



Gaps in the Legislation are Being Filled Against the People Living With HIV

Outcome Report of the HIV & Law Discussion

November 28, 2020

Prepared By: Anjelic Kelavgil

The cycle of discrimination, scapegoating, phobia and criminalization experienced by people living with HIV in many aspects of life, also shapes the experiences of those living with HIV when it comes to law and its enforcement.

The prevalence of an understanding that does not focus on those living with HIV and rejects the policies to provide support mechanisms against hivphobia among the policymakers causing the primary legislation to overlook those living with HIV.

The people living with HIV lack legal protection due to the medical and technical approach of HIV exclusive political mindset to those living with HIV, the practical nature of secondary legislation and faulty public healthcare policies.

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"Given the discrimination and rights violations suffered by people living with HIV, it should be said that access to justice is as important as access to healthcare. Violations of the rights of those living with HIV are frequently encountered in access to healthcare, work and school life."

"With the global dissemination of information about HIV, stigmatization and discrimination against HIV-positive people have taken their place next to other types of discrimination. This situation has pushed people living with HIV to a more vulnerable area in accessing rights, and the human rights of people living with HIV have emerged as a separate topic in the general human rights struggle in order to prevent violations caused by the lack of policy or by the acts of public officials themselves."

HIV and Lawyers Discussion, organized by Kaos GL Association and May 17 Association; took place with the facilitation of HIV and LGBTI+ activist Defne Güzel, Att. Hatice Demir's presentation of Pozitif-İz Association's "2018-2019 Violations of Rights Report and Legal Solutions" report, and presentation of Att. Kerem Dikmen of Kaos GL on the legislative part of the Report on the Human Rights of LGBTI+ Persons Living With HIV of May 17 and Kaos GL associations.

An Approach that Narrows the Range of Rights

Att. Kerem Dikmen

We should ask whether people living with HIV are protected within the legal framework; in particular, it is necessary to look at whether there is a lawful hierarchy between regulations and laws, laws and the constitution, and the constitution and international obligations. It is observed that the principles of

the right to life, the prohibition of discrimination in all circumstances, right to respect for private life, equality and having the highest health standards come to the fore in fundamental universal documents.

Converting and implementing the twin contracts of the UN; the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and also the European Convention on Human Rights, which constitutes the fundamental human rights text of the Council of Europe, ensures the inclusion of mentioned rights to the constitution in writing, even if there are problems regarding the implementations of Constitutional Court decisions.

"Another thing that stands out is that there is a huge gap in legal legislation regarding HIV. This gap, combined with HIVphobia in our country, is practically filled by interpretations against those living with HIV. Much of the statute on HIV is not legislated with primary resources such as laws; but with secondary legislation such as regulations, circulars, communiqués."

The fact that the secondary regulations shed light on the implementation aspect of the laws made these regulations also important. It is observed that the attitude of the legislator in the primary legislation has spread to the application. This attitude, which is far from prioritizing those living with HIV, led the secondary legislation regulating the implementation to not to focus on those living with HIV. This general state of the legislation leaves those living with HIV alone against violations of rights.

There is no clear provision in the Constitution that prohibits all kinds of discrimination, and the forms of discrimination are bound by an omnibus provision that is using equality as a means against discrimination. "While the Constitution enumerates certain forms of discrimination by name, it has limited the forms it includes with the statement 'or any such considerations,

without discrimination', following its introduction as 'All individuals are equal before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect'. Although this limitation can be related to the limited awareness of human rights and universal principles of law in the country and the world in 1982, the period in which the Constitution was adopted; the fact that this article was not addressed in more than ten amendments that came after its declaration shows that the attitude prevalent during its announcement has not been changed."

The problems in the Republic of Turkey's approach to fundamental rights and freedoms are prevalent in its approach to HIV. The fact that laws are far from a political approach that expands and guarantees the range of rights at the primary or secondary level, leaves the protection of the rights of those living with HIV at the mercy of the practitioners in the implementation of the rules determined by the secondary legislation. The legislator's lack of will to expand the range of rights and to legally protect those living with HIV does not make the legislation safe for those living with HIV.

Although it is seen as a positive attitude that discrimination is sanctioned by the Turkish Penal Code; the political stance of the legislator does not include discrimination based on gender identity, sexual orientation and HIV status within the scope of this prohibition. While the negative attitude of the legislation and its practitioners, which criminalizes those living with HIV, is generalized, the fact that the state is not considered in terms of its obligation to take positive action creates a picture that narrows the range of rights and incapable of preventing discrimination.

The fact that healthcare services are not handled by the legislator in the perspective of rights, that there is no reference to individual rights; causes healthcare to be seen as a commodity. This not-rights-oriented attitude prevents those living with HIV from feeling legally secure.

The articles in the exception provisions of the Personal Data Protection Law, which treats the health information of individuals as private data, creates a situation that is unable to protect those living with HIV against uncertainty and actions against their privacy. The fact that healthcare institutions can easily access health data creates situations that are contrary to the purpose of the law.

Equality is not strongly emphasized in the Turkish Civil Code, which regulates all relations except the relations of the individual with the state. This situation causes all other laws based on the Civil Code to be far from an attitude that guarantees the rights of people living with HIV. This situation exposes the people living with HIV to systematic rights violations.

The implementation of social security policies (such as income testing) forces people living with HIV to share their HIV status with people living in their household. Similar problems cause people living with HIV to be discriminated against in their employment. While the law makes regulations on the post-employment relationship, it does not include any regulation regarding the period before the business relationship is contracted. This situation causes people living with HIV not to be employed, and the privacy of the HIV status of people in the job search process becomes abolished. The fact that there are only unspecific provisions against discrimination before the start of the employment relationship and that these provisions are not inclusive further increases the severity of these problems.

The fact that the regulations are limited to the principles of implementation and the fact that rights cannot be discussed in the secondary legislation creates results that do not protect those living with HIV from discrimination.

The fact that the primary legislation is far from introducing a policy on this issue makes practice discriminatory.

The fact that the control mechanisms are far from an inclusive political attitude on this matter makes violations of rights systematic. The shortcomings in the Human Rights and Equality Institution of Turkey's practical attitude against discrimination are similar to the not so inclusive understanding of policymakers. The fact that the Public Chief Ombudsman has no decision to understand the attitude on this issue causes the control mechanism to not to act against violations of rights.

As the norms prohibiting discrimination are internally discriminatory, not inclusive, and policies are not established at the legal level; also renders the monitoring mechanisms that can be established under current conditions dysfunctional and unreliable. The fact that the intendment of the law is discriminatory and non-inclusive also affects the practitioners' attitude. As the practitioners, who have a viewpoint that restricts the range of rights, act based on exceptions when it comes to discrimination, leave those living with HIV without any protection against rights violations.

We Need to Listen to the Stories of Those Living With HIV More

Att. Hatice Demir

The fact that primary and secondary legislation falls short of an inclusive policy that guarantees the rights of those living with HIV leads the practitioners of law to act in a similar manner. The fact that the prohibition of discrimination is not addressed in an inclusive manner causes the legal practice to be shaped in a way that does not protect people living with HIV against violations of rights. Legal practitioners' internalized hivophobia causes legal gaps to be filled against those living with HIV; and this causes violations of rights to become widespread and those living with HIV to lose their faith in the law.

The lack of inclusive legislation against the lawmaker's political attitude that overlooks people living with HIV and the practices of the practitioners based on hivophobia requires a detailed legislative screening for each of the concrete cases while fighting against the rights violations of people living with HIV. The fact that the current system is opening up space for violations of rights of those living with HIV, directly and indirectly, poses a great challenge to the legal struggle against these rights violations.

Although the secondary legislation determines the implementation in detail, the fact that procedures contrary to the legislation are carried out easily when it comes to people living with HIV is an outcome of the hivphobia that has spread to the society and the internalized hivphobia of the practitioners.

In healthcare, especially in physician-based discrimination, there is not a lack of knowledge about HIV, but an internalized hivophobia behind the practices that cause discrimination. This mindset that pathologizes those living with HIV, manifests itself in the legal field as the criminalization of those living with HIV.

This approach of the lawyers, who tend to be hesitant regarding the demands of people living with HIV in the face of the violations of rights they suffered, both criminalizes those living with HIV, and makes the practitioners of law perpetrators of this violation. Using legal knowledge together with the common prejudices about HIV prevents the practice from being applied in favor of those living with HIV. The way to address the law in favor of those living with HIV and to eliminate hesitations is through confronting and struggling with internalized hivphobia.

When it comes to the rights of those living with HIV, providing full protection against violations of rights can only be established by the adoption of a

perspective by lawyers that prioritizes those living with HIV, and using their legal knowledge in this viewpoint. The most important way to do this is to focus on the stories of people living with HIV and to pay more attention to those stories.

"The prejudice still exists in the academy, which carries out activities that will serve as a basis for legislative activities and train the practitioners of laws and similar regulations to be formed as a result of these activities. It is evident that the experts who have written about this field are choosing the terminology to be used, shaping the content, and even drawing conclusions all based on the old, wrong and hearsay information about HIV. In practice, these attitudes of the experts serve as a screen for violations of rights against people living with HIV."

The mainstreaming of a human rights-based approach is important in terms of eliminating the rights violations faced by people living with HIV. It should be remembered under all circumstances that HIV is not an issue that only medicine and law deal with, but HIV itself is a social issue. This is the only way to end the discrimination faced by people living with HIV.

The discrimination experienced by LGBTI+'s living with HIV due to their LGBTI+ status and their HIV status becomes even deeper if the subject is also a refugee. Here, too, the legislation is full of huge legal gaps and internalized hivphobia leads to the disastrous consequence of being deprived of basic human rights for those living with HIV. A similar situation is also experienced by the prisoners.

The lack of a holistic approach in the political field causes the institutionalization of discrimination and the entire legal field to be covered with discriminatory practices. The lack of sanctions against the discriminatory attitudes of practitioners leaves those living with HIV with the threat of

disclosure; this situation itself keeps those living with HIV away from resorting to justice. The influence of the jurisdiction tradition, which is far from a perspective of expanding the range of rights, is also great.

The institutionalization of the approach, 'the rights of those living with HIV are fundamental human rights', will expand the rights of people living with HIV and reduce violations. In addition, the implementation of policies that strengthen those living with HIV is also one of the important steps that would increase the confidence of subjects in the judiciary system. Comprehensive policies that will empower people living with HIV after diagnosis have an effect that would eliminate discrimination in law.

The practitioners of law need to approach the law with an equitable perspective and should side with those living with HIV. This is the only way that the entire legal system and its practitioners can be transformed and be free from discriminatory attitudes.

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