



THE 2020

THE 2020 REPORT ON HUMAN RIGHTS VIOLATIONS

POZİTİF-İZ ASSOCIATION
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2020 REPORT ON HUMAN RIGHTS VIOLATIONS
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ABOUT US

Pozitif-iz Association (Pozitif-iz Derneği) is a non-governmental organization that aims to empower people living with HIV, and their close ones physically, psychologically and socially. Accordingly, it provides them with support and any consulting they may need. Besides, Pozitif-iz Association contributes to the correction of prejudices against HIV and AIDS, as well as to the spreading of correct and up-to-date information related to the matter.

In addition to addressing HIV/AIDS in terms of personal and public health, Pozitif-iz considers HIV/AIDS as an issue of human rights and conducts its activities accordingly.

Founders of Pozitif-iz have been working in this field for about 15 years with a strong commitment to the mission. Our members consists of individuals from a wide range of professions including physicians as well as academics. Among our stakeholders are other associations working in the field, health profession organizations, public and private sector institutions.



INTRODUCTION

This report sets out the violation of rights experienced by people living with HIV in 2020 based on data reported to the Pozitif-iz Association in 2020. Unlike previous years, the effects of the Covid-19 pandemic on people living with HIV, and its exploitation as a cover for justifying the violation of rights, particularly in the field of healthcare, are evident in this year's report. Unfortunately, diagnosis and follow-ups of people living with HIV were interrupted to a large extent due to the pandemic. During this period, individuals were unable to get tested and know for sure if they have HIV due to the shutdown of Voluntary Counselling and Testing Centers, and avoidance of contact with patients in healthcare institutions due to Covid. Therefore, delays were observed in access to treatment. Getting appointments from infectious diseases specialists, monitoring success/failure of their treatment and getting information about their health became almost impossible for patients. Furthermore, news published about Covid medication - HIV medication especially during the first months of the Covid-19 pandemic, absence of a clear declaration by the Ministry of Health about whether people living with HIV are at risk for Covid-19, and unclear instructions for people living with HIV in terms of administrative leave unlike others with chronic diseases also led to an extra difficult and challenging period for the majority of people living with HIV in 2020. Eventually, pandemic added to tens of prejudiced reasons with no scientific or legal basis for violating the rights of people living with HIV. People living with HIV, once again, suffered discriminatory attitudes from a wide range of people, ranging from civilians to bureaucrats, which stigmatized them once again during 2020. In April, Ali ERBAŞ, President of Directorate of Religious Affairs (Diyanet), uttered baseless and discriminatory remarks blaming the LGBTI+ individuals and people living with HIV for Covid-19 in his daily sermon on the first Friday of Ramadan¹. Following the sermon becoming publicly known, the Bars of Istanbul, Izmir, Ankara and Diyarbakır released statements reminding the public official in question of fundamental human rights that need respecting. Due to their press releases, criminal proceedings were initiated against board members of the bar in the following year 2021². These and similar events, summed up in a nutshell, even further exacerbated the current climate of hostility encouraging violations of rights at all levels against people living with HIV and LGBTI+ individuals.

Many awareness and advocacy events were held as part of the World AIDS Day celebrated on December 1, 2020. A large part of such events were conducted on social media and online platforms due to the Covid-19. Just like every year, such events were denounced and vilified due to prejudices against HIV. Several hate speeches appeared on social media following the Youtube program called 'Soramazsın', a concept show on channel 321 GO, which featured Çiğdem ŞİMŞEK, one of the founders of Pozitif-iz Association, who appealed to the masses to raise awareness. Such wave of hatred was commenced by dentists and dentistry students due to a purposeful misediting of Çiğdem Şimşek's speech on the program. Subsequently, discriminative and prejudiced statements were made against both people living with HIV and the officials of the Association. Based on short and biased quotations from the program, people living with HIV were targeted on Twitter; denying the challenges of people living with HIV opening up to their doctors, rights violations experienced by people living with HIV, all in the face of up-to-date and accurate information about HIV. Following the said debate and the statement made by the association,

1. <https://www.pozitifiz.org/post/diyanet-hiv-pozitifleri-%C3%BCzd%C3%BC> (Online: 20.07.2021)

2. See the following link for the article written by Atty. Polat YAMANER about the statement by the President of Directorate of Religious Affairs, and the article co-written by Atty. Onur SEZEN and Atty. Umut Rojda YILDIRIM about the investigations launched against the Bars: <https://spod.org.tr/wp-content/uploads/2021/05/LGBTIların-Hukuk-Gundemine-Iceriden-Bir-Bakis.pdf>



some dentists and dentistry students wanted to contact the association and learn about how they could reach accurate resources³.

Another challenge brought about by Covid-19, the abovementioned statement and the following process was the reckless expansion of the perceptions related to the accessibility of health data of people to include the right to protect personal data. As is known, Covid-19 introduced several new concepts in our daily lives starting from 2020. The “Hayat Eve Siğar” (we are happy in our homes) message and the HES code which have now become a part of our lives, and practices and concepts such as risk groups firstly come to mind in this regard. Such a new attitude adopted by both the lawmakers and law enforcement units related to health information specific to Covid-19 as well as the practices based on this attitude were designed and spread without observing the violation of rights to which people living with HIV are exposed. HIV status of individuals is considered health data by nature. Naturally, taking extraordinary precautions against a pandemic that affects the entire world is more likely and expected at the beginning. It is crystal-clear that even before Covid, there was an environment lacking any policies that prevented discrimination and stigmatizing practices against people living with HIV or respected the right of privacy. Along with the perception that access to the health data of people is legitimate based on public interests during the Covid period, the ground became quite slippery for people living with HIV as the issue became more vexed than ever.

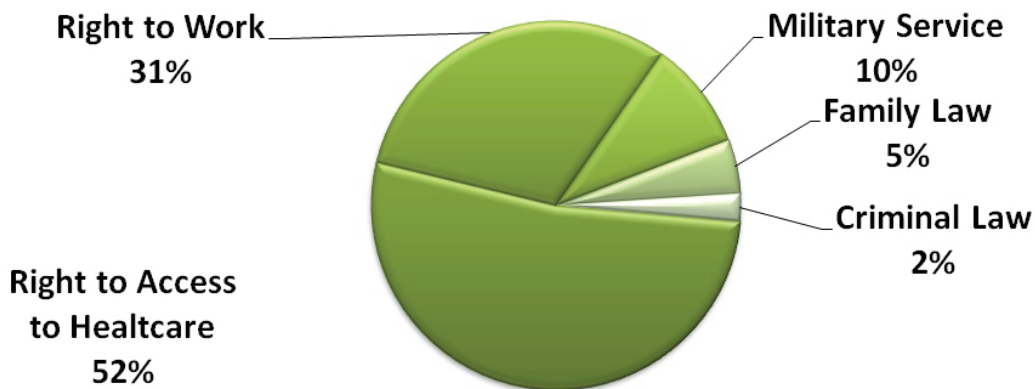
Another concept introduced to our lives was ‘risk groups’ during the Covid-19 pandemic. These groups were used and are still being used as a reference for various administrative practices. The regulation that stipulated being in one of these groups to be considered on administrative leave in order to work remotely from home at the early stages of pandemic is one example of such practices. As a result of inadequate statements of lawmakers and law enforcement units related to these risk groups, many people living with HIV had to act without knowing if Covid-19 had a different and specific effect on people living with HIV during the severe period of pandemic. In addition to their concerns about their own health conditions, people living with HIV were also faced with concerns that they would have to disclose their HIV status to their employers in order to work from home, and they could even lose their jobs.

Another important issue to be mentioned about the Covid-19 pandemic and people living with HIV is perhaps the extent of interruption in the right to access to health services for all individuals living with HIV. Along with the Covid-19 pandemic, infectious diseases unit became the most frequently visited department in hospitals. Normally providing regular follow-up services for people living with HIV, these units, so to say, suspended the follow-up of people living with HIV during the pandemic. The solution of extending the terms of medication reports for facilitating access to medication falls short considering that access to medication constitutes only a part of the access to health services right related to HIV. With the ongoing effects of the pandemic today, we can see that none of the governmental policies involve people living with HIV since the government still has not produced any solutions for routine check-ups of people living with HIV. This report will review the number and nature of applications to the association in 2020, and the types of violations of rights experienced. At the end of the report, we will provide findings and suggestions as to why the violations related to HIV have become rooted despite the presence of a patient rights legislation

3. For more detailed information on the statement made by the Pozitif-iz Association on that matter, see: <https://www.pozitifiz.org/post/dis-hekimleri-twitter-da-bilim-disi-uygulamalarini-savundu-hiv-pozitifleri-ve-aktivistleri-asagiladi> (Online :26.08.2021)

in Turkey which naturally covers people living with HIV; which obstacles people living with HIV in Turkey have to overcome for claiming their rights; why people living with HIV have difficulty in taking action against violation of rights; and what the non-governmental organizations and government can do to address all these issues.

CLLASSIFICATION OF CESES BY TYPE OF VIOLATION



A total of 42 counselees applied to the Pozitif-iz Association to report a violation of rights in 2020. The violation of rights to which these 42 counselees are exposed can be basically classified as follows in legal terms; "violation of rights based on legislation on access to healthcare services, violation of rights based on legislation on the right to work, violation of rights based on legislation on military service, violation of rights based on legislation on criminal law, violation of rights based on legislation on family law". Accordingly, out of the 42 cases, 22 cases were related to violation of rights based on legislation on access to healthcare services; 13 to violation of rights based on legislation on labor law; 2 to violation of rights based on legislation on family law; 1 to violation of rights based on legislation on criminal law; and 4 to violation of rights based on legislation on military service. It must be noted that various rights were violated simultaneously in most of these cases.

Among 42 counselees that applied to the association in 2020, 2 of them provided information about their sexual orientation during the counseling services provided.

9 out of 42 counselees took legal action⁴ following their benefiting from our counseling services. Out of these 9 counselees, 2 applied to the association due to rights violations based on legislation on military service; 2 due to rights violations based on legislation on the right to work; 1 due to rights violations ba-

4. Legal action here refers to individuals that filed an administrative report or a lawsuit against the violation of right they were exposed to.



sed on legislation on family law; and the other 4 due to rights violations based on legislation on access to healthcare services.

To give a city-by-city analysis of where the counselees come from: 17 from Istanbul, 3 from Antalya, 3 from Izmir, 2 from Kayseri, 1 from Zonguldak, 1 from Eskişehir, 1 from Mardin, 1 from Adana, 1 from Nevşehir, 1 from Ankara, 1 from Sakarya, and 1 from Bursa, making the total sum 42. The cities where the remaining 9 counselees resided were not disclosed. All cases were reported online or by calling the association due to the Covid-19 pandemic.

METHODOLOGY

This report reviews the rights violations against international conventions to which Turkey is a party as well as national legislations by using the reports of rights violations received by the Pozitif-iz Association in 2020. Unlike the “The 2018-2019 Report on Human Rights Violations and Legal Advice⁵” compiled by the Pozitif-iz Association and published in September 2020, this report does not include any legal advice on the rights violations to which the counselees were exposed. The reason behind this deliberate choice is that there has been no change in the laws with regards to the mentioned cases, and therefore the legal advice provided in the previous report is still valid. It is again crucial to note that the violations in this report are almost equal to the ones disclosed in the previous report on human rights violations and legal advice. The chronic state of rights violations that we mentioned several times throughout the report still persists as it did in the previous report.

Classification of rights violations is based on the group of legislation to address the respective violation in the report. Multiple rights were violated in most of the cases. In case of such multiple rights violations, the right violation directly affecting the counselee was taken as a basis for the classification. The in-coming cases were classified based on legislation on access to healthcare services, legislation on military services, legislation on family law, legislation on working life and legislation on criminal law. Following some brief references to people living with HIV in such legislation, explanations were made on which solutions were/were not produced by the existing laws for the problems of counselees.

5. <https://drive.google.com/.../1Ah6BYIWZhgsP2AnyI.../view> (Online: 20.07.2021)

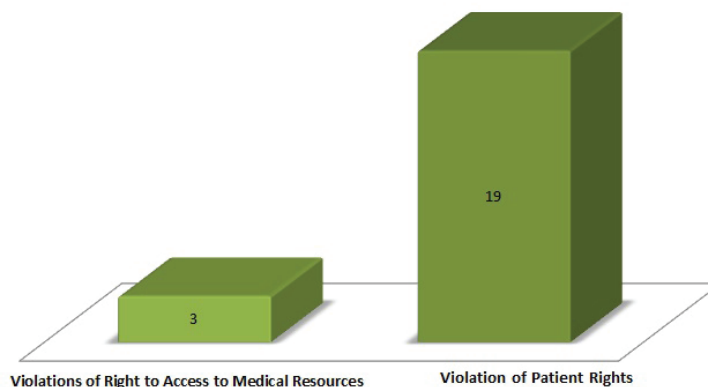
VIOLATIONS BASED ON LEGISLATION ON ACCESS TO HEALTHCARE SERVICES

The right to access to healthcare services is one of the fundamental human rights protected by both international conventions to which Turkey is a party, as well as the Constitution. The most common international and national legislation used in Turkey with regards to the right of access to healthcare services is 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
- Regulation on Patient Rights
- Regulation on Medical Deontology
- Code of Medical Ethics
- Public Health Law
- Social Insurance and General Health Insurance Law
- Deontology Regulation of Turkish Pharmacists
- Law on the Execution Ways of Medicine and Medical Sciences
- Turkish Pharmacists' Association Law

Right to access to healthcare services is a right covering 3 core rights and extending accordingly. These core rights consist of benefitting from preventive and protective healthcare services, access to medical resources, and patient rights.

VIOLATIONS BASED ON LEGISLATION ON ACCESS TO HEALTHCARE SERVICES



As mentioned above, 22 out of 42 reported cases were related to violation of right to access to healthcare. Out of the 22 cases, 3 included the violation of access to medical resources, and the remaining 19 included a violation of patient rights. 2 of 22 counselees with violated right to access to healthcare were of foreign nationality, and 20 consisted of citizens of the Republic of Turkey.



In 2020, cases brought to the attention of the Pozitif-iz Association by foreign counselees were all caused by violation of right to access to healthcare. Consultancy was provided in Turkish to two of these counselees. The first foreign counselee had no legal right to reside in Turkey; however, he claimed to be a refugee. Other counselee was of an unknown nationality, but had the legal permit to reside in Turkey. Both counselees were unable to access treatment due to having no general health insurance (GSS). The reason why they had no health insurance was that people with no legal residence in Turkey have no legal status. The counselee with a legal right to reside in Turkey, on the other hand, was complaining that their treatment expenses were not covered because the chronic diseases they had before they were covered by the GSS were excluded from the coverage.

The counselee that could not access treatment due to lack of a legal right to reside in Turkey was referred to associations that supported refugees living with HIV, since a more technical need was present as part of the law of foreigners and the counselee claimed to be a refugee. This counselee was able to access treatment as a result of the referral.

The counselee that had the legal right to reside in Turkey was provided with information on their rights and methods of application. The contact was lost with this counselee, so it is not known if they could access treatment. It must also be noted that, in the case of individuals of foreign nationality, Foreigners and International Protection Law and Regulation on Temporary Protection must be observed in addition to the provisions of the abovementioned legislation.

The main reason behind such low rate of cases reported by foreigners is the lack of translation support offered by Pozitif-iz Association in order to overcome language barriers. Support mechanisms provided by the association do not cover intersectionalism⁶ that deepens the effect of discrimination and rights violations when the case is related to foreign people living with HIV. The fact that all the cases reported by individuals of foreign nationality are limited to the right to access healthcare, naturally, does not indicate that discrimination and rights violations experienced by these people intensify in this way only. 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 to access healthcare only can be attributed to the inadequate and non-inclusive nature of intersectionalism policies made in Turkey even in the first step of pyramid of needs.

Out of 20 cases reported by Turkish citizens, 7 cases resulted from doctor's abstention from treatment due to the HIV status of the counselee. As a result of unjust and illegal abstention from treatment, dental treatment of 2 counselees was left unfinished, appointment of 1 counselee from the ear-nose-throat department was cancelled, and the other 4 counselees were not operated on. Only 2 of these 7 counselees reported their rights violations to CİMER. Among these 2 counselees, 1 was not operated on, and the other reported the case to the association due to the unfinished dental treatment.

6. "Intersectionalism is an approach emphasizing the fact that categories such as sex, sexual orientation, class, race, national, disability and age/generation cannot be addressed as categories that are independent from each other. It recognizes that complex social inequalities emerge by the engagement of such diverse domination lines with each other, and tries to analyze them within a single theoretical and methodological framework" <https://feministbellek.org/kesisimsellik/> (Online: 31.08.2021)



Doctor'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 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"⁷ which was sent to the governorates of all cities by the Ministry of Health at the beginning of 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.". This affected the counselees living with HIV in the following ways: At the beginning, the counselee was told that the operation/treatment was urgent and must be performed immediately. Then, the healthcare personnel abstained from treatment upon learning that the counselee was living with HIV, justifying their decision based on the relevant official letter. In this case, it is beyond doubt that an illegal and unfair situation is present. However, the chaos created by the pandemic, urgency of the situation and similar reasons restrained the counselees from taking legal action except through administrative ways (filing a complaint to CİMER, notice to the Ministry of Health, etc.). Because, the priority here was to find a doctor/hospital for the counselee to receive treatment immediately.

Out of 13 other reported cases, 12 applied to the association due to violations concerning patient rights. 7 of these counselees reported that they were exposed to ill treatment and discrimination by healthcare personnel at the hospital due to their HIV status. 1 counselee asked for a health certificate from the family physician for employment purposes, but was exposed to ill treatment when they objected to the family physician due to the health report stating the HIV status. (This also led to violation of right to work, but since the counselee applied to the association mainly for this reason, the case was categorized as an "access to healthcare" issue.) 1 counselee wanted to get a hair transplant but was exposed to discrimination due to their status, and they were quoted an unfair price. 4 counselees received incorrect and/or incomplete information from their doctors. 2 of these counselees had U=U (Undetectable = Untransmittable) HIV status, but were informed incorrectly by their doctors when they stated their will to have a baby. The other 1 counselee had problems in access to medication, and was in prison. This counselee got access to medication with the involvement of an attorney.

As is seen, rights violations based on the legislation on access to healthcare constitutes the largest part of cases reported to the association. This was unfortunately the same in 2018 and 2019. Furthermore, as detailed above, the chaos created by the Covid-19 pandemic increased the frequency of violation of rights and deepened the damages.

7. <https://shgmhastahakdb.saglik.gov.tr/Eklenti/36865/0/elektif-islemlerin-ertelenmesi-ve-diger-tedbirlerpdf.pdf> (Online: 20.07.2021)



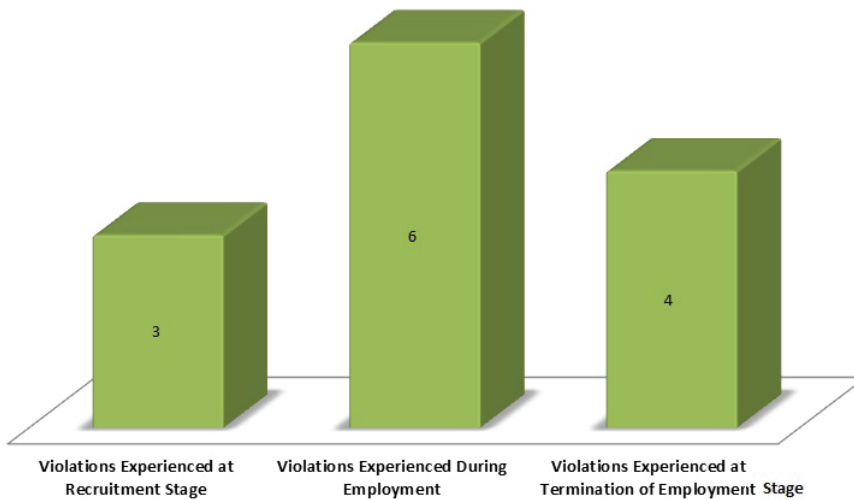
VIOLATIONS OF RIGHT BASED ON LEGISLATION ON WORK LIFE

Legal resources to be referred to in case of violations encountered in working life vary for people working in the public and private sector in Turkey. The most commonly used international and national legislation for violation of rights based on legislation on 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 Labour Organization (ILO) - Code of Practice on HIV/AIDS and the World of Work
- Civil Servants Law No 657
- Turkish Armed Forces' Regulation on Health Competence
- Regulation on Health Requirements for General Directorate of Security
- Regulation on Exam for Neighborhood Night Watchman

While there are no legislative provisions in our national law that prevents recruitment or dismissal of people living with HIV, living with HIV still poses an obstacle against employment due to the health regulations of the police force, the army and the health criteria for watchmen. Additionally, national regulations for the piloting profession make references to the international regulations, and the legislation available across the world forms an ambiguous basis for recruitment of people living with HIV as pilots.

VIOLATION OF RIGHTS BASED ON LEGISLATION ON WORKING LIFE



As mentioned above, 13 out of 42 reported cases occurred as a result of the violation of the right to work. 3 cases took place in the recruitment stage, 6 happened as a result of an illegal routine test requested during employment, and the other 4 occurred upon wrongful dismissal or suspension of the counselees by the employer.

While a rise was observed in rights violations affecting the working life in 2020, tests requested during the employment period increased as well. As mentioned in the introduction part, Covid-19 pandemic caused the spread of a misperception that accessibility to healthcare information of people by everyone was legitimate. This led to an increase in the number of routine tests performed especially in workplaces, and all kinds of health data that might be requested was added into these tests. Although the "Code of Practice on HIV/AIDS and the World of Work" of International Labor Organization (ILO) clearly states that "HIV/AIDS test must not be requested from people that apply for a job or already work in a workplace", the perception that is spread across the world suggesting that collection of such healthcare-related data will serve the public interest made it difficult for people to object to these routine HIV tests on the basis that they are against the law.

All 3 violations experienced in the recruitment stage occurred as a result of the request for an HIV test from the candidate worker in an unfair and illegal way. During the consultancy provided to all 3 counselees, the legislation provisions related to the tests that might be requested at the commencement of employment were explained in detail. 2 counselees preferred not to disclose their status and rejected getting tested at the beginning. However, as a result of the oppressive attitudes of employers, both had to respond to the illegal request of employers and overcome the issue by using the test results of their relatives who do not live with HIV. The remaining 1 counselee agreed to get tested since they did not know that such questions and requests were against the law at recruitment stage, and were also unaware of their status at the time, and therefore discovered their status simultaneously. The counselee who was actually a healthcare personnel, was not recruited due to this reason. The fact that such practices were against the discrimination principle was explained to the counselee, however they preferred not to take legal action. We believe that false statement of the candidate worker provided against the illegal questions and requests of employer during the recruitment stage is not against the law. "Misleading responses of the candidate worker about their HIV status which constitutes a part of their private life but no relation or an obstacle for the job to be performed, do not pose an opposition to the principle 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.⁸"

All 6 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 "the Code of Practice on HIV/AIDS and the World of Work" issued by International Labor Organization (ILO) 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 a such a test or a responsibility statement such as "I have no chronic diseases" by the employer is against

8. <https://anayasagundemi.com/2020/06/23/forum-pride2020-enes-salar-ve-erkin-akbay-hiv-aids-ekseninde-ise-alimda-ayrimcilik/> (Online: 20.07.2021)



the law. Their rights against such a situation were explained. None of the counselees reminded 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 doctors or workplace doctor or, so to say, saving the moment. As we have mentioned above, 2 of 3 counselees had the motivation to remind the employer about their rights concerning the tests requested at recruitment stage. However, no such motivation was observed during the employment. Apparently, this results from the fact that the power inequality between the worker-employer is against the interests of worker.

Among the 4 cases reported to Pozitif-iz Association due to wrongful termination of employment or suspension, 1 counselee was a student at police academy, 1 was among the military personnel, and the other 2 worked in private sector. Unfortunately, living with HIV has been indicated as a reason for discharge for both students of the police academy and military personnel pursuant to their occupational regulations within the positive law. Both counselees were informed about this situation. Both of the other 2 private sector employees were exposed to mobbing and discrimination after their HIV status was disclosed without their consent, and eventually their employment was terminated in an unjust manner. Both counselees filed a suit for the rights violations they suffered, as a result of referrals.

The case of one of the counselees that was dismissed in an unjust manner was justified at the court of first instance. But the court of appeal reversed the judgement against the counselee. The counselee, then, applied to the Constitutional Court. The other counselee whose employment was terminated wrongfully stated that they were going to file a case, but have not informed the association about the result of the process. 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 taking legal action 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

Military service is the right and duty of all Turkish citizens according to the Constitution of Turkey. 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' Regulation on Health Competence

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 42 reported 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 turn 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

Only one of 42 cases reported to the association will be reviewed in this section. The reason why we listed criminal law as an individual title is that the case related to the criminal law in the “I don’t have to disclose my HIV status!” discussions in public opinion corresponds to the criminal law title in the “I don’t have to disclose my HIV status!” agenda in public opinion.

The counselee was living with HIV for some time, and the HIV viral load was suppressed due to treatment. The counselee had to have an operation for some reason, so asked their own infectious diseases specialist before the surgery if they had to share their HIV status with their surgeon. Infectious diseases specialist told the counselee that surgeons must take the same sterilization precautions for everyone, and therefore there was no need for such a statement. No HIV test was requested from the counselee before the surgery. The counselee was called from the hospital one day after the surgery and asked to go to the hospital immediately. The surgeon that performed their surgery saw the counselee in his room, and told that the blood of counselee splashed in his eye during the surgery, which caused him to panic, so he sent the blood they collected before surgery to the laboratory for a test, and then learnt that the counselee was living with HIV. Counselee explained to the surgeon that they were aware of their status, had been attending follow-up examinations, their viral load was suppressed, and also stated that the surgeon must use prophylaxis⁹. Counselee also called their own infectious diseases specialist to make both doctors to speak to each other, and enabled the surgeon feel comfortable. Eventually, the surgeon went to the infectious diseases unit of his own hospital for getting prophylaxis prescription. When he told about the situation, the doctor in the relevant unit told him that this was a judicial case, and called the police saying that they had to inform the police to prescribe prophylaxis. Even though the surgeon that performed the operation said in his testimony that he was not going to file a complaint against the counselee, investigation was started against the counselee with the claim of reckless injury. The investigation ended with the decision of non-prosecution as a result of the defense prepared by the counselee under the legal consultancy of association.

It must be noted that while even calling the police in a concrete case alone is criminalizing, addressing the concrete case as a reckless injury and making it nondependent on the complaint reveals the jurisdiction’s point of view on HIV. There was no injury in the incident, and the surgeon got prophylaxis prescription. Even if the surgeon’s prescription of prophylaxis is addressed as a “simple medical intervention”, it would be considered as actual bodily harm, and the offense would be dependent on complaint in that case. Therefore, surgeon’s decision not to file a complaint is even enough to end the investigation. What matters more than this theoretical law discussion is that the real responsibility belongs to the surgeon in this case, as stated by the infectious diseases surgeon who followed up the counselee. The surgeon made the operation without taking the sterilization precautions that are standard for everyone, and did not wear equipment such as gloves, mask, surgeon glasses, etc. Unfortunately, there was no sanction for such a gap created by the surgeon even though the counselee underwent an investigation. It is apparent that this strengthens the inequality in already unequal patient - doctor relationship.

We would like to conclude this section with a paragraph from an article titled AIDS and Ethics written by Medical Doctor, Deontology - Medical Ethics and Medical History Science Doctor Prof. Dr. Nüket Ör-

9. For more detailed information about prophylaxis, see: <https://www.kisa.link/PiXs> page 24-25. (Online: 31.08.2021)



nek Büken: "...Patients are concerned that they will not receive the treatment they need if their condition is known, which may prevent them from being open and honest to their doctors. The rightfulness of reasons of patients such as not being able to receive service or being stigmatized give rise to the need to treat all patients as if they are living with HIV/AIDS. Patients' rejection to get tested or decision not to disclose their condition does not create a basis for the doctors not to fulfill their duty to treat the patients."¹⁰

10. <http://www.hatam.hacettepe.edu.tr/AIDSTipEtigi160115.pdf> (Online: 18.08.2021)



RIGHTS VIOLATIONS BASED ON LEGISLATION ON FAMILY LAW

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. Therefore, even though there are very few cases reported about this issue, we believe that it is meaningful to mention some facts in this report based on the available cases related to this chronic problem.

2 people applied to Pozitif-iz Association for rights violations concerning the legislation on family law in 2020. Both counselees were going through a divorce process at the time. Counselees were being threatened by their spouses with whom they were about to divorce for disclosing their statuses to the people they know. In both of these threats, the demand from the spouse living with HIV was to agree to an uncontested divorce and transfer all their assets to the other party. This threat was made not only by the spouse of the counselee, but also by their adult children. One of the counselees was subject to blackmailing that the spouse would put the counselee to shame around the whole town if the counselee did not move to another city, leaving their only asset, the house that they bought together, to the other party. 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 "it would be out of line to file a criminal complaint against their family", and the other one decided to proceed with the legal action by hiring an attorney in the city where they lived.

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.

CONSIDERATIONS

In this part of the report, 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- A Glimpse on the Legislation for People Living With HIV in Turkey

- 1- 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.) that are quite criticized especially by the disadvantaged groups in Turkey certainly provide a suspicious ground for the people living with HIV, too.
- 2- As we observed in last year's report covering the years 2018 and 2019, absence of a specific law on HIV and presence of a huge gap concerning HIV in the legal regulations 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. We would like to offer a deeper understanding of this issue with an example concerning a case reported to the association in 2020, which is as follows:

Counselee was dismissed with severance and notice pay from where they had worked for 10 years, upon the discovery of counselee's HIV status. Having filed a suit against this unjust termination of the contract of employment, the counselee won the case. The employer's request of appeal to the court of appeal concluded in favor of the employer, and the court decided that termination of the contract of employment was lawful for the safety of other employees concerning that HIV was "a contagious disease", and reversed the judgement of the court of first instance. However, considerations were made about this exact situation in the T.A.A decision of Constitutional Court published in the Official Gazette with the date 10/3/2017, no 30003, and application number 2014/19081.

"There is a conflict between the benefits to be gained by the employer by protecting other employees and keeping the peace and discipline at the workplace in line with the defined rules, and counselee's rights of respect to private life, and protection and development of



material and moral asset. Therefore, a meticulous balance must be ensured by the judicial authorities between protection of the interests of employer, and interests of the worker who is the weak party to the contract of employment, and additionally belongs to the weak group of society due to counselee's HIV positive status.

Whether the termination of contract of employment by the employer based on worker's health condition constitutes a contradiction to the duty of equal treatment (based on the conditions of each concrete incident) must be assessed in terms of factors such as nature of the worker's disease, effects of the disease on attendance to work, work conditions, performance and efficiency, whether the disease poses a hazard for other employees, precautions that can be taken in order to prevent such hazard.

In the decisions of Supreme Court and Labor Court, it was agreed that the only remedy to prevent such hazard is dismissal of the counselee from the workplace based on the "contagious" nature of HIV infection. However, mentioned decisions do not address the question if the employer has the liability to consider the opportunities of assigning the counselee to another position that would not pose a risk for other employees. However, it is seen in the witness statements that the workplace doctor advised the employer to assign the counselee to another position, the director of staff and finance mentioned assignment to a field position for fulfillment of the duty of dealer visits, and it is suggested in the report of expert assigned by the Court that employer should assign the complainant worker to another position that doesn't pose risks due to the worker's health condition. But no considerations have been made by the employer regarding matters such as whether there is such a position in the workplace, and if so, whether the qualifications of the counselee are adequate for the said position. Furthermore, it is seen that a fair balance does not exist between the conflicting interests of the counselee and employer since no assessment has been made concerning the liability to search for alternative work opportunities in the workplace, in the decisions of Supreme Court and Labor Court."

It is evident that the judges of the Court of Appeal, who reversed the lawful decision of the court of first instance and found the employer's decision justified, were not informed about the up-to-date and scientific developments about HIV and acted on a motive of prejudice, despite the decision of Constitutional Court. Counselee applied to the Constitutional Court in the concrete case, however it is clear that this costly and long process will not be easy.

- 3- 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 as follows:

Whether there was a legal basis for requesting mandatory HIV test in 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 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 (Article 123 and 124) lists 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 44 counselees that applied to the association with the claim of a right violation in 2020, only 9 stated that they would take legal action. This figure is unfortunately not higher than what we have seen in the previous years. We would like to find an answer to the question “Why don’t people living with HIV resort to the jurisdiction mechanisms?” while people living with HIV in Turkey are often exposed to discrimination and stigmatization in several fields including mainly access to healthcare and working life, by compiling the interviews we made with counselees of the association:

- After people are diagnosed with HIV, there are quite few doctors that inform them about their rights or refer them to institutions where they can learn about their rights. Some of the doctors 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. For people living with HIV, this also brings together the fear of being exposed to another violation by a public official. For instance, it is required to submit a petition to the district health directorate to exit MEDULA system. Especially some counselees living in small cities prefer to go to other cities to exit the MEDULA system since they fear that public officials who will take the petition in the district health directorate may gossip about their health status, or disclose their HIV status to other people.
- 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 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 doctor occurs in a bilateral discussion due to the nature of patient-doctor 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 healthcare services, some counselees thought that doctors were also going through a hard time due to Covid-19 pandemic, and complaining about a doctor 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 trainings' 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 doctor are more likely to be submitted to judicial mechanisms since they constitute a presumption that a conclusion can be received from the application.



CONCLUSION:

As we have emphasized throughout the whole report, the only difference between the violations found in the “POZİTİF-İZ ASSOCIATION / THE 2018-2019 REPORT ON HUMAN RIGHTS VIOLATIONS AND LEGAL ADVICE” report published last year, and the violations reported to the association in 2020 is the addition of Covid-19 pandemic to the reasons of these rights violations.

Since it can already be foreseen that Covid-19 pandemic and its effects will last for some more time all around the world and Turkey and the humanity is continuously creating new crises, this type of situations must be ended immediately using preventive measures as they pose an obstacle for the disadvantaged groups including people living with HIV against access to healthcare.

Therefore, it is essential for the relevant units of government including mainly the Ministry of Health to make comprehensive policies for the solution of problems, and include people living with HIV to these policy-making processes.

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

- Right of free treatment must be granted to all people living with HIV.
- ‘HIV/AIDS Diagnosis Treatment Guide’ must be distributed to all branches that do not perform HIV follow-ups apart from the infectious diseases.
- Number of Voluntary Counselling and Testing Centers must be increased across Turkey, and pre- and post-test consultancy service must be provided in all test centers.
- Doctors and healthcare personnel in all hospitals and family practices must be provided with information about respect for patient privacy for all groups that are open to stigmatization including mainly people living with HIV, and healthcare personnel must be trained about ensuring confidentiality and security of personal health data.
- A consensus must be established in all health institutions about explanation of the HIV diagnosis by a specialist doctor and/or psychologist.
- 95-95-95+95 global targets of the Joint United Nations Program on HIV/AIDS (UNAIDS) must be taken into consideration in our country, too. Because these targets aim for zero new HIV diagnosis by 2030 after performance of each step¹¹.

11. 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 ninety draws attention to how much of the HIV positive individuals that are diagnosed, receive treatment and are at B=B level should live without being stigmatized, exposed to discrimination, and in line with human dignity.



- National AIDS Commission must be restructured and made operational, and active participation of non-governmental organizations must be ensured in planning and implementation of HIV/AIDS country program.
- HIV/AIDS monitoring and evaluation system must be established immediately, and data must be shared transparently.
- In crises affecting the healthcare system such as Covid-19, necessary precautions must be taken in order not to interrupt the treatment of people living with HIV. In such international crises, necessary protocols and agreements must be made for access of those that are stuck abroad to medication.
- The request for an HIV test from spouses without a legal basis must be prevented in marriage procedures, and the fact that being HIV positive is not an impediment to marriage must be communicated to people.
- Problems concerning the access of convicts and prisoners to medication and treatment must be eliminated.
- Voluntary HIV test and consultancy practices must be performed for convicts and prisoners.
- Isolation of convicts and prisoners living with HIV must be prevented.
- Training about HIV must be provided 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 to police forces and members of the judiciary in order to increase the perception of privacy.
- Request for an HIV test at recruitment stage as well as termination of contract of employment due to HIV status must be prevented.
- Planning and practice guides must be prepared and spread for development of a workplace policy about HIV infection in line with the ILO standards.
- Collaboration must be made with non-governmental organizations for people living with HIV to use their rights to remedy as well as to strengthen access to justice.
- Special needs must be identified for groups that are exposed to multiple discrimination such as women living with HIV, children and LGBTI+ individuals, and they must be taken into consideration while developing policies related to HIV.
- Above all, a legislation must be prepared for ensuring, maintaining and auditing these standards, as well as implementing sanctions on relevant people in case of interruptions/neglections. "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.

Unfortunately, we were not able to add new suggestions in this year’s report which are quite different than those specified in the “POZİTİF-İZ ASSOCIATION / THE 2018-2019 REPORT ON HUMAN RIGHTS VIOLATIONS AND LEGAL ADVICE”. Because, rights violations have not changed, and not a single step has been taken with regards to the solution suggestions we provided last year. As we have mentioned in the introduction, there was even a hate speech produced by the government officials concerning people living with HIV and LGBTI+ individuals at the beginning of pandemic. Eventually, we have been drawn to a point where we hope that the hatred speeches and pointing people as targets will come to an end...

We would like to add a citation from the “Turkey HIV AIDS Control Program 2019 - 2024”¹² published by the Ministry of Health to the conclusion part of our report: “One of the most important components for a successful HIV/AIDS control program is prevention of discrimination and privacy violations aimed at people living with HIV. Explaining that we can talk about HIV infection and risky behaviors related to HIV infection in the society, and eliminating the existing incorrect/lacking information and prejudices will facilitate access of people that are infected with HIV or have a suspected HIV infection to diagnosis and treatment services, contribute in prevention of the spread of infection, and raise the life quality of people living with HIV.”

Even though people that are not infected with HIV are at the center of control plan of the Ministry of Health, it is clearly set out that it is a must for people living with HIV to access to diagnosis and treatment and therefore remain at ‘Undetectable = Untransmittable’ level to protect “public health”, and people will avoid being tested, diagnosed and therefore treated in an environment where rights violations and stigmatization are present. It is also seen by the government that spread of HIV will not stop unless discrimination against people living with HIV stops.

We are defenders of human rights, who find it right to act by putting people living with HIV and their rights at the center. We know that people living with HIV do not receive an equal treatment with those who are not infected with HIV, and do not give up asking for inequality. Because we know that the request for equality is based on the “equality of equals”. It asks for the necessary conditions to be provided for making the disadvantaged ones equal to others, and repeats that necessary preventive precautions must be taken for the contrary cases / legal/penal/social compensation mechanisms must be established if discrimination and stigmatization are still observed. As a result, we will not stop asking for equality for people living with HIV.

12.https://hsgm.saglik.gov.tr/depo/birimler/Bulasici-hastaliklar-db/hastaliklar/HIV-ADS/Tani-Tedavi_Rehberi/HIV_AIDS_Kontrol_Programi.pdf (Online: 18.08.2021)