

MEXICO - Discharge of HIV-Positive Troops Ruled Unconstitutional

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IPS - Mexico's Supreme Court ruled that it is unconstitutional for the military to expel HIV-positive members, a practice that is habitually followed by the armed forces.

The verdict handed down on Tuesday represented a triumph for the 11 HIV-positive members of the military who filed an appeal before the Supreme Court, and for human rights organisations and government bodies that argue that discharging soldiers living with HIV is an act of discrimination based on prejudice and ignorance.

Some 300 members of the military have been kicked out in the past 13 years after testing positive for HIV, the AIDS virus.

There are currently around 40,000 documented cases of HIV/AIDS in this country of 104 million, although according to official estimates, the real number is three to four times higher.

The Supreme Court ruling opens the door for Congress, which in 2003 unanimously approved the Social Security Institute Law for the Armed Forces, to repeal the article in the law that endorses the expulsion of HIV-positive members of the military.

Under the law, military personnel who have been rendered "useless" or disabled by contagion or accidents that occur while they are off-duty must be discharged, with the subsequent loss of their right to military medical coverage and a retirement pension.

Only members who have been in the armed forces for at least 20 years are exempt from the clause.

The Supreme Court verdict does not force the military to immediately reinstate the men who filed the appeal. They will first have to undergo medical exams to assess whether or not they are fit for service.

Two of the appellants have already died, but their families will now have access to the military benefits provided for by law, since the Supreme Court ruled that HIV-positive members of the military are to be considered active duty personnel.

Eight of the 11 Supreme Court magistrates considered the article that compels the military to expel HIV-positive members a violation of the constitution and specific national laws against discrimination.

The ruling also states that military regulations run counter to scientific evidence showing that a person living with HIV can engage in any productive activity without posing a risk to the community.

The three dissenting magistrates argued that the issue called for more thorough analysis, and that it was not clear that the law was unconstitutional.

In the first sessions in which they debated the case last week, Judge Mariano Azuela said that kicking out HIV-positive members of the military was not an act of discrimination, but was a measure to "protect those who are healthy," while Judge Genaro Góngora asserted that infected members must not be allowed to endanger their fellow troops.

However, these arguments were refuted by the other magistrates, who considered them outdated. They pointed out that people can live with HIV for a long time without requiring treatment, and that once they do begin to take anti-retroviral drugs, they can continue to live normal lives for years.

The televised Supreme Court debate, which at times was bogged down in legal formalisms, drew criticism from many observers. Human rights activists and academics said it was shocking that such uninformed positions were expressed by members of the country's highest court.

"It is a matter for concern that some magistrates expressed positions that are practically medieval. Their ideas give the impression that the justice system is in the hands of ignorants," constitutional lawyer Diego Pedroza told IPS.

In the view of Sergio Aguayo, a human rights activist and a columnist who writes for the daily Reforma, the live broadcast of the debates over the state-run Canal Judicial TV channel was a valuable exercise in democracy, because the magistrates received a wave of criticism that they were forced to take into consideration.

Azuela acknowledged to his fellow judges that the flood of reproaches triggered by his initial statements led him to consult scientific experts and study the issue outside of strictly juridical terms.

A few days prior to Tuesday's ruling, Jorge Saavedra, the head of the National Centre for Prevention and Control of HIV/AIDS, a public agency, urged the Court to act on the basis of the available scientific evidence.

"Out of ignorance, prejudice or lack of information, some judges invoke myths from last century" to refuse to support members of the armed forces who have been expelled for testing positive for HIV, said Saavedra.

"The probability of a person in the services infecting another through blood is so tiny, so close to zero, so far from reality, that it should not even be referred to as a probability," he argued.

"In the last 15 years, not a single surgeon has been infected by HIV through blood, even though surgeons come into contact with blood several times a day," he pointed out.

In a statement by Undersecretary of Health Mauricio Hernández, the Health Ministry said the Court would have committed an injustice if it had failed to find in favour of the appellants.

With respect to the appeal filed by the 11 HIV-positive members of the military, the governmental National Council for the Prevention of Discrimination had called on the Court "to guarantee the rights of the members of the armed forces to work, health, social security and a decent life, free of stigma."

The Council reminded the magistrates that the Joint United Nations Programme on HIV/AIDS (UNAIDS) states that those living with HIV pose no risk to the community, and can perform any job for which they are qualified.

In 2004, an administrative court in Mexico found the article in question to be discriminatory, in the case of a sergeant. But that ruling was not sufficient to strike down the clause.

The armed forces cannot merely apply their own internal regulations in such cases, because the constitution, six international treaties and several federal laws guarantee non-discrimination and the right of people living with HIV to remain in their jobs, the administrative court ruled at the time.

The Social Security Institute Law for the Armed Forces clause states that HIV infection causes permanent disability, which makes it grounds for dismissal along with illnesses like tuberculosis or diabetes.

UNAIDS has noted that the prevalence of sexually transmitted diseases is two to five times higher among military personnel than among the civilian population, because the circumstances of military service often

lead to high-risk sexual behaviour.

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