code naturally also constitute the crime of unlawful disclosure or acquisition of data under Article 136 of the Turkish Penal Code.

APPLICATION NO. 25: The counselee's military service deferment is about to expire and he is hesitant to obtain an exemption report due to his HIV status. The counselee requested information on whether they would be exempt from military service due to their HIV status and whether their employer would be able to find out about their HIV status if they were exempt.

LEGAL GROUNDS: Constitution art.20, art.72; Turkish Armed Forces Health Competency Regulation art.6, The List of Diseases and Disabilities in the Relevant Regulation art.52.

LEGAL JUSTIFICATION: HIV is a reason of absolute exemption from military service, which is not based on requests or consents of individuals. Paragraph b of Article 6 of the Turkish Armed Forces Health Competency Regulation states that "those who are not eligible for military service: are those whose diseases and disabilities are included in the (B) and (D) sections of the List of Diseases and Disabilities." In the list of diseases and disabilities in the annex of the Regulation, in Article 52 of the Infectious Diseases section, HIV infection proven by verification tests is included among group D diseases. Therefore, it is clear that people living with HIV are exempt from military service, in other words, they are not eligible for military service. Documents to be submitted to the workplace regarding exemption from military service can now be obtained from e-government. This document does not specify the reason for which the person is unfit for

military service, it only says “found unfit for military service”. Therefore, it is not possible for the employer to understand the HIV status of the prospective worker with this document. This may be questioned by some employers, but this is against the right to respect for the private life of the employee and the right to protection of personal data. Detailed explanations and legal mechanisms that can be applied in such a case are also explained in the cases on discrimination in recruitment.

APPLICATION NO. 26: The counselee’s partner filed for divorce and shared the counselee’s status with their children and third parties. The counselee applied to the association to find out what they could do legally.

LEGAL GROUNDS: Right to respect for the right to privacy (Constitution art.20; UDHR art.12; ECHR art.8; TPC art.134), Violation of the prohibition of discrimination (ECHR art.14; Human Rights and Biomedicine Convention art.11; TPC art.122).

LEGAL JUSTIFICATION: The counselee was told about the grounds for divorce under the Turkish Civil Code and it was mentioned in detail that HIV status cannot be considered as a ground for divorce. If the other party uses HIV status under another ground for divorce, this information should not be taken into consideration in the divorce case. However, it was also stated that the fact that they received the diagnosis within the marriage union may be a presumption for divorce due to adultery/cheating if it is conclusively determined that the virus was transmitted through sexual intercourse, after first determining the route of transmission. In addition, in this direction, the courses of action that can be taken regarding the situation against the privacy of life and the prohibition of discrimination were explained to the counselee.

APPLICATION NO. 27: The counselee was asked for a medical examination report for employment. The counselee wanted to get the report from the primary care physician, but they insisted on writing down the counselee’s HIV status. The counselee stated that they did not want to have it written down because they thought they would be subjected to discrimination and asked the association how to proceed in this regard.

LEGAL GROUNDS: Violation of Privacy of Private Life and Family Life (ECHR art.8; Convention art.20; TPC art.134; Medical Deontology Regulation art.4; Patients’ Rights Regulation art.21); Violation of the Right to Protection of Personal Health Data (Constitution art.20; TPC art.136); Violation of freedom of labor and contract (Constitution art.48- 49; TPC art.117); Violation of the prohibition of discrimination (ECHR art.14; Human Rights and Biomedicine Convention art.11; TPC art.122; Biomedicine Convention art.11); Violation of the Right to Confidentiality of Information (PRR art.23); Violation of the Right to Respect for Privacy (PRR art.21).

LEGAL JUSTIFICATION: The counselee was informed that the HIV test was not listed in the Recruitment/ Periodic Examination Form annexed to the Regulation on the Duties, Authorities, Responsibilities and Training of Primary Care Physicians, Occupational Physicians and Other Health Care Personnel, and that the HIV test was therefore not a mandatory test for recruitment and periodic examinations. According to ILO codes of practice on HIV/AIDS and the world of work, there can be no justification for asking job



applicants or employees to provide personal information about HIV. Furthermore, employees cannot be under any obligation to provide such information to their coworkers. Access to employees' personal data on matters relating to their health status must be subject to rules on confidentiality.

APPLICATION NO. 28: The counselee contacted the association to find out what legal remedies could take against their partner, whom the counselee believed had knowingly and willfully caused the counselee to become infected with HIV by making the counselee use drugs.

LEGAL GROUNDS: Constitution art.36; ECHR art.6; TPC art.86, art.89.

LEGAL JUSTIFICATION: The counselee's best course of action would be to file a criminal complaint against the partner and to mobilize the judicial authorities. The necessary authorities will investigate whether the allegation constitutes the offense of injury. In the trial phase, the issues that the counselee asserts as the elements of knowing and wanting should take into account whether or not the perpetrator knows that they are living with HIV and the relationship practices of the parties. Of course, the HIV-infected person's allegations regarding being infected by their partner must be well corroborated. Again, it should be taken into account when evaluating the moral elements that in the case of unprotected sex, there is a possibility that the person may become infected, and of course, people have their own responsibilities in limiting or not limiting themselves in safe sex practices. Contrary to the well-established and erroneous belief in the teaching, AIDS is a disease stage and not an infectious state. The acts of persons should not be included within the scope of Article 87 of the TPC contrary to the material reality. As a result, in the judicial process, both in the investigation and prosecution phases, HIV-related transmission routes, HIV-related treatment methods, the reality of "Undetectable=Untransmittable (U=U)" should not be ignored and a fair trial should be carried out without prejudices.

APPLICATION NO. 29: The counselee was informed by their physician that they could not have children due to their HIV status. Thereupon, the counselee contacted the association about having a child, and after learning about U=U and other scientific developments, they requested information from the association about what they could do legally against the physician providing false information.

LEGAL GROUNDS: Constitution art.17, art.20; Biomedicine Convention art.10; ECHR art.8; PRR art.5, art.11, art.21; CME art.5, art.24.

LEGAL JUSTIFICATION: Medicine is a field where learning never ends and scientific developments must be followed continuously. Article 5 of the Code of Medical Ethics: "The primary duty of the physician is to protect human life and health by trying to prevent diseases and to cure patients by fulfilling scientific requirements. It is also the primary duty of the physician to observe human dignity during professional practice. In order to fulfill these obligations, the physician closely monitors developments." It is the most natural right of patients to expect physicians working in a field such as HIV, where new scientific information is constantly obtained, to be aware of these developments. It has been shown that people living with HIV can have children naturally if certain conditions are met. Even if a physician working in this field does not know this information, it is certain that they should investigate the patient's question and inform

the patient without acting with prejudice. It is against the rules of Code of Medical Ethics for a physician to mislead their patient due to their prejudices or concerns that are not in line with scientific developments. Likewise, since the patient sees the physician as an expert, they may be hopeful or disappointed by what the physician says. Article 24 of the Code of Medical Ethics "Use of Influence on the Patient" states that "The physician cannot use their influence on the patient for purposes other than medical purposes." In addition to all these ethical rules, Article 11 of the Patients' Rights Regulation regulates that the patient has the right to request diagnosis, treatment and care in accordance with the requirements of modern medical knowledge and technology. In the light of this information, considering that the physician a- did not follow the scientific developments in their field and/or b- did not provide the correct information to their patient due to prejudice, the legal means that the counselee can use are to file a complaint against the physician to the Turkish Medical Association and to apply to the patient rights unit of the hospital where the physician works.

APPLICATION NO. 30: The counselee contacted a plastic surgery center for hair transplantation. After the counselee stated that they were living with HIV, the center stated that they could not perform the hair transplant procedure. The counselee received information from the association on what they could do about this issue legally.

LEGAL GROUNDS: Constitution art.20, art.56; ECHR art.8; UDHR art.25; PRR art.6, art.8, art.11; LAW OF THE HUMAN RIGHTS AND EQUALITY INSTITUTION OF TURKEY art.3, art.5; Regulation on Private Hospitals; Regulation on Private Health Institutions for Outpatient Diagnosis and Treatment.

LEGAL JUSTIFICATION: The aesthetic surgery centers where the counselee applied for hair transplantation are private businesses. These private businesses may be located within private hospitals or established separately as medical centers. The Regulation on Private Hospitals regulates the characteristics of private hospitals and the personnel working there. The regulations on the aforementioned issues within medical centers are regulated by the Regulation on Private Health Institutions for Outpatient Diagnosis and Treatment. Both regulations lay out the qualification requirements and the materials required for the medical procedure to be performed. In addition to all these regulations, the obligation to meet these qualification requirements is imposed on these entities. There is no separate regulation on HIV with regards to the qualification requirements for aesthetic interventions in both regulations. As such, the counselee has the right to receive health care services according to the principles of justice and equity, according to Article 6 of the Patients' Rights Regulation. Pursuant to Article 8 of the said Regulation, the patient has the right to choose the health care facility and organization and to receive health care services provided in the health care facility of their choice, provided that the procedures and conditions provided for in the legislation applicable to them are complied with. In accordance with Article 11 of the same regulation, the patient has the right to request diagnosis, treatment and care in accordance with medical requirements. Since these 3 rights of the counselee have been violated, the counselee can make a written application to the patient rights unit, which is obliged to be established by the health center where the applicant cannot receive service. The counselee can also file a report with and make a complaint to the Patient Rights Board within the Provincial Health Directorate and ALO 184 SABİM (Ministry of Health Communication Center) regarding the violated rights. Again, the counselee may also apply to the Human Rights and Equality Institution of Turkey since Article 3 of the Law No. 6701 of Human Rights and Equality Institution



of Turkey explicitly states that no discrimination can be made on the grounds of health status and Article 5 states that private persons who provide health care services cannot discriminate while providing these services. If the Institution determines that the prohibition of discrimination has been violated as a result of its investigation, it will impose an administrative fine on the employer.

APPLICATION NO. 31: The counselee was dismissed due to the discovery of their HIV status. The counselee requested legal information about the process.

LEGAL GROUNDS: Constitution art.20, art.48, art.49; ECHR art.8; UDHR art.12, art.23; Labor Law art.17, TPC art.117, art.134, art.136.

LEGAL JUSTIFICATION: The employer may terminate the employment contract with the employee under the conditions and methods specified in the labor law. The fact that the counselee was living with HIV will not give the employer the right to unilaterally terminate the employment contract based on justified or valid reasons. Article 18 of the Labor Law classifies workers within the scope of the labor law as workers covered by labor-job protection and workers who are not covered by labor-job protection. In order for employers to terminate the employment contract of employees granted labor-job protection, there must be a valid reason arising from the competence or behavior of the employee or the requirements of the business, workplace or company, as stated in Article 18 paragraph 1 of the Labor Law. The termination due to the fact that the employee is living with HIV is considered in the context of "race, color, gender, marital status, family obligations, pregnancy, birth, religion, political opinion and similar reasons" as clearly stated in subparagraph d of paragraph 3 of the same article, and as such does not constitute a valid reason. In the case of employees who are not subject to labor-job protection, the employer is not obliged to give any reason for the termination of the employment contract. However, this freedom is limited by the prohibition of abuse of the right of termination regulated by Article 17 paragraph 4 of the Labor Law. In this context, in the objective reality that the fact that the employee is living with HIV will not have any effect on the continuation of the employment relationship, the termination of the employee's employment contract for this reason will be considered as an abuse of the right of termination. Another way that the employer can use when terminating the employment contract with the employee is the immediate termination of the employment contract for just cause in accordance with Article 25 of the Labor Law. Although employers usually try to include the fact that the employee is living with HIV among the health reasons within the scope of this article, in today's world, it is not possible to include the HIV status of the person among the justified health reasons within the scope of the article. Within the scope of the same article, failure of the employee to share their HIV status with the employer during the employment negotiations or misinforming the employer cannot be considered as making a misleading statement about essential matters in the employment relationship within the meaning of the paragraph 2 of Article 25 of the Labor Law, and will not lead to immediate termination of the employment contract for just cause. As a result, there is no situation that prevents the execution of the employment relationship, and it will not be legally possible for the employer to obtain a legal right based on a misleading information obtained through their own fault. As questions asked to find out about the HIV status of the candidate employee will be unlawful questions unless an objective connection is established with the work to be performed, and the employee will not be obliged to answer and will not be obliged to answer correctly. Of course, the employer must investigate whether they can find other solutions before terminating the employment

relationship. Terminations contrary to this principle, which is referred to as the principle of last resort, will also be unlawful. As a result, it will be unlawful for the employer to terminate the employment contract with the employee, whether the employee is covered by labor-job protection or not, solely on the grounds that the employee lives with HIV. In this case, the employee will be able to use their rights of reinstatement, go to the court for determination of invalid termination, as well as make use of compensation rights granted to them under the law. Data on the HIV status of the counselee is health data. According to the Personal Data Protection Law, health data belongs to the special categories of data and their processing is subject to very strict conditions. The employer's disclosure of the job counselee's HIV status, which is related to his private life and is his sensitive data, against his consent violates the rights to privacy and protection of personal data protected by Article 20 of the Constitution. Again, the same acts will give rise to many crimes under the Turkish Penal Code. In this context, the said acts that violate privacy under Article 134 of the Turkish Penal Code naturally also constitute the crime of unlawful disclosure or acquisition of data under Article 136 of the Turkish Penal Code. The dismissal of the counselee for this reason would also give rise to the crime of violation of freedom of work and labor regulated under Article 117 of the Turkish Penal Code.

APPLICATION NO. 32: The counselee, who is living with HIV, and their partner applied to the primary care physician for marriage procedures. The counselee tested positive for HIV in the first tests. The primary care physician sent the test for verification and stated that they would not give the couple the necessary marriage license until the test results were received. The counselee contacted the association and asked what they could do about the issue.

LEGAL GROUNDS: Offense of abuse of power through neglect of duty (TPC art.257); Violation of the right to respect for the privacy of private and family life (ECHR art.8; Constitution art.20; TPC art.134; Medical Deontology Regulation art.4, PRR art.21); Violation of the right to protection of personal health data (Constitution art.20; TPC art.136); Violation of the prohibition of discrimination (ECHR art.14; Human Rights and Biomedicine Convention art.11; TPC art.122); Violation of professional standards (Human Rights and Biomedicine Convention art.4); Violation of the right to confidentiality of information (PRR art.23), Violation of the right to respect for privacy (PRR art.21).

LEGAL JUSTIFICATION: Mandatory tests to be performed before marriage are specified in the Public Health Law. HIV test is not among these mandatory tests. Therefore, waiting for the HIV test result in the issuance of the health report required for marriage results in the physician not performing his/her duty. This constitutes a crime under the Turkish Penal Code. The counselee was advised to talk to the physician again in line with this counseling. If necessary, the counselee was advised to obtain a consent form from the prospective spouse stating that they know that the counselee is living with HIV.

APPLICATION NO. 33: The applicant had just started a new job and was asked to take an HIV test, to which the counselee replied that they did not want to take an HIV test. The counselee contacted the association and asked what they could do about the issue.



LEGAL GROUNDS: Right to respect for the privacy of life (Constitution art.20; UDHR art.12; ECHR art.8; TPC art.134); Right to protection of personal health data (Constitution art.20; UDHR art.12; ECHR art.8; PDPL art.6; TPC art.135, 136, 137); Freedom of work, labor and contract (Constitution art.48, 49; UDHR art.23; TPC art.117); Prohibition of discrimination (Constitution art.10; UDHR art.2; ECHR art.14; Labor Law art.5).

LEGAL JUSTIFICATION: The counselee was provided with the necessary legal advice in line with ILO codes of practice on HIV/AIDS and the world of work. The Codes of Practice stipulate that HIV infection cannot be a justified or valid reason for not hiring, not renewing an employment contract or dismissing an employee, and that there can be no justification for asking prospective workers or employees to provide personal information about HIV. The counselee was informed that the HIV test was not listed in the Recruitment/Periodic Examination Form annexed to the Regulation on the Duties, Authorities, Responsibilities and Training of Occupational Physicians and Other Health Care Personnel, and that the HIV test was therefore not a mandatory test for recruitment and periodic examinations. In addition, it is regulated that employees are under no obligation to provide such information to their superiors or coworkers and that in matters relating to the health status of employees, HIV status should be subject to the rules on the confidentiality of access to sensitive personal data in accordance with the Personal Data Protection Law. Therefore, requesting an HIV test from a current or prospective employee and not hiring the prospective employee or terminating or not renewing the employee's employment contract based on the test result constitutes discriminatory treatment. This situation is contrary to both our international conventions and national legislation. HIV testing is mandatory in cases listed in the Regulation on Blood and Blood Components (blood and organ donors) and in cases listed in the Regulation on the Provisions Applicable for Prostitutes and Brothels and Combating Sexually Transmitted Diseases. Apart from these, HIV status is specifically considered in the medical examinations for police officers, watchmen, soldiers and pilots in accordance with the legal regulations for these professions. Therefore, there is no legal basis for requiring an HIV test for job entries other than these cases and it is unlawful.

APPLICATION NO. 34: The counselee, who is a candidate driver, contacted the association for information after the primary care physician refused to give them the medical report required for a driver's license and referred them to a research hospital.

LEGAL GROUNDS: Regulation on the Health Conditions and Examinations of Driver Candidates and Drivers

LEGAL JUSTIFICATION: Although HIV status is not among the areas to be examined within the scope of the Regulation on the Health Conditions and Examinations of Driver Candidates and Drivers, HIV status does not constitute an obstacle to driving in any way within the scope of the legislation. It is not possible for the physician who was to have issued the health report to make inquiries on this issue, and information has been given that the status should not be mentioned in the report to be received in any way, even if the counselee shares their HIV status.



OUR FINDINGS ON LEGAL SOLUTIONS

Along with the legal analyses we have tried to explain above, most of the counselees who applied in 2021, apart from the main violations mentioned above, contacted the association and requested legal assistance in connection with the violation of personal data with the launching of the medula system for all health care providers.

As is well known, the reporting of chronic health conditions, the prescriptions related to this reporting, or the retrospective recording of health care services used is done through a system called Medical Messenger (Medula), to which health care providers have access and in which the medicines/medical devices/health care services prescribed/reimbursed by the Social Security Institution are recorded.

However, the fact that such sensitive records containing information about chronic conditions are accessible to unrelated health care workers creates a number of problems in accessing treatment. In particular, people with HIV, hepatitis or other infections, psychiatric and neurological conditions have problems regarding this system that is accessible for many people.

For example, by entering the T.R. identity number of a person living with HIV in a query by the health care personnel/pharmacist/reporting secretariat, all reports, medications taken, and hospital visits can be accessed through the MEDULA system.

Since 1 January 2021, most of the requests for legal assistance received by the association were related to requests for information on rights such as the right to privacy, the right to work, and the protection of personal data due to the availability of the MEDULA system to health care providers and access to the system by occupational physicians.

It can be seen that easy access to this system by unrelated third parties entails a number of rights violations, even though it may seem useful for access to health data. For example, it is believed that the inspection of reports of HIV-infected individuals by occupational physicians during regular examinations of private sector workers can lead to stigmatization, discrimination, and even termination of employment contracts due to easy access to the Medula system.



In addition, the fact that physicians, especially primary care physicians, lack knowledge on the subject, abstain from treatment, and discriminate against patients is a major barrier to access to health care for people living with HIV.

In previous years, access to the system could be restricted to third parties by the citizen filing a petition with the relevant department of the provincial directorate of the Social Security Institution to which they belonged, provided that the right to access prescriptions and health care services was reserved. With the circular sent to the provincial directorates by the General Directorate of Service Delivery of the Turkish Social Security Institution dated 16/08/2021, the requests for limiting access to the Medula system made by personal application/email were prevented. In addition, even the access restrictions based on the applications made before the circular dated 16/08/2021 were annulled giving health care providers full access.

The article referred to in the circular in question states that requests to restrict access to the system in question cannot be made with a signed petition, but can only be restricted by a court decision. Regarding the issue, the action for nullity with a request for the stay of execution filed by the Positive Living Association with the relevant department of the State Council to annul the article related to this circular is still pending, and many of our counselees living with HIV have filed individual lawsuits with the Administrative Court, and many of them have received a rejection from the court.

Regarding the lawsuit filed by the Positive Living Association, we continue to work with other peer associations to seek solutions to issues such as the execution of the litigation process, having exchanges with the association's legal department to resolve the issue in question.

It is also clear from the legal aid requests submitted to our association that the rights violations experienced by health care workers living with HIV in particular have led to even greater problems with the launching of the system.

In response to our association's legal aid requests, a sample petition for filing a lawsuit and the circular appendix were sent to counselees who applied for legal aid, some of whom took the matter to court. In summary, the retrospective launching of the system for health care providers has caused many problems, a lawsuit has been filed with the relevant department of the State Council requesting a stay of enforcement, and investigations into the case are ongoing.

ABBREVIATIONS

AIDS:	Acquired Immune Deficiency Syndrome
ECHR:	European Convention on Human Rights
Constitution:	Constitution of the Republic of Turkey No. 2709
Biomedicine Convention:	Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine
See.:	See
CDC:	Center for Disease Control and Prevention
A.D.:	Access Date
TPR:	Temporary Protection Regulation
PRR:	Patients' Rights Regulation
HIV:	Human Immunodeficiency Virus
CME:	Code of Medical Ethics UDHR: Universal Declaration of Human Rights
Labor Law:	Labor Law No. 4857
ILO:	International Labour Organization
TCL:	Turkish Condominium Law No. 634
PDPL:	Personal Data Protection Law No. 6698
art.:	Article
SSGHIL:	Social Security and General Health Insurance Law No. 5510
TCO:	Turkish Code of Obligations No. 6098
TPC:	Turkish Penal Code No. 5237
MDR:	Medical Deontology Regulation
LHREIT:	Law No. 6701 of the Human Rights and Equality Institution of Turkey
TCC:	Turkish Civil Code No. 4721
TVK:	Turkish Citizenship Law No. 5901
RITCL:	Regulation on the Implementation of the Turkish Citizenship Law
PHL:	Public Health Law No. 1593
UNAIDS:	Joint United Nations Programme on HIV/AIDS
WHO:	World Health Organization
LFIP:	Law no. 6458 on Foreigners and International Protection
RILFIP:	Regulation on the Implementation of the Law on Foreigners and International Protection
Law No. 1219:	Law on the Practice of Medicine and Medical Sciences
Law No. 3071:	Law on the Exercise of the Right to Petition
Law No. 6284:	Law on the Protection of the Family and Prevention of Violence against Women