



This project is financed
by the European Union



Република Србија
МИНИСТАРСТВО ЗДРАВЉА



HIV/AIDS

in Legislation of the Republic of Serbia

Overview and analysis of legislation in the
Republic of Serbia with proposals for better
solutions and protection of human rights for
people living with HIV, with view to international
regulations and practice



Подршка
У Влади Републике Србије

JAZAS
INSTITUT
ZA
JAVNO
ZDRAVLJE
SRBIJE



Belgrade, 2010

Editor: Nenad Petkovic

Main consultant: Prof. Dr Vojin Dimitrijevic

Consultants: MSc Ana Maricic and Nenad Petkovic

Responsible person: Dr Miljana Grbic, National HIV/AIDS Advisor,
Secretariat of UN Thematic Group for HIV/AIDS in Serbia

Project funded by: UNDP/UNAIDS, Ministry of Health of the Republic of Serbia through project financed by Global Fund for fight against AIDS , Tuberculosis and Malaria

Project supported by: Project "Improvement of Legal Position of People Who Live with HIV", implemented by Youth of JAZAS in conjunction with Dutch Institute for International Development – HIVOS. The project has been financed from the European Commission funds.

The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Union, UNAIDS, UN or its member states, neither Ministry of Health of Republic of Serbia.

CONTENTS

Executive Summary	6
1. INTRODUCTION	8
2. PREVENTION OF HIV	10
2.1. Millennium Goal	11
2.2. Response to HIV/AIDS in Serbia	12
2.3. Programmes of Prevention	13
3. DETERMINATION OF HIV POSITIVE STATUS	14
3.1. Testing for HIV	15
3.2. Seropositive Test Result	17
4. HEALTH PROTECTION	18
4.1. Regulations Related to Health Protection	19
4.2. Patients' Rights	20
4.3. Obligations of HIV Positive People in Relation with Protection of Public Health	21
5. PROTECTION OF PRIVACY	22
5.1. Disclosure of the Status	23
5.2. International Protection	23
5.3. National Regulations	24
5.4. Ethic Norms	26
6. TRANSMISSION OF HIV	27
6.1. Criminalization of HIV Infection	28
6.2. Criminal Responsibility in Serbia	29

7.	STIGMA AND DISCRIMINATION	30
7.1.	Prohibition of Discrimination	31
7.2.	The “VAM” Case	34
8.	PARTICIPATION IN SOCIAL LIFE	36
8.1.	Right to Work and Labour Relations	37
8.2.	Loss of Working Ability	38
8.3.	Education	39
8.4.	Marriage and Family	40
9.	HIV, CHILDREN AND THEIR RIGHTS	41
9.1.	Rights of Children	42
9.2.	Testing of Juveniles to HIV	42
10.	SOCIAL PROTECTION	44
11.	LEGAL REMEDIES FOR VIOLATION OF HUMAN RIGHTS	46
11.1.	Constitutional Rights	47
11.2.	Compensation of Damages	47
12.	CONCLUSIONS	49
13.	OVERVIEW OF REGULATIONS	52
13.1.	Regulations of the Republic of Serbia Which May Pertain to HIV/AIDS Related Issues	53
13.2.	Most Relevant International Treaties and Other International Documents Which May Pertain to HIV/AIDS Related Issues	54
13.2.1.	International Treaties Which Obligate Serbia	54
13.2.2.	Decisions of International Organizations	55

About 25 years ago when the first cases of HIV/AIDS were properly diagnosed and the presence of the disease had already been confirmed on five continents, the world did not understand that urgent and concerted efforts were required to prevent the pandemic.

Today we are living in a world with HIV. Despite intensive prevention efforts, 33.4 million people are infected and 25 million have already died due to AIDS. Even in Serbia, a country with very low prevalence, HIV is part of life for every generation, present in different social strata, among different professions, and cultures. However, HIV positive status is still a significant barrier to the fulfilment of human rights - guaranteed by international laws. In addition, prevention services are not sufficiently accessible, especially to those at highest risk for HIV.

With the intention of supporting the Government and other social actors in identifying legal barriers and opportunities for improving prevention, treatment and care services for people living with HIV, the UN Theme Group on HIV/AIDS in Serbia, commissioned a legislative analysis. This document includes answers to the following key questions:

- *Is the current legislation sufficient to protect people living with HIV from any form of discrimination in all areas of life, ranging from access to the labour market to access to services?*
- *Are the particular legal provisions in accordance with international recommendations, and to what extent do they foster human rights based approaches?*
- *How does the current legislation address confidentiality of medical information, and are there provisions that ensure it?*
- *Are the existing social welfare/support provisions sufficient to ensure support and protection of people living with HIV?*
- *To what extent are the legal provisions regarding groups particularly vulnerable to HIV human rights based, and facilitative of targeted HIV/AIDS prevention services?*

The document also includes important suggestions, comments and recommendations provided by the members of the National AIDS Commission, a multi-sector national AIDS authority, and wide range of experts.

We would like to thank Prof. dr. sc. Vojin Dimitrijevic and his team for conducting the thorough and participatory analysis which is now before you.

We hope that the document will help guide all those who are committed to working for improved protection of people living with HIV/AIDS in Serbia!

Judita Reichenberg,

UNICEF Area Representative for Serbia and Croatia, Chairperson of the UN Theme Group on HIV/AIDS

Executive Summary

Analysis of the HIV/AIDS related legislation of the Republic of Serbia aims to highlight certain issues of legal rapport to HIV/AIDS and people living with HIV/AIDS, to point out current legal provisions and to offer solutions in order to achieve a higher degree of respect for human rights in this area. In order to make a successful response to the epidemic, it is necessary to develop an equal balance between the protection of public health and protection of the rights and dignity of HIV positive persons. Respect and development of human rights are of core importance in the prevention and fight against HIV. Despite all the efforts made at the international and national level to improve human rights and to prevent discrimination, to provide adequate protection of health to people who live with HIV and to inform the public about the illness itself, there is a lot more to do in order to overcome stereotypes and ensure adequate protection of the human rights of those who live with HIV. The analysis targets governmental bodies, non-governmental organizations, the legislator and people who live with HIV.

The legislation of the Republic of Serbia does not contain any specific regulations which particularly regulate issues related to HIV/AIDS. The legal documents which exist, pertaining to the wider area of health protection, are applicable indirectly in most cases, but some areas remain unregulated and rely on practice and professional and ethical codes of conduct.

For example, there is no law which protects HIV positive people – not as victims, but as persons living with HIV. Although HIV infection clearly differs from other infectious diseases with respect to transmission and the possibilities for social contact of people living with HIV, legislation in Serbia equates HIV with other easily transmissible infections. This excludes a clear legal definition of HIV which takes into account all the specific characteristics of this infection, which is the key for achievement of high standards in protection of human rights in this area. In addition to this basic premise which determines the legal treatment of HIV/AIDS in many situations, there are certain areas which pertain to this infection and which should be considered within the wider social contract. This would, of necessity, include those who are most affected by the infection, and would involve the adoption of appropriate improvements:

- The provisions of criminal law penalize every transmission or endangerment of HIV infection, without clearly explaining the impact of such a solution on the

protection of public health and in the fight against the HIV/AIDS epidemic;

- There are no clear guarantees in practice for respect and protection of privacy of HIV positive people in accordance with legal regulations and professional codes;
- There are no measures of affirmative action or equal treatment of HIV positive individuals and their associations when talking about health protection, social benefits or budget support to programmes;
- Clear regulations related to preventive activities and testing to HIV are lacking, especially when talking about juveniles.

1

INTRODUCTION

1. Introduction

The concept of HIV – AIDS, or SIDA¹ denotes acquired immune deficiency syndrome (the loss of immunological defence ability). At the same time, this represents the latest and most severe stage of the HIV virus infection that causes immune deficiency in humans – HIV (Human Immunodeficiency Virus). The first case of HIV infection was recorded in the USA in 1981: by 2006 more than 30 million people had died of AIDS, which makes it the most destructive epidemic in the written history of mankind. Although global efforts to stop the HIV epidemic have resulted in some improvements over the last few years, primarily through an increase in the availability of effective therapy and prevention programmes – the number of people living with HIV is still growing, particularly in the Eastern Asia region, as well as in Eastern Europe and Central Asia. According to estimates made by the WHO and UNAIDS, there are 33.2 million people living with HIV in the world. Sub-Saharan Africa is still the most affected region in the world: it has been estimated that two thirds of all people living with HIV live there, i.e. 22.5 million people, or 5% of the total population. The epicentre of this epidemic is located in Southern Africa, where one third of the global HIV population lives, and where the mortality rate is also the highest.²

According to data provided by Institute for Public Health “Dr Milan Jovanovic Batut”, from 1985 to 20 November 2009, 2,414 people have registered as HIV positive in Serbia, of which 1,472 (61%) developed AIDS (SIDA), and 962 people died of AIDS (65% of all infected). 90% of those registered are from Central Serbia, mostly based in the City of Belgrade area (77%), which, as a metropolis, has a higher prevalence of risky behaviour, but also the highest number of screenings performed. According to available data, there are 1,382 people in the Republic of Serbia living with HIV, making the officially registered prevalence of HIV infection among the population of 15-49 years old, less than 0.01%. The screening rate is very low in Serbia; some 4 persons per 1,000 citizens. Although Serbia falls among those countries with a low prevalence of HIV infection, experts judge the epidemiological situation to be potentially unsafe, taking into account the unfavourable socio-economic conditions and the existence of risky behaviour. Furthermore there is potential danger of economically conditioned migration from Eastern European and Central Asian countries, which are severely affected by the HIV epidemic.

1 AIDS – English: Acquired Immune Deficiency Syndrome; SIDA – French: Syndrome de immunodeficiency acquise.

2 UNAIDS/WHO 2007 AIDS epidemic update.

2

Prevention of HIV

2. Prevention of HIV

2.1. Millenium goal

At the Millennium Summit held in New York in September 2000, leaders from 189 UN countries adopted the Millennium Declaration, which contains basic values which should be the basis for international relations in the 21st century: freedom, equality, solidarity, tolerance, respect for nature and shared responsibility.³

The social inclusion of vulnerable groups throughout the world is an important aspect of achieving the Millennium Development Goals (MDGs), which mean an overall plan in the area of human development, with specific tasks and indicators to measure success in their accomplishment. The MDGs establish time and quantitatively determined indicators which should help governments and other stakeholders in achieving each of the eight goals, of which the sixth stipulates the fight against HIV/AIDS.

The Declaration stipulates that by 2015 the further spread of the illness should be stopped, and that eradication of the illness caused by HIV/AIDS should have begun, giving the following as primary goals:

- reduction of the spread of HIV among the population between 15 and 24 years of age;
- wider use of condoms, even in sexual intercourse with lowest risk; and increase of overall knowledge about HIV/AIDS among the population between 15 and 24 years of age.

The Declaration also stipulates that by 2010 equal access to treatment should be ensured for all HIV/AIDS positive people who need such treatment the most, stating the necessity of better access to anti-retroviral remedies for persons in the later phase of HIV infection.

³ *United Nations Millennium Declaration, Resolution 55/2, dated 8 September 2000*

2.2. Response to HIV/AIDS in Serbia

After the adoption of the UN Declaration of Commitment on HIV/AIDS,⁴ The Government of the Republic of Serbia established a multi-sectoral advisory body – HIV/AIDS Committee – one of the main tasks of this Committee is to define a National Strategy and to monitor its implementation. The Committee is composed of representatives from the Ministry of Health, the Ministry of the Interior, the Ministry of Justice, the Ministry of Education, the Ministry of Labour and Social Policy, provincial authorities, NGOs, people living with HIV, and health institutions and organizations. The following international institutions participate in the Committee as observers: the World Trade Organization, UNAIDS, UNICEF and UNDP.

On 17 February 2005, the Government of the Republic of Serbia adopted the National HIV/AIDS Strategy for 2005 to 2010, which provides a basic framework for formulation of goals and implementation of measures for prevention, treatment and support to the infected, and for awareness raising among the general population about certain issues related to HIV/AIDS. This Strategy recommends the following:

- Introduction of voluntarily and routine HIV screening for pregnant women;
- Further development of advice centres for voluntary and confidential counselling and HIV screening;
- Creation of pre-requisites for treatment of patients at the clinics, within departments for infectious diseases;
- Strengthening the roles of local health centres in providing healthcare services to HIV positive patients; and
- Development of a system for collection and analysis of data about the HIV epidemic through establishment of efficient prevention programmes and development of an institutional framework for coordination of activities related to HIV/AIDS prevention.

The Republic of Serbia has also undertaken other measures: The National HIV/AIDS Office was established (2006); implementation of the first project financed from the Global Fund was finalized (2003-2006) and two other projects financed by the Global Fund are being implemented, one worth 9 and other 12 million Euros (2007-2012 and 2009-2014).

⁴ Declaration on Commitment on HIV/AIDS, Resolution S-26/2, dated 27 July 2001.

During the implementation of this project capacities for treatment and nursing of people living with HIV were expanded (Novi Sad, Niš, Kragujevac), while the HIV department at the Clinic for Infectious Diseases in Belgrade was refurbished.

Anti-retroviral therapy (HAART) has been provided for all patients and is funded from the Republic Bureau of Health Insurance.⁵

2.3. Programmes of prevention

There are no legal obstacles in Serbia to implementation of preventive activities. Procurement and distribution of condoms is free and are based on market rules. Non-governmental organizations active in this area strongly contribute to elimination of prejudices related to the use of protective means.

Unlike the examples seen in some other countries, nowadays all major confessional communities in Serbia support the fight against HIV, which is a favourable circumstance, and they also tolerate the use of condoms.

It may be noticed that implementation of certain preventative activities may conflict with the provisions referred to in Article 246, paragraph 3 and Article 247 of the Criminal Code, which pertain to punitive measures for holding, using and supplying narcotics to other users. Although the latest amendments of the Criminal Code exempt health-care workers who enable the use of narcotics in provision of medical aid, from sanctions, these provisions retain the existence of criminal responsibility and may conflict with the programme “Damage Control for the Vulnerable Population”, which implies exchange of sterile injection equipment for administration of drugs. This programme has shown extraordinary results in reduction of HIV and HCV transmission among intravenous drug users and is implemented in almost all countries where there is a high prevalence of HIV among drug users. Nevertheless, damage control programmes and exchange of sterile needles are implemented in several cities in Serbia, and they have been approved by the Ministry of Health of the Republic of Serbia.

Criminal law provisions should be customized with respect to protection of public health needs and the fight against the HIV epidemic. More specifically, it is necessary to amend provisions of the Criminal Code of Serbia regulate keeping, use and supply of narcotics to other users in order to avoid disruption of activities related to prevention of HIV and other blood borne infections.

⁵ HAART - High active anti-retroviral therapy

3

**Determination of
HIV Positive Status**

3. Determination of HIV Positive Status

3.1. Testing for HIV

Testing for HIV is one of the key actions leading to successful prevention of HIV and treatment of persons living with HIV. HIV tests provide an easy and reliable way to monitor the number of persons living with HIV contribute to early discovery of infection and timely provision of necessary advice and information about the disease, as well as treatment options. This prevents the further spreading of HIV.

UNAIDS/WHO recommendations regarding HIV testing indicate that it is necessary to carry out screening in a way that will secure and protect human rights and guarantee that ethical principles are observed.⁶ There is a need for continual improvement of the healthcare system in order to earn the trust of the citizens and guarantee discretion to persons taking the test. Ever since the introduction of HIV tests (1985), there have been three fundamental principles that need to be observed:

1. guaranteed confidentiality;
2. ensured provision of appropriate advice before and after testing;
3. guarantee of informed consent for the testing.

UNAIDS and the WHO recommend clear differentiation of four types of HIV testing:

1. testing at personal request,
2. diagnostic testing (with people showing signs or symptoms of HIV/AIDS),
3. routine testing (with people who are treated for other sexually transmitted diseases, pregnant women, members of communities with high prevalence of HIV and where there is anti-retroviral treatment in place), and

4. mandatory testing (blood donors, etc.).

⁶ Policy statement on HIV testing, UNAIDS and the WHO, 2006.

It is legally necessary to obtain prior informed consent before the testing. If this is not the case, it will be deemed that the person's freedom and privacy has been infringed. The potential economic and social consequences to the person of a positive diagnosis, as well as possible discrimination, imply that a decision on testing may be made only with the person's awareness and approval. At the same time, it is necessary that such person be provided with counselling before and after testing, not only due to psychological reasons, but also because it is expected that such a person accepts certain measures for the prevention of further transmission. Although in some countries, including ours, doctors deem that HIV testing may be included in a patient's general acceptance of hospital interventions and blood testing, the European Court of Justice deems this illegal and illicit.

The key information that must be provided to a patient, so that the patient can confirm that he or she has been properly informed and on the basis of received information issued consent for testing, is the following:

- the significance of clinical treatment and prevention when a person is tested at their personal request,
- the right to refuse testing,
- the right to use counselling services after the testing, and the necessity to inform the persons who otherwise might not be aware of the risk of HIV infection, if the results are positive.

UNAIDS and the WHO do not support mandatory testing of individuals on the grounds of public health protection. Voluntary testing is more likely to result in the changes of behaviour needed to eliminate the risk of transmission of HIV to other persons. It is recommended that voluntary testing should be accompanied by counselling for both HIV-positive and HIV-negative individuals and referral to medical and psycho-social support for those with HIV positive results.

UNAIDS and the WHO deem that HIV testing may be performed without informed consent but that such an act can be justified only under extraordinary circumstances, e.g., if the patient is unconscious, if the parent or guardian is absent or if determination of HIV status is needed in order to establish proper medical treatment.

Centres for voluntary counselling and HIV testing are present in Serbia. This type of testing is based on the principle of voluntary participation and anonymity so that a person who wants to be tested does not have to use their name or provide any data related to their identity. This procedure inevitably involves counselling before and after testing which is extremely important in terms of information provided to the person tested on purpose and the consequences of such testing, as well as in terms of health protection and avoidance of risky behaviour.

The Small number of people tested for HIV in Serbia and the present “late patient” syndrome clearly indicate that it is necessary to raise public awareness related to the importance of prevention and timely HIV testing.

3.2. An HIV Positive Result

Once it has been established, HIV positive status has to be reported. If a certain person is HIV positive and he/she finds out about that status (e.g., through an anonymous test), that person is obliged to deliver personal information to the person presenting the test results, or to a hospital which treats communicable diseases⁷. The next step is a confirmation test at the reference laboratory, located at the Clinic for Infectious Diseases in Belgrade. Data on the infected person is kept in the main registry of persons suffering from contagious diseases that is maintained by the Institute, or public health institute.

It is also obligatory to report the death of a person infected with HIV.

HIV infection differs from other contagious diseases in respect of communicability and the possibilities for social contact of PLWHIV. Therefore, the options for special treatment of HIV infection should be taken into consideration (in a separate article within the Law on Protection of Population against Communicable Diseases or in a special law). In the current situation HIV is treated in the same way as other easily communicable infections and is addressed by special regulations on protection and regulations on health and social protection. A clear legal definition of HIV, which takes into account all specific characteristics of this infection, is essential for achieving high standards of protection of human rights in this area.

⁷ Law on Protection of Population against Communicable Diseases, Article

4

Healthcare Protection

4. Healthcare Protection

4.1. Regulations related to healthcare protection

International recommendations regarding HIV/AIDS and human rights clearly state that the states are obliged to amend and reform the legislation pertaining to health protection related to this illness⁸. The intention is to enable inclusion and regulation of HIV issues, and to make sure that provisions that otherwise pertain to frequently transmitted diseases are not inappropriately applied to HIV, all for the purpose of harmonization of the national legislation with the international obligations that pertain to respect and protection of human rights. Healthcare legislation should enable healthcare institutions to provide a wide range of services for prevention and treatment of HIV/AIDS, including dissemination of necessary information and education, access to voluntary testing and counselling, condoms, treatment of addiction, etc. The legislation must ensure that all HIV/AIDS cases, which are registered with the responsible institutions for epidemiological reasons, receive treatment that guarantees protection of personal data and confidentiality. It is necessary that medical workers undergo basic education/training in ethics and protection of human rights in order to be authorized to retain their positions. It is also necessary to encourage medical professional organizations to develop and secure implementation of an ethical code of conduct for protection of human rights, to ensure the confidentiality of data and the proper provision of healthcare services.

The Health Care Law and Medical Insurance Law regulate healthcare protection for all citizens of the Republic of Serbia, and also other persons with residence or right of abode in the Republic of Serbia. A higher level of social care is demonstrated through provision of healthcare services for those population groups that are exposed to higher risk of contracting a disease, through prevention, suppression and treatment of diseases of greater social and medical significance (which includes HIV infection).

Basic healthcare protection is free for all beneficiaries of medical insurance provided by the Republic Medical Insurance Fund and the beneficiaries can receive these services at medical centres in the territory of the municipality in which they are resident. All citizens in Serbia are entitled to medical insurance, that is, a certified medical insurance book, on the basis of which they may use the healthcare services provided by the healthcare system. People being treated for HIV infection and other communicable diseases belong to the group of specially protected

⁸ *International guidelines on HIV/AIDS and human rights, 2006 consolidated version, recommendation 3* (our translation).

insurance beneficiaries who are entitled to fully guaranteed medical insurance even in cases when their payments for medical insurance benefits have been delayed.⁹ The expenses of medical protection for persons entitled to receive mandatory medical insurance are covered from the funds of mandatory medical insurance, while for persons who are not beneficiaries of mandatory medical insurance, expenses are covered from the budget of the Republic of Serbia.

Another important law which pertains to HIV is the Law on Protection of the Population against Communicable Diseases. In compliance with provisions of this Law, treatment of the HIV infected persons is carried out in special medical institutions for hospitalization of persons suffering from communicable diseases¹⁰. The Law does not require special measures of isolation or quarantine for patients with HIV¹¹. However, access to services provided at stationary medical institutions for special rehabilitation (spa, rehabilitation centres) may involve difficulties in practice for persons living with HIV, because eligibility for use of these services requires previous testing for contagious diseases.

Treatment by combined anti-retroviral therapy requires simultaneous administration of several groups of medicines and frequent changes of combinations because of development of resistance or bad reaction to therapy. Unlike the countries of the European Union, the number of combinations available in Serbia is limited, which is the reason why treatment abroad is needed. The patients are also affected by regulations on the import of medicines and the general customs regulations, without specific provisions which would take into account treatment of HIV infected persons.

4.2. Patients' Rights

Patients' rights are defined in the Health Care Law as a part of the principle which defines respect of human rights and values in provision of healthcare services. Patients have the following:

- Right to have access to healthcare services
- Right to be informed
- Right to be notified

9 Law on Medical Insurance, Article 22

10 Law on Protection of Population against Communicable Diseases, Article 19

11 Law on Protection of Population against Communicable Diseases, Articles 20 and

- Right to have free choice
- Right to privacy and confidentiality
- Right to make own decisions and to consent
- Right to have access to medical documentation
- Right to data secrecy
- Right of the patient who is a subject in a medical experiment
- Right to object
- Right to compensation for damages.

Protection of all rights related to healthcare protection is exercised primarily through the protectors of patients' rights, who are located in every healthcare institution. In order to apply these rights, it is necessary that patients are fully informed about their scope and meaning so that they can understand those rights and require that they be respected.

4.3. Obligations of HIV Positive People in Relation with Protection of Public Health

In addition to their rights to use healthcare services, persons living with HIV also have certain obligations on account of their status as carriers of a contagious disease. According to the Law on Protection of the Population against Communicable Diseases, the infection carriers are obliged to follow the instructions received from their doctors, especially those regarding prevention of further transmission of the disease. Therefore, doctors' advice, particularly that which pertains to further transmission of disease (e.g. obligatory use of condoms, safe sex) is binding for patients. According to the Health Care Law, all patients, including the persons living with HIV, are obliged to observe and respect the general regulations of the medical institution during their stay at that institution. The patients using the services of state or private medical institutions are obliged to take an active part in working towards improvement of their health status, to inform the medical worker in charge about their condition, and follow all instructions and courses of treatment. A patient may, at their own discretion, discontinue treatment after signing a written statement to that effect.

5

Protection of Privacy

5. Protection of Privacy

Publication and communication of data on HIV status involves disclosure of intimate details about the health of an individual and other personal data which the person in question may want to keep confidential, as they are entitled to. Disclosure of data on HIV status may violate the privacy of a person living with HIV/AIDS and cause other adverse consequences, such as rejection, discrimination, violence or social isolation. Disclosure of such data may also result in severe deterioration of the economic status of the infected person, including loss of job, medical insurance or place of residence.

5.2. International Protection

The right to privacy is guaranteed by Article 9 of the Universal Declaration on Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and the Declaration of Commitment on HIV/AIDS.

Article 8 of the European Convention for the Protection of Human Rights guarantees rights regarding respect for private and family life, home and correspondence. Public administration bodies are not allowed to violate these rights, unless this is required by law or made necessary by reasons of national security, public safety or the economic well-being of the country, for the purpose of prevention of unrest or criminal activities, protection of health or morals or the rights and freedoms of other people.

In the case of Z v. Finland, 1997, the appealing party, inter alia, emphasized the failure of the Finnish authorities (primarily the police) to prevent disclosure of her identity and health condition as a potential HIV carrier through the media, resulting in loss of job. The court found that disclosure of the identity of a person and a person's HIV positive status constitute a violation of rights regarding respect for family and private life, guaranteed by Article 8 of the European Convention for the Protection of Human Rights¹²

¹² Case *Z versus Finland*, appeal no. 22009/93, European Court of Human Rights, 25 February 1997

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹³ is the first obligatory international instrument in the area of personal data protection. It establishes the obligation of the countries that are signatories to this convention to take necessary measures to secure the legal protection of basic human rights in connection with automatic processing of personal data.

The Convention stipulates that personal medical data is a special category of data that can be processed only if appropriate protection of data has been ensured. "Personal medical data" is data that pertains to the past, present or future physical and mental health of individuals. The data may pertain to a person that is suffering from a medical condition, a healthy person or a deceased person.

The Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹⁴ amends the Convention by introducing the obligation for signatories to establish supervisory bodies and define in detail the cross-border flow of personal data to recipients who reside outside the states obliged by the Convention.

5.3. National Regulations

Disclosure of personal or family data that may adversely affect one's social standing or reputation, individually, in public or through the media, constitutes a criminal offence that is regulated by provisions of Article 172 of the Criminal Code. The provisions of this article could theoretically be extended to include the disclosure of HIV status by third parties. Special attention is given to situations when HIV status is disclosed with the intention of degrading or humiliating a person, particularly if sexual or other preference is disclosed together with the previously mentioned details, which may be related.

Every patient is entitled to have data communicated to medical workers treated as confidential information, and to full protection of privacy in the course of medical treatment.¹⁵ The information received by medical workers in the performance of their duties is treated as confidential and is protected as an official and medical

¹³ *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Official Gazette of FRY (International Treaties), 1/92 and Official Gazette of SCG, 11/05

¹⁴ *Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Official Gazette 98/08 dated 23 October 2008

¹⁵ *Health Care Law*, Article 30

secret. The persons obliged to protect professional secrets (doctors, journalists, judges, etc.) are only allowed to reveal such information to competent bodies if the public interest requires such disclosure, for the purpose of achieving higher and justified goals. Medical workers are not allowed to reveal private information about a patient to any third party¹⁶. The data contained in the medical documentation is also treated as confidential. A medical worker in charge shall only be freed of the duty to keep medical data confidential if the patient consents to this in writing or otherwise clearly and unambiguously gives consent for disclosure, or if the responsible court passes a decision to that effect¹⁷. If the patient has issued such consent, the medical worker in charge is allowed to reveal the data on the health status of the patient. A family member may receive the data even without prior consent of the patient, provided that such a family member is of age and that such disclosure is necessary in order to avoid a health risk for the family member in question. This is not an obligation, but an option to be used at the doctor's discretion, if there is justified doubt that the patient is disregarding received instructions regarding prevention of further transmission of the infection.

The data contained in the medical documentation can be presented in the form of a record or transcript taken from the official medical documentation. Such a transcript has to be marked as confidential and can be provided only upon request of the court authorities, guardian, medical insurance organization or the authority in charge of statistics, when prescribed by law.¹⁸

Within the context of national legislation, the Constitution of Serbia does not guarantee the right to privacy as such; however, it contains general provisions that guarantee protection of personal data or stipulate that collection, storing, processing and use of personal data shall be regulated by law¹⁹. At the same time, it is explicitly regulated that any use of personal data for purposes other than those for which they were collected is prohibited and shall be prosecuted, except if it is required for the purpose of conducting a criminal procedure or protection of the security of the Republic of Serbia, as prescribed by the relevant laws.

Until recently, protection of personal data in Serbia was regulated by the Law on Personal Data Protection adopted in 1998, the provisions of which did not meet

16 Health Care Law, Article 30, paragraph 2

17 Health Care Law, Article 39

18 Ibid

19 Constitution of the Republic of Serbia, Article 42, paragraphs 1 and 2

the requirements of international standards. The new Law on Personal Data Protection was adopted in November 2008 and comes into effect on 1 January 2009. The new Law stipulates that the purpose of collection, processing and use of personal data has not only to be strictly lawful, but also precisely defined in advance, before the personal data is collected. In terms of this Law, information on health status is especially sensitive data that can only be used under condition that the person in question has issued a consent to that effect, unless otherwise stipulated by the Law²⁰. This new law extends the powers of the Administrator in charge of access to the information of public interest, who has now become the Administrator for Access to Information of Public Interest and Protection of Personal Data, as an independent government authority in charge of protection of personal data. This Law defines the procedures for collection, control and protection against misuse of personal data, guarantees the right of individuals to receive information on the processing of data and receive a copy if they require one.

5.4. Ethical Norms

The obligation to protect privacy is also included in the Code of Professional Ethics of the Serbian Medical Council and the Serbian Dentistry Council. However, neither ethical nor legal norms have absolute value. The obligation to protect the privacy of patients exists in parallel with other obligations of medical workers, which may clash. Medical workers are obliged to disclose information, even without the consent of the patient, if there is a danger to any third parties and if such disclosure, in their professional opinion, would diminish or eliminate such a danger. In order to make such a decision it is necessary to take into account and assess possible damage to the patient, on the one hand, and the extent of the threat to the community on the other. For example, a doctor is obliged to notify the spouse of the person infected with HIV if the patient intends to continue having sex with their spouse without protection.

In order to provide full protection of persons living with HIV, it is necessary to apply the rules contained in the Health Care Law and professional codes of conduct in conjunction. It is necessary to introduce stronger guarantees for respect and protection of the privacy of HIV positive persons in compliance with relevant regulations and professional codes of conduct, primarily those which pertain to the procedures implemented by medical staff and management of medical documentation.

²⁰ Personal Data Protection Law, Article 16

6

Transmission of HIV

6. Transmission of HIV

6.1. Criminalization of HIV Infection

The Report issued by Global Network of People Living with HIV/AIDS Europe and Terrence Higgins Trust²¹ revealed that more than 36 out of 45 surveyed countries treat the transmission or putting at risk of transmission of HIV as a criminal offence. The highest number of court sentences passed on these grounds were found in Austria, Sweden and Switzerland, while in countries such as Bulgaria, Luxembourg and Slovenia, transmission or risk of transmission to third parties are not regarded as a criminal offence.

In the UNAIDS report “Criminalization of Transmission of HIV infection”²² it is stated that the criminal codes of some countries treat transmission of HIV infection or putting other persons at risk of contracting the HIV infection as a punishable criminal offence. However, there are no clear indications that broad criminalization of transmission of HIV infection can ensure either proper service of justice in the courts, or prevention of transmission of the HIV infection. Moreover, this type of practice may even have an adverse effect on public health and human rights. Therefore, UNAIDS appealed to the governments to limit this type of punishment to cases of deliberate transmission, by persons who were aware of their HIV positive status and acted with deliberation to spread the infection. In addition, punishment should not be applied if the risk of transmission was low, if the offender was not aware of their HIV positive status or of the ways the disease can be communicated, if the other party was previously informed of the HIV positive status of the partner, if the offending party failed to discover the HIV positive status because of danger of violence or other negative consequences, if the offending party did take necessary protective measures to diminish the risk of transmission, e.g., use of condoms.

Instead of criminalization of HIV transmission, countries should expand the programmes and measures that have been proven to contribute to reduction of the transmission rate, thus securing protection of human rights both of the persons living with HIV and the persons who are HIV negative.

The UNAIDS document “Criminalisation of Transmission of HIV Infection” and the recommendation No. 4 of the International Recommendations in Connection with HIV/AIDS and Human Rights²³, indicate that the countries are obliged to ensure safe application of criminal code provisions in connection with transmission of HIV in accordance with international obligations regarding protection of human rights²⁴.

21 *Global Network of People Living with HIV/AIDS Europe and Terrence Higgins Trust*, 29 June 2005

22 *Criminalisation of HIV Transmission*, UNAIDS, August 2008

23 *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, Office of the UNHCHR and Joint UN Programme on HIV/AIDS

24 First of all, the right to privacy, the highest available standard of health protection, non-discrimination, equal access to justice (Articles 3, 7 and 12 of the Universal Declaration of Human Rights and Article 12 of

To tell or not to tell? There is no specific legal, provision which imposes an obligation of communication of HIV positive status to sexual partners. It is necessary to respect rules on safe intercourses unconditionally i.e. avoid putting the partner in danger.

6.2. Criminal Responsibility in Serbia

The Criminal Code of 2005, in addition to retaining the transmission of contagious diseases in general as a criminal offence (Article 249), also introduced the transmission of HIV as a punishable offence into national legislation for the first time. The legislators introduced harsh prison sentences (from one to five years) for transmission of infection to another person (Article 250, paragraphs 2 and 3). In addition, putting somebody at risk of contracting HIV is punishable by a prison sentence of up to two years, even if no transmission of the virus occurred (paragraph 1), as well as transmission of HIV by negligent behaviour (paragraph 5). The legislators provided no clarification regarding the type or level of negligence or failure to act that is punishable. The harshest sentences are applied in cases when the transmission of HIV results in the death of the infected person (paragraph 4). It is evident that the intention of the legislators was to deploy harsh sentences to prevent the spread of HIV, emphasizing the responsibility of the virus carrier for spreading of the infection. It is not clear whether the criminal responsibility of an HIV infected person should be the same in cases of a minor negligence (e.g. injury at work!?) and in cases of deliberate endangerment of other persons at risk of contracting the infection, which could be open to different interpretations, especially if we bear in mind the specific characteristics of HIV as infection (three established ways of transmission and a theoretical possibility of transmission through other types of contact, e.g. a kiss). There is no recorded court practice in Serbia that could indicate how the courts might interpret and apply these provisions. Theoretically, these provisions open the possibility of criminal procedures that could not be justified from an ethical point of view (e.g. if a person did not know they were HIV positive, or if he/she had done everything to protect the partner). So far there has been only one court case based on these grounds.

Criminalisation of HIV transmission disregards personal responsibility for one's own health and the general obligation of prevention and protected sexual intercourse, which should be insisted on in general.

In terms of protection of human rights and the dignity of all citizens, it is necessary to revise the attitude towards criminalization of HIV transmission and to strengthen programmes of positive prevention which reduce communication of disease. It is necessary to consolidate provisions of the Criminal Code of Serbia which regulate transmission of HIV infection in order to enable integration of public health protection and respect of human rights.

7

Stigma and Discrimination

7. Stigma and Discrimination

7.1. Prohibition of Discrimination

Article 7 of the Universal Declaration of Human Rights stipulates that all are equal before the law and are entitled without any discrimination to the equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Discrimination is unlawful differentiation or unequal treatment of individuals or groups on the basis of their inborn or involuntarily or unconsciously acquired characteristics. It is often systematic and socially enforced or socially acceptable. Many legal regulations may contain discriminatory provisions, or can be interpreted in that way. Although the obligation of non-discrimination, the right to privacy and the right to work are not absolute rights, and certain exceptions are possible, according to the current practice of the European Court of Human Rights (ECHR), a procedure is regarded as discriminatory if it has no objective and reasonable justification regarding the aim and consequences of the procedure, or if there is no proper balance between the means and the ends of a procedure.²⁵ With adoption of the Additional Protocol 12 to the European Convention on Human Rights in 2000, discriminatory practices were absolutely prohibited in Europe.

The Constitution of the Republic of Serbia generally prohibits discrimination (and consequently discrimination against persons living with HIV/AIDS). All types of discrimination are prohibited, either direct or indirect, on any grounds whatsoever, and especially on the grounds of race, gender, birth, language, culture, social background, ethnicity, religious belief, political or other opinions, financial standing, age or physical or mental disability. The Criminal Code of Serbia protects the equal rights of citizens (Article 128) in a similar way.

The Anti-Discrimination Law regulates the general prohibition of discrimination, detailing special forms and cases of discrimination, and protective procedures. All types of discrimination are prohibited, either direct or indirect, regardless of personal characteristics. Serious cases of discrimination have been defined which, inter alia, include multiple or cross-discrimination, i.e. discrimination based on two or more personal characteristics.

²⁵ Case *Belgium Linguistic Case*, European Court for Human Rights, decisions dated 9 February 1967 and 23 July 1968

Special cases of discrimination have been prohibited on the basis of Articles 15 to 27. From the HIV/AIDS aspect, special interest is given to prohibition of discrimination based on sexual orientation, i.e., provisions which state that everybody shall be free to express their own sexual orientation and, at the same time, cannot be forced to express such orientation (Article 21). Provisions related to non-discrimination of children particularly pertain to their health status "It shall be prohibited to discriminate against a child, i.e. a juvenile, according to their health status..." (Article 22, paragraph 2).

Article 27 of the Anti-Discrimination Law strictly prohibits discrimination against a person or group of persons with respect to their health status, defining these as special forms of discrimination. Such discrimination is deemed to be present if a person or a group of persons are deprived of the right to receive medical services on account of their personal characteristics, when the provision of medical services is conditioned by requirements which have no medical justification, when the performance of a diagnostic procedure is refused, when information on the current health status or performed or planned therapeutic and rehabilitation procedures are withheld or if there has been disturbing, insulting or derogatory treatment during a stay in a medical institution. Although HIV is not explicitly mentioned, this formulation could provide sufficient legal grounds for prosecuting cases of discrimination against persons living with HIV, but it cannot provide protection for those who are discriminated against on account of their connection with an HIV positive person, even if they are not a member of the HIV positive person's family, e.g. partners, friends, NGO activists, etc.

The Law stipulates two methods of protection if anticipated rights have been violated; either by filing a suit before the court, in which case urgent procedure is applied in compliance with the procedural rules and this Law, or by complaining to the Administrator for Protection of Equality. Selection of the Administrator is entrusted to the National Assembly, but enforcement of these provisions has been postponed until 1st January 2010, so that we have to wait and see what their implementation will look like.

The Law on Non-Discrimination against People with Disabilities has been in force in Serbia since 2006, and it prohibits both general and special cases of discrimination e.g. in proceedings before bodies of state administration, in relation to associations, provision of services or use of facilities and areas, use of medical services, in upbringing and education, etc. In terms of this Law, people with disabilities are people with inborn or acquired physical, sensory, intellectual or emotional disabilities, who due to social or

other obstacles have no or limited possibilities to get involved into social activities at the same level as others do. We may agree that HIV infection itself would not present this type of disability, but the question still remains whether acquired immune deficiency syndrome (AIDS) could be classified as such a disability, thus enabling people with AIDS to avail themselves of the protection provided by this Law. The answer to this question may be obtained only from court practice, taking into account the absence of regulations which specifically regulate HIV/AIDS. There is no doubt that this Law may be applied in cases of HIV positive people who are also disabled, no matter whether their handicap was caused by HIV/AIDS.

Almost all of the international treaties, and most national legislation, present prohibited forms and bases of discrimination in the form of a list of examples. In the case of HIV, for example, the prohibition of discrimination is based on the concluding words of these provisions, which specify that this is only a list of examples, and that differentiation between individuals on the basis of any other characteristics, that are not a fault of their own, is also prohibited. Therefore, if one cannot be held responsible or discriminated against on account of race, skin colour or status, which clearly do not result from one's own choices, then the HIV infected person cannot be held responsible for the infection. Unfortunately, this still needs to be emphasized in those communities in which infected persons are seen as "guilty" for their own infection, which is often the case with diseases that are transmitted by sexual intercourse. This type of reasoning is deeply rooted in religious circles in which sexual intercourse itself is often regarded as something "sinful", not to mention belonging to any of the groups with high HIV risk, such as homosexuals and prostitutes. Of course, correct reading of the provisions on discrimination should follow the opinion of the UN Human Rights Commission, according to which these provisions should be interpreted in a way that will include health status related issues, including HIV/AIDS status.²⁶

From a legal point of view, no one is guilty for their illness.

Affirmative action or positive discrimination measures can also be applied to improve the social status of vulnerable groups. Granting certain benefits (e.g. for employment) would allow persons living with HIV to play a more active role and thus contribute to improvement of their social status. These measures are not deemed discriminatory, and they are already being applied in the case of persons with disabilities, in the form of benefits offered to employers who hire persons with

26 Resolution of the UN Human Rights Commission, No. 1996/44

disabilities, so a similar model could be used in this case as well.²⁷

In order to provide affirmation to HIV positive people and their higher inclusion into society, it is necessary to introduce certain measures of positive discrimination (affirmative action) in favour of people infected with HIV.

7.2. The “VAM” Case

So far, the courts in Serbia have not had much opportunity to make decisions in discrimination cases. There is one characteristic and very important case, however, the case of V.A.M., that was tried before the District Court in Belgrade, after a decision passed by the European Court of Human Rights.²⁸

The applicant got married in 1994 and in 1995 gave birth to a daughter. Marital problems started when her husband found out that V.A.M. was HIV positive (1998), and he finally left the home taking the child with him and denying the applicant the right to establish contact with her daughter. After several unsuccessful attempts to see her child, in February 1999 V.A.M. filed a suit for divorce with the Fourth Municipal Court in Belgrade, seeking sole custody and maintenance of the child. She also requested interim relief, granting her temporary custody or, alternatively, regular weekly meetings with her daughter until conclusion of the proceedings.

Due to unreasonable delays (the applicant had not seen her daughter for seven years by that time) and the inefficiency of the courts, the applicant finally addressed the European Court of Human Rights in 2005. In her application the applicant claimed violation of provisions of Article 6, paragraph 1, of the European Convention for the Protection of Human Rights (the right to a hearing within a reasonable time) because of the length of the civil procedure and the bias demonstrated by the presiding judge; violation of provisions of Article 8 of the Convention (the right to respect one’s private and family life), stating that the duration of the procedure had deprived her of the right to see her child over a period of eight years or exercise any of her parental rights; violation of provisions of Article 13 of the Convention (the right to an effective legal remedy) on account of the absence of any domestic legal remedy that could accelerate the civil proceedings, and violation of Article 14 of the Convention (prohibition of discrimination), because her rights guaranteed by the provisions of Articles 6 and 8 were violated solely on

²⁷ Law on Professional Rehabilitation and Employment of People with Disabilities, *Official Gazette* of RS, 36/09

²⁸ Case *V.A.M. versus Serbia*, Application No. 39177/05, European Court of Human Rights, 13 March 2007.

account of her being HIV positive.

In the decision passed on 13 March 2007, the court found that there had been violations of the provisions of Article 6, paragraph 1, and Article 8 of the Convention, on account of the extended length of the civil proceedings, violation of Article 8 of the Convention, on account of failure to enforce the interim relief measure regarding the applicant's access to the child, and violation of Article 13 of the Convention, for which reasons the Republic of Serbia is to pay to the Applicant 15,000 EUR in non-pecuniary damages and 4,350 EUR for costs. The same court decision ordered realization of two individual measures: securing of contact between mother and child and swift completion of the first instance procedure. The Republic of Serbia made the payment to the applicant, and the District Court in Belgrade found that the Republic of Serbia was responsible for discrimination against the applicant on account of her being HIV positive. This court decision went even further than the decision passed by the European Court of Human Rights, because the European Court did not pass a decision on violation of Article 14 of the Convention (prohibition of discrimination) because the evidence was insufficient for such a decision.

8

Participation in Social Life

8. Participation in Social Life

8.1. Right to Work and Labour Relations

The International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights stipulate that everyone is entitled to work, free choice of employment, fair and satisfying working conditions and protection in case of unemployment. The right to work means that everyone should be able to take employment without fulfilling any special pre-requisites, apart from the proper qualifications required for the job in question.

This right is violated if the prospective employees are required to take an HIV/AIDS test and may be deprived of the right to work or lose their work benefits if they test positive. Each state is obliged to ensure that persons living with HIV are entitled to work as long as they are able to perform their work duties.

Also, current regulations regarding the sick stipulate that HIV positive persons must be allowed to retain their jobs. Once they have lost the ability to work, the HIV positive persons shall be entitled to participate in the programs for the sick and the handicapped. Prospective employees or current employees should not be required to disclose their HIV status to the employer or any other persons in the course of exercising their rights regarding the employee's remuneration, pension insurance benefits or medical insurance schemes.

The obligation of the state to prevent any kind of discrimination at work, in particular discrimination related to HIV status, should also include the private sector.

As a part of working benefits, all employees are entitled to safe and healthy working conditions in the work place. "In the vast majority of occupations and occupational settings, work does not involve a risk of acquiring or transmitting HIV between workers, from worker to client, or from client to worker"²⁹. However, if any particular line of work involves a risk of transmission of disease at work, e.g. in the healthcare sector, the state should take special measures to minimize this risk. More specifically, employees in the healthcare sector must be properly trained in the area of general precautions that should prevent transmission of infection, and they have to be properly equipped to carry out certain procedures.

²⁹ *Consultation on AIDS and the Workplace* (World Health Organization, in association with the International Labour Organization), Geneva, 1988, sect. II, "Introduction"

Clear provisions are needed to prevent prospective employees having to disclose their HIV status to the employer or third parties in the course of exercising their rights regarding remuneration, pension insurance benefits or mandatory insurance schemes.

8.2. Loss of Working Ability

The HIV infection itself does not necessarily affect the ability of the infected, person to work as defined in the Labour Law. The law prohibits any form of discrimination in connection with employment and work, persons living with HIV are entitled to the same rights as other employees regarding salary, safety and public health provisions in force in the work place, healthcare services, protection of personal integrity and other rights in case of any medical problems, reduced or lost working ability or old age, as well as financial aid in case of temporary unemployment. They are also entitled to other forms of protection, in accordance with the law. The right to receive special protection is granted to all persons less than 18 years of age and employees with disabilities.

An employee is obliged to notify the employer, before signing the employment contract, about his/her medical status or other circumstances that might affect his/her performance at work or might endanger the life or health of other persons. The specific circumstances under which HIV positive status might endanger the health of others and the exact fields of work in which performance may be affected by HIV positive status are still under discussion in many global forums, even within court authorities. In principle, HIV status does not pose a direct threat in daily social interaction, however, it is necessary to take into account all relevant facts in order to regulate this issue in a clear manner, taking into consideration the interests of public health and human rights.

It is necessary that people with AIDS who are no longer able to work obtain support just like others who are incapable of working due to illness.

It is necessary to ensure support from the relevant ministries, the republic and local budgets, for associations of people living with HIV, in the same way such support is provided to other patients' associations and societies.

8.3. Education

International treaties and the Universal Declaration of Human Rights stipulate that everyone is entitled to receive education, that education should be free, at least

at the level of elementary and lower secondary schools, and that it should aim for full development of the human personality and respect for human rights and fundamental freedoms. Education should advance understanding, tolerance and friendship.

Primary education in Serbia is free and accessible to everyone. The Law on the Fundamentals of the Education System, among other things, guarantees respect and protection against discrimination for all students.

This particular right is based on three general assumptions that bear relevance for HIV/AIDS related issues. Firstly, children and adults are entitled to receive education about HIV, especially in the areas of prevention and treatment. Access to education about HIV is of crucial importance for effective protection of life through efficient prevention and treatment programmes. The state is obliged to secure inclusion of relevant knowledge about HIV in curricular and extracurricular educational activities. The education of children in this area and provision of related information should not be regarded as encouragement for children to engage in unconventional sexual activities at an early age; on the contrary, relevant studies show that this type of education actually results in postponement of the beginning of sexual activity among the young.

Secondly, the state should take steps to ensure that children and adults living with HIV are not deprived of their right to education, including access to schools, universities, school grants or participation in international exchange programmes, on account of their being HIV positive. From the medical point of view there is no rational justification for any measures of this type, because there is no risk of accidental communication of HIV infection in educational institutions.

Thirdly, the state should use the education system to promote respect, tolerance and non-discriminatory behaviour in contacts with persons living with HIV.

It is necessary to provide undisturbed access to education for children living with HIV, in terms of prohibition of any type of isolation or special treatment, but also in terms of creation of a tolerant environment with full care protection of all children's health.

It is also necessary to ensure that educational programmes and their implementation provide a better introduction to the HIV/AIDS infection and its nature in order to dispel prejudices and facilitate the position of patients and children in particular.

8.4. Marriage and Family

The Family Law of the Republic of Serbia contains no provisions that introduce limitations to the family and conjugal relations of persons living with HIV, or sexually transmitted diseases in general, which was not the case with the previous version of the same law. There is only a possibility of abrogation (relative nullification) of marriage, if one of the partners was deceived about important characteristics of their spouse. These are characteristics that, if disclosed, might have resulted in a decision of one of the spouses not to enter into marriage.

9

HIV, Children and Their Rights

9. HIV, Children and Their Rights

9.1. Rights of Children

In the Dublin Declaration to Fight HIV/AIDS from 2004³⁰ it is emphasized that the young, in spite of being a vulnerable group, present the key factor and the driving force in the fight against HIV/AIDS at national and regional level.

The Political Declaration on HIV/AIDS from 2006³¹ voiced concerns regarding the fight against HIV/AIDS among the younger population, because it has been found that the young lack information and education in this area and that one half of the newly infected are young people under 25 years of age.

The rights of children are protected by all international treaties on human rights, especially the Convention on the Rights of the Child. According to the definition contained in Article 1 of the Convention, a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier. In addition to the rights guaranteed to adults (the right to life, non-discrimination, the right to privacy), children have some special rights under this Convention. Many of these rights are relevant to HIV: Article 3, which regulates that the best interests of the child shall be the primary concern, Article 12, which protects the right of the child to express and have his or her opinion heard and taken into consideration, Article 16, which protects the right to privacy, and Article 24, which grants to the child the right to receive medical services at the highest level of medical standards and capacities for treatment and medical rehabilitation.

In compliance with Health Care Law, every child under 18 years of age is entitled to receive the highest possible level of health standards and healthcare protection (Article 25).

9.2. Testing of Juveniles for HIV

The issue of a minor's consent for HIV screening should be observed with the view to rights guaranteed by the Convention, first of all, in Article 14, paragraph 1, which stipulates that signatories shall be obliged to allow children who are able to form their own opinions and beliefs freely to express opinions on all issues that concern

³⁰ Dublin Declaration on Partnership to fight HIV/AIDS in Europe and Central Asia, 24 February 2004

³¹ Political Declaration on HIV/AIDS, Resolution of the UN General Assembly UN No. 60/262 dated 15 June 2006

them, in accordance with the evolving capacities and maturity of the child.

The Convention guarantees the right of the child to take part in development and implementation of the HIV programmes for the children, namely, through non-discrimination and the right to privacy of the child living with HIV, as well as the right of the child to express opinions freely and have these opinions taken into consideration. The Convention recommendations require some adjustments to regulations and practices in the area which covers children and HIV issues.

When considering counselling in relation to HIV, there is no doubt that this is recommended, regardless of the age of the child or whether the child is counselled in the presence of his/her parents or not. However, when it is about screening of juveniles for HIV, a number of dilemmas arise. It is necessary to assess each individual case in terms of the importance of screening and whether such screening is in the child's best interest. According to the Health Care Law, a 15-year-old child who is capable for making judgements may give consent on his/her own for a proposed medical procedure. A medical procedure may be undertaken upon juveniles and individuals deprived of working capability with the informed consent from their legal guardian (parent, foster parent, guardian). In any case, it is necessary that the juvenile (or person deprived of working ability) is involved in the decision-making process about acceptance of the proposed medical measure, in accordance with the evolving capacities and maturity of the child.³²

It is necessary to apply the Convention on the Rights of the Child on the observation and respect of a child's decision when medical interventions are in question (including HIV testing) with juveniles older than 14.

32 Health Care Law, Article 35

10

Social Protection

10. Social Protection

The International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights stipulate that everyone, as a member of a society, is entitled to social insurance and the right to exercise the economic, social and cultural rights, needed to ensure their own dignity and free development of personality with the help of the state and through international cooperation, in accordance with the internal organization and resources of each state. Serbia has ratified the revised European Social Charter, as the main document adopted by the Council of Europe in the area of economic and social rights. The European Social Charter stipulates social and economic rights which pertain to the existential matters of citizens' everyday life, such as residence, migrations, labour and labour relations, health and education, social protection and all other human rights in a legal and non-discriminatory manner.

The area of social welfare is regulated in the Republic of Serbia by the Law on Social Protection and the Social Security of Citizens. With regard to procedures, these rights are exercised on the basis of the Law on General Administrative Procedure, except for disputed issues that may be regulated by other positive regulations. In order to exercise the rights provided by the social security system, interested parties are instructed to contact the centre for social work in the territory in which they reside. Social services are provided to those citizens who are unable to work and have no means of support, and those who are unable to secure sufficient means of support on their own. AIDS patients and persons infected with HIV may apply for social services, both on account of the nature of their health and on account of social prejudices that may diminish their chances of finding paid employment. However, HIV positive persons find it difficult to exercise their social rights in practice, even though their need for the protection of those rights is greater. The problems occur in particular when it comes to housing in social protection facilities, which is accessible only to those certified free of contagious disease. This does not take into account the specific nature of HIV transmission and the greater possibilities for social contact for HIV positive people.

There are no special social benefits reserved strictly for persons living with HIV.

It is necessary to ensure undisturbed access to all medical and social services for people living with HIV, and affirmative programmes of social and psychological support.

11

**Legal Remedies
for Violation of Human Rights**

11. Legal Remedies for Violation of Human Rights

11.1. Constitutional Appeal

In addition to the legal remedies that are available through regular court procedure, depending on the case and type of violation in question, which also apply to persons infected with HIV who have been deprived of certain rights or have sustained injury, the Constitution of the Republic of Serbia from 2006 reinstated and reinforced the institute of constitutional appeal, inefficient in the past. Constitutional appeal is an instrument that may be used by citizens to address the Constitutional Court directly, in cases of violation or deprivation of human rights by individuals or government authorities, provided that all other legal remedies have been exhausted or that current legislation does not offer protection for such cases, or if the regular legal remedies have not yet been exhausted, but the appealing party has been deprived of the right to a hearing within a reasonable period of time. However, there is a danger that this particular remedy will remain inefficient and insufficient in protecting human rights, because more than 1,000 constitutional appeals have been received to date, and there are only ten judges working in the Constitutional Court of Serbia.

A similar situation occurred several years ago in Croatia, when the Constitutional Court was paralysed by the huge number of such appeals. In order to tackle this problem and ensure that citizens can exercise their right to a hearing within a reasonable period of time, the Republic of Croatia passed a decision that allowed the higher courts to act in cases where the plaintiff had been deprived of the right to a hearing within a reasonable period of time. Facing a similar problem, the Republic of Serbia should probably take some urgent steps to adopt this or some other solution to limit the number of cases submitted to the ECHR³³.

Within protection of human rights in general, it is necessary to capacitate the Constitutional Court to pass decisions on constitutional appeals and in particular to strengthen its role and the role of the Supreme Court in preventing delays, i.e. extension of court procedures.

11.2. Compensation for Damages

According to the basic principles of civil law, compensation for damages or injury caused to another person in an unlawful manner is obligatory. This principle

33

See: <http://yucom.org.yu/rest.php?tip=vestgalerija&idSek=18&idSubSek=61&id=26&status=drugi>

is further elaborated in the Law on Obligations, which thoroughly regulates the grounds for indemnification and compensation for damages. Indemnification for damage sustained should, if possible, be through restitution to the original condition, but if this proves impossible, through payment.

It is possible to imagine situations, some of which exist in real life, resulting in an injury that has to do with HIV infection. This may occur if a healthy person is infected through an unlawful act, without being aware of the risks involved, for example, through sexual intercourse with an infected partner who refuses or prohibits the use of a condom. In this case, the indemnification should be provided by the party that communicated the infection, as well as the persons who allowed this to happen. The establishment of criminal responsibility does not exclude the obligation to provide indemnification, which may be ordered by the court in the course of criminal procedure or left to be settled through a civil procedure. However, the need for indemnification may also occur on account of unlawful discrimination against a person infected with HIV or other persons that have close links with such a person. Due to ignorance about transmission of the HIV infection, discrimination can affect both the infected person and persons who are not infected, but are close to the infected person. The children of families in which one or both parents have been infected with HIV are in a particularly difficult situation, even if they are not infected themselves. In such cases the parents would have the right to claim damages, not only from private entities, but also from state institutions, e.g. schools, which fall under the influence of prejudices and exclude the children of such families from regular school activities.

12

Conclusion

12. Conclusion

This description of the current status of legislation in Serbia emphasizes the fact that, methods exist, albeit mainly indirect, to protect the interests of the vulnerable. However, these have been developed for protection over a range of similar cases, and recourse can only be made to them if the courts or other authorities are aware of the human rights of PLWHIV and if they interpret existing regulations in an appropriate, i.e. benevolent manner.

Above all, attitudes towards HIV and HIV positive persons should be influenced. In order to stop the infection spreading, it is necessary to increase efforts towards prevention and to humanize the approach to people living with HIV.

The legal system in Serbia contains provisions which could be customized or changed in order to improve the legal position of people living with HIV, better protect their human rights, and combat the HIV epidemic more efficiently, in accordance with international standards.

The recommendation which obtained the support of those professionals consulted during the drafting of this document, was that the best solution would be to develop a special legal act (*lex specialis*), which would regulate most of the issues pertaining to HIV/AIDS. This recommendation was derived from the fact that there are numerous norms which indirectly address HIV/AIDS, scattered over various laws, but there are no specific provisions dealing directly with HIV. This is one of the reasons why few cases related to HIV/AIDS have reached court recently. A special law on HIV/AIDS would derogate or change the provisions already referred to in the existing legislation, and would regulate legal relations when necessary, taking into account the specific characteristics of HIV and AIDS.

Also, from the aspect of human rights, it would be far better if those rights which are most commonly violated with respect to patients with AIDS and people infected by HIV could be directly protected through special regulations. These are the rights which are generally protected through the Constitution of the Republic of Serbia and international treaties which oblige Serbia, of which the most important are the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights and the European Convention on Human Rights. Such rights include the right to life, the right to privacy, the right to dignity and reputation, prohibition of discrimination, the right to employment under conditions of equal opportunity, the right to the highest achievable stan-

dards of living, the right to health, the right to equal pay for equal work, the right to social insurance, the right to exercise parental rights, the right to education, the freedom to move and settle, the freedom to express oneself, freedom of thought and conscience and freedom of participation in social and political life. Some of these rights are so-called solidarity rights and they cannot be exercised in court. They must be guaranteed through appropriate social policy and efforts made by state authorities, so they cannot be formulated as individual rights only, but must also become obligations of state authorities.

13

Overview of Regulations

13. Overview of Regulations

13.1 Regulations of the Republic of Serbia Which May Pertain to HIV/AIDS Related Issues

- The Constitution of the Republic of Serbia, Official Gazette of RS, 83/06
- The Law on the Constitutional Court, Official Gazette of RS, 109/07
- Criminal Code, Official Gazette of RS, 85/05; 72/09
- Law on Lawsuit Proceedings, Official Gazette of RS, 125/04
- Family Law, Official Gazette of RS, 18/05
- Labor Law, Official Gazette of RS, 24/05, 61/05
- Law on the Fundamentals of the Educational System, Official Gazette of RS, 64/03, 58/04, 62/04, 72/09
- Health Care Law, Official Gazette of RS, 107/05
- Medical Insurance Law, Official Gazette of RS, 107/05 and 109/05-correction
- Law on Protection of Population Against Communicable Diseases, Official Gazette of RS, 125/04
- Anti-Discrimination Law, Official Gazette of RS, 22/09
- Law on Prevention of Discrimination of People with Disabilities, Official Gazette of RS, 33/06
- Public Health Law, Official Gazette of RS, 72/09
- Law on Transfusiology, Official Gazette of RS, 72/09
- Law on Professional Rehabilitation and Employment of People with Disabilities, Official Gazette of RS, 36/09
- Law on Ratification of Revised European Social Charter, Official Gazette of RS, 42/09

13.2. Most Relevant International Treaties and Other International Documents Which May Pertain to HIV/AIDS Related Issues

13.2.1. International Treaties which Obligate Serbia

International treaties are agreements entered into between individual states which thereby undertake to meet and observe their provisions. Serbia is obligated by the following treaties, either as the legal successor of SFRY, FRY and Serbia and Montenegro, or as one of the state parties. According to the Constitution of the Republic of Serbia, international treaties have priority over domestic legislation:

- International Covenant on Civil and Political Rights, Official Gazette of SFRY, (International Agreements), 7/71.
- International Covenant on Economic, Social and Cultural Rights, Official Gazette of SFRY, 7/71.
- Convention on the Rights of the Child, Official Gazette of SFRY, (International Agreements), 15/90
- European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette of SCG (International Agreements), 9/03
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Official Gazette of FRY, (International Agreements), 1/92 and Official Gazette of SCG, 11/05.
- Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Official Gazette of RS, 97/08

13.2.2. Decisions of international organizations

The following documents are not international treaties, but decisions passed by the international organizations of which Serbia is a member. These decisions are obligatory for member states just as any other recommendations issued by international organizations. The Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, occupies a special place among these documents. This is the document that, for the first time, described fundamental human rights at an international level, providing the legal grounds for most important covenants on human rights. It has inspired the provisions on human rights that have been included in the constitutions of many states, including that of the Republic of Serbia. Provisions of the Universal Declaration of Human Rights have become an integral part of international customary law with the same relevance as international treaties.

- Universal Declaration of Human Rights, Resolution of the UN General Assembly No. 217 (III) dated 10 December 1948
- United Nations Millennium Declaration, Resolution of the UN General Assembly No. 55/2 dated 8 September 2000
- Declaration of Commitment on HIV/AIDS, Resolution of the UN General Assembly dated 27 June 2001
- Dublin Declaration on Partnership to Fight HIV/AIDS, Resolution of the UN General Assembly dated 24 February 2004
- Political Declaration on HIV/AIDS, Resolution of the UN General Assembly dated 15 June 2006
- UNAIDS/WHO recommendations regarding HIV testing
- International Recommendations on HIV/AIDS and human rights, consolidated version of 2006.

