



HIV/AIDS related rights in Kosovo

Review of existing legal barriers

Prepared by: **Edona Ahmetaj**

April 2016



Acknowledgement

I would like to thank all the participants, the key population members and to all stakeholders to whom this report belongs, in joint efforts to improve rights of key populations in benefit to national HIV response in Kosovo. I would also like to extend my gratitude to Centre for Social Group Development (CSGD), Kosovo Association of People Living with HIV/AIDS (KAPHA), Kosovo Population Fund (KOPF), Labyrinth, Integra and Community Development Fund staff who enabled effective and very successful management throughout the implementation of the research.

This report is a review of laws and practices to see whether they impact the response to HIV/AIDS. Identify existing legal barriers and provide recommendations for improvement

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List of abbreviations

HIV- Human Immunodeficiency Virus

AIDS- Acquired Immunodeficiency Syndrome

ARV – Antiretroviral treatment

CID- Clinic of Infectious Diseases

FSW – Female Sex Worker

KAPHA – Kosovo Association of People Living with HIV/AIDS

KOPF – Kosovo Population Fund

MH- Ministry of Health

MMT – Methadone Maintenance Treatment

MSM – Men who have Sex with Men

NIPH- National Institute of Public Health

NGO – Non-Governmental Organization

NSEP – Needle and Syringe Exchange Program

OGG – Office of Good Governance

OHCHR – Office of High Commissioner for Human Rights

OIK- Ombudsperson Institution of Kosovo

PWID – People Who Inject Drugs

PLHIV – People Living with HIV

UCCK- University Clinical Center of Kosova

UNAIDS – Join United Nations Program on HIV/AIDS

UNDP – United Nations Development Program

VCT – Voluntary Counselling and Testing

Introduction

The realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS. Due to lack of implementation of laws which guaranty such rights and freedoms and the high scale of stigma and discrimination, many people are afraid to get tested for HIV, to take up HIV prevention and treatment, to disclose their HIV status, and to participate in national HIV response. They also have little chance of getting legal redress for HIV-related harms. Women continue to face discrimination and violence that make them more vulnerable to HIV, and young people often cannot access information and services for sexual health. The criminalization of people who are at higher risk of infection, sex workers and people who use drugs drives them underground and away from HIV services. This increases their vulnerability to HIV, as well as to stigma, discrimination, marginalization and violence. Most people living with or vulnerable to HIV do not know their rights or the laws that might protect

them.

The HIV epidemic in Kosovo is likely very low. However, efforts should be made to maintain the current low HIV prevalence rates among key populations at higher risk in Kosovo; to prevent HIV from spreading into other groups of the general population and to mitigate the impact of HIV and AIDS on persons infected and affected, as well as on society as a whole. The realization of Human Rights and Fundamental Freedoms is a core part of such efforts.

This report is a review of laws and practices and to see whether they impact the response to HIV. It aims to identify existing legal barriers and provide recommendations for improvement. The analysis of legislation and international standards applicable in Kosovo is mainly based on International Guidelines on HIV/AIDS and Human Rights and other relevant documents produced by international organizations such as UNAIDS, United Nations High Commissioner for Human Rights, UNDP, World Health Organization etc.

I. Methodology

This report is the result of desk research on applicable legal framework, various reports of stakeholders, NGOs and other actors involved, consultations and various studies on the needs of key populations and people living with HIV, expert interviews with the Ombudsperson as an equality body, representatives of Office of Good Governance (OGG) of the Government of the Republic of Kosovo, Kosovo Police and other relevant stakeholders.

Given the limitations in terms of topics, their sensitivity and the lack of data, I do not pretend to present this report as comprehensive, which covers all issues related to HIV/AIDS in Kosovo, given that the problems and challenges in this area in Kosovo are considerable. However, I hope

to appropriately highlight the main challenges which will serve as a basis for further steps in improving the overall situation in particular concerning key populations and people living with HIV and their access to services.

The structure of this research is done based on UNAIDS and OHCHR guidelines, in order to achieve a clearer presentation of existing legal barriers in Kosovo in terms of HIV/AIDS and human rights. Legal analysis is deliberately done to give recommendations on harmonization of legislation with international standards, thus directly and indirectly I have referred to the international instruments applicable in Kosovo and best practices.

II. Needs of key populations

A significant part of the report is based on the needs of key populations in order to draft clear and precise recommendations which would address these needs in the most effective manner. Based on the research and consultation with organizations working with key populations and representatives of these groups, it is evident that there is a lack of knowledge and understanding of human rights that are associated with HIV/AIDS. Consequently, the articulation of their needs is service oriented, rather than rights oriented.

People belonging to key populations are facing many challenges in their access to health services. The populations at the highest risk are people who inject drug (PWID). Harm reduction program that includes: Needle and Syringe Exchange Program (NSEP), Methadone Maintenance Treatment (MMT) and Voluntary HIV counselling and testing (VCT), psycho-social counselling, condom distribution, self-help groups and basic medical counselling, are available to them. Despite a large number of drug users that have access to these services, methadone distribution is mostly accompanied by challenges especially in public sector, which has resulted with a decrease of the number of people using MMT services. One of the most common problems is the attitude and behavior of the healthcare workers in public institutions responsible for MMT, which is quite discriminatory and stigmatizing towards their clients/PWID; closing of methadone center in Gjilan without any argument and health workers responsible for methadone therapy refusing to provide this service, is one of such cases.

With regard to people living with HIV (PLHIV), due to the high level of stigma and

discriminatory attitudes within Kosovo society, only a symbolic number of them have disclosed their HIV/AIDS status to the public. The challenges that people living with HIV are facing are related with access to health care services and issues related to their social and economic welfare. In relation to access to health care services, the most evident problems are refusal or reluctance to undertake treatment due to the fear that their HIV status might be disclosed; lack of treatment (ARV) in local public health centers (currently treatment is available only at UCK) and lack of treatment, therapy and medical personnel for children living with HIV. This poses additional financial burden for PLHIV, as they have to travel to Prishtina for treatment and monitoring of treatment.

For female sex workers (FSW) some of the issues identified are: non-comprehensive approach when accessing health care services; problems with documents and application of double standards when applying for residency permit in Kosovo (in case of foreign citizens) as well as unequal treatment by the judiciary in judicial proceedings, when sex workers participate in criminal or civil proceeding.

There is still non-acceptance by society for men who have sex with men (MSM). As a result of stigma, discrimination and physical attacks, this community lives hidden and out of reach of institutions and NGO's. Due to this situation it is difficult not only for them to access HIV/AIDS related services, but also seek redress for violations of their rights through legal remedies.

A need which is articulated quite often from people belonging to key populations, especially by people living with HIV, is the lack of a special law on HIV/AIDS which would set out specific rights and responsibilities related to HIV/AIDS. This comes as a result of lack of understanding on legal infrastructure in place that guarantees their rights and lack of legal services at their disposal. Therefore, they hope that a law that clearly specifies their rights and obligations as well as the responsibilities of the institutions, would contribute to the improvement of their lives and fulfillment of their fundamental rights and freedoms.

III. Legal Analysis

1) National structure on response to HIV/AIDS

States should establish an effective national framework for their response to HIV which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV policy and programme responsibilities across all branches of government.

The Ministry of Health is responsible for policy development and coordination of all stakeholders in the response to HIV/AIDS. However, there is a lack of leadership from the government's side to take charge the coordination and improvement of cooperation between multi-sectorial governmental actors and non-governmental organizations in response to HIV/AIDS, in order to ensure quality and sustainability of services for prevention and treatment of HIV/AIDS.

There is also lack of clear definition and division of responsibilities between relevant institutions. Therefore, responsibilities switch from one institution to the other. At the same time there is a culture of not taking responsibility for their actions and lack of accountability.

Currently Kosovo does not have a costed and measurable action plan for the prevention of HIV/AIDS, which means that there is lack of effective coordination and structured approach in response to HIV/AIDS. In 2011 the Ministry issued an administrative instruction on the activity, structure and functions of health services for HIV/AIDS. However, other accompanying by-laws, protocols and guidelines are lacking. These documents are important for the actors involved in order to have a clear guideline in response to HIV/AIDS.

2) Public Health

States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV and that they are consistent with international human rights obligations.

Health services related to HIV/AIDS and HIV treatment are available in Kosovo and are free of charge in public health institutions and in NGOs funded by the Global Fund grant (excluding

ARV treatment). The quality of these services is in line with international standards. However, the fact that many people leaving with HIV prefer to receive HIV treatment services in other countries, indicates that treatment in Kosovo public health institutions are not satisfactory to their requirements and needs. Some of the alleged reasons are the fear from breach of their privacy and lack of trust in health system in Kosovo due to frequent stock-outs which interrupted their treatment. This was problematic in the past years, until January 2015 when Ministry of Health started using the pooled procurement mechanism through UNICEF.

There is a high presence of stigma and discrimination among health workers when treating patients among key populations and people living with HIV, even when delivering health care services not related to HIV/AIDS. Health workers use discriminatory terminology for drug users, sex workers and men who have sex with men; they refuse or are reluctant to treat infected people with HIV and stigmatize or have prejudices towards health workers who provide these services without prejudice. Due to this environment people among key populations and people living with HIV are reluctant to receive these services. Therefore, organizations working with key populations offer alternative health services, by contracting private clinics or in the case of people living with HIV they intermediate doctor-patient relationships in ad-hoc cases.

Nevertheless, the most disturbing challenges remain a) the lack of therapy, treatment and adequate health personnel for children living with HIV and b) the lack of HIV treatment in local public health institutions.

3) Discrimination- law, mechanisms and practice

States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies.

The Constitution of the Republic of Kosovo and the Law on protection from discrimination in itself contain important provisions for the protection of human rights. Unfortunately, these provisions are not implemented effectively in order to protect the most vulnerable and marginalized groups. Lack of implementation of these provisions is due to many factors such as weak judicial system, inefficiency of non-judicial mechanisms and the so-called "rights illiteracy" of key populations who are the most vulnerable and marginalized groups.

First, the Constitution provides a non-exhaustive list of protected grounds, including but not limited to: race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. The principal of non-discrimination is also listed among other fundamental rights and freedoms guaranteed by the Constitution. Second, the Constitution of Kosovo guarantees direct application of several international instruments which are very important for protection of human rights and fundamental freedoms, such as European Convention on Human Rights, and in case national and international legislation conflicts with one another international norms prevail. Furthermore, according to the Constitution, Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights. This provision is very important since European Court on Human Rights has a developed jurisprudence on the rights of people living with HIV/AIDS in different fields of life.

The law on protection from discrimination provides a general framework on protection from discrimination. The law prohibits direct and indirect discrimination on different spheres of life including employment (access to employment, training and discharge or termination of the contract and salary) self-employment, education, social protection (social assistance scheme), social advantages, access to housing, access to public spaces, access to and supply of goods and services which are available to the public and any other rights foreseen by other legislation in force. The law foresees as a form of discrimination and prohibits also harassment, incitement to discrimination, victimization, segregation, discrimination based on affiliation, Failure of a reasonable adaptation/accommodation for persons with disabilities, Discrimination based on perception and multiple-discrimination. This law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or

may violate the rights of any person or natural and legal entities in all areas of life.

Consolidated guidelines on HIV and Human Rights require that the mechanisms and other legal remedies shall be effective, efficient and independent in order for the victims of discrimination to seek redress for their human rights violations. The law on protection from discrimination sets Ombudsperson as a central and national equality body, non-judicial mechanisms for protection from discrimination in the Ministries and Municipalities, Office of Good Governance as well as judicial institutions. Consequently, potential victims of discrimination have the opportunity to pursue their case using several legal remedies: they can issue a complaint at Ombudsperson or file a case in the competent court (administrative conflict, minor offence procedure, criminal procedure and/or civil procedure). Regardless of the efforts made to simplify and clarify the mechanisms and legal remedies in cases of discrimination, in the current setting many problems and challenges may arise which may have impact on the implementations of the law in practice. These challenges have direct impact on the efficiency and the length of the proceedings. Having in mind the lack of jurisprudence in the field of discrimination, these challenges can be analyzed only in theory.

First, the Ombudsperson Institution is in principle an independent institution and it can issue recommendation in cases of discrimination. In the other hand, the implementation of the Ombudsperson's recommendation remains a challenge since the beginning of its establishment. Hence, there is no guarantee that recommendations on discrimination cases will be implemented by institutions and private sector. However, the new law gives additional powers to the ombudsperson in relation to discrimination cases such as: a) the Ombudsperson can appear as *amicus curiae* (friend of the court) in court proceedings in discrimination cases and cases concerning quality and b) the Ombudsperson can file cases to the competent court on behalf of the victims when the case concerns group of victims. These new powers can contribute that the cases are better prepared and that the judiciary will be more efficient when dealing with them.

Second, depending on the interest they want to achieve, victims can file a case in the competent courts and pursue different legal remedies: civil procedure, minor offences, criminal procedure and administrative conflict. According to OHCHR and UNAIDS guidelines it is important for the victim to be able to pursue administrative and civil remedies. Administrative procedure is not explicitly foreseen on the law on protection from discrimination. However, the victim can base its claim on other legal provisions which govern administrative procedure in order to use administrative remedies. Due to this diversity of procedures and inefficiency of the judicial system in Kosovo challenges are foreseen that in the future might impact implementation of the law on protection from discrimination.

And last, non-judicial mechanisms for protection from discrimination in Municipalities and Ministries have not been efficient in addressing discrimination related issue in the past. Currently these mechanisms are under reform process and Office of Good Governance has started the process of drafting the new Administrative instruction which will determine their mandate.

Despite the fact that Kosovo adopted the first law on anti-discrimination in 2004, the case law is very poor. Until now only two typical discrimination cases have been litigated. These cases have to do with segregation based on ethnicity and age discrimination. Furthermore, only the last case has reached a final verdict. The lack of discrimination cases in courts has been due to a) lack of efficiency of the mechanisms that are supposed to implement the law, b) lack of knowledge from the citizen to know and claim their rights, c) lack of expertise from the NGO's to identify and litigate cases and d) lack of trust from the victims towards the institutions and justice system.

Being aware of the low number of discrimination cases, consequently we can conclude that there are no discrimination cases based on HIV status.

a) HIV as a “disability” or “health status”

Although the law on protection from discrimination does not explicitly recognizes HIV status as a basis to protect against discrimination according to international standards and practices, Article 1.1 of this Law may be interpreted as also covering this protected characteristic. This legal provision expressly mentions “*disability*” and “*health status as a protected*” ground and moreover, this provision contains a clause “*or any other grounds*”.

4) Data protection- law, mechanisms and practice

Although the law does not expressly mention the status of HIV / AIDS, the definition of sensitive personal data includes the clause any data related health status. This means that information related to HIV/AIDS status is protected by the law.

Data related to HIV person's status are as sensitive personal data and they must be protected on a special way and must be classified in order to prevent unauthorized access and use. When these data are transmitted over telecommunications networks are considered to be adequately protected if they are encrypted to ensure their illegibility and non-recognition..

The law also guarantees legal remedies which the personal data subject can undertake if one's rights related to personal data have been violated. In addition to consultations and complaints which they can file to the Agency for Protection of Personal Data, they can file a case to the competent court. Person or persons in charge in the state institutions which fall in contradiction with these provisions shall be punished with minor offense and fines are imposed to them.

The law on health also requires health institutions to protect personal health data, confidentiality and prohibits any kind of abuse of with such data. The law also provides easy access to this data to the data subject.

National Institute of Public Health is the institution that possess and administrates with the personal data for people infected with HIV. According to the administrative instruction based on which NIPH has been established, there is no legal provisions explicitly guaranteeing confidentiality or generally regulate the management of personal data of persons infected with HIV. However, NIPH applies practices through which these data are managed and are in accordance with the Law on protection of personal data and the Law on Health.

Data of HIV-infected persons are also maintained by other institutions, including the Ministry of Health, Clinic of Infectious Diseases, voluntary HIV counseling and testing centers within institutions or non-governmental organizations and the organization which works with people living with HIV (KAPHA). These data are encrypted and used mainly for generating statistical data, except for KAPHA which has more detailed information on people living with HIV. VCTs work on voluntary, anonymous and confidentiality principles and when reporting the data on clients served, within the institutions or nongovernmental organizations, data are reported as encrypted. This is a practice that relevant actors have established to protect the confidentiality of clients tested or people infected with HIV. However, there is no legal provision that regulates this issue.

So far there is no confirmed case of mismanagement of these data. In February 2016 it was suspected that the list of persons living with HIV has been given to an unauthorized person. The case was reported to the prosecutions office and there is still no final decision on the case.

5) Criminal Law

States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups

In relation to persons infected with HIV, the Criminal Code of the Republic of Kosovo provides that anyone knowing to be infected with HIV, and does not reveal this fact and infects another person shall be punished with imprisonment of two (2) to twelve (12) years. From this provision we can conclude that the legislator has not differentiated non-disclosure from deliberate infection of another person with HIV.

Additionally, this provision requires that the two elements, the disclosure of the person's HIV status and the infection of another person shall be applied cumulatively. Such a provision could be problematic when being implemented in practice.

Initially, according to international standards people infected with HIV are not obliged to disclose their status, with few exceptions. Usually these exceptions, depending on national legislation, include:

- Sexual Partner, regardless of sexual relation (spouse, fiancé, clients, etc.) and the reason they are in a sexual relationship (will/desire, love, money, etc.);
- Certain health institutions that are obliged to take all necessary measures for prevention and

vertical transmission of HIV from mother to child.

Criminal legislation of the Republic of Kosovo criminalizes and prohibits other activities which affect harm reduction programs related to key populations such as people who inject drugs and sex workers.

While prostitution is foreseen as a minor criminal offense, enabling or forcing prostitution is a criminal offense. This legal infrastructure has led this category of key populations to operate hidden and therefore limiting their access to services of HIV prevention and treatment. Therefore in cities such as Pristina where this activity is highly criminalized, organizations that provide free services such as HIV counseling and testing, condoms and health services have failed to reach sex workers.

Similar problems face doctors who provide medical services for sex workers. They have been subject of interrogations by the police due to their work in providing health services, under claims that they are enabling prostitution. As a result the program had to stop providing HIV prevention services in several cities and currently these services are being delivered only in Prizren and Ferizaj.

Another problematic issue is the use of condoms as they may serve as evidence and may lead to police investigations. Despite the efforts of the organizations such as KOPF to deliver free condoms in spots and premises where allegedly prostitution acts happen, sex workers refuse or hesitate to use condoms because of their use as evidence.

Criminal Code offers protection from human trafficking and exploitation. A large percentage of victims trafficking are for the purpose of prostitution. Even though such provision is in compliance with international human rights standards, law enforcement officers should be careful when applying this provision in practice. Hence, when undertaking actions to protect women and minors from human trafficking, law enforcement officers should consider them as potential victims and should not oblige them to testify. In this regard, Kosovo police and other relevant institutions should act according to the Standard Procedures for Victims of Human Trafficking in Kosovo, which sets down the actions that should be undertaken for domestic victims of human trafficking, foreign victims and minors.

In relation to drug users, Criminal Code prohibits the use and distribution of needles and syringes. Due to this legal barrier, it is very difficult for organizations such as Labyrinth to undertake harm reduction services in order to prevent HIV infection within drug users who inject. Despite the fact of the existing legal provisions prohibiting distribution of needle syringes, Labyrinth has managed to establish a good cooperation with law enforcement agencies. Due to this dialogue Labyrinth has been able to work without being interrupted. Furthermore, the distribution of needle syringes has been included in the national strategy against narcotics as a harm reduction tool.

Another issue concerning drug users is the lack of safe injection room. The current legislation does not regulate this issue. However, according to the NGO's working with drug users there is an urgent need for such intervention.

6) Legal services

Human rights mechanisms and legal remedies are essential for the realization and implementation of human rights and fundamental freedoms. Legal services constitute a very important aspect of it. Organizations working with key populations and with people living with HIV are more service oriented rather than playing a proactive role in assisting and providing necessary legal support in cases of human rights violations. As a result, there is a lack of data on cases of human rights violations concerning key populations.

There are several existing mechanisms which provide free legal aid in cases of violations of human rights. For example there is a National Legal on Free Legal Aid, which provides legal assistance to persons who meet the conditions for the enjoyment of this assistance and NGO CLARD. These two mechanisms help victims in preparing their cases; provide representation in front of the competent authorities for the victim, as well as counseling or referral of cases. Therefore, individuals or organizations can refer cases to these two mechanisms.

Despite the existence of these mechanisms, organizations working with key populations and people living with HIV should develop their own capacities to at least identify cases of violations of human rights and document them. This should be their minimum commitment in providing legal services. While counseling, referral and preparation of cases could be done with a specialized legal assistance.

III. Recommendations

Recommendations presented below aim to improve the legal and institutional infrastructure in Kosovo in response to HIV/AIDS. Recommendations are addressed to different stakeholders with the primary purpose to encourage coordination between them.

Recommendations for decision-makers

- Ensure treatment and adequate health personnel for children living with HIV;
- Show leadership and ensure adequate monitoring of the implementation of legislation and other legal acts related to HIV/AIDS;
- Adopt an action plan to respond to HIV/AIDS which will enable a coordinated and effective approach when addressing issues of human rights related to HIV/AIDS;
- To initiate the process of completing the legal framework, regulations as well as establishing standards and protocols that are necessary for coordination and providing a clear guidance for institutions and non-governmental actors that are part of a national structure for prevention and response to HIV/AIDS.

Make recommendations for law enforcement officers

- Police officers and other persons involved in law enforcement should be trained to be more sensitive regarding the rights of sex workers, drug users, men who have sex with men and people living with HIV/AIDS, when accessing the services.

Recommendations for health workers

- Health workers should be trained to be more sensitive in relation to the rights of sex workers, drug users and men who have sex with men.

Recommendations for organizations that provide services for key populations and people living with HIV/AIDS

- Increase their capacities in identifying and documenting violations of human rights;
- Use documented cases of human rights violations for advocacy purposes in order to improve the situation for key populations;
- To develop advocacy plans for key populations rights;
- Create a model of providing free legal aid for key populations;
- To coordinate activities with other independent mechanisms such as the Ombudsperson or the Agency for Protection of Personal Data.

Recommendations for the independent institutions

- To be more active in promoting and addressing human rights related to HIV/AIDS, such as discrimination, confidentiality, access to services and well-being of people living with HIV/AIDS;
- To mediate a dialogue between civil society and other stakeholders on issues of human rights related to HIV/AIDS;
- Be open to cooperation and dialogue with civil society in joining efforts in removing legal barriers which prevent access to services for key populations.

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