

Human Rights in Patient Care

KAZAKHSTAN



Human Rights in Patient Care:

A Practitioner Guide

KAZAKHSTAN

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Human Rights in Patient Care: A Practitioner Guide is a result of the joint project of the Law and Health Initiative (LAHI) of the Open Society Public Health Program, and the Open Society Foundations' (OSF) Human Rights and Governance Grants Program (HRGGP), and the Soros Foundation-Kazakhstan (SFK). Armenia, Georgia, Kyrgyzstan, Macedonia, Moldova, Russia and Ukraine also took part in implementation of the project. The important norms of the international and regional law concerning standards of human rights in the rendering of medical care are included in the Practitioner Guide. Rights and duties of patients and medical workers are revealed through the national constitutional provisions, laws and bylaws. Additional supporting material is presented by samples of statements of claims and complaints and the Glossary of terms related to Human Rights in Patient Care, containing International and Country-Specific terminology. Human Rights in Patient Care: A Practitioner Guide targets lawyers, medical workers, health care managers, and patient advocates. We hope that this work will be interesting also to a wide range of the readers not indifferent to preservation of the health.

References are to regulatory legal acts and legislation in effect on August 8, 2012.

The contents of this publication reflect the point of view of authors which does not necessarily coincide with the point of view of Soros Foundation-Kazakhstan (SFK) and Open Society Foundations (OSF).

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PREFACE

The right to health has long been treated as a “second generation right,” which implies that it is not enforceable at the national level, resulting in a lack of attention and investment in its realization. However, this perception has significantly changed as countries increasingly incorporate the right to health and its key elements as fundamental and enforceable rights in their constitutions and embody those rights in their domestic laws. Significant decisions by domestic courts, particularly in Asia, Africa, and Latin America, have further contributed to the realization of the right to health domestically and to the establishment of jurisprudence in this area.

Although these and other positive developments toward ensuring the highest attainable standard of physical and mental health represent considerable progress, the right to health for all without discrimination is not fully realized, because, for many of the most marginalized and vulnerable groups, the highest attainable standard of health remains far from reach. In fact, for many, interaction with health care settings and providers involves discrimination, abuse, and violations of their basic rights. As I explored in my report to the UN General Assembly on informed consent and the right to health, violations to the right to privacy and to bodily integrity occur in a wide range of settings. Patients and doctors both require support to prevent, identify, and seek redress for violations of human rights in health care settings, particularly in those cases in which power imbalances—created by reposing trust and by unequal levels of knowledge and experience inherent in the doctor-patient relationship—are further exacerbated by vulnerability due to class, gender, ethnicity, and other socioeconomic factors.

Although there are a large number of publications on the principles of human rights, very little has been available in the area of the application of human rights principles in actual health care settings. In this context, the present guide fills a long-felt void. The specific settings detailed in this guide are Eastern European countries, but the guide is useful beyond this context in the international settings. I hope it will encourage the establishment of protective mechanisms and legislative action relating to violations within health care settings. Not only will it help to support health care providers, legal practitioners, and health activists to translate human rights norms into practice, it will also ultimately help communities to raise awareness, mobilize, and claim the rights they are entitled to.

The authors have done a huge service in furthering the right to health. They deserve full credit for undertaking this arduous task. The Open Society Foundations also needs to be thanked for funding and publishing this very important work. I have no doubt that this practitioner’s guide will generate a greater appreciation for the role of human rights in the delivery of quality health care in patient care settings and will also prove to be an invaluable resource for those working to realize the right to health.

Anand Grover

United Nations Special Rapporteur on the Right to Health

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This guide is the product of the cooperative effort of a number of dedicated people and organizations. The idea grew out of genuine concern and the sincere belief of many of these individuals that, considering the dependent position of patients in relation to their health care providers, the promotion of human rights norms in the realm of patient care will secure the human dignity of both patients and health care professionals alike.

Organizations supporting this project include the Law and Health Initiative (LAHI) of the Open Society Public Health Program, and the Open Society Foundations' (OSF) Human Rights and Governance Grants Program (HRGGP), Soros Foundation-Kazakhstan (SFK), Public Fund "Amansauylk".

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Finally, this guide would not exist if it were not for the enthusiasm and personal dedication paid to this project by **Judith Overall**, OSF Consultant, M.Ed, MSHA, JD.

¹ This chapter builds on material in *Health and Human Rights: A Resource Guide*, published by Open Society Institute and Equitas and edited by J. Cohen, T. Ezer, PMcAdams, and M. Miloff. An HTML version of this resource guide is available at: <http://equalpartners.info/>. The appendix to the international and regional procedures chapter is excerpted, with permission, from the Human Rights Centre, University of Essex, publication *Reported Killing as Human Rights Violations*, by Kate Thompson and Camille Giffard, pages 127–130.

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1.1 INTRODUCTION

1.2 OVERVIEW OF THE GUIDE

1.3 TABLE OF ABBREVIATIONS

1.4 TABLE OF RATIFICATIONS

1

Introduction

1.1 Introduction

This Guide is part of a series published in cooperation with the Law and Health Initiative of the Open Society Foundation (OSF) Public Health Program, OSF's Human Rights and Governance Grants Program, OSF's Russia Project, and the Soros Foundations of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, and Ukraine. Designed as a practical “how to” manual for lawyers, it aims to provide an understanding of how to use legal tools to protect basic rights in the delivery of health services. The guide systematically reviews the diverse constitutional provisions, statutes, regulations, bylaws, and orders applicable to patients and health care providers and categorizes them by right or responsibility. It additionally highlights examples and actual cases argued by lawyers.

The aim of the guide is to strengthen awareness of existing legal tools that can be used to remedy abuses in patient care. If adequately implemented, current laws have the potential to address pervasive violations of rights to informed consent, confidentiality, privacy, and nondiscrimination. As this effect can be accomplished through both formal and informal mechanisms, this guide covers litigation and alternative forums for resolving claims, such as enlisting ombudspersons and ethics review committees. It is hoped that lawyers and other professionals will find this book a useful reference in a post-Soviet legal landscape, which is often in rapid flux.

This guide addresses the concept of “human rights in patient care,” which brings together the rights of patients and health care providers. The concept of human rights in patient care refers to the application of general human rights principles to all stakeholders in the delivery of health care. These general human rights principles can be found in international and regional treaties, such as the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the European Convention on the Protection of Human Rights and Fundamental Freedoms; and the European Social Charter. These rights are universal and can be applied in the context of health care delivery just as they can be in any other context.

1.2 Overview of the Guide

Chapters 2 and 3 of the guide respectively cover the international and regional laws governing human rights in patient care. They examine relevant “hard” and “soft” laws and provide examples of cases and interpretations of treaty provisions. These two chapters are identically organized around the established human rights applicable to both patients and providers. These are the rights to liberty and security of the person; privacy; information; bodily integrity; life; highest attainable standard of health; freedom from torture, cruel, inhuman, and degrading treatment; participation in public policy; nondiscrimination and equality for patients; decent work conditions; freedom of association; and due process for providers. Chapter 4 provides information on the international and regional procedures for protecting these rights.

Chapters 5, 6, 7, and 8 are country specific. Chapter 5 clarifies the legal status of international and regional treaties ratified, signed, or adopted by Kazakhstan; explains the country’s use of precedent; and includes a brief description of the legal and health systems. Chapter 6 deals with patient rights and responsibilities. The patient rights section is organized according to the rights in the European Charter of Patients’ Rights, with the addition of any country-specific rights not specifically covered by the charter. Drawn up in 2002 by the Active Citizenship Network—a European network of civic, consumer, and patient organizations—the European Charter of Patients’ Rights is not legally binding, but it is generally regarded as the clearest and most comprehensive statement of patient rights. The charter attempts to translate regional documents on health and human rights into 14 concrete provisions for patients: rights to preventive measures, access, information, informed consent, free choice, privacy and confidentiality, respect of patients’ time, observance of quality standards, safety, innovation, avoidance

of unnecessary suffering and pain, personalized treatment, the filing of complaints, and compensation. These rights have been used as a reference point to monitor and evaluate health care systems across Europe and as a model for national laws. Chapter 6 uses the rights enumerated in the European Charter of Patients' Rights as an organizing principle, but along with each right, the applicable binding provisions under the national laws are presented and analyzed. These rights are then cross-referenced with the more general formulation of rights in the international and regional chapters. Chapter 7 focuses on provider rights and responsibilities, including the right to work in decent conditions, the right to freedom of association, the right to due process, and other relevant country-specific rights.

Chapter 8 covers the national mechanisms for enforcement of both patient and provider rights and responsibilities. These mechanisms include administrative, civil, and criminal procedures and alternative mechanisms, such as the Office of the Public Prosecutor, ombudspersons, ministries of internal affairs, ethics review committees, inspectorates of health facilities, and mediation. The chapter additionally contains an annex of sample forms and documents for lawyers to file.

The final section is a glossary of terms that are relevant to the field of human rights in patient care. Some versions of the guide also include a section of the glossary with country-specific terminology. The glossary will enable greater accessibility of law, health, and human rights material.

Uses of the Guide

The guide has been designed as a resource for both litigation and training. It may be particularly useful in clinical legal-education programs. Although designed for lawyers, the guide may additionally be of interest to medical professionals, public health managers, Ministries of Health and Justice personnel, patient advocacy groups, and patients who desire a firmer understanding of the legal basis for patient and provider rights and responsibilities and the available mechanisms for enforcement.

Companion Websites

The field of human rights in patient care is constantly changing and evolving, necessitating the need for regular updates to the guide. Electronic versions of the guides will be periodically updated at www.health-rights.org. The Kazakhstan country website is www.health-rights.kz. This international home page links to country websites, which include additional resources gathered by the country working groups that prepared each guide.

These resources include relevant laws and regulations, case law, tools and sample forms, and practical tips for lawyers. The websites also provide a way to connect lawyers, health providers, and patients concerned about human rights in health care. Each of the websites provides a mechanism for providing feedback on the guides.

Note from the Authors

The material in this guide represents the views of an interdisciplinary working group composed of legal and medical experts. The guide does not carry judicial or legislative authority and it does not substitute for legal advice from a qualified lawyer.

Rather, it represents the authors' attempt to capture the current state of the law and legal practice in the field of human rights in patient care in Kazakhstan. The authors welcome any comments concerning errors or omissions, suggested additions to the guide, and questions about how the law might apply to a particular factual scenario.

As this guide illustrates, in Kazakhstan, the field of human rights in patient care is still new and evolving. Many of the statutory provisions cited in the guide have not been authoritatively interpreted by courts, and those that have still remain open to additional application and interpretation. There remain huge gaps in understanding how, in practice, to apply human rights in patient care. This guide is, therefore, a starting point for legal inquiry, not a final answer. It is hoped that this guide will attract new professionals to the field of human rights in patient care, and that future editions will be much richer in their elaboration of legal protections.

1.3 Table of Abbreviations

ABBREVIATION	TITLE
AC	Advisory Committee
CAT	Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment
CE	ILO Committee of Experts
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
CHR	Commission on Human Rights
CMW	International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families
COE	Council of Europe
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	UN Economic and Social Council
ECSR	European Committee of Social Rights
EPHA	European Public Health Alliance
ESC	European Social Charter
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
HRC	Human Rights Committee
IAPO	International Alliance of Patients' Organizations
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICN	International Council of Nurses
ILO	International Labour Organization
OHCHR	Office of the High Commissioner for Human Rights
SR	Special Rapporteur on the Right to Health
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review
WHO	World Health Organization
WMA	World Medical Association

1.4 Table of Ratifications

DOCUMENTS	Date of Accession	Date of Signature	Date of Ratification	Entry into Force	Applicable In-country Legislation	Reservation Entered
Convention on the Rights of the Child	November 20, 1989		June 8, 1994			
International Covenant on Economic, Social and Cultural Rights	December 16, 1966		November 21, 2005,	April 24, 2006		
International Covenant on Civil and Political Rights	December 16, 1966		November 28, 2005	April 24, 2006		
WHO Framework Convention on Tobacco Control	May 21, 2003		November 25, 2006			
Convention on Psychotropic Substances	February 21, 1971/ June 29, 1998					
UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	December 20, 1988/ June, 29, 1998					
Convention on the Rights of Persons with Disabilities	November 18, 2005					
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	December 10, 1984/ June 29, 1998					
Single Convention on Narcotic Drugs of 1961	March 30, 1961/ July 01, 1998					
The Convention against convention to revise the Convention (Revised), 1952 Maternity Protection	June 15, 2000		February 14, 2012			

2.1 INTRODUCTION

2.2 KEY SOURCES

2.3 PATIENTS' RIGHTS

Right to liberty and security of the person

Right to privacy

Right to information

Right to bodily integrity

Right to life

Right to the highest attainable standard of health

Right to freedom from torture and cruel, inhuman, and degrading treatment

Right to participate in public policy

Right to nondiscrimination and equality

2.4 PROVIDERS' RIGHTS

Right to work in decent conditions

Right to freedom of association

Right to due process and related rights

2

International Framework for Human Rights in Patient Care

2.1 Introduction

This chapter presents the main standards that safeguard human rights in patient care internationally and examines how United Nations (UN) treaty-monitoring bodies have interpreted these standards. The chapter is divided into three parts. The first part describes the key international sources governing human rights in patient care. The second examines patients' rights, and the third focuses on the rights of providers. Each part includes subsections that discuss the standards and relevant interpretations connected to a particular right (e.g., the Right to Liberty and Security of the Person) and also provide some examples of potential violations. The standards addressed include binding treaties, such as the International Covenant on Civil and Political Rights (ICCPR), and nonbinding policies developed by the UN and nongovernmental organizations (NGOs), such as the World Medical Association's Declaration on Patients' Rights.

2.2 Key Sources

UNITED NATIONS

Universal Declaration of Human Rights 1948 (UDHR)

The UDHR is not a treaty but it is highly authoritative. It has shaped the evolution of modern human rights law, and many of its provisions are effectively reproduced in international treaties (see below). Many of its provisions have also achieved the status of customary international law— they are universal and indisputable.

Key provisions include:

- Article 3 (right to life)
- Article 5 (prohibition on torture and cruel, inhuman, or degrading treatment)
- Article 7 (protection against discrimination)
- Article 12 (right to privacy)
- Article 19 (right to seek, receive, and impart information)
- Article 25 (right to medical care)

TREATIES

All of the seven major international human rights treaties contain guarantees relating to the protection of human rights in patient care. While these treaties are binding on those states that have ratified them, their standards have strong moral and political force even for nonratifying countries. Many, such as the two international covenants and the Convention on the Rights of the Child (CRC), have been widely (and, in the case of the latter, almost universally) ratified.¹

The treaty-monitoring bodies have issued numerous General Comments (GCs) to serve as authoritative guides for the interpretation of treaty standards. For example, the Committee on Economic and Social Rights (CESCR) issued GC 14 on Article 12 of the International Covenant on Civil and Political Rights (ICCPR), interpreting the right to health as the right to control one's own health and body.

All of the treaty bodies monitor compliance through the consideration of periodic state reports and then issue concluding observations.² The majority—including the Human Rights Committee (HRC), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT), Committee on the Elimination of Racial Discrimination (CERD), and the Committee on the Rights of Persons with Disabilities (CRPD)—may now also consider individual

1 Office of the UN High Commissioner for Human Rights (OHCHR). Status of the Ratifications of the Principle International Human Rights Treaties. <http://www2.ohchr.org/english/bodies/docs/status.pdf>. Accessed November 14, 2009.

2 OHCHR. Human Rights Bodies. <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>. Accessed November 14, 2009.

complaints provided that, in most cases, the State has ratified the appropriate optional protocol to the treaty.³ Together, these materials can be used to further interpret the standards.

► **International Covenant on Civil and Political Rights (ICCPR)⁴**

Together with the UDHR and the ICESCR, the ICCPR forms part of the International Bill of Rights. The ICCPR is monitored by the HRC.

Relevant provisions include:

- Article 2(1) (prohibition on discrimination)
- Article 6 (right to life)
- Article 7 (prohibition on torture)
- Article 9 (right to liberty and security)
- Article 10 (right to dignity for detainees)
- Article 17 (right to privacy)
- Article 19(2) (right to information)
- Article 26 (equality before the law)

► **International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵**

The ICESCR is monitored by the CESCR.

Key provision:

- Article 12 (right to highest attainable standard of health) (See General Comment 14)⁶

The SR (currently, Anand Grover, who replaced Professor Paul Hunt in August 2008) is an independent expert who is mandated by the UN to investigate how the right to the highest attainable standard of health can be effectively realized. The SR conducts country visits, produces annual reports, and carries out in-depth studies into particular issues. For example, in September 2007, the SR produced draft guidelines for pharmaceutical companies on access to medicines.⁷

► **Other relevant provisions include:**

- Article 2(1) (prohibition on discrimination)
- Article 10(3) (protection of children)
- Article 11 (adequate standard of living)

Note: Special Rapporteur (SR) on the Right to Health⁸

3 OHCHR. Human Rights Bodies: Complaint Procedures. <http://www2.ohchr.org/english/bodies/petitions/index.htm>. Accessed November 14, 2009. The ICESCR will also have its own complaints mechanism in the near future, following adoption of an optional protocol by the UN in December 2008 and its opening for ratification on September 24, 2009.

4 International Covenant on Civil and Political Rights (ICCPR). United Nations General Assembly Resolution 2200A [XXI]. December 16, 1966. <http://www2.ohchr.org/english/law/ccpr.htm>. Accessed November 14, 2009.

5 International Covenant on Economic, Social and Cultural Rights (ICESCR). United Nations General Assembly Resolution 2200A[XXI]. December 16, 1966. <http://www2.ohchr.org/english/law/cescr.htm>.

6 Official Documents Center of the United Nations. <http://daccessdds.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement>. Accessed November 14, 2009.

7 OHCHR. <http://www2.ohchr.org/english/issues/health/right/docs/draftguid.doc>.

8 OHCHR. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. <http://www2.ohchr.org/english/issues/health/right/>. Accessed November 14, 2009.

► **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁹**

Monitored by the Committee on the Elimination of Discrimination against Women.

Key provisions:

- Article 12 (elimination of discrimination against women in health care)
- Article 14(2)(b) (right of women in rural areas to have access to adequate health care facilities)

(See also General Recommendation 24 on Article 12 (women and health), a comprehensive analysis of women's health needs and recommendations for government action.)¹⁰

► **Convention for the Elimination of All Forms of Racial Discrimination (CERD)¹¹**

Monitored by the Committee on the Elimination of Racial Discrimination.

Key provision:

- Article 5(1)(e) (prohibition on race discrimination in public health and medical care)

► **Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)¹²**

Monitored by the Committee Against Torture, the CAT introduced a new optional protocol in 2002 that focuses on prevention of torture.¹³

► **Convention on the Rights of the Child (CRC)¹⁴**

Monitored by the Committee on the Rights of the Child, the CRC contains a comprehensive range of civil, political, economic, social, and cultural rights guarantees.

Key provision:

- Article 24 (right to highest attainable standard of health)

► **International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)¹⁵**

Monitored by the Committee on Migrant Workers, the CMW contains a comprehensive range of civil, political, economic, social, and cultural rights guarantees.

9 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). United Nations General Assembly. December 18, 1979. <http://www2.ohchr.org/english/law/cedaw.htm>. Accessed November 14, 2009.

10 UN Committee on the Elimination of Discrimination against Women. CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>. Accessed November 14, 2009.

11 International Convention for the Elimination of all Forms of Racial Discrimination (ICERD). UN General Assembly Resolution 2106 [XX]. December 21, 1965. <http://www2.ohchr.org/english/law/cerd.htm> Accessed November 14, 2009.

12 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. UN General Assembly Resolution 39/46. December 10, 1984. <http://www2.ohchr.org/english/law/cat.htm>. Accessed November 14, 2009.

13 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. UN General Assembly Resolution A/RES/57/199. December 18, 2002. <http://www2.ohchr.org/english/law/cat-one.htm>. Accessed November 14, 2009.

14 Convention on the Rights of the Child (CRC). UN General Assembly Resolution 44/25. November 20, 1989. <http://www2.ohchr.org/english/law/crc.htm>. Accessed November 14, 2009.

15 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. UN General Assembly Resolution 45/158. December 18, 1990. <http://www2.ohchr.org/english/law/cmw.htm>. Accessed November 14, 2009.

Key provisions:

- Article 28 (right to medical care)
- Articles 43 and 45(1)(c) (equal treatment in health care)

► **Convention on the Rights of Persons with Disabilities (CRPD)¹⁶**

The CRPD applies to people with “long-term physical, mental, intellectual or sensory impairments,” and seeks to “ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.”¹⁷ The CRPD contains a comprehensive range of civil, political, economic, social, and cultural rights guarantees. It was entered into force on May 12, 2008.

Key provision:

- Article 25 (health)

Other relevant provisions include:

- Article 5 (equality and nondiscrimination)
- Articles 6 and 7 (women and children)
- Article 9 (access to medical facilities and services)
- Article 10 (right to life)
- Article 14 (liberty and security)
- Article 15 (freedom from torture, etc.)
- Article 16 (freedom from exploitation, violence, and abuse)
- Article 17 (protection of physical and mental integrity)
- Article 19 (independent living)
- Article 21 (access to information)
- Article 22 (respect for privacy)
- Article 26 (habilitation and rehabilitation)
- Article 29 (participation in public life)

NOTREATY INSTRUMENTS

► **UN Standard Minimum Rules for the Treatment of Prisoners¹⁸**

► **UN Body of Principles for the Protection of All Persons Under Any Form of Detention¹⁹**

► **UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care²⁰**

¹⁶ Convention on the Rights of Persons with Disabilities (CRPD). UN General Assembly Resolution. December 13, 2006. <http://www2.ohchr.org/english/law/disabilities-convention.htm>. Accessed November 14, 2009.

¹⁷ CRPD, Article 1.

¹⁸ Standard Minimum Rules for the Treatment of Prisoners. Economic and Social Council Resolution 663 C (XXIV). July 31, 1957. <http://www2.ohchr.org/english/law/treatmentprisoners.htm>. Accessed November 14, 2009.

¹⁹ Body of Principles for the Protection of All Persons Under Any Form of Detention. UN General Assembly Resolution 43/173. December 9, 1998. <http://www2.ohchr.org/english/law/bodyprinciples.htm>. Accessed November 14, 2009.

²⁰ Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care. UN General Assembly Resolution 46/119. December 17, 1991. <http://www2.ohchr.org/english/law/principles.htm>. Accessed November 14, 2009.

ADDITIONAL INTERNATIONAL DOCUMENTS

There are also a number of other important international consensus documents that do not have the binding force of a treaty but exert considerable political and moral force.

► **WHO Alma-Ata Declaration 1978²¹**

This declaration reaffirms that health is a state of complete physical, mental, and social well-being, not merely the absence of disease or infirmity, and is a fundamental human right (Article 1). It focuses on the importance of primary health care.

► **Charter on the Right to Health 2005 (International Union of Lawyers)²²**

This charter addresses issues such as privacy and informed consent.

► **Declaration on the Rights of the Patients 2005 (revised) (World Medical Association (WMA))²³**

This declaration addresses issues such as the rights to confidentiality, information, and informed consent. The following is an excerpt from the preamble:

The relationship between physicians, their patients and broader society has undergone significant changes in recent times. While a physician should always act according to his/her conscience, and always in the best interests of the patient, equal effort must be made to guarantee patient autonomy and justice. The following Declaration represents some of the principal rights of the patient that the medical profession endorses and promotes. Physicians and other persons or bodies involved in the provision of health care have a joint responsibility to recognize and uphold these rights. Whenever legislation, government action or any other administration or institution denies patients these rights, physicians should pursue appropriate means to assure or to restore them.

► **Declaration on Patient-Centred Healthcare 2007, International Alliance of Patients' Organizations (IAPO)²⁴**

This declaration was produced by IAPO as part of its effort to advocate internationally, with a strong voice for patients, on relevant aspects of health care policy, with the aim of influencing international, regional, and national health agendas and policies.

The document espouses five principles:

- Respect:
Patients and carers have a fundamental right to patient-centred healthcare that respects their unique needs, preferences and values, as well as their autonomy and independence.
- Choice and empowerment:
Patients have a right and responsibility to participate, to their level of ability and preference, as a partner in making healthcare decisions that affect their lives. This requires a responsive health service which provides suitable choices in treatment and

21 Declaration of Alma-Ata. September 6, 1978. http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf. Accessed November 14, 2009.

22 Charter on the Right to Health. International Union of Lawyers. UIA General Assembly. August 31, 2005. www.uanet.org/documents/quia/resolutions/Sante4GB.pdf. Accessed November 15, 2009.

23 Declaration on the Rights of the Patient. World Medical Association. WMA Assembly September/October 1981. <http://www.wma.net/en/30publications/10policies/14/index.html>. Accessed November 15, 2009.

24 International Alliance of Patients' Organizations (IAPO). Declaration on Patient-Centred Healthcare. www.patientsorganizations.org/. Accessed November 15, 2009.

management options that fit in with patients' needs, and encouragement and support for patients and carers that direct and manage care to achieve the best possible quality of life. Patients' organizations must be empowered to play meaningful leadership roles in supporting patients and their families to exercise their right to make informed healthcare choices.

- Patient involvement in health policy:

Patients and patients' organizations deserve to share the responsibility of healthcare policy-making through meaningful and supported engagement in all levels and at all points of decision-making, to ensure that they are designed with the patient at the centre. This should not be restricted to healthcare policy but include, for example, social policy that will ultimately impact patients' lives.

- Access and support:

Patients must have access to the healthcare services warranted by their condition. This includes access to safe, quality and appropriate services, treatments, preventive care and health promotion activities. Provision should be made to ensure that all patients can access necessary services, regardless of their condition or socio-economic status. For patients to achieve the best possible quality of life, healthcare must support patients' emotional requirements, and consider non-health factors such as education, employment and family issues which impact on their approach to healthcare choices and management.

- Information:

Accurate, relevant and comprehensive information is essential to enable patients and carers to make informed decisions about healthcare treatment and living with their condition. Information must be presented in an appropriate format according to health literacy principles considering the individual's condition, language, age, understanding, abilities and culture.

► **Jakarta Declaration on Leading Health Promotion into the 21st Century (1997)²⁵**

This declaration is the final outcome document of the Fourth International Conference on Health Promotion. It lays down a series of priorities for health promotion in the twenty-first century, including social responsibility, increased investment and secured infrastructure, and empowerment of the individual.

► **Position Statement: Nurses and Human Rights 1998, International Council of Nurses (ICN)²⁶**

The ICN views health care as the right of all individuals, regardless of financial, political, geographic, racial, or religious considerations. This right includes the right to choose or decline care, including the rights to acceptance or refusal of treatment or nourishment; informed consent; confidentiality; and dignity, including the right to die with dignity.

The ICN addresses the rights of both those seeking care and the providers. Nurses have an obligation to safeguard and actively promote people's health rights at all times and in all places. This obligation includes assuring that adequate care is provided within the scope of the available resources and in accordance with nursing ethics. In addition, the nurse is obliged to ensure that patients receive appropriate information in understandable language prior to giving their consent for treatment or procedures, including participation in research.

25 Jakarta Declaration on Leading Health Promotion into the 21st Century. World Health Organization (WHO). July 21–25, 1997. www.who.int/hpr/NPH/docs/jakarta_declaration_en.pdf. Accessed November 15, 2009.

26 Position Statement: Nurses and Human Rights. International Council of Nurses. www.icn.ch/pshumrights.htm. Accessed November 15, 2009.

2.3 Patients' Rights

This section explores international protection of nine critical patients' rights: the rights to liberty and security of the person; privacy and confidentiality; information; bodily integrity; life; highest attainable standard of health; freedom from torture, cruel, inhuman, and degrading treatment; participation in public policy; and nondiscrimination and equality for patients.

The CESCR has provided the most significant international legal commentary on the rights of patients. Its elaboration on UN General Comment 14 on the right to the highest attainable standard of health (under Article 12 of the ICESCR) has been particularly influential. In addition, the CESCR has frequently condemned governments for failing to devote adequate resources to health care and services for patients. At this writing, however, the lack of an individual complaint mechanism has hampered the ability of the CESCR to examine specific violations beyond the systemic failures identified in country reports. The expected introduction of such a mechanism should provide the CESCR with an opportunity to mirror the work of its sister body, the HRC, in developing significant case law on human rights in patient care.

Although the CESCR has elaborated on the right to health with the most detail, other UN monitoring bodies have also provided significant comments on patients' rights. The HRC has frequently cited Articles 9 and 10 of the ICCPR to condemn the unlawful detention of mental health patients and the denial of medical treatment to detainees, respectively. It has also upheld the need to protect confidential medical information under Article 17 of the ICCPR and has used the right to life under Article 6 of the ICCPR to safeguard medical treatment during pretrial detention. Additionally, as detailed below, UN bodies concerned with monitoring racial and sex discrimination have examined equal access to health care.

In addition to binding treaty provisions, other international standards, such as the Standard Minimum Rules for the Treatment of Prisoners, also provide significant reference points regarding patients' rights. Although these standards cannot be directly enforced against states, patients and their advocates can use them to progressively interpret treaty provisions.

Right to Liberty and Security of the Person

EXAMPLES OF POTENTIAL VIOLATIONS

- A person is detained indefinitely on mental health grounds without any medical opinion being sought
- Residents of an institution are not informed about their right to apply to a court or tribunal to challenge their involuntary admission
- A female drug user is detained in hospital after giving birth and is denied custody of her child

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 9(1) ICCPR:** *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

- The HRC has stated that treatment in a psychiatric institution against the will of the patient constitutes a form of deprivation of liberty that falls under the terms of Article 9 of the ICCPR.²⁷ In this context, the HRC has considered a period of 14 days of detention for mental health reasons without review by a court incompatible with Article 9(1) of the ICCPR.²⁸
- The HRC has stated, in relation to arbitrary committal under mental health legislation, in a case in which the victim was at the time considered to be legally capable of acting on her own behalf:²⁹

[T]he State party has a particular obligation to protect vulnerable persons within its jurisdiction, including the mentally impaired. It considers that as the author suffered from diminished capacity that might have affected her ability to take part effectively in the proceedings herself, the court should have been in a position to ensure that she was assisted or represented in a way sufficient to safeguard her rights throughout the proceedings....The Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order, without assistance or representation sufficient to safeguard her rights, may be unavoidable. In the present case, no such special circumstances have been advanced. For these reasons, the Committee finds that the author's committal was arbitrary under article 9, paragraph 1, of the Covenant.³⁰

► **Article 25 CRC:** *States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.*

27 UN Human Rights Committee (HRC). *A. v. New Zealand*, Communication No. 754/1997. (CCPR/C/66/D/754/1997). Views adopted July 15, 1999. See also UN Human Rights Committee (HRC). *Fijalkowska v. Poland*. Communication No. 1061/2002: Poland. (CCPR/C/84/1061/2002). Views adopted July 26, 2005.

28 HRC. Concluding Observations of the Human Rights Committee: Estonia, 2003. (CCPR/CO/77/EST).

29 HRC. *Fijalkowska v. Poland*. Communication No. 1061/2002(CCPR/C/84/1061/2002). Views adopted July 26, 2005.

30 *Ibid.*, para. 8.3.

► **Article 14 CRPD:**

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

► **UN Body of Principles for the Protection of All Persons Under Any Form of Detention**

► **UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care**

► **Article 6 Charter on the Right to Health:** *No one may be deprived of liberty on the ground of medical danger to oneself or others unless this danger is certified by competent and independent physicians and by a judicial ruling made in accordance with the due process of law.*

Right to Privacy

EXAMPLES OF POTENTIAL VIOLATIONS

- A doctor discloses a patient's history of drug use or addiction without his or her consent
- Government requires disclosure of HIV status on certain forms
- Health care workers require young people to obtain parental consent as a condition of receiving sexual health services
- Residents of an institution have no place to keep their personal possessions

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- **Article 17(1) ICCPR:** *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.*
- **Article 16(1) CRC:** *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.*
- **Article 12 ICESCR:** *The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
 - **CESCR GC 14, para. 12:** *Accessibility of information should not impair the right to have personal health data treated with confidentiality.*

- **CESCR GC 14, para. 23:** *The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.*
- ▶ **Article 22 CRPD: (1)** *No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence or other types of communication or to unlawful attacks on his or her honor and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. (2) States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.*
- ▶ **Article 8 Charter on the Right to Health:** *Physicians are bound by professional confidentiality to ensure due respect for patient privacy. This confidentiality...contributes to the effectiveness of medical care. Exceptions to medical confidentiality, strictly limited by law, may serve only the goals of protection of health, safety or public hygiene. Patients are not bound by medical confidentiality. Physicians may be relieved of their obligation to maintain professional confidentiality if they become aware of attacks on the dignity of the human person....*
- ▶ **Principle 8 WMA Declaration on the Rights of the Patients**
Right to confidentiality
 - a. *All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death. Exceptionally, descendants may have a right of access to information that would inform them of their health risks.*
 - b. *Confidential information can only be disclosed if the patient gives explicit consent or if expressly provided for in the law. Information can be disclosed to other health care providers only on a strictly "need to know" basis unless the patient has given explicit consent.*
 - c. *All identifiable patient data must be protected. The protection of the data must be appropriate to the manner of its storage. Human substances from which identifiable data can be derived must be likewise protected.*

Note: Confidentiality of Sexual and Reproductive Health Information

Clearly the need to protect the confidentiality of medical information can have an impact across a range of health issues. Confidentiality is particularly vital in relation to sexual and reproductive health, however. Examinations by UN treaty-monitoring bodies in the context of right to privacy have included (i) condemnation of a legal duty imposed on health personnel to report cases of abortions as part of a general criminalization of the procedure without exception, thereby inhibiting women from seeking medical treatment and jeopardizing their lives;³¹ (ii) the need to investigate allegations that women seeking employment in foreign enterprises are subjected to pregnancy tests and are required to respond to intrusive personal questioning followed by the administering of antipregnancy drugs;³² and (iii) the need to address the concerns and need for confidentiality of adolescents with respect to sexual and reproductive health, including those married at a young age and those in vulnerable situations.³³

31 HRC. Concluding Observations of the Human Rights Committee: Chile, 1999. (CCPR/C/79/Add.104); Concluding Observations: Venezuela, 2001. (CCPR/CO/71/VEN).

32 HRC. Concluding Observation of the Human Rights Committee: Mexico, 1999. (CCPR/C/79/Add.109). Requirement for women to have access to appropriate remedies where their equality and privacy rights had been violated.

33 CRC. Concluding Observations of the Committee on the Rights of the Child: Djibouti, 2000. (CRC/C/15/Add.131).

Right to Information

EXAMPLES OF POTENTIAL VIOLATIONS

- Government bans publications about drug use or harm reduction, claiming it promotes illegal activity
- Young people are deliberately denied information about sexually transmitted diseases (STDs) and the use of condoms
- Roma women lack access to information on sexual and reproductive health

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 19(2) ICCPR:** *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
 - A member of the HRC noted that in the case of *Zheludkov v. Ukraine*:³⁴

*“A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be ‘treated with humanity and with respect for the inherent dignity of the human person,’ regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.”*³⁵
- ▶ **Article 12 ICESCR:** *The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
 - **CESCR GC 14, para. 12(b)(iv):** *[Health care accessibility] includes the right to seek, receive and impart information and ideas concerning health issues.*
 - **CESCR GC 14, para. 23:** *States Parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health behaviour choices they make.*
- ▶ **Article 17 CRC:** *States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual, and moral well-being and physical and mental health.*³⁶
- ▶ **Article 21 CRPD:** *States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive, and impart information and ideas on an equal basis with others and through*

34 HRC. *Zheludkov v. Ukraine*. Communication No. 726/1996. (CCPR/C/76/D/726/1996). Views adopted October 29, 2002.

35 Individual opinion by Ms. Cecilia Medina Quiroga (concurring).

36 CRC. General Comment 4 of the Committee on the Rights of the Child: Adolescent Health and Development in the Context of the Convention on the Rights of the Child. (CRC/GC/2003/4).

all forms of communication of their choice, as defined in article 2 of the present Convention, including by: (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.

► **Principle 7 WMA Declaration on the Rights of the Patients:**

- a. The patient has the right to receive information about himself/herself recorded in any of his/her medical records, and to be fully informed about his/her health status including the medical facts about his/her condition. However, confidential information in the patient's records about a third party should not be given to the patient without the consent of that third party.*
- b. Exceptionally, information may be withheld from the patient when there is good reason to believe that this information would create a serious hazard to his/her life or health.*
- c. Information should be given in a way appropriate to the patient's culture and in such a way that the patient can understand.*
- d. The patient has the right not to be informed on his/her explicit request, unless required for the protection of another person's life.*
- e. The patient has the right to choose who, if anyone should be informed on his/her behalf.*

► **Principle 5 IAPO Declaration on Patient-Centred Healthcare:³⁷**

Accurate, relevant, and comprehensive information is essential to enable patients and carers to make informed decisions about health care treatment and living with their condition. Information must be presented in an appropriate format according to health literacy principles considering the individual's condition, language, age, understanding, abilities, and culture.

Note: Access to Sexual and Reproductive Health Information

The provision of appropriate and timely information with respect to sexual and reproductive health is particularly crucial. UN treaty-monitoring bodies have urged States to improve access in light of increasing teenage abortions and sexually transmitted diseases,³⁸ including HIV/AIDS,³⁹ with such information also extending to children⁴⁰ and to people in areas with prevalent alcohol and tobacco use.⁴¹

37 IAPO. IAPO Policy Statement on Health Literacy. <http://www.patientsorganizations.org/showarticle.pl?id=126&n=962>. Accessed November 6, 2009.

38 UN Committee on Economic Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Lithuania, 2004. (E/C.12/1/Add.96). UN Committee on Elimination of Discrimination Against Women (CEDAW). Concluding Observations of the Committee on Elimination of Discrimination Against Women: Costa Rica, 2003. (A/58/38 [SUPP]). See also UN Committee on Economic Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: China, 2005. (E/C.12/1/Add.107).

39 CESCR. Concluding Observations of the Committee on Economic Social and Cultural Rights: Chile, 2004. (E/C.12/Add.105). See also CESCR. Concluding Observations of the Committee on Economic Social and Cultural Rights: Cameroon, 1999. (E/C.12/Add.40). See also CEDAW. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Ethiopia, 2004. (A/59/38 [SUPP]).

40 CRC. Concluding Observations of the Committee on the Rights of the Child: Mozambique, 2002. (CRC/C/15/Add.172). See also CRC. Concluding Observations of the Committee on the Rights of the Child: Indonesia, 2004. (CRC/C/15/Add.203).

41 CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine, 2001. (E/C.12/1/Add.65).

Right to Bodily Integrity

EXAMPLES OF POTENTIAL VIOLATIONS

- A Roma woman is sterilized against her will
- Doctors compel a drug-using pregnant woman to undergo an abortion
- Treatment is routinely given to residents of an institution without their consent as they are assumed to lack the capacity to make decisions about their treatment and care
- Patients at a psychiatric hospital are treated as part of a clinical medication trial without being informed that they are included in the research
- Patients are given electroconvulsive therapy (ECT) that is described to them as “sleep therapy”

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

Note: Right to Bodily Integrity

The right to bodily integrity is not specifically recognized under the ICCPR or ICESCR, but it has been interpreted to be part of the right to security of the person (ICCPR 9), the right to freedom from torture and cruel, inhuman, and degrading treatment (ICCPR 7), the right to privacy (ICCPR 17), and the right to the highest attainable standard of health (ICESCR 12).

- ▶ **Article 12(1) CRC:** *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- ▶ **Article 39 CRC:** *States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect, and dignity of the child.*
- ▶ **Article 17 CRPD:** *Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.*
- ▶ **Article 12 ICESCR:** *The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
 - **CESCR GC 14 para 8:** *[The right to health includes] the right to be free from nonconsensual medical treatment and experimentation.*
- ▶ **International Ethical Guidelines for Biomedical Research Involving Human Subjects⁴²**

⁴² Council for International Organizations of Medical Sciences (CIOMS). International Ethical Guidelines for Biomedical Research Involving Human Subjects. Geneva 2002. http://www.cioms.ch/frame_guidelines_nov_2002.htm. Accessed November 15, 2009.

- ▶ **Article 5 Charter on the Right to Health:** *Consent of the patient must be required before any medical treatment, except in case of emergency only as strictly provided by law.*

▶ **Principles 2-6 WMA Declaration on the Rights of the Patients:**

2. *Right to freedom of choice*

- a. *The patient has the right to choose freely and change his/her physician and hospital or health service institution, regardless of whether they are based in the private or public sector.*
- b. *The patient has the right to ask for the opinion of another physician at any stage.*

3. *Right to self-determination*

- a. *The patient has the right to self-determination, to make free decisions regarding himself or herself. The physician will inform the patient of the consequences of his/her decisions.*
- b. *A mentally competent adult patient has the right to give or withhold consent to any diagnostic procedure or therapy. The patient has the right to the information necessary to make his/her decisions. The patient should clearly understand the purpose of any test or treatment, what the results would imply, and what would be the implications of withholding consent.*
- c. *The patient has the right to refuse to participate in research or the teaching of medicine.*

4. *The unconscious patient*

- a. *If the patient is unconscious or otherwise unable to express his/her will, informed consent must be obtained whenever possible, from a legally entitled representative.*
- b. *If a legally entitled representative is not available, but a medical intervention is urgently needed, consent of the patient may be presumed, unless it is obvious and beyond any doubt on the basis of the patient's previous firm expression or conviction that he/she would refuse consent to the intervention in that situation.*
- c. *However, physicians should always try to save the life of a patient unconscious due to a suicide attempt.*

5. *The legally incompetent patient*

- a. *If a patient is a minor or otherwise legally incompetent, the consent of a legally entitled representative is required in some jurisdictions. Nevertheless the patient must be involved in the decision-making to the fullest extent allowed by his/her capacity.*
- b. *If the legally incompetent patient can make rational decisions, his/her decisions must be respected, and he/she has the right to forbid the disclosure of information to his/her legally entitled representative.*
- c. *If the patient's legally entitled representative, or a person authorized by the patient, forbids treatment which is, in the opinion of the physician, in the patient's best interest, the physician should challenge this decision in the relevant legal or other institution. In case of emergency, the physician will act in the patient's best interest.*

6. Procedures against the patient's will

Diagnostic procedures or treatment against the patient's will can be carried out only in exceptional cases, if specifically permitted by law and conforming to the principles of medical ethics.

Note: Genital Mutilation and the Right to Bodily Integrity

Treaty-monitoring bodies have recognized that practices such as genital mutilation can infringe girls' right to personal security and their physical and moral integrity by threatening their lives and health.⁴³

Right to Life

EXAMPLES OF POTENTIAL VIOLATIONS

- Doctors refuse to treat a person who is experiencing a drug overdose because drug use is illegal, resulting in the person's death
- Drug users die as a result of poor fire safety in a locked hospital ward
- Government places arbitrary legal restrictions on access to life-saving HIV prevention or treatment
- The mortality rate of an institution is particularly high during the winter months due to the poor condition of the building, inadequate sanitation and heating, and poor quality of care
- A patient at a psychiatric hospital known to be at risk of committing suicide is not monitored adequately and subsequently takes her own life

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 6(1) ICCPR:** *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
 - HRCGC 6, paras. 1 and 5: The right to life “should not be interpreted narrowly” or “in a restrictive manner,” and its protection “requires that States adopt positive measures ... to increase life expectancy.”
 - The HRC, in finding a violation of Article 6 and Article 10(1) of the ICCPR, in a case in which a healthy young man who fell ill in a pretrial detention center did not receive any medical treatment despite repeated requests for assistance and subsequently died, noted that:

⁴³ CEDAW. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Burkina Faso, 2000. (A/55/38 [SUPP]). See also CEDAW. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Cameroon, 2000. (A/55/38 [SUPP]).

*It is incumbent on States to ensure the right to life of detainees, and not incumbent on the latter to request protection...it is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably be expected. Lack of financial means cannot reduce this responsibility.*⁴⁴

Because the detention center had a properly functioning medical service within and should have known about the dangerous change in the victim's state of health, the state was required to take immediate steps to ensure that the conditions of detention were compatible with its obligations under Articles 6 and 10. Such obligations are retained even where private companies run such institutions.⁴⁵

- While not explicitly recognizing the right to an abortion, the HRC has stated that states have a duty to take measures to ensure the right to life of pregnant women whose pregnancies are terminated, thereby ending the blanket ban on the procedure.⁴⁶

▶ **Article 10 CRPD:** *States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.*

Right to the Highest Attainable Standard of Health

EXAMPLES OF POTENTIAL VIOLATIONS

- State fails to take progressive steps to ensure access to antiretroviral drugs for people living with HIV or to prevent mother-to-child HIV transmission
- Doctors and health facilities are not located in proportionate proximity to certain poor neighborhoods
- State systematically fails to provide training in palliative care for its medical personnel
- A child in a social care home becomes bedridden due to malnutrition
- Adults and children are placed on the same wards in a psychiatric hospital
- Women with mental disabilities are denied reproductive health services

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

▶ **Article 12 ICESCR:** *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this*

44 HRC. *Lantsova v. The Russian Federation*. Communication No. 763/1997. (CCPR/C/74/763/1997). Views adopted March 26, 2002.

45 HRC. General Comment 20 of the Human Rights Committee. (A/47/40/ [SUPP]).

46 HRC. Concluding Observations of the Human Rights Committee: Chile, 1999. (CCPR/C/79/Add.104) See also UN Committee on the Elimination of Discrimination Against Women (CEDAW). General Comment 19 of the Committee on the Elimination of Discrimination Against Women: Violence against Women. (A/47/38 [SUPP]).

right shall include those necessary for: ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

- **CESCR GC 14, para. 4:** *The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.*
 - **CESCR GC 14, para. 12:** Health care and services must be available, in sufficient quantity, accessible (physically and economically) to all without discrimination, culturally acceptable and of good quality.
 - **CESCR GC 14, paras. 30–37:** In delivering such services, states are under a duty to progressively realize the right to health while ensuring that they respect people's own resources,⁴⁷ protect them against the negative actions of third parties, and fulfill or provide sufficient resources where there are none.
 - **CESCR GC 14, paras. 46–52:** Violations of the right to health can be caused by deliberate acts or failures to act by the state.
 - In the context of obligations under Article 12 of the ICESCR, the CESCR has frequently condemned states for failing to devote adequate resources to health care and services because of the obviously detrimental impact of that failure on patients.⁴⁸
 - The CESCR has required that states should introduce appropriate legislation to safeguard patient rights, including redress for medical errors.⁴⁹
- **Article 3(3) CRC:** *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*
- **Article 24 CRC:** *(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. (2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;... (d) To ensure appropriate pre-natal and post-natal health care for mothers.*

⁴⁷ Some obligations such as nondiscrimination are immediately realizable without qualification.

⁴⁸ CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uruguay, 1997. (E/C.12/1/Add.18). Alarm expressed at fact that very low wages paid to nurses led to a low ratio of nurses to doctors (lower than 1:5), tending to diminish the quality and accessibility of medical care available to the community. See also UN Committee on Economic, Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Congo, 2000. (E/C.12/1/Add.45). Grave concern expressed at decline of standard of health, due in part to ongoing financial crisis, which resulted in serious shortage of funds for public health services; UN Committee on Economic Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mongolia, 2000. (E/C.12/1/Add.47). Deteriorating health situation for population since 1990 in light of decreasing government expenditure on health from 5.8 percent of GDP in 1991 to 3.6 percent in 1998.

⁴⁹ CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russia, 2003. (E/C.12/1/ADD.94).

- In the context of the right to health, the Committee on the Rights of the Child has criticized the incompatibility of a proposed free trade agreement being negotiated by three Latin American countries and the United States and, in particular, the right to access low-cost drugs and social services by poor people.⁵⁰ The committee went on to recommend that a study on the impact of trade standards should be carried out.⁵¹

► **Article 25 CRPD:** *States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:*

- (a) *Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programs as provided to other persons, including in the area of sexual and reproductive health and population-based public health programs;*
- (b) *Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;*
- (c) *Provide these health services as close as possible to people's own communities, including in rural areas;*
- (d) *Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;*
- (e) *Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;*
- (f) *Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.*

Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment

EXAMPLES OF POTENTIAL VIOLATIONS

- Fearing prosecution by the state, a doctor refuses to prescribe morphine to relieve a patient's pain

50 CRC. Concluding Observations of the Committee on the Rights of the Child: Ecuador, 2005. (CRC/C/15/Add.262). Examen de los informes presentados por los Estados bajo el artículo 44 de la Convención Internacional de los Derechos del Niño (13/09/05).

51 In so doing, the committee was reiterating the recommendations issued by the CESCR in June 2004 (E/C.12/1/Add.100), which urged Ecuador to "conduct an evaluation of the effects of international trade standards on the right to health of all persons and to make ample use of the flexibility clauses allowed by the Agreement on Trade-Related Aspects of Intellectual Property of the World Trade Organization (WTO), so as to provide access to generic drugs and, more generally, to enable the universal enjoyment of the right to health in Ecuador."

- A person is denied mental health treatment while in detention and instead is locked in solitary confinement
- Staff of an AIDS ward permit television cameras to film patients without patients' consent and broadcast the footage on local television
- Female residents of an institution are required to shower together, supervised by male staff

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 7 ICCPR:** *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*
- ▶ **Article 10(1) ICCPR:** *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
 - The HRC has made clear that Article 10(1) of the ICCPR applies to any person deprived of liberty under the laws and authority of the State, who is held in a prison or hospital—particularly, in a psychiatric hospital—or in a detention camp, correctional institution, or elsewhere, and that States Parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.⁵²

The HRC has reaffirmed on a number of occasions that the obligation under Article 10(1) of the ICCPR to treat individuals with respect for the inherent dignity of the human person encompasses the provision of, inter alia, adequate medical care during detention.⁵³ Often in conjunction with Article 7, it has gone on to find breaches of this obligation on numerous occasions.⁵⁴ Specifically, in relation to the mentally ill in detention facilities (both in prisons

52 HRC. General Comment 21 of the Human Rights Committee. (A/47/40 [SUPP]).

53 HRC. *Kelly v. Jamaica*. Communication No. 256/1987. (CCPR/C/41/D/253/1987). Views adopted April 8, 1991. Breach of Article 10(1), where a prisoner contracted health problems as a result of a lack of basic medical care and was only allowed out of his cell for 30 minutes each day. See also UN Human Rights Committee (HRC). *Linton v. Jamaica*. Communication No. 255/1987. (CCPR/C/46/D/255/1987). Views adopted October 22, 1992. Denial of adequate medical treatment for injuries sustained during aborted escape attempt breached Articles 7 and 10(1); UN Human Rights Committee (HRC). *Bailey v. Jamaica*. Communication No. 334/1988. (CCPR/C/47/D/334/1988); UN Human Rights Committee (HRC). *Thomas v. Jamaica*. Communication No. 321/1988. (CCPR/C/49/D/321/1988). Views adopted October 19, 1993; UN Human Rights Committee (HRC). *Mika Miha v. Equatorial Guinea*. Communication No. 414/1990. (CCPR/C/51/D/414/1990). Views adopted July 8, 1994; UN Human Rights Committee (HRC). *Colin Johnson v. Jamaica*. Communication No. 653/1995. (CCPR/C/64/D/653/1995). Views adopted October 20, 1998; UN Human Rights Committee (HRC). *Kalenga v. Zambia*. Communication No. 326/1988. (CCPR/C/48/D/326/1988). Views adopted July 27, 1993.

54 HRC. *Whyte v. Jamaica*. Communication No. 732/1997. (CCPR/C/63/D/732/1997). Views adopted July 27, 1998. Failure to treat asthma attacks and injuries sustained through beatings. See also UN Human Rights Committee (HRC). *Leslie v. Jamaica*. Communication No. 564/1993. (CCPR/C/63/D/564/1993). Views adopted July 31, 1998. Lack of adequate medical treatment for beatings and stabbing on basis that Leslie was due to be executed imminently; UN Human Rights Committee (HRC). *Henry v. Jamaica*. Communication No. 610/1995. (CCPR/C/64/D/610/1995). Views adopted October 20, 1995. Lack of medical treatment despite a recommendation from a doctor that prisoner be operated on; UN Human Rights Committee (HRC). *Pennant v. Jamaica*. Communication No. 647/1995. (CCPR/C/64/D/647/1995). Views adopted October 20, 1998; UN Human Rights Committee (HRC). *Levy v. Jamaica*. Communication No. 719/1996. (CCPR/C/64/D/719/1996). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Marshall v. Jamaica*. Communication No. 730/1996. (CCPR/C/64/D/730/1996). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Morgan and Williams v. Jamaica*. Communication No. 720/1996. (CCPR/C/64/D/720/1996). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Morrison v. Jamaica*. Communication No. 663/1995. (CCPR/C/64/D/663/1995). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Brown v. Jamaica*. Communication No. 775/1997. (CCPR/C/65/D/775/1997). Views adopted March 23, 1999; UN Human Rights Committee (HRC). *Bennett v. Jamaica*. Communication No. 590/1994. (CCPR/C/65/D/590/1994). Views adopted March 25, 1999; UN Human Rights Committee (HRC). *Smith and Stewart v. Jamaica*. Communication No. 668/1995. (CCPR/C/65/D/668/1995). Views adopted April 8, 1999; UN Human Rights Committee (HRC). *Mulezi v. Democratic Republic of the Congo*. Communication No. 962/2001. Views adopted July 6, 2004; UN Human Rights Committee (HRC). *Saidov v. Tajikistan*. Communication No. 964/2001. Views adopted July 8, 2004.

and mental health institutions), the HRC has required improvements in hygienic conditions and the provision of regular exercise and adequate treatment.⁵⁵ Failure to adequately treat a mental illness condition that is exacerbated by being on death row can also amount to a breach of Articles 7 and/or 10(1).⁵⁶

In relation to Article 10(1), the HRC has found a violation where a prisoner on death row was denied medical treatment⁵⁷ and where severe overcrowding in a pretrial detention center resulted in inhumane and unhealthy conditions, eventually leading to the detainee's death.⁵⁸

Other examples of violations of Articles 7 and 10(1) include a case in which a detainee had been held in solitary confinement in an underground cell, was subjected to torture for three months, and was denied the medical treatment his condition required⁵⁹ and a case where the combination of the size of the cells, hygienic conditions, poor diet and lack of dental care resulted in a finding of a breach of Articles 7 and 10(1).⁶⁰

Denying a detainee direct access to his medical records, particularly where this may have consequences for his treatment, can constitute a breach of Article 10(1).⁶¹

Where a violation has occurred, the obligation to provide an effective remedy under Article 2(3)(a) of the ICCPR can include the provision of appropriate medical and psychiatric care.⁶²

- ▶ **Article 1 CAT:** (1) *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.* (2) *This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*
- ▶ **Article 2 CAT:** (1) *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.* (2) *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability*

55 HRC. Concluding Observations of the UN Human Rights Committee: Bosnia and Herzegovina, 2006. (CCPR/C/BIH/CO/1).

56 HRC. Williams v. Jamaica. Communication No. 609/1995. (CCPR/C/61/D/609/1995). Views adopted November 4, 1997.

57 HRC. Lewis v. Jamaica. Communication No. 527/1993. Views adopted July 18, 1996. Appointments to treat skin condition not kept over period of 2½ years. See also Pinto v. Trinidad and Tobago. Communication No. 232/1987. (CCPR/A/45/40 [vol. II SUPP]). Views adopted July 20, 1990. The HRC reaffirmed that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention and that this obligation, obviously, extends to persons under the sentence of death. However, the facts did not disclose a violation where the allegations of ill treatment and lack of medical care were uncorroborated and made at a late stage in the application; UN Human Rights Committee (HRC). Henry and Douglas v. Jamaica. Communication No. 571/1994. (CCPR/A/51/40 [vol. II SUPP]), CCPR/C/57/D/571/1994). Views adopted July 25, 1996. Keeping Henry in a cold cell after he was diagnosed for cancer breached Articles 7 and 10(1); UN Human Rights Committee (HRC). Leehong v. Jamaica. Communication No. 613/1995. (CCPR/A/54/40 [vol. II]), (CCPR/C/66/D/613/1995). Views adopted July 13, 1999. Prisoner on death row only allowed to see a doctor once, despite sustained beatings by warders and request for medical attention.

58 HRC. Lantsova v. The Russian Federation. Communication No. 763/1997. Views adopted March 26, 2002.

59 HRC. Setelich/Sendic v. Uruguay. Communication No. R.14/63. (CCPR/A/37/40). Views adopted October 28, 1981.

60 HRC. Howell v. Jamaica. Communication No. 798/1998. (CCPR/A/59/40 [vol. II], C/79/D/798/1998). Views adopted October 21, 2003).

61 HRC. Zheludkov v. Ukraine. Communication No. 726/1996. (CCPR/A/58/40 [vol. II], CCPR/C/76/D/726/1996). Views adopted October 29, 2002. See concurring opinion of Quiroga, which states that committee's interpretation of Article 10(1) relating to access to medical records is unduly narrow and that mere denial of records is sufficient to constitute a breach, regardless of consequences.

62 HRC. Sahadath v. Trinidad and Tobago. Communication No. 684/1996. (CCPR/A/57/40 [vol. II], CCPR/C/684/1996). Views adopted April 2, 2002.

or any other public emergency, may be invoked as a justification of torture. (3) An order from a superior officer or a public authority may not be invoked as a justification of torture.

- ▶ **Article 4 CAT:** (1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.
- ▶ **Article 10 CAT:** (1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
- ▶ **Article 13 CAT:** Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given.
- ▶ **Article 14 CAT:** (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.
- ▶ **Article 16 CAT:** (1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. (2) The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

The Committee Against Torture has identified overcrowding, inadequate living conditions, and lengthy confinement in psychiatric hospitals as “tantamount to inhuman or degrading treatment.”⁶³ It has also condemned, in similar terms, extreme overcrowding in prisons where living and hygiene conditions would appear to endanger the health and lives of prisoners,⁶⁴ in addition to lack of medical attention.⁶⁵

63 OHCHR. Concluding Observations: Russia. (CAT/C/RUS/CO/4).

64 OHCHR. Concluding Observations: Cameroon. (CAT/C/CR/31/6).

65 OHCHR. Concluding Observations: Nepal. (CAT/C/NPL/CO/2). See also observations on Paraguay (CAT/C/SR.418) and Brazil (CAT/C/SR.471).

The committee has also emphasized that medical personnel who participate in acts of torture should be held accountable and punished.⁶⁶

Note: Special Rapporteurs on Torture

Successive UN Special Rapporteurs on Torture have found numerous abuses of detainees' health and access to health services that amount to breaches of prohibitions against torture and/or cruel, inhuman, or degrading treatment. Special Rapporteurs have noted that conditions and the inadequacy of medical services are often worse for pretrial detainees than for prisoners.⁶⁷ Some of the worst abuses include: failure to provide new detainees with access to a medical professional and with sanitary living conditions;⁶⁸ failure to segregate those with contagious diseases such as tuberculosis;⁶⁹ completely unacceptable quarantine procedures;⁷⁰ and insufficient provision of food, leading in some instances to conditions approaching starvation.⁷¹

Another issue repeatedly raised by UN Special Rapporteurs on Torture is the impact on the mental health of children who enter the justice system and the accompanying threats presented by inhuman and violent conditions.⁷²

- ▶ **Article 37 CRC:** *States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*
- ▶ **Article 39 CRC:** *States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*
- ▶ **Article 15 CRPD:** *(1) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation. (2) States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.*
- ▶ **Code of Conduct for Law Enforcement Officials**
- ▶ **Article 2:** *In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.*

66 OHCHR. Concluding Observations: Argentina. (A/48/44).

67 M. Nowak. Report of the Special Rapporteur on Torture, mission to Jordan (addendum), 2007a. (UN doc. A/HRC/33/Add.3); T. van Boven. Report of the Special Rapporteur on torture, mission to Uzbekistan (addendum), 2003. (UN doc. E/CN.4/2003/68/Add.2).

68 N. S. Rodley. Report of the Special Rapporteur on Torture, mission to the Russian Federation (addendum), 1994. (UN doc. E/CN.4/1995/34/Add.1).

69 Rodley. Report of the Special Rapporteur on Torture, mission to Azerbaijan, 2000. (UN doc. E/CN.4/2001/66/Add.1).

70 Rodley. Report of the Special Rapporteur on Torture, mission to Azerbaijan, 2000. (UN doc. E/CN.4/2001/66/Add.1); Nowak. Report of the Special Rapporteur on Torture, mission to Moldova, 2009. (UN doc. A/HRC/10/44/Add.3).

71 Rodley. Report of the Special Rapporteur on Torture, mission to Kenya (addendum), 2000. (UN doc. E/CN.4/2000/9/Add.4).

72 Nowak. Report of the Special Rapporteur on Torture, mission to Nigeria, 2007. (UN doc. A/HRC/7/3/Add.4.0); Nowak. Report of the Special Rapporteur on Torture, mission to Moldova, 2009. (UN doc. A/HRC/10/44/Add.3); Rodley. Report of the Special Rapporteur on Torture, mission to Kenya (addendum), 2000. (UN doc. E/CN.4/2000/9/Add.4).

▶ **Article 5:** *No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances...as a justification of torture or other cruel, inhuman or degrading treatment or punishment.*

▶ **Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).**⁷³

▶ **UN Body of Principles for the Protection of All Persons under Any Form of Detention**

Principle 1: *All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.*

Principle 6: *No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*

▶ **UN Standard Minimum Rules for Treatment of Prisoners**⁷⁴

Rules 22–26 on Medical Services

Rule 22(1) requires that every institution should have at least one qualified medical officer who has some knowledge of psychiatry. More generally, medical services should be organized in collaboration with the public health system and should include appropriate psychiatric services. Rule 22(2) requires the transfer of sick prisoners to specialist institutions as appropriate while also ensuring that prison hospitals are properly equipped and staffed. Under Rule 22(3), the services of a qualified dental officer shall be available to every prisoner.

Rule 23 focuses on the provision of pre- and postnatal care and nursery care for women and their children and ensures that, whenever practicable, babies will be born in an external hospital.

Rule 24 requires that the medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view to diagnose any physical or mental illnesses and to segregate prisoners with infectious or contagious conditions.

Under Rule 25, the medical officer should see all sick prisoners on a daily basis and report to the prison director whenever he determines that a prisoner's physical or mental health is being adversely affected by his detention. In addition, in line with Rule 26, the medical officer shall regularly inspect and report upon prisoners' food, hygiene, sanitation, heating, lighting, clothing, and bedding. The director shall, after considering the reports, take immediate action as required.

▶ **Physicians for Human Rights Principles on the Effective Investigation and Documentation of Torture: the Istanbul Protocol**⁷⁵

73 OHCHR. <http://www.wfrrt.net/humanrts/instree/h3pmerhp.htm>.

74 OHCHR. Standard Minimum Rules for the Treatment of Prisoners. <http://www2.ohchr.org/english/law/treatmentprisoners.htm#wp1018277>.

75 Physicians for Human Rights. Istanbul Protocol. www.physiciansforhumanrights.org/library/istanbul-protocol.html.

Right to Participate in Public Policy

EXAMPLES OF POTENTIAL VIOLATIONS

- An indigenous group is denied any say in policy decisions affecting their health and well-being on the grounds of their perceived lack of competence
- Lesbian, Gay, Bisexual, and Transgender (LGBT) groups are deliberately excluded from participating in the development of policies that address HIV/AIDS

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 25 ICCPR:** *Every citizen shall have the right and the opportunity, without ... distinctions ... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.*
- ▶ **Article 7 CEDAW:** *State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: ... (b) [t]o participate in the formulation of government policy and the implementation thereof.*
- ▶ **Article 14(2)(a) CEDAW:** *The right of rural women to participate in development planning.*
- ▶ **Article IV WHO Alma-Ata Declaration:** *The people have the right and the duty to participate individually and collectively in the planning and implementation of their health care.*
- ▶ **Principle 2 IAPO Declaration on Patient-Centred Healthcare: Choice and Empowerment:** *Patients have a right and responsibility to participate, to their level of ability and preference, as a partner in making health care decisions that affect their lives. This requires a responsive health service which provides suitable choices in treatment and management options that fit in with patients' needs, and encouragement and support for patients and carers that direct and manage care to achieve the best possible quality of life. Patients' organizations must be empowered to play meaningful leadership roles in supporting patients and their families to exercise their right to make informed health care choices.*
- ▶ **Principle 3 IAPO Declaration on Patient-Centred Healthcare:⁷⁶ Patient involvement in health policy:** *Patients and patients' organizations deserve to share the responsibility of health care policy-making through meaningful and supported engagement in all levels and at all points of decision-making, to ensure that they are designed with the patient at the center. This should not be restricted to health care policy but include, for example, social policy that will ultimately impact on patients' lives.*
- ▶ **Article 12 ICESCR:** *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this*

76 Physicians for Human Rights. Istanbul Protocol. www.physiciansforhumanrights.org/library/istanbul-protocol.html.

right shall include those necessary for: ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

- **CESCR GC 14, paras. 43 and 54:** The CESCR has called for countries to adopt “a national public health strategy and plan of action” to be “periodically reviewed, on the basis of a participatory and transparent process.” In addition, “[p]romoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people’s participation is secured by States.”

Right to Nondiscrimination and Equality

EXAMPLES OF POTENTIAL VIOLATIONS

- Asylum seekers are denied access to all health care apart from emergency treatment
- Hospitals routinely place Roma women in separate maternity wards
- Drug users are underrepresented in HIV treatment programs despite accounting for a majority of the people living with HIV
- A woman with a diagnosis of schizophrenia is told by nursing staff that her abdominal pains are “all in your mind”; she is later diagnosed as having ovarian cancer

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 26 ICCPR:** *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
- ▶ **Article 2(2) ICCPR; Article 2(2) ICESCR:** *The States Parties to the present Covenant undertake to guarantee the rights enunciated in the present Covenant shall be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.*
- **CESCR GC 14, para. 12:** The CESCR has stated that health facilities, goods, and services have to be accessible to everyone without discrimination “and especially to the most vulnerable and marginalized sections of the population.” In particular, such health facilities, goods, and services “must be affordable for all,” and “poorer households should not be disproportionately burdened with health expenses as compared to richer households.” The CESCR has further urged particular attention to the needs of “ethnic minorities and indigenous

populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.”

- **CESCR GC 5, para. 15:** The CESCR has defined disability-based discrimination as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.” It has gone on to emphasize the need “to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.”⁷⁷

To ensure equality between men and women in accessing health care, the CESCR has stated that it requires, at a minimum, the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on the basis of gender. This requirement includes, inter alia, addressing the ways in which gender roles affect access to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; the prohibition of female genital mutilation; and the provision of adequate training for health care workers to deal with women’s health issues.⁷⁸

- ▶ **Article 5 CERD:** *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (e) Economic, social and cultural rights, in particular: ... (iv) The right to public health, medical care, social security and social services.*
- CERD GR 30, para. 36: The CERD has recommended that the States that are party to the Convention, as appropriate to their specific circumstances, ensure that they respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.
- ▶ **Article 12 CEDAW:** *(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*
- ▶ **Article 14(2)(b) CEDAW:** *States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure*

⁷⁷ CESCR. General Comment 14 of the Committee on Economic, Social and Cultural Rights: The right to the highest attainable standard of health. (E/C.12/2004/4).

⁷⁸ CESCR. General Comment 16 of the Committee on Economic, Social and Cultural Rights: The equal right of men and women to enjoyment of all economic, social, and cultural rights (article 3 of the International Covenant on Economic, Social and Cultural Rights). (E/C.12/2005/4).

to such women the right: To have access to adequate health care facilities, including information, counselling and services in family planning.

- ▶ **Article 23 CRC:** (1) States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. (2) States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. (3) Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. (4) States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.
- ▶ **Article 28 CMW:** Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.
- ▶ **Article 43 CMW:** (1) Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met; (2) States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.
- ▶ **Article 45(1)(c) CMW:** (1) Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: Access to social and health services, provided that requirements for participation in the respective schemes are met.
- ▶ **Article 1 CRPD:** The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

- ▶ **Article 12 CRPD:** (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.
- ▶ **Article 25 CRPD:** States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.
- ▶ **Article 23 Convention Relating to the Status of Refugees**
- ▶ The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.
- ▶ **Article 3 Charter on the Right to Health:** Duty of states to institute health services that are available, accessible, and affordable for every individual.
- ▶ **Principle 1 WMA Declaration on the Rights of the Patients:** Every person is entitled without discrimination to appropriate medical care.
- ▶ **Principle 4 IAPO Declaration**
Patients must have access to the health care services warranted by their condition. This includes access to safe, quality and appropriate services, treatments, preventive care and health promotion activities. Provision should be made to ensure that all patients can access necessary services, regardless of their condition or socio-economic status. For patients to achieve the best possible quality of life, health care must support patients' emotional requirements, and consider non-health factors such as education, employment and family issues which impact on their approach to health care choices and management.
- ▶ **Resolution on Medical Care for Refugees (World Medical Association)⁷⁹**
Physicians have a duty to provide appropriate medical care regardless of the civil or political status of the patient, and governments should not deny patients the right to receive, nor should they interfere with physicians' obligation to administer, adequate treatment; and
Physicians cannot be compelled to participate in any punitive or judicial action involving refugees or IDPs or to administer any non-medically justified diagnostic measure or treatment, such as sedatives to facilitate easy deportation from the country or relocation; and
Physicians must be allowed adequate time and sufficient resources to assess the physical and psychological condition of refugees who are seeking asylum.

Note: The right to nondiscrimination and equal access to medical services

79 World Medical Association. Resolution on Medical Care for Refugees. www.wma.net/e/policy/m10.htm. Accessed November 22, 2009.

UN treaty bodies have frequently condemned states for failing to ensure equal access to medical services (often due to a lack of sufficient resources) for marginalized and vulnerable groups. These groups have included indigenous people living in extreme poverty;⁸⁰ refugees of a particular nationality;⁸¹ children, older persons, and persons with physical and mental disabilities;⁸² and those living in rural areas where the geographical distribution of health services and personnel shows a heavy urban bias.⁸³ In one country, the CESCR noted with regret that 90 percent of the population had no access to health services.⁸⁴ In another case, a state was criticized for inadequate medical care provided to low-income patients and was urged to subsidize expensive drugs required by chronically ill and mentally ill patients.⁸⁵

Treaty bodies have emphasized the importance of ensuring that those infected with particular diseases, such as HIV/AIDS, should not be the subject of discrimination and stigmatized as a result of their medical condition.⁸⁶

Two groups that continue to suffer from unequal access to health services are women and young people, which frequently leads to high mortality rates.⁸⁷ Both groups, particularly women living in rural areas⁸⁸ and especially vulnerable groups of children (such as girls, indigenous children, and children living in poverty), will often experience multiple discrimination, requiring specific targeted measures and sufficient budgetary allocations.⁸⁹

80 CERD. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bolivia, 1996. (CERD/C/304/Add.10). See also CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, 1999. (E/C.12/1/Add.14). State was urged to take more effective measures to ensure access to basic health care services for all children and to combat malnutrition, especially among children belonging to indigenous groups living in rural and remote areas.

81 CERD. Concluding Observations: Japan, 2001. (A/56/18 [SUPP]). Different standards of treatment are applied to Indochinese refugees compared to those from other nationalities.

82 CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, 2000. (E/C.12/1/Add.52). Failure of certain municipalities to allocate sufficient funds to health care services, resulting in inequality with regard to levels of provision depending on the place of residence.

83 CESCR. Concluding Observations: Mali, 1994. (E/1995/22). See also concluding observations Guatemala, 1996. (E/1997/22); Paraguay, 1996. (E/1997/22 (1996)). Noting the very small number of medical and paramedical personnel in the country; Mongolia, 2000. (E/2001/22). Noting the long-term deterioration in health situation and need to improve access to health care services for the poor and in rural areas.

84 CESCR. Concluding Observations: Nepal, 2001. (E/2002/22). The committee notes that under the current national health plan for 1997–2017, the role of the state in the development of a national health care system, consistent with the structural adjustment programs, is minimized. It further notes that the mental health service was insufficient and that no community mental health program was available.

85 CESCR. Concluding Observations: China, 2005. (E/C.12/1/ADD.107). See also concluding observations Russian Federation, 2003. (E/C.12/1/ADD.94). Committee criticizes Russia for frequent failure of hospitals and clinics in poor regions to stock essential drugs.

86 CEDAW. Report of the Committee on the Elimination of Discrimination against Women, 2001. (A/56/38 [SUPP]). See also CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation, 2003. (E/2004/22).

87 ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Peru, 1997. (E/1998/22). See also concluding observations Ukraine, 2001. (E/2002/22). Noting deterioration in the health of the most vulnerable groups, especially women and children, and in the quality of health services. Committee urges state to ensure that its commitment to primary health care is met by adequate allocation of resources and that all persons, especially from the most vulnerable groups, have access to health care.

88 CEDAW. Report of the Committee on the Elimination of Discrimination against Women: Burkina Faso, 2000. (A/55/38).

89 CRC. Convention on the Rights of the Child. Concluding Observations: Bolivia, 1993. (CRC/C/16).

2.4 Providers' Rights

Numerous international treaties and conventions include rights that are designed to protect workers and ensure safe and healthy work environments. The United Nations and its agencies, including the International Labor Organization, have developed some of these international labor standards and monitor their implementation. This section presents several standards and how they have been interpreted in relation to three key rights for health care providers. These include the right to (i) work in decent conditions, including the receipt of fair pay; (ii) freedom of association, including association with trade unions and the right to strike; and (iii) due process and related rights to receive a fair hearing and an effective remedy, protection of privacy and reputation, and freedom of expression and information.

Part I of this section covers the right to work in decent conditions. Part II discusses the right to freedom of association. Part III explores the right to due process and related rights. Each section begins with a discussion of the significance of that particular right for health providers and is followed by examples of potential violations. The relevant standards from various UN treaties are reproduced, including those of general application and the standards that refer to particular groups. Key interpretative materials are then summarized, and interpretive guidelines are drawn from the concluding observations, general comments, and case law of official monitoring bodies.

Right to Work in Decent Conditions

UN treaty-monitoring bodies have made it clear that there is no right that requires an individual be provided with work or the occupation of one's choice. States must, however, refrain from unduly hindering the ability of individuals to freely pursue their chosen careers. Furthermore, states are required to ensure the fair treatment of migrant workers, a requirement that is particularly relevant for medical professionals, who are often recruited from other countries to staff hospitals and clinics. The Convention on Migrant Workers emphasizes states' obligation to foreign-born employees.

The UN bodies have conducted surveys of workers' pay and conditions, and these investigations have resulted in specific references to the treatment of health care personnel. The concern for medical professionals is driven in part by the poor remuneration that they receive in some countries.

Right to Work

EXAMPLES OF POTENTIAL VIOLATIONS

- All overseas migrant workers from country X, including a number who are employed as doctors and nurses, are summarily expelled after diplomatic relations are broken off following a trade dispute
- Female employees are subject to frequent sexual harassment by other members of staff with no action taken to stop harassment
- There is no regulation of working hours for medical staff, who are frequently required to work in excess of 80 hours per week

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 23(1) Universal Declaration of Human Rights (UDHR):** *Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*
- ▶ **Article 6(1) International Covenant on Economic, Social and Cultural Rights (ICESCR):** *(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
 - **CESCR GC 18, para. 1:** *The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.*
 - **CESCR GC 18, para. 4:** *The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.*
 - **CESCR GC 18, paras. 6, 23, and 25:** *The right to work does not mean there is an absolute and unconditional right to obtain employment but that rather that the state should ensure that neither itself or others (such as private companies) do anything unreasonably or in a discriminatory way to prevent a person from earning a living or practicing their profession.*
 - **CESCR GC 16, para. 23:** *Implementing article 3, in relation to article 6, requires inter alia, that in law and in practice, men and women have equal access to jobs at all levels and all occupations and that vocational training and guidance programmes, in both the public and*

private sectors, provide men and women with the skills, information and knowledge necessary for them to benefit equally from the right to work.

- In addition to frequent criticisms of states' high levels of unemployment, the CESCR has also condemned (a) the expulsion of HIV-positive foreign workers with valid work permits;⁹⁰ (b) the disproportionate number of women in low paid part time work;⁹¹ and (c) the downsizing of the public sector with significant social repercussions.⁹²

► **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**

- The CERD has expressed concern on numerous occasions about the failure of states to address the lack of employment opportunities for ethnic minorities and migrant workers.⁹³
- The CERD has held that the examination and quota system for doctors trained overseas did not breach a migrant worker's right, under Article 5(e)(i) of the ICERD. Article 5(e)(i) guarantees the right to work and freely choose employment without distinction as to race, color, or national or ethnic origin.⁹⁴

Article 11 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998:⁹⁵ *Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.*

Standards related to women

- **Article 11(1) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:*

(a) the right to work as an inalienable right of all human beings; ...

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;...

90 ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Libyan Arab Jamahiriya, 1997. (E/1998/22 (1997).

91 ICESCR. Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 1997. (E/1998/22). See also concluding observations on Ukraine, 1995 (E/1996/22).

92 ICESCR. Concluding Observations: Solomon Islands, 1999. (E/2000/22).

93 CERD. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Poland, 1997. (A/52/18). See also concluding observations Norway, 1994 (A/49/18); United Kingdom of Great Britain and Northern Ireland, 1991 (A/46/18); Israel, 1998 (A/53/18); The Netherlands, 1998 (A/53/18); Lebanon, 1998 (A/53/18); Azerbaijan, 1999 (A/54/18); Denmark, 2000 (A/55/18); Latvia, 2003 (A/58/18); Iceland, 2005 (A/60/18); and Turkmenistan, 2005 (A/60/18).

94 CERD. Opinion regarding B. M. S. v. Australia, 1996. (C/54/D/8/1996); Procedural Decisions, 1999. (A/54/18).

95 UN General Assembly Resolution 53/144. December 9, 1998.

Standards related to migrant workers

- ▶ **Article 51 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families:** *Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.*

Right to Fair Pay and Safe Working Conditions

EXAMPLES OF POTENTIAL VIOLATIONS

- Nurses and ancillary staff are paid less than the national minimum wage
- A staff canteen remains open despite repeatedly failing to meet basic hygiene standards
- Medical staff in the X-ray department are frequently exposed to dangerously high levels of radiation due to faulty equipment that has not been checked or replaced
- A nurse is infected with HIV due to improperly sterilized medical equipment

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 7 ICESCR:** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*
- ▶ **Article 12 ICESCR: (1)** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2)* *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this*

right shall include those necessary for ... (b) [t]he improvement of all aspects of environmental and industrial hygiene. ...

- The CESCR has expressed concern about a range of working-condition issues, including: the need to harmonize the labor code with international standards, especially with regard to maternity leave;⁹⁶ disparities in pay and conditions between the private and public sectors (in teaching);⁹⁷ discrimination in employment on the grounds of political opinion;⁹⁸ the lack of a national minimum wage for public sector employees and the serious deterioration of some of those employees' (specifically, teachers') salaries in terms of purchasing power; the conflictual nature of relations between teachers and the state and the apparent ineffectiveness of the measures taken to remedy that situation;⁹⁹ ineffective campaigns to increase awareness of hygiene and safety in the workplace where they are frequently below established standards;¹⁰⁰ the fact that standards for the protection of workers concerning limits on the duration of the working day and weekly rest are not always fully met due to some areas of the private sector being dilatory in enforcing the relevant legislation;¹⁰¹ the lack of legislation to protect workers who are not covered by collective bargaining agreements in relation to a minimum wage, health and maternal benefits, and safe working conditions;¹⁰² unsafe working conditions and lack of compensation for workplace injury;¹⁰³ the privatization of labor inspections and control systems;¹⁰⁴ legislation that favors individual negotiation with employers over collective bargaining;¹⁰⁵ the need for effective implementation of legislative provisions concerning job security;¹⁰⁶ and the allowance of excessive working hours in both the public and private sectors.¹⁰⁷

► **International Convention on Civil and Political Rights (CCPR)**

- The UN Human Rights Council (HRC) has condemned sexual harassment in the workplace¹⁰⁸ and the lack of implementation of laws concerning labor standards. Laws concerning labor standards include those that call for adequate monitoring of working conditions and sufficient funding for labor inspection workforce.¹⁰⁹

► **Article 4 International Labour Organization (ILO) Occupational Safety and Health Convention No. 155, 1981:**¹¹⁰ *The state is under an obligation to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment with the aim of preventing accidents and injury to health arising out of, linked with or*

96 ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador, 1990. (E/1991/23).

97 ICESCR. Concluding Observations: Spain, 1991. (E/1992/23); Concluding observations Columbia, 1991 (E/1992/23).

98 ICESCR. Concluding Observations: Germany, 1993. (E/1994/23).

99 ICESCR. Concluding Observations: Uruguay, 1994. (E/1995/22). See also concluding observations Finland, 1996. (E/1997/22).

100 ICESCR. Concluding Observations: Argentina, 1994. (E/1995/22).

101 ICESCR. Concluding Observations: Austria, 1994. (E/1995/22).

102 ICESCR. Concluding Observations: Suriname, 1995. (E/1996/22).

103 ICESCR. Concluding Observations: Russian Federation, 1997. (E/1998/22). The committee later condemned the large number of illegal dismissals and nonpayment of wages.

104 CESCR. Concluding Observations: Argentina, 1999. (E/2000/22).

105 ICESCR. Concluding Observations: Australia, 2000. (E/2001/22).

106 ICESCR. Concluding Observations: Finland, 2000. (E/2001/22).

107 ICESCR. Concluding Observations: Japan, 2001. (E/2002/22).

108 ICCPR. Chile, 1999. (A/54/40 [vol. 1]). See also ICCPR. Trinidad and Tobago, 2001. (A/56/40 [vol. II]).

109 ICCPR. Dominican Republic, 1993. (A/48/40 [vol. II]). See also ICESCR. El Salvador, 1996. (E/1997/22).

110 International Labour Organization (ILO). Occupational Health Services Convention No. 155, 1981. http://www.ilocarib.org.tt/projects/cariblex/conventions_19.shtml.

occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

► **Article 3(1) ILO Occupational Health Services Convention No. 161, 1985¹¹¹**

States undertake to develop progressively occupational health services for all workers, including those in the public sector.

► **Article 2(1) ILO Promotional Framework for Occupational Safety and Health Convention No. 187, 2006:¹¹²** *States under a duty to promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system and national programme.*

Standards related to nursing staff

► **ILO Nursing Personnel Convention¹¹³ No. 149, 1977:¹¹⁴**

Article 1(2): *This Convention applies to all nursing personnel, wherever they work.*

► **Article 2:** *(1) Each Member which ratifies this Convention shall adopt and apply, in a manner appropriate to national conditions, a policy concerning nursing services and nursing personnel designed, within the framework of a general health programme, where such a programme exists, and within the resources available for health care as a whole, to provide the quantity and quality of nursing care necessary for attaining the highest possible level of health for the population. (2) In particular, it shall take the necessary measures to provide nursing personnel with— (a) education and training appropriate to the exercise of their functions; and (b) employment and working conditions, including career prospects and remuneration, which are likely to attract persons to the profession and retain them in it. (3) The policy mentioned in paragraph 1 of this Article shall be formulated in consultation with the employers' and workers' organisations concerned, where such organisations exist. (4) This policy shall be co-ordinated with policies relating to other aspects of health care and to other workers in the field of health, in consultation with the employers' and workers' organisations concerned.*

¹¹¹ Occupational Health Services Convention No. 161, 1985. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C161>.

¹¹² ILO. Promotional Framework for Occupational Safety and Health Convention. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C187>.

¹¹³ ILO. Nursing Personnel Convention No. 149, 1977. <http://www.ilo.org/public/english/dialogue/sector/publ/health/c149.pdf>. The preamble states: Recognising the vital role played by nursing personnel, together with other workers in the field of health, in the protection and improvement of the health and welfare of the population, and Recognising that the public sector as an employer of nursing personnel should play an active role in the improvement of conditions of employment and work of nursing personnel, and Noting that the present situation of nursing personnel in many countries, in which there is a shortage of qualified persons and existing staff are not always utilised to best effect, is an obstacle to the development of effective health services, and Recalling that nursing personnel are covered by many international labour Conventions and Recommendations laying down general standards concerning employment and conditions of work, such as instruments on discrimination, on freedom of association and the right to bargain collectively, on voluntary conciliation and arbitration, on hours of work, holidays with pay and paid educational leave, on social security and welfare facilities, and on maternity protection and the protection of workers' health, and Considering that the special conditions in which nursing is carried out make it desirable to supplement the above-mentioned general standards by standards specific to nursing personnel, designed to enable them to enjoy a status corresponding to their role in the field of health and acceptable to them, and Noting that the following standards have been framed in co-operation with the World Health Organisation and that there will be continuing co-operation with that Organisation in promoting and securing the application of these standards....

¹¹⁴ ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C149>.

Article 6: *Nursing personnel shall enjoy conditions at least equivalent to those of other workers in the country concerned in the following fields: (a) hours of work, including regulation and compensation of overtime, inconvenient hours and shift work; (b) weekly rest; (c) paid annual holidays; (d) educational leave; (e) maternity leave; (f) sick leave; (g) social security.*

Article 7: *Each Member shall, if necessary, endeavour to improve existing laws and regulations on occupational health and safety by adapting them to the special nature of nursing work and of the environment in which it is carried out.*

Note: Working Conditions and Health Care Professionals

UN treaty-monitoring bodies have made specific reference to health personnel on numerous occasions. There is general consensus about the need to take measures to increase the salaries of nurses.¹¹⁵ The failure to pay medical staff their salaries for extended periods also presents an issue, as it leads many doctors to seek employment overseas. Monitoring bodies have also noted the pressing need to allocate funds to hospitals and health care services on a priority basis in order to restore health services to an operational level and to ensure that doctors, nurses, and other medical personnel are able to resume work as soon as possible.¹¹⁶ The low wages of the medical staff and the suboptimal living and working conditions in hospitals have also generated concern.¹¹⁷ Finally, the "brain drain" associated with the exodus of health professionals due to poor working conditions in the health sector in their home countries has been cited as problematic.¹¹⁸

Standards related to women

- ▶ **Article 10(2) ICESCR:** *Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
- ▶ **Article 7 ICESCR:** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*

¹¹⁵ CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uruguay, 1997. (E/1998/22).

¹¹⁶ CRC. Concluding Observations of the Committee on the Rights of the Child: Solomon Islands, 2003. (CRC/C/132).

¹¹⁷ ICESCR. Concluding Observations: Georgia, 2002. (E/2003/22).

¹¹⁸ ICESCR. Concluding Observations: Zambia, 2005. (E/2006/22).

- **CESCR GC 16, para. 24:** *Article 7 (a) of the Covenant requires States parties to recognize the right of everyone to enjoy just and favourable conditions of work and to ensure, among other things, fair wages and equal pay for work of equal value. Article 3, in relation to article 7 requires, inter alia, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate. The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally, the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.*
- ▶ **Article 11(1)(f) CEDAW:** *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ... [t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*
- ▶ **Article 11(2) CEDAW:** *In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.*
- **CEDAW General Recommendation 24 on Article 12, para. 28:** *When reporting on measures taken to comply with article 12, States parties are urged to recognize its interconnection with other articles in the Convention that have a bearing on women's health. Those articles include ... article 11, which is concerned, in part, with the protection of women's health and safety in working conditions, including the safeguarding of the reproductive function, special protection from harmful types of work during pregnancy and with the provision of paid maternity leave.*
- CEDAW has offered frequent criticism of the disproportionate number of women occupying low-paid, low-skilled, and part-time work, including in the health sector.¹¹⁹ The CEDAW committee has also highlighted the relative absence of women from high decision-making professional and administrative positions in both the public and private sectors (evidence of the so-called "glass-ceiling" phenomenon).¹²⁰

¹¹⁹ CEDAW. Report of the Committee on the Elimination of Discrimination against Women: Belarus, 2004. (A/59/38 [part I])

¹²⁰ CEDAW. Report of the Committee: Finland, 1995. (A/50/38). See also reports of the committee on Ethiopia, 1996 (A/51/38) and Albania, 2003 (A/58/38 [part I]).

- CEDAW has also condemned: the lack of regulations to penalize and remedy sexual harassment in the workplace in the private sector;^{121, 122} the poor working conditions of women workers in both the private and the public sectors, particularly with respect to the nonimplementation of minimum wage levels and the lack of social and health benefits;¹²³ discrimination against women on the grounds of pregnancy and maternity in spite of policies that prohibit this practice;¹²⁴ the lack of affordable childcare;¹²⁵ and the need to expand the number of crèches available for working mothers.¹²⁶

Standards related to workers with disabilities

- ▶ **Article 7 CESC:** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular...*
- **CESCR GC 5, para. 25:** The right to "the enjoyment of just and favourable conditions of work" (Article 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labor market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of nondisabled workers. States parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labor protection or for paying below-minimum wages.

Standards related to race, noncitizens, and migrant workers

- ▶ **Article 5(e)(i) CERD:** *In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.*
- **CERD GC 30, paras. 33–35:** *[The committee recommends] that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures: ... (33) Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects; (34) Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical*

¹²¹ CEDAW. Report of the Committee: Argentina, 1997. (A/52/38/Rev. 1 [part II]). See also report of the committee on Cuba, 2000 (A/55/38 [part II]).

¹²² CEDAW. Report of the Committee: China, 1999. (A/54/38/Rev.1 [part II]).

¹²³ CEDAW. Report of the Committee: Bangladesh, 1997. (A/52/38/Rev.1 [part II]).

¹²⁴ CEDAW. Report of the Committee: Guyana, 2001. (A/56/38 [part II]). The committee recommended development of a national policy for the private and public sectors to include minimum mandatory and paid maternity and parental leave and also to include provisions for effective sanctions and remedies for violation of laws regarding maternity leave. It also recommended establishment of training programs for the staff of the labor office to facilitate prosecution and ensure the effective enforcement of existing laws for both the public and private sectors.

¹²⁵ CEDAW. Report of the Committee: Ireland, 2005. (A/60/38 [part II]).

¹²⁶ CEDAW. Report of the Committee: Bangladesh, 2004. (A/59/38 [part II]).

assault; **(35)** Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.

- ▶ **Article 25 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1)** Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment. **(2)** It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article. **(3)** States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.
- ▶ **Article 70:** States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Right to Freedom of Association

The ability of workers to be able to form, join, and run associations without undue interference is critical to their ability to effectively defend their rights. Health care professionals enjoy the same collective action rights as other employees. Although the health sector provides an essential service, this fact only precludes its members from work stoppage in certain exceptional circumstances. Although UN jurisprudence on freedom of association has focused on the treatment of NGOs and political parties, the interpretation of the core aspects of the right can also be applied to professional associations and trade unions. The latter are also the subject of relevant ILO standards.

Certain provisions of the UN Human Rights Defenders Declaration emphasize the role of health care providers as human rights defenders who implement and protect social rights and fundamental civil rights, such as life and freedom from torture and inhuman or degrading treatment.¹²⁷

¹²⁷ UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. (A/RES/53/144). [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En).

Right to Freedom of Association and Assembly

EXAMPLES OF POTENTIAL VIOLATIONS

- A professional medical association is not approved by the Ministry of Health because its president is a leading member of an opposition political party
- Authorities prevent a rally for improved pay and conditions for health workers from taking place without any justification

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

General standards

- ▶ **Article 20 Universal Declaration of Human Rights (UDHR):** *(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.*
- ▶ **Article 21 International Covenant on Civil and Political Rights (ICCPR):** *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*
 - Although freedom of assembly is not an absolute right, any restrictions on the ability of people to peacefully protest must be justified in line with the conditions explicitly stated in Article 21 of the ICCPR.¹²⁸
- ▶ **Article 22 ICCPR:** *(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*
 - It is not clear whether Article 22 of the ICCPR also includes the freedom not to join an association, in which case trade union "closed shop" practices would amount to a breach, although it is probable that the article does include this freedom.¹²⁹

¹²⁸ S. Joseph, J. Schultz, and M. Castan. *The ICCPR: Cases, Materials and Commentary*. (Oxford: Oxford University Press, 2004), 569.

¹²⁹ *Ibid.*, 582. See also HRC. *Gauthier v. Canada*. Communication No. 633/1995. Views adopted May 5, 1999.

- Procedural formalities for recognition of associations must not be so onerous as to amount to a substantive restriction on Article 22 of the ICCPR.¹³⁰
- Although legislation governing the incorporation and status of associations may be, on its face, compatible with Article 22, de facto state practice restricting the right to freedom of association through a process of prior licensing and control has been condemned.¹³¹

► **Article 2 ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organise:**¹³² *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

- The right to establish and to join organizations for the promotion and defense of workers' interests without previous authorization is a fundamental right under Article 2 of ILO Convention No. 87 that should be enjoyed by all workers without any distinction whatsoever; hospital personnel are entitled to take full advantage of this right.¹³³
- A law providing that the right of association is subject to authorization granted by a government department purely in its discretion is incompatible with the principle of freedom of association as guaranteed by ILO Convention No. 87.¹³⁴

► **UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Human Rights Defenders Declaration) 1998**¹³⁵

Article 1: *Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.*

Article 5: *For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) To meet or assemble peacefully; (b) To form, join and participate in non-governmental organizations, associations or groups; (c) To communicate with non-governmental or intergovernmental organizations.*

Standards related to women

- **Article 7(c) CEDAW:** *States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to participate in non-governmental organizations and associations concerned with the public and political life of the country.*

¹³⁰ HRC. Concluding Observations of the Human Rights Committee: Belarus, 1997. (CCPR/C/79/Add.); Concluding Observations: Lithuania, 1997. (CCPR/C/79/Add.87).

¹³¹ HRC. Concluding Observations: Lebanon, 1997. (A/52/40 [vol. I]).

¹³² ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C087>.

¹³³ ILO. Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee, 2005.

¹³⁴ ILO. Freedom of Association: Digest of Decisions and Principles, 2005; Digest of Decisions and Principles, 1996; and 332nd Report of the Freedom of Association Committee. Case No. 2225.

¹³⁵ UN General Assembly Resolution 53/144. December 9, 1998. [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En).

- ▶ **Article 3 CEDAW:** *States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*
- **CESCR GC 16 on Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, E/2006/22 (2005) 116, para. 25:** *Article 8, paragraph 1 (a), of the Covenant requires States parties to ensure the right of everyone to form and join trade unions of his or her choice. Article 3, in relation to article 8, requires allowing men and women to organize and join workers' associations that address their specific concerns. In this regard, particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this right.*

Standards related to race

- ▶ **Article 5(d)(ix) CERD:** *In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of [t]he right to freedom of peaceful assembly and association.*

Trade Unions and the Right to Strike

EXAMPLES OF POTENTIAL VIOLATIONS

- Health sector trade unions or professional associations have not been approved by the Ministry of Health to represent members
- A nurse cannot work at a particular hospital unless she joins the only trade union recognized by the management, as part of a "closed shop" agreement
- Some doctors and nurses are dismissed after taking collective action over their poor pay and conditions

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 22 ICCPR: (1)** *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2)* *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members*

of the armed forces and of the police in their exercise of this right. **(3)** Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

- Trade unions have specific protection under Article 22(1) of the ICCPR;¹³⁶ Article 22(3) emphasizes preexisting obligations under ILO Convention 87.
- The need for multiple trade unions to be lawfully guaranteed has been emphasized by both the HRC and the CESCR,¹³⁷ and the absence of enabling legislation has been condemned.¹³⁸
- Workers' rights—including collective bargaining, protection against reprisals for exercising free association rights, and freedom from unnecessary interference in trade union activities—have been reaffirmed by the HRC¹³⁹ and the CESCR¹⁴⁰ on numerous occasions.
- The HRC has found breaches of both Article 22 and 19 (free expression) for the unlawful detention of individuals because of their trade union activities.¹⁴¹
- Trade union protection includes ensuring that foreign workers are not barred from holding official positions and that unions are not dissolved by the executive.¹⁴²
- Article 22(3) does not implicitly guarantee the right to strike.¹⁴³
- The denial to civil servants of the right to form associations and to bargain collectively has been condemned as a violation of Article 22 of the ICCPR.¹⁴⁴
- An absolute ban on strikes by public servants who are not exercising authority in the name of the state and are not engaged in "essential services," as defined by the ILO, may violate Article 22 of the ICCPR.¹⁴⁵

► **Article 23(4) UDHR:** *Everyone has the right to form and to join trade unions for the protection of his interests.*

► **Article 8 ICESCR**

1. *The States Parties to the present Covenant undertake to ensure:*

(a) *The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right*

136 Article 22(1) of the ICCPR reads: *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

137 ICCPR. Brazil, 1996. (A/51/40 [vol. I]); ICESCR. Rwanda, 1989. (E/1989/22).

138 ICCPR. Georgia, 1997. (A/52/40 [vol. I]).

139 ICCPR. Costa Rica, 1999. (A/54/40 [vol. I]). "Freedom of association, including the right to collective bargaining, should be guaranteed to all individuals. Labour legislation should be reviewed and, where necessary, reformed to introduce measures of protection against reprisals for attempts to form associations and trade unions and to ensure that workers have access to speedy and effective remedies." See also Dominican Republic, 2001. (A/56/40 [vol. I]); Argentina, 1995. (A/50/40 [vol. I]); Guatemala, 1996. (A/51/40 [vol. I]); Nigeria, 1996. (A/51/40 [vol. I]); Bolivia, 1997. (A/52/40 [vol. I]); Venezuela, 2001. (A/56/40 [vol. I]).

140 ICESCR. Jamaica, 1990. (E/1990/23).

141 Burgos v. Uruguay. (R.12/52); ICCPR. A/36/40. July 29, 1981; Pietraroia v. Uruguay. (R.10/44); ICCPR. A/36/40. March 27, 1981; Weinberger v. Uruguay. (R.7/28); ICCPR. A/36/40. October 29, 1980; Sohn v. Republic of Korea. (518/1992); ICCPR. (A/50/40 [vol. II]). July 19, 1995. (CCPR/C/54/D/518/1992).

142 HRC. Concluding Observations of the Human Rights Committee: Senegal, 1997. (CCPR/C/79/Add.).

143 Majority view in J. B. and Ors v. Canada. (118/82). A sizeable minority of the committee dissented, however.

144 HRC. Concluding Observations: Lebanon, 1997. (A/52/40 [vol. I]); ICCPR. Chile, 1999. (A/54/40 [vol. I]).

145 ICCPR. Germany, 1997. (A/52/40 [vol. I]).

other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

- In contrast to Article 22(3) ICCPR, Article 8(1)(d) ICESCR contains an explicit guarantee of the right to strike, which the CESCR has stated could be self-executing.¹⁴⁶
- "Consultation and co-operation are no substitute for the right to strike" under Article 8(1) of the ICESCR.¹⁴⁷
- The CESCR has condemned the refusal of some employers to recognize or deal with new, "alternative" unions and the fact that some employers take adverse action, including dismissal, against union activists.¹⁴⁸
- The apparent lack of measures to enable workers' and employers' organizations to participate in discussions about the determination of minimum wages for public sector employees has been criticized by the CESCR,¹⁴⁹ as has been the failure to enact legislative measures to regulate the access of employers' and workers' organizations to the National Labour Council and other relevant organs.¹⁵⁰

► **ILO Convention 87 on the Freedom of Association and Protection of the Right to Organise**¹⁵¹

Article 2: *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

Article 3: (1) *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration*

¹⁴⁶ ICESCR. Luxembourg, 1990. (E/1991/23). It is questioned whether the covenant, virtually alone among applicable international human rights treaties, is considered a non-self-executing in its totality. It was observed that, by contrast, the covenant contained a number of provisions that the great majority of observers would consider to be self-executing. These included, for example, provisions dealing with nondiscrimination, the right to strike, and the right to free primary education.

¹⁴⁷ ICESCR. Rwanda, 1989. (E/1989/22). See also Peru, 1997. (E/1998/22). Convention expresses concern about the ineffectiveness of labor legislation to protect the rights of trade unions, including the right to strike.

¹⁴⁸ ICESCR. Russian Federation, 1997. (E/1998/22).

¹⁴⁹ ICESCR. Uruguay, 1994. (E/1995/22).

¹⁵⁰ ICESCR. Belgium, 1994. (E/1995/22).

¹⁵¹ ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C087>.

and activities and to formulate their programmes. **(2)** The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4: Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5: Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

► **ILO Convention 98 on Right to Organize and Collective Bargaining:**¹⁵²

Article I: (1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. **(2)** Such protection shall apply more particularly in respect of acts calculated to: (a) Make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) Cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2: (1) Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

Article 6: This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

- Although there is no explicit recognition of the right to strike in any ILO convention or recommendation, the ILO's Freedom of Association Committee frequently states that the right to strike is a fundamental right of workers and of their organizations¹⁵³ and defines the limits within which it may be exercised. In addition, two resolutions of the International Labour Conference, which provide guidelines for ILO policy, have emphasized recognition of the right to strike in member states in at least two resolutions.¹⁵⁴
- Persons employed in public hospitals should enjoy the right to collective bargaining as guaranteed by ILO Convention No. 98.¹⁵⁵
- Recognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike.¹⁵⁶
- The ILO Freedom of Association Committee has acknowledged that the right to strike can be restricted or even prohibited in the public service or in certain essential services when

¹⁵² ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C098>.

¹⁵³ ILO. Digest of Decisions and Principles of the Freedom of Association Committee, 1952. Fourth (revised) edition. During its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and laid down the basic principle underlying this right, from which all others to some extent derive and which recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests.

¹⁵⁴ ILO. Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation, 1957. Resolution called for the adoption of "laws ... ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers. See also Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, 1970. Resolution invited the governing body to instruct the director-general to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense," with particular attention to be paid, inter alia, to the "right to strike."

¹⁵⁵ ILO. 306th Report of the Freedom of Association Committee. Case No. 1882.

¹⁵⁶ ILO. Digest, 2005; Digest, 1996; and 304th Report of the Freedom of Association Committee. Case No. 1719.

striking could cause serious hardship to the national community, provided that the limitations are accompanied by certain compensatory guarantees.¹⁵⁷

- The ILO Committee has expressly stated that the hospital sector is considered an essential service for the purposes of prohibiting work stoppages.¹⁵⁸ More broadly, to determine situations in which a strike could be prohibited in an essential service, there must be a clear and imminent threat to the life, personal safety, or health of the whole or part of the population.¹⁵⁹ Within those services considered essential, however, certain categories of employees, such as hospital laborers and gardeners, should not be deprived of the right to strike.

Right to Due Process and Related Rights

This section outlines the relevant due process standards that health care providers enjoy when commencing or responding to civil proceedings, including disciplinary matters. It does not deal with the rights of the accused in criminal proceedings.¹⁶⁰ As in previous sections, material that elaborates on the interpretation of standards in relation to health sector personnel has been highlighted. Relevant standards from the 1998 UN Human Rights Defenders Declaration underscore the fact that health care providers, in addition to enjoying the same core rights as patients, are defenders of rights in their daily work.

The first part of this section examines the right to a fair hearing. The second part focuses on the related right to an effective remedy. The interpretation of what is meant by a "suit at law" under Article 14(1) of the ICC PR continues to evolve, although regulation of the activities of a professional body and scrutiny of such regulations by the courts may fall within its scope.

This section also details those standards that protect the privacy rights of health care providers—in and outside the workplace—and their honor and reputations. In addition, there is a brief discussion of standards that address the right to free expression and the right to impart information. These liberties are particularly important as they might offer protection to whistle-blowers who seek to place certain information in the public domain. This protection is important because public sector employees are often reluctant to disseminate information due to fear of adverse consequences.

¹⁵⁷ ILO. *Digest of Decisions and Principles of the Freedom of Association Committee*, 2005; *Digest*, 1996; 300th Report of the Freedom of Association Committee. Case No. 1791; 302nd Report. Case No. 1849; and 318th Report. Case No. 2020.

¹⁵⁸ ILO. *Digest*, 2005; *Digest*, 1996; 300th Report of the Freedom of Association Committee. Case No. 1818; 306th Report. Case No. 1882; 308th Report. Case No. 1897; 324th Report. Case No. 2060 and Case No. 2077; 329th Report. Case No. 2174; 330th Report. Case No. 2166; and 338th Report. Case No. 2399.

¹⁵⁹ ILO. *Digest*, 2005; *Digest*, 1996; 320th Report. Case No. 1989; 324th Report. Case No. 2060; 329th Report. Case No. 2195; 332nd Report. Case No. 2252; 336th Report. Case No. 2383; and 338th Report. Case No. 2326 and Case No. 2329.

¹⁶⁰ The United Nations Human Rights Treaties. Rights of the accused in criminal proceedings. <http://www.bayefsky.com/bytheme.php/id/1041>.

Right to a Fair Hearing

EXAMPLES OF POTENTIAL VIOLATIONS

- A doctor facing disciplinary proceedings is unable to obtain access to all of the evidence presented against him in advance of the hearing
- A nurse facing a medical negligence suit has still not been given a hearing date five years after commencement of the proceedings

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 14(1) ICCPR

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

- The concept of "suit at law" under Article 14(1) of the ICCPR is based on the nature of the right in question rather than on the status of one of the parties (whether state or nonstate). The particular forum that the legal systems employ to adjudicate individual claims does not determine the nature of the right (an especially important condition in the case of common law systems).¹⁶¹
- The regulation of the activities of a professional body and the scrutiny of such regulations by the courts may raise issues under Article 14.¹⁶²
- Purely administrative proceedings will fall outside the scope as not amounting to a determination of civil rights and obligations.¹⁶³
- The notion of a "tribunal" in Article 14(1) refers to a body—regardless of denomination—that is a) established by law; b) independent of the executive and legislative branches of government; and c) in specific cases enjoys judicial independence in deciding legal matters in proceedings that are judicial in nature.¹⁶⁴
- Determination of public law rights falls within the scope of Article 14(1) if, within the relevant municipal legal system, it is conducted by a court of law or if the administrative determination is subject to judicial review.
- Article 14 does not, however, appear to guarantee a right of judicial review of public law determinations by administrators or administrative tribunals and does not guarantee that any such review entails evaluation of the merits.
- The right to a fair hearing in a civil suit encompasses:

¹⁶¹ HRC. General Comment 32 of the Human Rights Committee; *Y. L. v. Canada*. (112/81). Applying this interpretation, claim for disability pension did amount to a "suit at law." See also *Casanovas v. France*. (441/90). Covers procedure concerning employment dismissal; *Jansen-Gielsen v. The Netherlands*. (846/99). Tribunal proceedings to determine the psychiatric ability of people to perform their jobs amounted to "suit at law."

¹⁶² *J. L. v. Australia*. (491/92).

¹⁶³ *Kolanowski v. Poland*. (837/98). Challenge to the fact that denied promotion of police officer was not covered but dismissals from public service are (*Casanovas v. France* [441/90]). See also *Kazantzis v. Cyprus*. (972/01). Procedure for appointing public servants (in this case, judicial appointments) did not fall within scope of Article 14.

¹⁶⁴ HRC. General Comment 32 of the Human Rights Committee, paras. 18 and 19.

==> Equality before the courts:¹⁶⁵ This distinction is narrower than the right of equality before the law under Article 26 of the ICCPR as the latter applies to all organs involved in the administration of justice and not just to judicial power.¹⁶⁶

==> Access to courts:¹⁶⁷ Access includes the provision of legal aid.¹⁶⁸ Article 14 ICCPR requires that states provide for particular causes of action "in certain circumstances" and for competent courts to determine those causes of action, although it is not clear what those circumstances are.¹⁶⁹

- Article 14, in guaranteeing procedural equality, cannot be interpreted as guaranteeing equality of results or absences of error on the part of the competent tribunal.¹⁷⁰
 - Elements of a fair hearing in a civil suit encompass equality of arms,¹⁷¹ respect for the principle of adversarial proceedings, preclusion of ex officio worsening of an earlier verdict, and an expeditious procedure.¹⁷²
 - Public hearings in civil suits have been explicitly recognized by the HRC, subject only to limited public interest exceptions.¹⁷³
 - Placing the burden of proof on defendants in civil cases is permissible.¹⁷⁴
 - Examples of breaches of Article 14 include: refusing to allow a complainant to attend the proceedings and to have the opportunity to brief legal representatives properly,¹⁷⁵ failing to inform the author of his appeal date until after it has taken place,¹⁷⁶ refusal of an administrative tribunal to admit crucial evidence,¹⁷⁷ and failure to permit one litigant to submit comments on the other side's submissions.¹⁷⁸
- ▶ **Article 26 ICCPR:** *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law*
- ▶ **Article 5(a) CERD:** *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to equal treatment before the tribunals and all other organs administering justice*
- ▶ **Article 15(1) CEDAW:** *States Parties shall accord to women equality with men before the law.*

165 Ibid., paras. 3 and 7.

166 Ibid., para. 65.

167 Ibid., paras. 8, 9, and 12.

168 Bahamonde v. Equatorial Guinea. (468/91); Avellanar v. Peru. (202/86); and HRC GC 32, para. 10.

169 Mahuika v New Zealand. (547/93).

170 HRC. GC 32, para. 26; B. D. B v. The Netherlands. (273/88).

171 HRC. GC 32, para. 13. See concurring individual opinion of Prafullachandra Natwarlal Bhagwati in Pezoldova v. The Czech Republic. (757/1997). "As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information. ..."

172 Morael v. France. (207/86). See also Fei v. Colombia. (514/92); HRC. GC 32, para. 27 on delay.

173 HRC. GC 32, paras. 28 and 29. See also van Meurs v. The Netherlands. (215/1986).

174 HRC. GC 32, para. 9.4.

175 Wolf v. Panama. (289/88).

176 Thomas v. Jamaica. (272/88).

177 Jansen-Gielen v. The Netherlands. (846/99). Proceedings to determine psychiatric ability to perform job.

178 Aarela and Anor v. Finland. (779/97).

Right to an Effective Remedy¹⁷⁹

EXAMPLES OF POTENTIAL VIOLATIONS

- No damages are awarded to a doctor after his reputation has been damaged following the appearance of unsubstantiated and false accusations of medical negligence in the media
- A nurse is unable to appeal an employment tribunal decision to a court

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 2(3) ICCPR

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

- There is a clear link between the right to an effective remedy and the right to a fair hearing and/or due process and, in general, this provision needs to be respected whenever any guarantee of Article 14 has been violated.¹⁸⁰
- Remedies must be accessible and effective. Although a remedy generally entails appropriate compensation, reparation can, where appropriate, involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of nonrepetition and changes in relevant laws and practices, and actions to bring to justice the perpetrators of human rights violations.¹⁸¹
- States are required, as part of the obligation under Article 2(3)(a) of the ICCPR, to ensure determination of the right to a remedy by a competent judicial, administrative, or legislative authority,¹⁸² a guarantee that would be void if it were not available in cases in which a violation of the ICCPR had not been established. The State is not obliged to make such procedures available, however, regardless of how unmeritorious the claim might be.¹⁸³

► Article 2(1) ICESCR

- Each state party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially in economic and technical matters, to

¹⁷⁹ UN. Human Rights Defenders Declaration. Article 9.

¹⁸⁰ HRC. General Comment 32 of the Human Rights Committee, para. 58.

¹⁸¹ HRC. General Comment 31 of the Human Rights Committee, paras. 15 and 16.

¹⁸² Ibid., para. 15.

¹⁸³ Kazantzis v. Cyprus. (972/01).

the maximum extent allowed by its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including, particularly, the adoption of legislative measures.

- Administrative remedies will, in many cases, be adequate. Any such remedies should be accessible, affordable, timely, and effective. The ultimate right of judicial appeal from administrative procedures is also often appropriate, however. There are some obligations, such as (but by no means limited to) those concerning nondiscrimination, for which the provision of some form of judicial remedy is indispensable.¹⁸⁴

▶ **Article 9 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders Declaration) 1998**¹⁸⁵

- All human rights defenders have the right to an effective remedy and to protection in the event of the violation of their rights. This right includes the right to complain about the policies and actions of government bodies and officials. In turn, the state should conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation has occurred in any territory under its jurisdiction.

Right to Protection of Privacy and Reputation

EXAMPLES OF POTENTIAL VIOLATIONS

- The phone of a hospital chief executive is bugged without any prior lawful authorization
- A doctor involved in a civil suit against a hospital for unfair dismissal finds out that his correspondence has been routinely intercepted and read without his knowledge

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 17 ICCPR: (1)** *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.*
- ▶ **HRC General Comment 16 on the Right to Privacy**
 - The term "home" is to be understood to indicate the place where a person resides or carries out his usual occupation.¹⁸⁶
 - Even with regard to interferences that conform to the covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. Compliance with Article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Surveillance, whether electronic or other;

¹⁸⁴ ICESCR, General Comment 9. (E/C.12/1998/24, CESCR). December 3, 1998.

¹⁸⁵ UN General Assembly Resolution 53/144. December 9, 1998.

¹⁸⁶ HRC. General Comment 16 of the Human Rights Committee. August 4, 1988.

interceptions of telephonic, telegraphic, and other forms of communication; wiretapping; and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.¹⁸⁷

- The gathering and holding of personal information on computers, data banks, and other devices, whether by public authorities or by private individuals or bodies, must be regulated by law.¹⁸⁸
- The state is obliged to provide protection under the law against any unauthorized interferences with correspondence¹⁸⁹ and to ensure strict and independent (ideally, judicial) regulation of any such practices, including wiretapping.¹⁹⁰
- Searches—of a home (and workplace) and of a person—should also be subject to appropriate safeguards.¹⁹¹
- The protection of honor and reputation under Article 17 is probably limited to unlawful rather than arbitrary attacks—in other words, attacks that fail to comply with an established legal procedure.¹⁹² Given the HRC's interpretation of "lawful" in the context of another ICCPR provision (Article 9[4]), the term may extend beyond domestic law.¹⁹³
- Professional duties of confidence, such as those undertaken by the medical profession, are an important aspect of the right to privacy, and any limitations on professional privilege must be specified in detail.¹⁹⁴

► **Article 19(3) ICCPR:** *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Right to Free Expression and Information¹⁹⁵

EXAMPLES OF POTENTIAL VIOLATIONS

- A senior health service manager is dismissed after revealing that a hospital has been purchasing unlicensed drugs
- State authorities intervene to prevent employees from learning that their hospital contains dangerously high levels of radiation

¹⁸⁷ Ibid., para. 8.

¹⁸⁸ Ibid., para. 10.

¹⁸⁹ Ibid., para. 8; HRC. Concluding Observations of the Human Rights Committee: Zimbabwe, 1998. (CCPR/C/79/Add.89).

¹⁹⁰ HRC. Concluding Observations: Poland, 1999. (CCPR/C/79/Add.10). See also Concluding Observations: Lesotho, 1999. (CCPR/C/79/Add. 106).

¹⁹¹ HRC. General Comment 16 of the Human Rights Committee, para. 8.

¹⁹² I. P. v. Finland. (450/91); Joseph, Schultz, and Castan. The ICCPR, 494.

¹⁹³ Joseph, Schultz, and Castan. The ICCPR, 494.

¹⁹⁴ HRC. Concluding Observations of the Human Rights Committee: Portugal, 2003. (CCPR/CO/78/PRT).

¹⁹⁵ See also Human Rights Defenders Declaration 1998, Article 6.

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 19(2) ICCPR:** *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
 - The right to free expression under Article 19 of the ICCPR includes the freedom to impart information, and any restrictions that do not accord with acceptable limitations contained in Article 19(3), such as public order or public health, could result in a breach.¹⁹⁶
 - Therefore, in theory, whistleblowers within the medical profession could be protected from unlawful prosecution provided that the information they are seeking to put into the public domain cannot legitimately be restricted.
 - Permissible limitations on public health grounds under Article 19 are unclear, although it has been suggested that prohibiting misinformation on health-threatening activities could be justified.¹⁹⁷
 - Freedom of expression (including that of the media) can be lawfully restricted to protect the rights and reputation of others, through, for example, the use of reasonable civil defamation laws.¹⁹⁸

- ▶ **Article 5(d)(viii) CERD:** *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to freedom of opinion and expression. ...*

- ▶ **Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders Declaration) 1998**¹⁹⁹

- ▶ **Article 6:** *Everyone has the right, individually and in association with others:*
 - (a) *To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;*
 - (b) *As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;*
 - (c) *To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.*

¹⁹⁶ Laptsevich v. Belarus. (780/97).

¹⁹⁷ Joseph, Schultz, and Castan. The ICCPR, 525.

¹⁹⁸ Ibid., 541.

¹⁹⁹ UN General Assembly Resolution 53/144. December 9, 1998.

3.1 INTRODUCTION

3.2 KEY SOURCES

3.3 PATIENTS' RIGHTS

Right to liberty and security of the person

Right to privacy

Right to information

Right to bodily integrity

Right to life

Right to the highest attainable standard of health

Right to freedom from torture and cruel, inhuman, and degrading treatment

Right to participate in public policy

Right to nondiscrimination and equality

3.4 PROVIDERS' RIGHTS

Right to work in decent conditions

Right to freedom of association

Right to due process and related rights

3

Regional Framework for Human Rights in Patient Care

3.1 Introduction

This chapter elaborates on the main standards that safeguard human rights in patient care within Europe (as defined geographically by the Council of Europe [COE]) and examines how they have been interpreted by supranational bodies, most notably the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR). As in the preceding chapter on the international framework, this chapter is divided into three parts that describe key regional sources governing human rights in patient care and also examine patients' and providers' rights. Each part includes subsections that discuss the standards and relevant interpretations connected to a particular right (for example, the right to liberty and security of the person) and also provide some examples of potential violations. The standards addressed include binding treaties, such as the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights [ECHR]), the European Social Charter (ESC), and other standards developed by the COE and civil society, such as the highly significant European Charter of Patients Rights.

3.2 Key Sources

COUNCIL OF EUROPE

► **Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997 (European Convention on Human Rights and Biomedicine)¹**

This convention sets out certain basic patient rights principles based on the premise that there is a "need to respect the human being both as an individual and as a member of the human species and recognising the importance of ensuring the dignity of the human being."² It is binding on ratifying states.

Key provisions include:

- Equitable access to health care (Article 3)
- Protection of consent (Chapter II, Articles 5–9)
- Private life and right to information (Chapter III, Article 10)

► **European Convention on Human Rights (ECHR)³**

The ECHR is the leading regional human rights instrument and it has been ratified by all Council of Europe member states. It is enforced by the ECtHR, which hands down binding decisions that frequently involve monetary compensation for victims.

Relevant provisions include:

- Article 2 (right to life)
- Article 3 (protection against torture and cruel, inhuman or degrading treatment)
- Article 5 (right to liberty and security of person)
- Article 6 (access to a fair hearing)
- Article 8 (right to privacy)
- Article 13 (right to effective remedies)
- Article 14 (prohibition of discrimination)

► **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

Article 1 establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which monitors compliance with the treaty through regular monitoring visits to places of detention. The rest of the treaty sets out the membership and working methods of the committee.

1 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. <http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm>.

2 Subsequent additional protocols have been produced on prohibition of cloning (Treaty No. 168), transplantation of organs and tissues (Treaty No. 186), and biomedical research (Treaty No. 195).

3 European Convention on Human Rights. <http://www.hri.org/docs/ECHR50.html>.

► **European Social Charter 1961 and 1996 (ESC)⁴**

The ESC is the leading regional economic and social rights instrument. It is monitored by the ECSR through a system of periodic state reporting and collective complaints. Originally drafted in 1961, the ESC was significantly revised in 1996, although some states have not ratified the later version and have the option as to which provisions they accept.

Given the generality of many of the clauses and given the progressive/liberal approach of the ECSR, patients' rights can be advocated under a number of provisions even in the absence of acceptance of the specific health care guarantees.

Relevant provisions include:

- Article 11 (right to protection of health)
- Article 13 (right to social and medical assistance)
- Article 14 (right to benefit from social welfare services)
- Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community)
- Article 16 (right of the family to social, legal and economic protection)
- Article 17 (right of children and young persons to appropriate social, legal and economic protection)
- Article 19 (right of migrant workers and their families to protection and assistance)
- Article 23 (right of elderly persons to social protection)

The ECSR has stated that rights related to health in the ESC are inextricably linked to their counterpart guarantees in the ECHR because “human dignity is the fundamental value and indeed the core of positive European human rights law—and health care is a prerequisite for the preservation of human dignity.”⁵

► **Framework Convention for the Protection of National Minorities 1995⁶**

This binding treaty guarantees equal treatment for all ethnic and other minorities.

Relevant provisions include:

- Article 4(2) (adoption of adequate measures to promote, in all areas of economic, social, political, and cultural life, full and effective equality for persons belonging to a national minority, taking due account of the specific conditions of the persons belonging to national minorities)

► **Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care⁷**

⁴ Council of Europe (COE). European Social Charter. http://www.coe.int/T/E/Human_Rights/Esc/.

⁵ International Federation of Human Rights Leagues (FIDH) v. France. (14/2003).

⁶ Framework Convention for the Protection of National Minorities. <http://conventions.coe.int/treaty/en/Treaties/Html/157.htm>.

⁷ COE. Recommendation Rec No. R (2000) 5. <https://wcd.coe.int/ViewDoc.jsp?id=340437&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

Although not binding, this recommendation possesses strong political and moral authority. It focuses on the need to ensure effective participation for all in increasingly diverse and multicultural societies where groups such as ethnic minorities are frequently marginalized.

EUROPEAN UNION

► **EU Charter of Fundamental Rights⁸**

Signed in Nice, France, on November 7, 2000, this charter sets out in a single text, for the first time in the history of the European Union (EU), the whole range of civil, political, economic, and social rights belonging to European citizens and all persons resident in the EU. The charter was incorporated as part two of the treaty establishing a constitution for Europe on June 18, 2004. After the rejection of the proposed EU constitution, an adapted version of this charter was retained and proclaimed in Strasbourg on December 12, 2007, before the signing of the Treaty of Lisbon, which makes it legally binding.

The charter's full implications for EU member states remain unclear, but it will be an important reference point even for countries outside of the EU, especially with respect to those in the process of accession.

Key provision:

Article 35 (right to health protection as the “right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices,” specifying that the EU must guarantee “a high level of protection of human health”)

Other relevant provisions include:

- Article 1 (the inviolability of human dignity)
- Article 2 (the right to life)
- Article 3 (the right to the integrity of the person)
- Article 6 (the right to security)
- Article 8 (the right to the protection of personal data)
- Article 21 (the right to non-discrimination)
- Article 24 (the rights of the child)
- Article 25 (the rights of the elderly)
- Article 34 (the right to social security and social assistance)
- Article 37 (the right to environmental protection)
- Article 38 (the right to consumer protection)

► **Proposed EU Directive on Patients’ Rights in Cross Border Health Care⁹**

After repeated delays, the European Commission released this proposed directive, together with a communication on improving cooperation between member states in this area, on

⁸ Charter of Fundamental Rights of the European Union. http://www.europarl.europa.eu/charter/default_en.htm.

⁹ The draft directive, along with other key documents, communication from the commission, and press releases are available at http://ec.europa.eu/health/ph_overview/co_operation/healthcare/cross-border_healthcare_en.htm.

July 2, 2008. The aim of the directive is to create legal certainty on the issue, thereby avoiding potential court cases, as the EU treaty grants individuals the right to seek health care in other member states, a principle confirmed by several clear rulings by the European Court of Justice.

Under the treaty's major provisions:

- **Patients** have the right to seek health care abroad and to be reimbursed the same amount that they would have received if they had sought care in their home country. The directive will provide clarity as to how these rights can be exercised, including the limits that member states can place on cross-border health care and the level of financial coverage provided for it.
- **Member states** are responsible for health care provided on their territory. Patients should be confident that the quality and safety standards of the treatment they will receive in another member state are regularly monitored and based on sound medical practices.

In its press release, the commission stated that the directive “provides a solid basis to unlock the huge potential for European cooperation to help improve the efficiency and effectiveness of all EU health systems.”¹⁰

The European Public Health Alliance (EPHA) has expressed some concerns about the draft directive, including in relation to patients’ rights and whether it can really resolve the existing significant differences concerning access to and quality of health care between member states. The EPHA goes on to warn that the directive may merely lead to financial savings for the tiny minority who can already afford “health care tourism” as opposed to equal access for all.

NONTREATY INSTRUMENTS

► **The European Charter of Patients’ Rights**¹¹

“As European citizens, we do not accept that rights can be affirmed in theory, but then denied in practice, because of financial limits. Financial constraints, however justified, cannot legitimize denying or compromising patients’ rights. We do not accept that these rights can be established by law, but then left not respected, asserted in electoral programmes, but then forgotten after the arrival of a new government.”¹²

Drawn up in 2002 by the Active Citizenship Network, a European network of civic, consumer, and patient organizations, this charter provides a clear, comprehensive statement of patients’ rights. The statement was part of a grassroots movement across Europe that encouraged patients to play a more active role in shaping the delivery of health services

¹⁰ European Commission. “Commission Adopts Proposal for Directive on Patients’ Rights in Cross-Border Healthcare.” July 2, 2008. (IP/08/1080).

¹¹ European Charter of Patients’ Rights. http://www.activecitizenship.net/health/european_charter.pdf.

¹² Ibid., preamble.

and was also an attempt to convert regional documents concerning the right to health care into specific provisions.¹³

The charter identifies 14 concrete patients' rights that are currently at risk: the right to preventive measures, access, information, consent, free choice, privacy and confidentiality, respect of patients' time, observance of quality standards, safety, innovation, avoidance of unnecessary suffering and pain, personalized treatment, the filing of complaints, and compensation.

Although the charter is not legally binding, a strong network of patients' rights groups across Europe has successfully lobbied their national governments for recognition and adoption of the rights it addresses.¹⁴ The charter has also been used as a reference point to monitor and evaluate health care systems across Europe.

► **WHO Declaration on the Promotion of Patients' Rights in Europe: European Consultation on the Rights of Patients, Amsterdam¹⁵**

*"In its scope and focus, this document seeks to reflect and express people's aspirations not only for improvements in their health care but also for fuller recognition of their rights as patients. In so doing, it keeps in mind the perspectives of health care providers as well as of patients. This implies the complementary nature of rights and responsibilities: patients have responsibilities both to themselves for their own self-care and to health care providers, and health care providers enjoy the same protection of their human rights as all other people. There is a basic assumption in the text that the articulation of patients' rights will in turn make people more conscious of their responsibilities when seeking and receiving or providing health care, and that this will ensure that patient/provider relationships are marked by mutual support and respect."*¹⁶

This nonbinding declaration was issued by the WHO Regional Office for Europe in 1994 and has become a significant reference point. Taking as its conceptual foundation the International Bill of Rights, the ECHR, and the ESC, the declaration focuses on rights to information, consent, confidentiality and privacy and care and treatment.

► **The WHO Ljubljana Charter on Reforming Health Care 1996¹⁷**

This charter contains a number of fundamental principles to ensure that "health care should first and foremost lead to better health and quality of life for people."¹⁸ Specifically, it recommends that health care systems be people-centric and calls for patient participation in shaping improvements.

13 The pharmaceutical company Merck & Co., Inc., also provided funding for this movement.

14 One of the activities of new EU member states during the process of preparation for accession in the EU was adjustment of health care legislation toward European legislation and standards. Many countries, such as Bulgaria, adopted new health law, whose structure and contents are strictly in line with the European Charter of Patients' Rights.

15 World Health Organization (WHO). Declaration on the Promotion of Patients' Rights in Europe. www.who.int/genomics/public/eu_declaration1994.pdf.

16 Ibid.

17 Ljubljana Charter on Reforming Health Care. <http://www.bmj.com/cgi/content/full/312/7047/1664>.

18 Ibid.

3.3 Patients' Rights

Just as in the preceding chapter on the international framework, this section is structured around nine critical patient rights: the rights to liberty and security of the person; privacy; information; bodily integrity; life; highest attainable standard of health; freedom from torture, cruel, inhuman, and degrading treatment; participation in public policy; and nondiscrimination and equality for patients.

The lack of an explicit provision guaranteeing the right to health in the ECHR has not prevented the ECtHR, the ECHR's supervisory and enforcement body, from addressing some patients' rights issues. Article 5, which guarantees the right to liberty and security of person, has been used by the ECtHR to protect the rights of those detained on mental health grounds. Article 3 has outlawed the use of torture and/or cruel, inhuman, or degrading treatment against detainees, including those detained on mental health grounds. Article 8, safeguarding the right to privacy, has been successfully argued in relation to unlawful disclosure of personal medical data. Beyond these examples, however, the ECtHR has been reluctant to indirectly recognize a positive right to health, although the door has been left open in relation to the right to life under Article 2 in cases in which preexisting obligations have not been fulfilled. This reluctance is in line with the ECtHR's general desire not to make decisions that could have a significant economic and/or social impact on policy or resources.

On the other hand, in Article 11 of the ESC, the ECSR has specifically defined the right to protection of health, together with a number of related guarantees, such as the right to social and medical assistance under Article 13. Because the ESC cannot be used by individual victims, however, all of the ECSR's analysis relates to country reports or to the collective complaints mechanism and, therefore, tends to be general in nature (stating, for example, that health care systems must be accessible to everyone or that there must be adequate staff and facilities). To date, under the collective complaints mechanism, the ECSR has only considered one right to health care case, concerning denial of medical assistance to poor illegal immigrants. Therefore, there is great potential for development of the ECSR's case law further in this area.

Other significant sets of standards discussed in this chapter, such as the European Charter of Patients' Rights, also contain a number of specific relevant guarantees, but these standards lack any form of supervisory body. They, therefore, cannot be directly enforced by victims to gain redress. Nonetheless, that does not mean that they cannot be referred to when arguing claims under binding treaties, such as the ECHR and the ESC, in order to better interpret the treaties' own provisions. In turn, increased references to nonbinding documents such as the European Charter of Patients' Rights will help them gain further credibility and strength so that, over time, some of their provisions might attain customary international law status.¹⁹

¹⁹ Article 38(1)(b) of the Statute of the International Court of Justice refers to "international custom" as a source of international law, specifically emphasizing the two requirements of state practice and acceptance of the practice as obligatory.

Right to Liberty and Security of the Person

EXAMPLES OF POTENTIAL VIOLATIONS

- A person is detained indefinitely on mental health grounds without efforts to seek any medical opinion
- Residents of an institution are not informed about their right to apply to a court or tribunal to challenge their involuntary admission
- A female drug user is detained in hospital after giving birth and is denied custody of her child

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 5(1)(e) ECHR

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants. ...

- The ECtHR has not defined the phrase "unsound mind" on the basis that its meaning is continually evolving.²⁰ It has established, however, that there must be objective expert medical evidence that the person at the relevant time is of unsound mind (other than in emergencies).²¹ Therefore, detention pursuant to the order of a prosecutor, without obtaining a medical opinion, will breach Article 5(1)(e), even if the purpose of the detention is to obtain such an opinion.²²
- The ECtHR has established a number of procedural guarantees in relation to the application of Article 5(1)(e):
 - Committing somebody to confinement must only occur according to a properly prescribed legal procedure and cannot be arbitrary. In relation to the condition of "unsound mind," this guarantee means that the person must have a recognized mental illness and require confinement for the purposes of treatment.²³
 - Any commitment must be subject to a speedy periodic legal review that incorporates the essential elements of due process.²⁴
 - Where such guarantees have not been adhered to, the ECtHR has been prepared to award damages for breaches of a person's liberty under Article 5(1)(e).²⁵

20 Litwa v. Poland. (33 EHRR 53). Providing definition of alcoholism for purposes of Article 5(1)(e).

21 Herz v. Germany. (44672/98); Rakevich v. Russia. (No 58973/00).

22 Varbanov v. Bulgaria. (31365/96).

23 Winterwerp v. The Netherlands. (6301/73). See also HL v. UK (45508/99). System of detaining "informal patients" in psychiatric institutions did not incorporate sufficient procedural safeguards in order to prevent arbitrary deprivations of liberty.

24 X v. United Kingdom. (7215/75).

25 Gajcsi v. Hungary. (34503/03). Patient unlawfully detained for three years in a Hungarian psychiatric hospital, where the commitment procedure was superficial and insufficient to show dangerous conduct.

- Detention under Article 5(1)(e) can be justified both in the interests of the individual and on public safety grounds.²⁶ A relevant factor in determining the legality of detention is whether the detention occurs in a hospital, clinic, or other appropriate authorized institution.

The fact that detention may be in a suitable institution has no bearing on the appropriateness of the patient's treatment or conditions under which he or she is detained.²⁷ A violation of Article 5(1)(e) was found where a person was detained as a person infected with HIV—after having transmitted the virus to another man as a result of sexual activity—on the grounds that a fair balance had not been struck between the need to ensure that the virus did not spread and the individual's right to liberty.²⁸

Right to Privacy

EXAMPLES OF POTENTIAL VIOLATIONS

- A doctor discloses a patient's history of drug use or addiction without their consent
- Government requires disclosure of HIV status on certain forms
- Health care workers require young people to obtain parental consent as a condition of receiving sexual health services
- Residents of an institution have no place to keep their personal possessions

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 8(1) ECHR

Everyone has the right to respect for his private and family life, his home and his correspondence.

- The ECtHR has held that *“the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life ... Respecting the confidentiality of health data is a vital principle in the legal systems of [State] Parties. ... It is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general.”*²⁹

The reasons for such protection are clear: without it, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance,

26 Litwa v. Poland. (33 EHRR 53). See also Hutchinson Reid v. UK. (37 EHRR 9). Detention under Article 5(1)(e) of a person with psychopathic personality disorder justified both in the interests of the individual and on public safety grounds, even where his condition was not susceptible to medical treatment.

27 Ashingdane v. UK. (7 EHRR 528)

28 Enhorn v. Sweden. (56529/00).

29 M. S. v. Sweden. (27/08/1997); Z v. Finland. (25 EHRR 371).

thereby endangering their own health and, in the case of transmissible diseases, that of the community.³⁰

The ECtHR has gone on to note that the disclosure of health data “may dramatically affect a person’s private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism.”³¹ Disclosure is clearly particularly damaging in case of HIV infection. Therefore sufficient safeguards in domestic law must be in place.

A person’s body concerns the most intimate aspect of one’s private life³² so there are clear links between the right to privacy and the right to bodily integrity.³³

► **Article 10(1) European Convention on Human Rights and Biomedicine:**

Everyone has the right to respect for private life in relation to information about his or her health.

► **Article 13(1) COE Recommendation No. R (2004) 10:** *All personal data relating to a person with mental disorder should be considered to be confidential. Such data may only be collected, processed and communicated according to the rules relating to professional confidentiality and personal data collection.*

► **Article 6 European Charter of Patients’ Rights:** *Every individual has the right to the confidentiality of personal information, including information regarding his or her state of health and potential diagnostic or therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general.*

► **Article 4(1) and (8) Declaration on the Promotion of Patients’ Rights in Europe:** *All information about a patient’s health status ... must be kept confidential, even after death. ... Patients admitted to health care establishments have the right to expect physical facilities which ensure privacy.*

► **Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data:**³⁴ *Provides additional safeguards to protect a person’s privacy with respect to the automatic processing of personal data (i.e., data protection).*

- **Article 5:** *Quality of data: Personal data undergoing automatic processing shall be: obtained and processed fairly and lawfully; stored for specified and legitimate purposes and not used in a way incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are stored; accurate and, where necessary, kept up to date; preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.*
- **Article 6:** *Special categories of data: Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.*

30 Z v. Finland. (25 EHRR 371).

31 Ibid.

32 Y. F. v. Turkey. (24209/94). A forced gynecological exam conducted on woman in police custody breached Article 8 of the ECHR.

33 Glass v. UK. (39 EHRR 15). The practice of administering diamorphine to a severely mentally and physically ill child against the clearly expressed wishes of the mother breached Article 8 of the ECHR.

34 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. <http://conventions.coe.int/treaty/EN/Treaties/Html/108.htm>.

- **Article 7:** Data security: *Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.*
- **Article 8:** Additional safeguards for the data subject *Any person shall be enabled: (a) to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file; (b) to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form; (c) to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this convention; (d) to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.*

Right to Information

EXAMPLES OF POTENTIAL VIOLATIONS

- Government bans publications about drug use or harm reduction, claiming they promote illegal activity
- Young people are deliberately denied information about STDs and the use of condoms
- Roma women do not have access to information about sexual and reproductive health

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 8(1) ECHR:** *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 - The ECtHR has held that there is a positive obligation for the state to provide information to those whose right to respect for family and private life, under Article 8, is threatened by environmental pollution,³⁵ suggesting that any claim to the right to information in relation to health protection will have more prospects for success under Article 8 than Article 10.
- ▶ **Article 10(1) ECHR:** *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

35 Ibid. See also *McGinley and Egan v. UK*. (27 EHRR 1). Positive obligation could arise under Article 8 in relation to provision of information about risks of exposure to radiation.

- The ECtHR has narrowly interpreted Article 10 of the ECHR as only prohibiting authorities from restricting a person from receiving information that others wish to impart and *not imposing* a positive obligation on the state to collect and disseminate information on its own motion.³⁶

► **Article 3 European Charter of Patients' Rights:** *Every individual has the right to access to all kind of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available.*

► **COE Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care**

II. Information the most intimate aspect of one's private life.

6. Information on health care and on the mechanisms of the decision-making process should be widely disseminated in order to facilitate participation. It should be easily accessible, timely, easy to understand and relevant.

7. Governments should improve and strengthen their communication and information strategies should be adapted to the population group they address.

8. Regular information campaigns and other methods such as information through telephone hotlines should be used to heighten the public's awareness of patients' rights. Adequate referral systems should be put in place for patients who would like additional information (with regard to their rights and existing enforcement mechanisms).

► **Article 10(2) European Convention on Human Rights and Biomedicine:** *Everyone has the right to know any information collected about his or her health.*

► **Article 2(2) and (6) Declaration on the Promotion of Patients' Rights in Europe:** *Patients have the right to be fully informed about their health status, including the medical facts about their conditions; about the proposed medical procedures, together with potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis, and progress of treatment. [Moreover, patients] have the right to choose who, if any one, should be informed on their behalf.*

36 Guerra v. Italy. (26 EHRR 357).

Right to Bodily Integrity

EXAMPLES OF POTENTIAL VIOLATIONS

- A Roma woman is sterilized against her will
- Doctors compel a drug-using pregnant woman to undergo an abortion
- Treatment is routinely given to residents of an institution without their consent as they are assumed to lack the capacity to make decisions about their treatment and care
- Patients at a psychiatric hospital are treated as part of a clinical medication trial without being informed that they are included in the research
- Patients are given ECT (electroconvulsive therapy) but are told that it is “sleep therapy”
- HIV tests are routinely administered without informed consent

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 5 European Convention on Human Rights and Biomedicine:** *An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.*
- ▶ **Article 18 COE Recommendation No. R (2004) 10: Council of Europe guidelines concerning the protection of the human rights and dignity of persons with mental disorder.** A person should be subject to involuntary treatment for a mental disorder only if: the individual has a mental disorder which “represents a significant risk of serious harm to his or her health or to other persons;” less intrusive means of providing appropriate care are not available; and “the opinion of the person concerned has been taken into consideration.”
- ▶ **Articles 4 and 5 European Charter of Patients’ Rights:** *A patient has the right to refuse a treatment or a medical intervention and to change his or her mind during the treatment, refusing its continuation ... [and] the right to freely choose from different treatment procedures and providers on the basis of adequate information.*
- ▶ **Articles 3(1) and (2) Declaration on the Promotion of Patients’ Rights in Europe:** *[T]he informed consent of the patient is a prerequisite for any medical intervention [and] [a] patient has the right to refuse or halt a medical intervention.*
- ▶ **Article 3 EU Charter of Fundamental Rights:** *(1) Everyone has the right to respect for his or her physical and mental integrity. (2) In the fields of medicine and biology, the following must be respected in particular: (a) the free and informed consent of the person concerned, according to the procedures laid down by law; (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons; (c) the prohibition on making the human body and its parts as such a source of financial gain; (d) the prohibition of the reproductive cloning of human beings.*

Note: ECHR and the Right to Bodily Integrity

The right to bodily integrity is not specifically recognized under the ECHR, but it has been interpreted to be part of the right to security of the person (ECHR 5), the right to freedom from torture and cruel, inhuman, and degrading treatment (ECHR 3), the right to privacy (ECHR 8), and the right to the highest attainable standard of health (ESC 11).

- The ECtHR has found in relation to Article 8 of the ECHR that a person's body concerns the most intimate aspect of one's private life.³⁷ It has gone on to hold that a breach of physical and moral integrity occurred when dimorphine was administered to a son against his mother's wishes and a DNR (Do Not Resuscitate) order was placed in his records without his mother's knowledge.³⁸
- English courts have considered whether the compulsory treatment of a mentally competent patient has the potential to breach Articles 8 and 3 of the ECHR (even if the proposed treatment complies with the legislative requirements). Relevant factors include the consequences of the patient's not receiving the proposed treatment, the treatment's possible side effects, and the potential for less invasive options.³⁹

► **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has stated that every competent patient should be given the opportunity to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and should only relate to clearly and strictly defined exceptional circumstances.

Right to Life

EXAMPLES OF POTENTIAL VIOLATIONS

- No one calls 911 in the case of a drug overdose due to fear of arrest, and the person subsequently dies
- Drugs users die in locked hospital wards
- Government places unjustified legal restrictions on access to lifesaving HIV prevention or treatment
- The mortality rate of an institution is particularly high during the winter months due to the poor condition of the building, inadequate sanitation and heating, and poor quality of care
- A patient of a psychiatric hospital known to be at risk of suicide is not monitored adequately and subsequently takes her own life

³⁷ Y. F. v. Turkey. (24209/94).

³⁸ Glass v. United Kingdom. (61827/00).

³⁹ R (on the application of PS) v. (1) Responsible Medical Officer (Dr. G) and (2) Second Opinion Appointed Doctor (Dr. W). (EWHC 2335 [Admin.]).

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 2(1) ECHR:** *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

- Given the recognizable problems that arise in determining the allocation of limited resources for health care and the general reluctance of the ECtHR to sanction states for the impact of their economic decisions, it is likely that a breach of Article 2 for denial of health care will only be found in exceptional cases:⁴⁰

*"[I]t cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."*⁴¹

The ECtHR has held that an issue may arise under Article 2 "where it is shown that the authorities ... put an individual's life at risk through the denial of health care which they had undertaken to make available to the population generally"⁴²—in other words, where there are preexisting obligations, these must not be applied in a discriminatory manner.

- The ECtHR has held that the right to life can impose a duty to protect those in custody, including in cases in which the risk derives from self-harm.⁴³ The ECtHR will consider whether the authorities knew or ought to have known that the person "posed a real and immediate risk of suicide and, if so, whether they did all that could have been reasonably expected of them to prevent that risk."⁴⁴
- In relation to medically caused deaths, states are required under Article 2 to create regulations compelling public and private hospitals: 1) to adopt measures for the protection of patients' lives, and 2) to ensure that the cause of death, if in the case of the medical profession, can be determined by an "effective, independent judicial system" so that anyone responsible can be made accountable. Civil law proceedings may be sufficient in cases of medical negligence provided they are capable of both establishing liability and providing appropriate redress, such as damages.⁴⁵

40 In *Nitecki v. Poland* (65653/01), no breach of Article 2 was found where the authorities only paid 70 percent of the cost of lifesaving drugs prescribed to a patient, with the latter expected to pay the remainder.

41 *Powell v. UK*. (No 45305/99). Claim by parents that circumstances surrounding the alleged falsification of their son's medical records and the authorities' failure to investigate this matter properly gave rise to a breach of Article 2 (1) was declared inadmissible.

42 *Cyprus v. Turkey*. (35 EHRR 731).

43 *Keenan v. United Kingdom*. (33 EHRR 913).

44 *Ibid.*

45 *Calvelli and Ciglio v. Italy*. (32967/96). The dissenting judgments favored the use of criminal proceedings. On the facts, by accepting compensation through the settling of civil proceedings with respect to the death of their baby, plaintiffs denied themselves access to the best means of determining the extent of responsibility of the doctor concerned.

- To date, there has been no substantive decision on euthanasia, apart from the determination by the ECtHR that the right to life does not mean the right to die.⁴⁶
- The ECtHR has also left open the possibility that Article 2 could be engaged in a situation in which sending a terminally ill person back to their country of origin could seriously shorten their life span or could amount to cruel and inhuman treatment due to inadequate medical facilities.⁴⁷

Right to the Highest Attainable Standard of Health

EXAMPLES OF POTENTIAL VIOLATIONS

- State fails to take progressive steps to ensure access to antiretroviral drugs to prevent mother-to-child HIV transmission
- Doctors and health facilities are not located in close proximity to certain poor neighborhoods
- State fails to provide any training in palliative care for its medical personnel
- A child in a social care home becomes bedridden due to malnutrition
- A hospital is unable to provide the appropriate specialist pediatric services for children who instead have to be treated with adult patients
- Women with mental disabilities are denied reproductive health services

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 11 ESC:** *With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.*
 - The ESCR has stated that Article 11 includes physical and mental well-being in accordance with the definition of health in the WHO Constitution.⁴⁸
 - States must ensure the best possible state of health for the population according to existing knowledge, and health systems must respond appropriately to avoidable health risks, i.e., those controlled by human action.⁴⁹

⁴⁶ Pretty v. UK. (35 EHRR 1).

⁴⁷ D v. UK. (24 EHRR 423). Issues under Article 2 were indistinguishable from those raised under Article 3.

⁴⁸ COE. Conclusions of the European Committee of Social Rights. (XVII-2); Conclusions 2005. Statement of interpretation of Article 11.

⁴⁹ COE. Conclusions: Denmark. (XV-2).

- The health care system must be accessible to everyone (see the section on right to nondiscrimination and equality). Arrangements for access must not lead to unnecessary delays in provision. Access to treatment must be based on transparent criteria, agreed upon at national level, taking into account the risk of deterioration in either clinical condition or quality of life.⁵⁰
- There must be adequate staffing and facilities with a very low density of hospital beds, combined with waiting lists, amounting to potential obstacles to access for the largest number of people.⁵¹

In relation to advisory and educational facilities, the ESCR has identified two key obligations:

1) developing a sense of individual responsibility through awareness campaigns and 2) providing free and regular health screening especially for serious diseases.⁵²

- ▶ **Articles 8–10 The European Charter of Patients’ Rights:** The charter refers to the right to “the observance of quality standards,” “safety,” and “innovation.”
- ▶ **Article 5(3) WHO Declaration on the Promotion of Patients’ Rights in Europe:** *Patients have the right to a quality of care which is marked both by high technical standards and by a humane relationship between the patient and health care provider.*
- ▶ **Article 35 EU Charter on Fundamental Rights:** *Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.*

Note: ECHR and Detainees’ Right to Health

The ECtHR has ruled that states have a duty to protect the health of detainees and that lack of treatment may amount to a violation of Article 3, which prohibits torture and cruel, inhuman, and degrading treatment or punishment.⁵³

Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment

EXAMPLES OF POTENTIAL VIOLATIONS

- Fearing prosecution by the state, a doctor refuses to prescribe morphine to relieve a patient’s pain
- A prisoner suffering from cancer is denied treatment
- A drug user is denied mental health treatment while in detention

50 COE. Conclusions: United Kingdom. (XV-2).

51 COE. Conclusions: Denmark. (XV-2).

52 COE. The Right to Health and the European Social Charter. http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetHealth_en.pdf.

53 Hurtado v. Switzerland. (280-A); Ilhan v. Turkey. (34 EHRR 36).

- Residents of an institution are not allowed to keep their own clothes as all clothes are communal
- Female residents of an institution are required to have showers together, supervised by male staff

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 3 ECHR: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.***

- The former European Commission on Human Rights has stated that it "did not exclude that the lack of medical care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3."⁵⁴
- However, the medical cases that the ECtHR has examined in relation to Article 3 have tended to involve those who are confined either (a) under the criminal law or (b) on mental health grounds. With respect to both forms of detention, failure to provide adequate medical treatment to persons deprived of their liberty may violate Article 3 in certain circumstances.⁵⁵ Breaches will tend to amount to inhuman and degrading treatment rather than torture.
- Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, however. Instead, the ECtHR has reiterated the "right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention."⁵⁶
- In relation to prisoners' health and well-being, this condition includes the provision of requisite medical assistance.⁵⁷ Where the lack of this assistance gives rise to a medical emergency or otherwise exposes the victim to "severe or prolonged pain," the breach of Article 3 may amount to inhuman treatment.⁵⁸ However, even when these results do not occur, a finding of degrading treatment may still be made if the humiliation caused to the victim by the stress and anxiety that he suffers due to the lack of assistance is severe enough.⁵⁹ For example, this finding was made in a case in which lack of medical treatment for the applicant's various illnesses, including TB, contracted in prison, caused him considerable mental suffering, thereby diminishing his human dignity.⁶⁰
- Should a prisoner's state of health require adequate medical assistance and treatment beyond that available in prison, he should be released subject to appropriate restrictions in the public interest.⁶¹

⁵⁴ Tanko v. Finland. (23634/94).

⁵⁵ Hurtado v. Switzerland. (280-A); İlhan v. Turkey. (34 EHRR 36).

⁵⁶ Mouisel v. France. (38 EHRR).

⁵⁷ Kudła v. Poland. (30210/96).

⁵⁸ McGlinchey v. UK. (37 EHRR 821).

⁵⁹ Sarban v. Moldova. (3456/05).

⁶⁰ Hummatov v. Azerbaijan. (9852/03) and (13413/04).

⁶¹ Wedler v. Poland. (44115/98). See also Mouisel v. France. (38 EHRR 34).

- Where detainees have preexisting conditions, it may not be possible to ascertain to what extent symptoms at the relevant time resulted from the conditions of the imposed detention. However, this uncertainty is not determinative as to whether the authorities have failed to fulfill their obligations under Article 3. Therefore, proof of the actual effects of the conditions of detention may not be a major factor.⁶²
- Examples of breaches of Article 3 include: the continued detention of a cancer sufferer, causing "particularly acute hardship;"⁶³ significant defects in the medical care provided to a mentally ill prisoner known to be suicide risk;⁶⁴ and systematic failings in relation to the death of a heroin addict in prison.⁶⁵
- In a recent case against Ukraine, the ECtHR found a breach of Article 3 both in terms of the conditions of detention in a pretrial detention center (overcrowding, sleep deprivation, and lack of natural light and air) and the failure to provide timely and appropriate medical assistance to the applicant for his HIV and tuberculosis infections.⁶⁶
- If an individual suffers from multiple illnesses, the risks associated with any illness he suffers during his detention may increase and his fear of those risks may also intensify. In these circumstances, the absence of qualified and timely medical assistance, coupled with the authorities' refusal to allow an independent medical examination of the applicant's state of health, leads to the person's strong feeling of insecurity, which, combined with physical suffering, can amount to degrading treatment.⁶⁷
- Generally, compulsory medical intervention in the interests of the person's health, where it is of "therapeutic necessity from the point of view of established principles of medicine," will not breach Article 3.⁶⁸ In such cases, however, the necessity must be "convincingly shown," and appropriate procedural guarantees must be in place. Furthermore, the level of force used must not exceed the minimum level of suffering/humiliation that would amount to a breach of Article 3, including torture.⁶⁹
- The combined and cumulative impact on a detainee of both the conditions of detention and a lack of adequate medical assistance may result in a breach of Article 3.⁷⁰
- The mere fact that a doctor saw the detainee and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate.⁷¹
- The authorities must also ensure that there is a comprehensive record concerning the detainee's state of health and the treatment he underwent while in detention⁷² and that the

62 Keenan v. UK. (33 EHRR 48). The treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 with regard to the protection of fundamental human dignity, even though the person may not be able to point to any specific ill effects.

63 Mouisel v. France. (38 EHRR 34). Finding the detention amounted to inhuman and degrading treatment.

64 Keenan v. UK. (33 EHRR 48). Finding failure to refer to psychiatrist and lack of medical notes.

65 McGlinchey and Ors v. UK. (37 EHRR 821). Finding inadequate facilities to record weight loss, gaps in monitoring, failure to take further steps including admission to hospital.

66 Yakovenko v. Ukraine. (15825/06). See also Hurtado v. Switzerland (A 280-A). An X-ray, which revealed a fractured rib, was only ordered after a delay of six days.

67 Khudobin v. Russia. (59696/00).

68 Jalloh v. Germany. (44 EHRR 667).

69 Nevermerzhitsky v. Ukraine. (43 EHRR 32). Finding that force feeding of prisoner on hunger strike was unacceptable and amounted to torture. See also Herczegfalvy v. Austria. (15 EHRR 437). Finding that forcible administration of drugs and food to violent prisoner on hunger strike complied with established medical practice.

70 Popov v. Russia. (26853/04); Lind v. Russia. (25664/05); Kalashnikov v. Russia. (47095/99) and (ECHR 2002-VI).

71 Hummatov v. Azerbaijan. (9852/03) and (13413/04); Malenko v. Ukraine. (18660/03).

72 Khudobin v. Russia. (59696/00).

diagnoses and care are prompt and accurate.⁷³ The medical record should contain sufficient information, specifying the kind of treatment the patient was prescribed, the treatment he actually received, who administered the treatment and when, how the applicant's state of health was monitored, etc. In the absence of such information, the court may draw appropriate inferences.⁷⁴ Contradictions in medical records have been held to amount to a breach of Article 3.⁷⁵

- Experimental medical treatment may amount to inhuman treatment in the absence of consent.⁷⁶ During the drafting of the convention, compulsory sterilization was considered to amount to a breach.⁷⁷
- Medical negligence that does not cause a level of suffering/stress/anxiety in excess of the minimal level of humiliation, as defined by the ECtHR, will not involve a breach of Article 3.

► **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

The convention's monitoring mechanism, the European Committee for the Prevention of Torture (CPT), monitors compliance with Article 3 of the European Convention on Human Rights through regular visits to places of detention and institutions. Its mandate includes prisons, juvenile detention centers, psychiatric hospitals, police holding centers, and immigration detention centers. The CPT has established detailed standards for implementing human rights-based policies in prisons and has also set monitoring benchmarks.⁷⁸

The CPT has emphasized the impact of overcrowding on prisoners' health.⁷⁹ It has also highlighted the frequent absence of sufficient natural light and fresh air in pretrial detention facilities and the impact of these conditions on detainees' health.⁸⁰

- **Article 11 European Charter of Patients' Rights:** *Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness. The health services must commit themselves to taking all measures useful to this end, like providing palliative care treatment and simplifying patients' access to them.*
- **Articles 5(10) and (11) Declaration on the Promotion of Patients' Rights in Europe:** *Patients have the right to relief of their suffering according to the current state of knowledge. ... Patients have the right to humane terminal care and to die in dignity.*
- The ECSR has stated in relation to Article 11 of the ESC that conditions of stay in hospital, including psychiatric hospitals, must be satisfactory and compatible with human dignity.⁸¹

73 Aleksanyan v. Russia. (46468/06).

74 Hummatov v. Azerbaijan. (9852/03) and (13413/04); Melnik v. Ukraine. (72286/01). See also Holomiov v. Moldova. (30649/05).

75 Radu v. Romania. (34022/05).

76 X v. Denmark. (32 DR 282).

77 COE. Travaux préparatoires of the European Convention on Human Rights. Volume 1.

78 COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The CPT Standards. (CPT/Inf/E [2002, rev. 2006]).

79 Ibid.

80 Ibid.

81 COE. Conclusions of the European Committee of Social Rights. (XVII-2); Conclusions 2005. Statement of interpretation of Article 11; Conclusions 2005: Romania.

Right to Participate in Public Policy

EXAMPLES OF POTENTIAL VIOLATIONS

- An indigenous group is denied any meaningful participation in decisions regarding the design of appropriate systems to meet their health care needs
- LGBT groups are deliberately excluded from developing policies on addressing HIV/AIDS
- Civil society organizations are excluded from government deliberations to prepare applications for funds from the Global Fund to Fight AIDS, Tuberculosis and Malaria
- The government negotiates a large-scale clinical trial without consulting or requiring researchers to consult affected communities

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 5.3 Fundamental Principles of the Ljubljana Charter on Reforming Health Care:** *Health care reforms must address citizens' needs, taking into account their expectations about health and health care. They should ensure that the citizen's voice and choice decisively influence the way in which health services are designed and operate. Citizens must also share responsibility for their own health.*
- ▶ **Part III European Charter of Patients' Rights: Section on the Rights of Active Citizenship:** **Citizens have the "right to participate in the definition, implementation and evaluation of public policies relating to the protection of health care rights."**
- ▶ **COE Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care**⁸²

Recommends that the governments of member states:

- *ensure that citizens' participation should apply to all aspects of health care systems, at national, regional and local levels and should be observed by all health care system operators, including professionals, insurers and the authorities;*
- *take steps to reflect in their law the guidelines contained in the appendix to this recommendation;*
- *create legal structures and policies that support the promotion of citizens' participation and patients' rights, if these do not already exist;*
- *adopt policies that create a supportive environment for the growth, in membership, orientation and tasks, of civic organisations of health care "users", if these do not already exist;*

⁸² COE. Recommendation No. R (2000) 5. <https://wcd.coe.int/ViewDoc.jsp?id=340437&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

- support the widest possible dissemination of the recommendation and its explanatory memorandum, paying special attention to all individuals and organisations aiming at involvement in decision-making in health care.

The guidelines in this recommendation cover: citizen and patient participation as a democratic process; information; supportive policies for active participation; and appropriate mechanisms.

► **Committee of Ministers Recommendation No. R (2006) 18 to member states on health services in a multicultural society**⁸³

5.1. Patient training programmes should be developed and implemented to increase their participation in the decision-making process regarding treatment and to improve outcomes of care in multicultural populations.

5.2. Culturally appropriate health promotion and disease prevention programmes have to be developed and implemented as they are indispensable to improve health literacy in ethnic minority groups in terms of health care.

5.3. Ethnic minority groups should be encouraged to participate actively in the planning of health care services (assessment of ethnic minorities' health needs, programme development), their implementation and evaluation.

Right to Nondiscrimination and Equality

EXAMPLES OF POTENTIAL VIOLATIONS

- Asylum seekers are denied access to all health care apart from emergency treatment
- Hospitals routinely place Roma women in separate maternity wards
- Drug users are underrepresented in HIV-treatment programs despite fact that they account for a majority of people living with HIV
- A woman with a diagnosis of schizophrenia is told by nursing staff that her abdominal pains are “all in your mind” and is later diagnosed as having ovarian cancer
- A person with intellectual disabilities is not provided with the appropriate community care support to effectively socially integrate in the community

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- **Article 14 ECHR: Prohibition of Discrimination:** *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,*

⁸³ COE. Committee of Ministers Recommendation No. R (2006) 18. <https://wcd.coe.int/ViewDoc.jsp?id=1062769&BackColorInternet=9999CC&BackColorIntranet>.

color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- Article 14 is not a stand-alone provision—in other words, it must be argued in conjunction with one of the substantive provisions of the ECHR.⁸⁴ For this reason, the court has not always examined Article 14 claims in cases in which it has already found a violation of the main provision.
- To date, there have been no significant Article 14 decisions in relation to health care. Because Article 14 case law has increased during the last decade in areas such as racial discrimination and sexual orientation, it is likely that this circumstance will change in the future.
- The main principles for considering an Article 14 claim are: evidence that there has been a difference of treatment on one of the nonpermitted categories (although this condition is not exhaustive); and, if so, the existence of an objective and reasonable justification for such difference.⁸⁵
- The court has also recently accepted the use of statistics to prove indirect discrimination,⁸⁶ a practice that in itself may not amount to impermissible discrimination but that disproportionately affects members of a particular group.

► **Article 11 ESC (taken together with Article E of the charter guaranteeing nondiscrimination)**

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organizations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

► **Article 15 ESC: Rights of persons with disabilities to vocational training, rehabilitation and social resettlement**

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular: (1) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private; (2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services; (3) to promote their full social

⁸⁴ A stand-alone provision on non-discrimination in the form of Protocol 12 to the convention entered into force in 2005 but has not been widely ratified. <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>.

⁸⁵ Rasmussen v. Denmark. (7 EHRR 371).

⁸⁶ D. H. v. Czech Republic. (57325/00).

integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

- The ECSR has stated that the health care system must be accessible to everyone and that restrictions on the application of Article 11 ESC must not be interpreted in such a way as to impede disadvantaged groups' exercise of their right to health.⁸⁷

Specifically, the right of access to care requires that care must not represent an excessively heavy cost for the individual, and steps must be taken to reduce the financial burden on patients from the most disadvantaged sections of the community.⁸⁸

- The ESCR, in considering a claim brought against France that it had violated (a) the right to medical assistance of poor illegal immigrants on very low incomes under Article 13⁸⁹ of the Revised European Social Charter⁹⁰ by ending their exemption from charges for medical and hospital treatment⁹¹ and (b) the rights of children of immigrants to protection under Article 17 of the revised charter⁹² by a 2002 legislative reform that restricted their access to medical services for children, upheld the claim of the children but not of the adults.

With regard to Article 13, the ESCR did find, based on a purposive interpretation of the ESC consistent with the principle of individual human dignity, that medical assistance protection should extend to illegal and to lawful foreign migrants (although this condition did not apply to all ESC rights). This finding is highly significant in relation to the protection afforded to such marginalized groups within Europe. On the facts, however, by a majority of nine to four, the ESCR found no violation of Article 13 as illegal immigrants could access some forms of medical assistance after three months of residence, and all foreign nationals could, at any time, obtain treatment for "emergencies and life threatening conditions."

By contrast, the ESCR found a violation of Article 17 (the right of children to protection), even though the affected children had similar access to health care as adults, because Article 17

87 COE. Conclusions of the European Committee of Social Rights. (XVII-2); Conclusions 2005. Statement of interpretation of Article 11.

88 COE. Conclusions: Portugal. (XVII-2).

89 Article 13: With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; (2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; (4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

90 The Revised Social Charter of 1996 (ETS No. 163) embodies in one instrument all the rights guaranteed by the original charter of 1961 (ETS No. 035) and its additional protocol of 1988 (ETS No. 128) and adds new rights and amendments adopted by the parties. The revised charter is gradually replacing the initial, 1961 treaty.

91 International Federation of Human Rights Leagues (FIDH) v. France. (13/2003).

92 Article 17: With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: (1) (a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; (b) to protect children and young persons against negligence, violence or exploitation; (c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support; (2) to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.'

was considered more expansive than the right to medical assistance. In response to the decision, the government of France changed its policy in relation to migrant children.⁹³

► **Article 3 European Convention on Human Rights and Biomedicine⁹⁴**

Equitable access to health care

► **Article 23 Convention Relating to the Status of Stateless Persons**

The contracting states shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

► **Article 4 Framework Convention for the Protection of National Minorities**

The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

► **Committee of Ministers Recommendation No. R (2006) 18 to member states on health services in a multicultural society**

This recommendation includes a number of strategies for promoting health and health care for multicultural populations, including: nondiscrimination and respect for patient rights; equal access to health care; overcoming language barriers; sensitivity to health and socioeconomic needs of minorities; empowerment; and greater participation and development of appropriate knowledge base of the health needs of multicultural populations.

► **Paragraph 4 COE Parliamentary Assembly Recommendation 1626 (2003) on the Reform of Health Care Systems in Europe: Reconciling equity, equality and efficiency⁹⁵**

Member states should take as their main criterion for judging the success of health system reforms the existence of effective access to health care for all, without discrimination, as a basic human right.

► **Article 2 European Charter of Patients Rights: Right of Access**

Every individual has the right of access to the health services that his or her health needs require. The health services must guarantee equal access to everyone, without discriminating on the basis of financial resources, place of residence, kind of illness or time of access to services.

93 The government issued a circular on March 16, 2005, which provided that "all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement." (CIRCULAR DHOS/DSS/DGAS).

94 Convention on Human Rights and Biomedicine. <http://conventions.coe.int/Treaty/en/Treaties/Word/164.doc>.

95 COE. Parliamentary Assembly Recommendation 1626 (2003). <http://assembly.coe.int/Documents/AdoptedText/TA03/EREC1626.htm>.

3.4 Providers' Rights

This section presents relevant European regional standards as they appear in the European Convention on Human Rights and the European Social Charter. It also explains how these standards have been interpreted in relation to three key rights for health care and service providers: (i) work-related rights, including the right to work and to equal opportunity based on sex; (ii) freedom of association, including the right to form trade unions and the right to strike; and (iii) due process and related rights to a fair hearing, effective remedy, protection of privacy and reputation, and freedom of expression and information.

The chapter is divided into three major sections. Part I discusses the right to work in decent conditions; Part II discusses freedom of association; and Part III discusses due process and related rights. Each section outlines the significance of the right for health providers and gives examples of potential violations. The relevant standards from the Council of Europe treaties are then presented. Finally, key interpretative guidelines based on case law and concluding observations of state reports issued by the monitoring bodies are summarized.

Right to Work in Decent Conditions

The right to work and rights in work are governed by the European Social Charter (ESC). Although they are not the focus of this section, relevant ECHR standards may include Article 2 (the right to life) and Article 3 (the prohibition of torture and subjection to inhuman or degrading treatment or punishment) insofar as they provide safeguards against ill treatment in the workplace.

The European Committee of Social Rights (ECSR) has provided extensive interpretation of the right to work in decent conditions in the ESC, particularly in the following four areas: the right to work (article 1[2]) and to equal opportunity based on sex (article 20); the right to reasonable daily and weekly working hours (article 2[1]); the right to safe and healthy working conditions (article 3); and the right to a fair remuneration.⁹⁶ Each of these is discussed in turn in this section. Although there is little or no direct reference to health sector personnel, they enjoy the same level of protection as other workers.

96 A digest of the case law of the ECSR is regularly updated and available at http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestIndex_en.asp.

Right to Work and to Equal Opportunity Based on Sex

EXAMPLES OF POTENTIAL VIOLATIONS

- A female doctor is constantly passed over for promotion despite having more relevant experience and better qualifications than male colleagues
- All nationals from a country are banned from taking jobs in the health sector following a territorial dispute subsequently referred to the International Court of Justice
- Female employees are subject to frequent sexual harassment by other members of staff, and no action is taken to stop harassment

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 1(2) ESC: The right to work

With a view to ensuring the effective exercise of the right to work, the Parties undertake to protect effectively the right of the worker to earn his living in an occupation freely entered upon.

- Article 1(2) of the ESC, ensuring the effective exercise of the right to work, is further divided into three separate issues:
 - a) the prohibition of all forms of discrimination in employment (which overlaps with the right to equal opportunity based on sex);
 - b) the prohibition of any practice that might interfere with a worker's right to earn a living in an occupation freely entered upon;⁹⁷
 - c) the prohibition of forced or compulsory labor.

The first two of these issues are discussed below, with an emphasis on the definition and scope of discrimination. Acceptable domestic policies to combat discriminatory practices that limit enjoyment of the right to work, as set forth in Article 1, are also outlined.

Prohibition of all forms of discrimination in employment

- The ESC defines discrimination as the different treatment of persons in comparable situations where such treatment does not pursue a legitimate aim, is not based on objective and reasonable grounds, or is not proportionate to the aim pursued.⁹⁸ The assessment of whether a difference in treatment pursues a legitimate aim and is proportionate takes into account Article G,⁹⁹ the limitation provision of the ESC.¹⁰⁰

97 COE. Conclusions of the European Committee of Social Rights. Conclusions (II and XVI-1). Statements of interpretation of Article 1§2.

98 Syndicat national des Professions du Tourisme v. France. (6/1999). Decision on the merits of 10 October 2000.

99 Article G: The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

100 COE. Conclusions: Greece. (XVI-1).

- Under Article 1(2), legislation should prohibit any discrimination in employment on grounds of, inter alia, sex, race, ethnic origin, religion, disability, age, sexual orientation, and political opinion.¹⁰¹ This provision is inherently linked to other provisions of the ESC, in particular to Article 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex) and Article 15(2) (the right of persons with disabilities to employment).
- Legislation should prohibit both direct and indirect discrimination.¹⁰²
- Indirect discrimination arises when a measure or practice that is identical for everyone, without a legitimate aim, disproportionately affects persons having a particular religion or belief, disability, age, sexual orientation, political opinion, ethnic origin, etc.¹⁰³
- Discrimination may also result from the failing to take positive account of all relevant differences or failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible to and by all.¹⁰⁴
- The discriminatory acts and provisions prohibited by this provision are ones that may occur in connection with recruitment or with employment conditions in general. Remuneration, training, promotion, transfer, and dismissal or other detrimental action are especially important.¹⁰⁵
- In order to make the prohibition of discrimination effective, domestic law must at least provide for:
 - the power to set aside, rescind, abrogate, or amend any provision contrary to the principle of equal treatment, which appears in collective labor agreements, in employment contracts, or in firms' own regulations;¹⁰⁶
 - protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action;¹⁰⁷
 - appropriate and effective remedies that are adequate and proportionate and available to victims in the event of an allegation of discrimination. The imposition of predefined upper limits to compensation that may be awarded are not in conformity with Article 1(2).¹⁰⁸
- Domestic law should also provide for an alleviation of the burden of proof that rests with the plaintiff in discrimination cases.¹⁰⁹
- The following measures also contribute to combating discrimination in accordance with Article 1(2) of the ESC:
 - Recognizing the right of trade unions to take action in cases of employment discrimination, including action on behalf of individuals¹¹⁰

101 COE. Conclusions: Iceland. (XVIII-1); Conclusions 2006 (Albania).

102 COE. Conclusions: Austria. (XVIII-1).

103 David Harris et al. *Law of the European Convention on Human Rights*. (Oxford: Oxford University Press, 2009), 607.

104 Association Internationale Autisme-Europe (AIAE) v. France. (13/2002). Decision on the merits of 4 November 2003.

105 COE. Conclusions: Austria. (XVI-1).

106 COE. Conclusions: Iceland. (XVI-1).

107 COE. Conclusions: Iceland. (XVI-1).

108 COE. Conclusions 2006: Albania.

109 COE. Conclusions 2002: France; Syndicat Sud Travail et Affaires Sociales v. France. (24/2004). Decision on the merits of 16 November 2005.

110 COE. Conclusions: Iceland. (XVI-1).

- The right to challenge discriminatory practices that violate the right to take collective action
- Establishing a special, independent body to promote equal treatment, particularly by providing discrimination victims with the support they need to take proceedings
- States parties to the ESC may make foreign nationals' access to employment while in their territories subject to possession of a work permit. They cannot, however, in general, ban nationals of other states from occupying jobs for reasons other than those set out in Article G. The only jobs from which foreigners may be banned are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.¹¹¹
- Exclusion of individuals from functions on grounds of previous political activities, either in the form of refusal to recruit or dismissal, is prohibited, unless the job relates to law and order and national security or to functions involving such responsibilities.¹¹²
- The ECSR has offered limited interpretation of the following standard: "Prohibition of any practice that might interfere with workers' right to earn their living in an occupation freely entered upon." Practices that could violate this standard include:
 - the lack of adequate legal safeguards against discrimination in respect to part-time work. In particular, there must be rules to prevent nondeclared work through overtime and equal pay, in all its aspects, between part-time and full-time employees;¹¹³
 - undue interference in employees' private or personal lives associated with or arising from their employment situation, in particular through electronic communication and data collection techniques.¹¹⁴

► **Article 20 ESC: Equal opportunity based on sex**

All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields: (a) access to employment, protection against dismissal and occupational reintegration; (b) vocational guidance, training, retraining and rehabilitation; (c) terms of employment and working conditions, including remuneration; (d) career development, including promotion.

¹¹¹ COE. Conclusions 2006: Albania.

¹¹² COE. Conclusions 2006: Lithuania.

¹¹³ COE. Conclusions: Austria. (XVI-1).

¹¹⁴ COE. Conclusions 2006. Statement of Interpretation on Article 1§2.

Right to Reasonable Daily and Weekly Working Hours

EXAMPLES OF POTENTIAL VIOLATIONS

- A doctor regularly works 100 hour weeks including, on occasion, 18-hour shifts
- A nurse is forced to work overtime without prior agreement

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 2(1) ESC: Reasonable working hours to ensure the right to just conditions of work:**

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit.

- Article 2(1) ESC guarantees workers the right to reasonable limits on daily and weekly working hours, including overtime. This right must be guaranteed through legislation, regulations, collective agreements, or any other binding means. In order to ensure that the limits are respected in practice, an appropriate authority must supervise whether the limits are being respected.¹¹⁵
- The ESC does not expressly define what constitutes reasonable working hours, instead it assesses situations on a case-by-case basis: extremely long working hours (more than 16 hours in any one day¹¹⁶ or, under certain conditions, more than 60 hours in one week¹¹⁷ are unreasonable and therefore contrary to the ESC.
- Overtime work must not simply be left to the discretion of the employer or the employee. The reasons for overtime work and its duration must be subject to regulation.¹¹⁸
- Article 2(1) also provides for the progressive reduction of weekly working hours, to the extent permitted by productivity increases and other relevant factors. These “relevant factors” may include the nature of the work to be performed and the safety and health risks to which workers are exposed.¹¹⁹
- Periods of “on call” duty during which the employee has not been required to perform work for the employer do constitute effective working time and cannot be regarded as rest periods, in the meaning of Article 2 of the ESC, except in the framework of certain occupations or particular circumstances and pursuant to appropriate procedures. The absence of effective work cannot constitute an adequate criterion for regarding such a period as a period of rest.¹²⁰

¹¹⁵ COE. Conclusions I. Statement of Interpretation on Article 2§1.

¹¹⁶ COE. Conclusions: Norway. (XIV-2).

¹¹⁷ COE. Conclusions: The Netherlands. (XIV-2).

¹¹⁸ COE. Conclusions. (XIV-2). Statement of Interpretation on Article 2(1).

¹¹⁹ Ibid.

¹²⁰ Confédération Française de l'Encadrement CFE-CGC v. France. (16/2003). Decision on the merits of 12 October 2004.

Right to Safe and Healthy Working Conditions

EXAMPLES OF POTENTIAL VIOLATIONS

- Medical staff in the X-ray department are frequently exposed to dangerously high levels of radiation due to faulty equipment that has not been checked or replaced
- A nurse is infected with HIV after medical equipment is not properly sterilized
- A staff canteen remains open despite repeatedly failing basic hygiene standards

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 3 ESC: The right to safe and healthy working conditions

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations: To formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment; (1) to issue safety and health regulations; (2) to provide for the enforcement of such regulations by measures of supervision; (3) to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

- The right of every worker to a safe and healthy working environment is a “widely recognised principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights.”¹²¹
- The purpose of Article 3 ESC is thus directly related to that of Article 2 of the European Convention on Human Rights, which recognises the right to life.¹²²
- Article 3 ESC applies to both the public and private sectors.¹²³
- Occupational risk prevention must be a priority. It must be incorporated into the public authorities' activities at all levels and form part of other public policies (on employment, persons with disabilities, equal opportunities, etc.).¹²⁴ The policy and strategies adopted must be assessed and reviewed regularly, particularly in light of changing risks.
- At the employer level, in addition to compliance with protective rules, there must be regular assessment of work-related risks and the adoption of preventive measures geared to the nature of risks in addition to information and training for workers. Employers are also required to provide appropriate information, training, and medical supervision for temporary workers and employees on fixed-term contracts (for example, taking account of employees'

¹²¹ COE. Conclusions I. Statement of Interpretation on Article 3.

¹²² COE. Conclusions. (XIV-2). Statement of Interpretation on Article 3.

¹²³ COE. Conclusions II. Statement of Interpretation on Article 3.

¹²⁴ COE. Conclusions 2005: Lithuania.

accumulated periods of exposure to dangerous substances while working for different employers).¹²⁵

- The ESC does not actually define the risks to be regulated. Supervision takes an indirect form, referring to international technical occupational health and safety standards, such as the ILO conventions and European Community Directives on health and safety at work.
- Domestic law must include framework legislation (often, the Labour Code) that sets out employers' responsibilities, workers' rights and duties, and specific regulations. The risks that the ECSR currently highlights include:
 - establishment, alteration, and upkeep of workplaces (equipment, hygiene);
 - hazardous agents and substances;
 - risks connected with certain sectors (the health sector is not expressly mentioned).
- Most of the risks listed above have to be covered by a specific regulation, i.e., they must set out rules in sufficient detail for them to be applied properly and efficiently.¹²⁶ Accordingly, the ECSR does not consider that states are required to introduce specific insurance for occupational diseases and accidents to comply with Article 3(2).¹²⁷
- All workers, all workplaces, and all sectors of activity must be covered by occupational health and safety regulations.¹²⁸
- There is a need for regular inspections and effective penalties for breaches.

Right to a Fair Remuneration

EXAMPLES OF POTENTIAL VIOLATIONS

- Some health staff are only paid the equivalent of 40 percent of the national average wage, and ancillary staff are paid less than the national minimum wage
- A nurse working overtime receives the same wage that she is normally paid

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 4 ESC: The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: (1) to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; (2) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; (3) to recognise the right of men and women workers to equal pay for work of equal value; (4) to recognise the

¹²⁵ COE. Conclusions 2003: Bulgaria.

¹²⁶ COE: Conclusions: Norway. (XIV-2).

¹²⁷ Marangopoulos Foundation for Human Rights (MFHR) v. Greece. (30/2005). Decision on the merits of 6 December 2006.

¹²⁸ COE. Conclusions 2005: Estonia.

right of all workers to a reasonable period of notice for termination of employment; (5) to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards. The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.

- To be considered fair within the meaning of Article 4(1) of the ESC, wages must be above the poverty line in a given country—in other words, 50 percent of the national average wage. In addition, a wage must not fall too far short of the national average wage. The threshold adopted by the ESCR is 60 percent.¹²⁹
- Employees who work overtime must be paid at a higher rate than the normal wage rate.¹³⁰ Article 4(2) permits granting an employee leave to compensate for overtime, provided that the leave is longer than the overtime hours worked. It is not sufficient, therefore, to offer employees leave of equal length to the number of overtime hours worked.¹³¹

Exceptions to Article 4(2) may be authorized in certain specific cases. These “special cases” have been defined by the ECSR as “state employees, management executives, etc.”¹³² With respect to state employees, confining exceptions to “senior officials” is compatible with Article 4(2).¹³³ Exceptions to receipt of a higher rate of overtime pay cannot, however, be applied to all state employees or public officials, irrespective of their level of responsibility.¹³⁴ Exceptions may be applied to all senior managers. The ECSR has ruled that certain limits must apply, however, particularly on the number of hours of overtime not paid at a higher rate.¹³⁵

- Women and men are entitled to “equal pay for work of equal value,” and this right must be expressly provided for in legislation.¹³⁶ The equal pay principle should apply to all jobs performed by both women and men. The principle of equality should cover all the elements of pay, including minimum wages or salary plus all other benefits paid directly or indirectly in cash or in kind by the employer to the worker.¹³⁷ It must also apply to full-time and part-time employees, covering the calculation of hourly wages, pay increases, and the components of pay.¹³⁸
- Domestic law must provide for appropriate and effective remedies in the event of alleged wage discrimination.¹³⁹ Employees who claim that they have suffered discrimination must be able to take their cases to court.
- Domestic law should provide for an alleviation of the burden of proof in favor of the plaintiff in discrimination cases. Anyone who suffers wage discrimination on grounds of sex must

129 COE. Conclusions. (XIV-2). Statement of Interpretation on Article 4§1. The committee’s calculations are based on net amounts, (after deduction of taxes and social security contributions). Social transfers (for example, social security allowances or benefits) are taken into account only when they have a direct link to the wage.

130 COE. Conclusions I. Statement of Interpretation on Article 4§2.

131 COE. Conclusions: Belgium. (XIV-2).

132 COE. Conclusions: Ireland. (IX-2).

133 COE. Conclusions: Ireland. (X-2).

134 COE. Conclusions: Poland. (XV-2).

135 Confédération Française de l’Encadrement CFE-CGC v. France. (9/2000). Decision on the merits of 16 November 2001.

136 COE. Conclusions: Slovak Republic. (XV-2, addendum).

137 COE. Conclusions I. Statement of Interpretation on Article 4§3.

138 COE. Conclusions: Portugal. (XVI-2).

139 COE. Conclusions I. Statement of Interpretation on Article 4§3.

be entitled to adequate compensation, sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender.¹⁴⁰ In cases of unequal pay, any compensation must, at minimum, cover the difference in pay.¹⁴¹

Right to Freedom of Association

Freedom of association is recognized under Article 11 of the ECHR. Although the European Court of Human Rights has only examined this right in a limited number of cases, it has confirmed that it includes the freedom to abstain from joining an association. In addition, the ECtHR has determined that official regulatory body members do not fall within the scope of the guarantee. This finding is particularly important for medical professionals as these bodies are established by law and have the authority to discipline their members.¹⁴²

The most comprehensive analysis of the right to strike has been made under the ESC. The ECtHR has engaged in a more limited exploration of trade unions, which includes upholding workers' right to strike.

This section covers two aspects of freedom of association: the freedom of association and assembly, found in Article 11 of the ECHR, and the right to form trade unions and to strike, addressed by Articles 5, 6, 21, and 22 of the ESC.

Right to Freedom of Association and Assembly

EXAMPLES OF POTENTIAL VIOLATIONS

- A professional medical association is not approved by the Ministry of Health because its president is a leading member of an opposition political party
- Without any justification, authorities prevent a rally for improved pay and conditions for health workers from taking place

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- **Article 11 ECHR:** (1) *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.* (2) *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for*

¹⁴⁰ COE. Conclusions. (XIII-5). Statement of Interpretation on Article 1 of the Additional Protocol.

¹⁴¹ COE. Conclusions: Malta. (XVI-2).

¹⁴² See also International Centre for the Protection of Legal Rights. INTERIGHTS Manual for Lawyers. Article 11 of the European Convention of Human Rights: Freedom of Assembly and Association. <http://www.interights.org/view-document/index.htm?id=520>. Provides information on how the ECtHR has interpreted Article 11 of the ECHR.

the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

- Under Article 11, "association" is an autonomous concept that is not dependent on the classification adopted under domestic law. This factor is relevant but not decisive.¹⁴³
- The right to freedom of association under Article 11 applies to private law bodies only. Public law bodies (i.e., those established under legislation) are not considered to be "associations" within the meaning of Article 11. This limited scope of the right may be particularly relevant for health professionals and the compulsory membership of their national professional bodies.¹⁴⁴
- The right also includes the freedom not to join an association or trade union.¹⁴⁵
- Article 11(2) permits "lawful restrictions" to be placed on certain public officials (for example, the armed forces and the police) and on members of the "administration of the state."¹⁴⁶ The latter term should be narrowly interpreted, however; the ECtHR left open whether it should apply to teachers.¹⁴⁷

Trade Unions and the Right to Strike

EXAMPLES OF POTENTIAL VIOLATIONS

- A nurse is refused a promotion on the grounds that she has been "causing problems" for the management through her trade union activities
- A collective agreement between a trade union and health authority management ensures that 30 percent of the vacant posts will be reserved for the union's members
- There is a blanket ban on all health sector workers, prohibiting them from taking any form of industrial action

143 Chassagnou and Ors v. France. (29 EHRR 615). Hunters' associations in France are held to be "associations" for purposes of Article 11 even though government argued that they were public law institutions.

144 Le Compte v. Belgium. (4 EHRR 1). After being suspended by the regulatory body for their profession, doctors unsuccessfully complained about their compulsory membership in it and their subjection to the jurisdiction of its disciplinary organs. Given the regulatory body's public law status—it was integrated with the structure of the state, and judges were appointed to most of its organs by the state—its functions of regulating medical practice and maintaining the register of practitioners, and its administrative, rule making, and disciplinary powers, the court held that it was also relevant that there were no restrictions on practitioners establishing or joining their own professional associations. See also the subsequent cases of Albert and Le Compte v. Belgium (7299/75, etc.) as regards medical doctors; Revert and Legallais v. France (14331/88 and 14332/88) as regards architects; A. and others v. Spain (13750/88) as regards bar associations; and Barthold v. Germany (8734/79) as regards veterinary surgeons. See also O. VR. v. Russia (44139/98) and A v. Spain (6 DR 188).

145 Young and Ors v. UK. (4 EHRR 38). "Closed shop," compulsory membership of the rail trade union breached Article 11. See also Sigurjonsson v. Iceland. (A264).

146 This approach has been endorsed by ESCR experts but not by the ILO Freedom of Association Committee, although Article 9(1) of ILO Convention No. 87 limiting public servants' rights does not refer to "administration of the state."

147 Vogt v. Germany. (21 EHRR 205). The court has left open whether teachers are members of the "administration of the state," but the commission decided that they are not.

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 5 ESC: The right to organize

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

- Article 5 of the ESC applies both to the public and to the private sector.¹⁴⁸ Domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies when this right is not respected.
- Under Article 5, workers must be free to join and free not to join a trade union.¹⁴⁹ Any form of compulsory trade union membership imposed by law is incompatible with Article 5.¹⁵⁰
- Domestic law must clearly prohibit all preentry or postentry "closed shop" clauses and all union security clauses (automatic deductions from wages).¹⁵¹ Consequently, clauses in collective agreements or legally authorized arrangements whereby jobs are reserved in practice for members of a specific trade union are a breach of Article 5.¹⁵²
- Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal, or promotion. Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.¹⁵³
- Trade unions and employers' organizations must be independent from excessive state interference in relation to their infrastructure or effective functioning.¹⁵⁴ For example, trade unions are entitled to choose their own members and representatives, and there should be not excessive limits on the reasons for which a trade union may take disciplinary action against a member.¹⁵⁵ Further, trade union officials must have access to the workplace, and union members must be able to hold meetings at work, subject to the requirements of the employer.¹⁵⁶
- Trade unions and employer organizations must be free to organize without prior authorization, and initial formalities, such as declaration and registration, must be simple and easy to

148 COE. Conclusions I. Statement of Interpretation on Article 5.

149 COE. Conclusions I. Statement of Interpretation on Article 5.

150 COE. Conclusions III. Statement of Interpretation on Article 5..

151 COE. Conclusions VIII. Statement of Interpretation on Article 5.

152 COE. Conclusions: Denmark. (XV-1).

153 COE. Conclusions 2004: Bulgaria.

154 COE. Conclusions: Germany. (XII-2).

155 COE. Conclusions: United Kingdom. (XVII).

156 COE. Conclusions: France. (XV-1).

apply. If fees are charged for the registration or establishment of an organization, they must be reasonable and designed only to cover strictly necessary administrative costs.¹⁵⁷

- Registration requirements as to the minimum number of members comply with Article 5 if the number is reasonable and presents no obstacle to the founding of organizations.¹⁵⁸
- Domestic law may restrict participation in various consultation and collective bargaining procedures to certain representative trade unions, subject to certain criteria being met.¹⁵⁹
- The right to strike may be restricted, provided that any restriction satisfies the conditions laid down in Article G, which outlines the circumstances that can justify limitation of rights guaranteed by the charter. Any limitation must serve a legitimate purpose and be necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.¹⁶⁰
- Prohibiting strikes in sectors that are essential to the community is deemed to serve a legitimate purpose, as strikes in these sectors could pose a threat to public interest, national security, and/or public health. Simply banning strikes, however, even in essential sectors—particularly when they are extensively defined, for example, as “energy” or “health”—is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6(4).¹⁶¹

► **Article 19(4) ESC: The right of migrant workers and their families to protection and assistance**

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake: ... (4) to secure for such workers lawfully within their territories, insofar as much matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favorable than that of their own nationals in respect of the following matters: ... (b) membership of trade unions and enjoyment of the benefits of collective bargaining.

► **Article 6 ESC: The right to bargain collectively**

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: (1) to promote joint consultation between workers and employers; (2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; (3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: (4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

157 COE. Conclusions: United Kingdom. (XV-1).

158 COE. Conclusions: Portugal. (XIII-5).

159 COE. Conclusions: Belgium. (XV-1); Conclusions: France. (XV-1).

160 COE. Conclusions: Norway. (X-1). Regarding Article 31 of the charter.

161 COE. Conclusions I. Statement of Interpretation on Article 6§4; Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour “Podkrepa” and European Trade Union Confederation v. Bulgaria. (32/2005). Decision on the merits of 16 October 2006.

- Public officials enjoy the right to strike under Article 6(4). Prohibiting all such officials from exercising the right to strike is not permissible. The right of certain categories of public officials to strike may be restricted, however. Under Article G, these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security or to the general public interest.¹⁶²
- A strike should not be considered a violation of the contractual obligations of the striking employees, constituting a breach of their employment contract; participation should be accompanied by a prohibition of dismissal. If strikers are fully reinstated when the strike has ended and their previously acquired entitlements (for example, pensions, holidays, and seniority) are not affected, then formal termination of the employment contract does not violate Article 6(4).¹⁶³ Any deduction from strikers' wages should not exceed the proportion of their wage that would be attributable to the duration of their strike participation.¹⁶⁴ Workers who are not members of the striking trade union but participate in the strike are entitled to the same protection as the trade union members.¹⁶⁵

► **Article 21 ESC: The right to information and consultation**

With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice: (a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and (b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.

► **Article 22 ESC: The right to take part in the determination and improvement of the working conditions and working environment**

With a view to ensuring the effective exercise of the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute: (a) to the determination and the improvement of the working conditions, work organisation and working environment; (b) to the protection of health and safety within the undertaking; (c) to the organisation of social and socio-cultural services and facilities within the undertaking; (d) to the supervision of the observance of regulations on these matters.

¹⁶² Ibid.

¹⁶³ COE. Conclusions I. Statement of Interpretation on Article 6§4.

¹⁶⁴ COE. Conclusions: France. (XIII-1); Confédération Française de l'Encadrement (CFE CGC) v. France. (16/2003). Decision on the merits of 12 October 2004.

¹⁶⁵ COE. Conclusions: Denmark. (XVIII-1).

► **Article 11 ECHR: Freedom of assembly and association**

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

- The right to form and join trade unions is a subdivision of freedom of association and is not a special and independent right under Article 11.¹⁶⁶
- Article 11 does not explicitly guarantee any particular treatment of trade unions, such as the right to be consulted by the government or to strike.¹⁶⁷ Trade unions, however, should be heard and should be permitted to take action to protect the occupational interests of their members.¹⁶⁸
- This protection can include the right to strike, which may only be limited under certain circumstances.¹⁶⁹

Right to Due Process and Related Rights

Health providers have rights to due process when complaints about their conduct are lodged against them. The ECtHR has provided extensive interpretation of the right to a fair hearing, which is protected in Article 6 of the ECHR. It is clear that this right covers matters such as licensing and medical negligence suits against a hospital.

Administrative proceedings do not necessarily need to comply with Article 6, provided that, at some point, there is an opportunity to appeal to a judicial process that does adhere to Article 6 standards. Similarly, legal proceedings do not need to meet fair trial standards at each stage of the process. Rather, courts will assess whether the proceedings, taken together as a whole, constitute a fair trial.

This section discusses four aspects of due process and related rights: the interpretation of the right to a fair hearing in Article 6(1) of the ECHR; the guarantee of effective remedy articulated in Article 13 of the ECHR; the protection of privacy and reputation in Article 8 of the ECHR; and the protection of freedom of expression and information in Article 10 of the ECHR.

It should be noted that there is no explicit right to information under the ECHR, and Article 10 (freedom of expression) offers only very limited protection in relation to information. There is no right to impart information, and the right to receive has been narrowly interpreted.

Freedom of expression can be restricted legitimately, through application of Article 8, to protect the rights and reputation of others. For example, the media does not have an absolute right to publish unwarranted attacks on public officials.

¹⁶⁶ National Union of Belgian Police v. Belgium. (1 EHRR 578).

¹⁶⁷ Schmidt and Dahlstrom v. Sweden. (1 EHRR 632).

¹⁶⁸ National Union of Belgian Police v. Belgium. (1 EHRR 578).

¹⁶⁹ Wilson and Ors v. UK. (35 EHRR 20). Court found violation of Article 11 where law permitted an employer to derecognize trade unions for collective bargaining purposes and to offer inducements to employees to relinquish some of their union rights.

Right to a Fair Hearing

EXAMPLES OF POTENTIAL VIOLATIONS

- A doctor facing a disciplinary hearing is denied the opportunity to contest the allegations made against him
- A disciplinary body decides, without explanation, that all of its hearings should take place in private
- A nurse's disciplinary hearing takes more than three years to complete, during which time she is suspended

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 6(1) ECHR: Right to a fair hearing

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- Article 6(1) of the ECHR applies to the determination of civil rights or criminal charges. It also covers all related proceedings between the state and the individual or between private parties, the result of which is "decisive" for civil rights and obligations.¹⁷⁰
- In *König v. Federal Republic of Germany*, the court found: "Whether or not a right is to be regarded as civil ... must be determined by reference to the substantive contents and effects of the right—and not its legal classification—under the domestic law of the State concerned."¹⁷¹
- A merely investigative procedure will not engage Article 6(1),¹⁷² even though pretrial proceedings may be determinative of civil rights and obligations under certain circumstances.¹⁷³
- The ECtHR has confirmed that civil rights and obligations are implicated in disciplinary proceedings that determine the right to practice a profession. The ECtHR was ruling on claims brought by medical professionals in these cases.¹⁷⁴ Licensing decisions are also covered.¹⁷⁵
- Article 6(1) will usually apply where an individual claims compensation from a public authority for an unlawful act provided there is a right to such compensation. Medical negligence proceedings against a hospital have been held to be covered.¹⁷⁶

¹⁷⁰ *Ringeisen v. Austria*. (1 EHRR 466).

¹⁷¹ *König v. Federal Republic of Germany*. (2 EHRR 170).

¹⁷² *Fayed v. UK*. (18 EHRR 393).

¹⁷³ *Brennan v. UK*. (34 EHRR 50).

¹⁷⁴ *König v. Germany*. (2 EHRR 170). Concerning the revocation of the applicant's permission to practice as a doctor in proceedings before the Tribunal for the Medical Profession; *Wickramasinghe v. UK*. (31503/96).

¹⁷⁵ *König v. Germany*. (2 EHRR 170). Disciplinary proceedings led to the withdrawal of the applicant's licence to run a medical clinic.

¹⁷⁶ *H v. France*. (12 EHRR 74).

- Disputes relating to private law relations between private employers and employees fall within the scope of Article 6(1).¹⁷⁷ As a general rule, however, disputes relating to the employment of public servants fall outside of it.¹⁷⁸
- In civil proceedings, a litigant has the right to:
 - real and effective access to a court;
 - notice of the time and place of the proceedings;¹⁷⁹
 - a real opportunity to present his/her case;
 - a reasoned decision.
- There is no express requirement for legal aid in civil cases. In order to give effect to the right of access and the need for fairness, however, some assistance may be required in certain cases.¹⁸⁰
- Entitlement to present one's case effectively is not as strong in the civil context as it is in the criminal context. There is no automatic requirement to be present and to have an oral hearing. The principle of the "equality of arms" does apply, however,¹⁸¹ and can be violated by mere procedural inequality.¹⁸²
- The same principle applies to the submissions of nonparties to the proceedings.¹⁸³
- Both parties have a right to be informed of the other's submissions and other written material and have a right to reply.¹⁸⁴ Disclosure is crucial for a fair hearing.¹⁸⁵
- Although there is no obligation on a court to obtain an expert report merely because one party seeks it,¹⁸⁶ where an expert is appointed, there must be compliance with the equality of arms principle.¹⁸⁷
- In order to comply with the obligation to give a reasoned decision, the court or tribunal does not need to provide a detailed answer to every argument, but needs to address the essential issues in the case.¹⁸⁸
- A decision-making disciplinary or administrative process does not need to comply with Article 6 at all stages, provided it is subject to appeal and/or judicial review.¹⁸⁹
- Similarly, even where an adjudicatory body is not impartial and independent, it will not breach Article 6(1) if its deliberations are subject to control by a body that has the power to quash its decision.¹⁹⁰

177 *Obermeier v. Austria*. (13 EHRR 290).

178 *Lombardo v. Italy*. (21 EHRR 188).

179 *De La Pradelle v. France*. (A 253-B).

180 *Airey v. Ireland*. (2 EHRR 305); *P and Ors v. UK*. (35 EHRR 31).

181 *Ruiz-Martin v. Spain*. (16 EHRR 505).

182 *Fischer v. Austria*. (ECHR 33382/96).

183 *Van Orshoven v. Belgium*. (26 EHRR 55). Breach of Article 6(1), where applicant, who had been struck off the medical register following disciplinary proceedings, was given no prior notice of submission by the advocate-general intended to advise the court.

184 *Dombo Beheer B. V. v. The Netherlands*. (18 EHRR 213).

185 *Ruiz Torija v. Spain*. (19 EHRR 55).

186 *H v. France*. (12 EHRR 74).

187 *Mantovanelli v. France*. (24 EHRR 370). Claimants in medical negligence case had not been given an opportunity to give instruction to court-appointed expert.

188 *Helle v. Finland*. (26 EHRR 159).

189 *Le Compte v. Belgium*. (5 EHRR 533). The Court of Cassation's review of a medical disciplinary body was insufficient for Article 6(1) as the court did not "take cognisance" of the merits of the case, as many aspects fell outside of its jurisdiction.

190 *Kingsley v. UK*. (35 EHRR 10).

- The right to a public hearing includes disciplinary hearings of professionals.¹⁹¹
- Determining whether a hearing has been held within a reasonable time will depend upon a number of relevant factors, including the complexity of the case, the applicant's conduct, and the importance of what is at stake for the applicant.¹⁹² The time period begins at the moment when proceedings are instituted¹⁹³ and does not end until all matters—including appeals and determination of costs—have been completed.¹⁹⁴

Right to an Effective Remedy

EXAMPLES OF POTENTIAL VIOLATIONS

- No damages are awarded to a doctor after his reputation is damaged by unsubstantiated and false accusations of medical negligence that appear in the media
- A nurse is unable to appeal an employment tribunal decision to a court

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 13 ECHR: Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

- According to the terms of Article 13, the availability of a remedy must include the determination of the claim and the possibility of redress.¹⁹⁵ All procedures, including judicial and nonjudicial, will be examined.¹⁹⁶
- Formal remedies that prevent examination of the merits of the claim, including judicial review, may not comply with Article 13.¹⁹⁷
- The nature of the remedy required to satisfy the obligation under Article 13 will depend upon the nature of the alleged violation. In most cases, compensation will suffice. In all cases the remedy must be "effective" in both practice and law, meaning that there must not be undue interference by state authorities.¹⁹⁸
- The authority with the ability to provide the remedy must be independent of the body alleged to have committed the breach.¹⁹⁹

191 *Diennet v. France*. (21 EHRR 554). Concluding that misconduct hearing of a general practitioner should have been in public, except in the event that a confidential private or professional matter arose in the proceedings.

192 *Gast and Popp v. Germany*. (33 EHRR 37).

193 *Scopelliti v. Italy*. (17 EHRR 493); *Darnell v. UK* (18 EHRR 205). The total period of nine years—for the determination of the dismissal of the applicant from a health authority following several judicial review applications, an industrial tribunal hearing, and an Employment Appeal Tribunal hearing—was considered unreasonable.

194 *Somjee v. UK*. (36 EHRR 16).

195 *Klass v. Germany*. (2 EHRR 214).

196 *Silver v. UK*. (5 EHRR 347).

197 *Peck v. UK*. (36 EHRR 41).

198 *Aksoy v. Turkey*. (23 EHRR 553).

199 *Khan v. UK*. (31 EHRR 45); *Taylor-Sabori v. UK*. (36 EHRR 17).

Right to Protection of Privacy and Reputation

EXAMPLES OF POTENTIAL VIOLATIONS

- The phone of a hospital's chief executive is bugged without any prior lawful authorization
- A doctor involved in a civil suit against a hospital for unfair dismissal finds out that his correspondence has been routinely intercepted and read without his knowledge

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 8 ECHR: Privacy and reputation

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- The term "private life," within the context of Article 8 of the ECHR can extend to an individual's office, offering protection, for example, against the unlawful bugging of telephone calls.²⁰⁰ Protection can extend to certain behavior and activity that takes place in public, depending on whether the individual had a "reasonable expectation of privacy" and whether that expectation was voluntarily waived.²⁰¹ It has been held, however, that private life is not engaged by "real time" closed-circuit television if no images are recorded, although once a systematic record is made or the image is processed in some way, it will be engaged.²⁰²

► Article 10(2) ECHR: Limiting free expression to protect rights and reputation of others

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

²⁰⁰ Halford v. UK. (20605/92). Concluding that bugging of private telephone calls made to an office telephone could constitute a breach of Article 8.

²⁰¹ Von Hannover v. Germany. (43 EHRR 7).

²⁰² Peck v. UK. (36 EHRR 41).

Right to Freedom of Expression and Information

EXAMPLES OF POTENTIAL VIOLATIONS

- A senior health service manager is dismissed after revealing that a hospital has been purchasing unlicensed drugs
- State authorities intervene to prevent employees from receiving information that their hospital contains dangerously high levels of radiation
- A senior health services manager is dismissed after revealing that a hospital has been purchasing unlicensed drugs

HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► Article 10(1) ECHR: Freedom of expression including information

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

- There is no right to impart information under Article 10 of the ECHR. The right to receive information has been narrowly interpreted as prohibiting the authorities from restricting a person from receiving information that others may wish to impart. The state has no positive obligation to collect and disseminate information on its own motion.²⁰³
- Civil servants, insofar as they should enjoy public confidence, can be protected from "offensive and abusive verbal attacks." Even in such cases, however, civil servants have a duty to exercise their powers by reference to professional considerations only, without being unduly influenced by personal feelings.²⁰⁴

²⁰³ Guerra and Ors v. Italy. (26 EHRR 357).

²⁰⁴ Yankov v. Bulgaria. (39084/97).

4.1 INTRODUCTION

4.2 THE INTERNATIONAL SYSTEM

4.3 THE EUROPEAN SYSTEM

4.4 COMPLAINT PROCEDURE: EUROPEAN CONVENTION ON HUMAN RIGHTS

4

International and Regional Procedures

4.1 Introduction

International and regional human rights mechanisms play an important role in the implementation of rights. These mechanisms were established to enforce governments' compliance with the international and regional human rights treaties they have ratified. These treaties make up the so-called "hard law" of international human rights, and the interpretations of the treaty mechanisms make up "soft law" that is not directly binding on governments. There are two main types of enforcement mechanisms:

- ▶ **courts, which act in a judicial capacity and issue rulings that are binding on governments in the traditional sense; and**
- ▶ **committees, which examine reports submitted by governments on their compliance with human rights treaties and, in some cases, examine individual complaints of human rights violations.**

4.2 The International System

Human Rights Committee

MANDATE

The Human Rights Committee (HRC) oversees government compliance with the International Covenant on Civil and Political Rights (ICCPR). The HRC has two mandates: to monitor country progress on the ICCPR by examining periodic reports submitted by governments and to examine individual complaints of human rights violations under the Optional Protocol to the ICCPR.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the HRC on any aspect of a government’s compliance with the ICCPR. Shadow reports should be submitted through the HRC Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. The HRC meets three times a year. Individuals and NGOs can also submit complaints to the HRC under the Optional Protocol.

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Committee on Economic, Social, and Cultural Rights

MANDATE

The Committee on Economic, Social, and Cultural Rights (CESCR) oversees government compliance with the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The CESCR monitors country progress on the ICESCR by examining periodic reports submitted by governments.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the CESCR on any aspect of a government’s compliance with the ICESCR. Shadow reports should be submitted through the CESCR Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. The CESCR meets twice a year.

CONTACT

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Email: wlee@ohchr.org
Web: <http://www2.ohchr.org/english/bodies/cescr/index.htm>

Committee on the Elimination of Racial Discrimination

MANDATE

The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by states. It monitors country progress on ICERD by examining periodic reports submitted by governments. The committee then addresses its concerns and recommendations to the country in the form of “concluding observations.” Besides commenting on country reports, CERD monitors state compliance through an early-warning procedure and through the examination of interstate and individual complaints.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the CERD on any aspect of a government’s compliance with the ICERD. Shadow reports should be submitted through the CERD Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. CERD meets twice a year.

CONTACT

Nathalie Prouvez
Secretary of the Committee on the Elimination of Racial Discrimination
Treaties and Commission Branch
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Mailing address: UNOG-OHCHR, CH 1211 Geneva 10, Switzerland
Tel: +41.22.917.93.09; Fax: +41.22.917.90.22
Email: nprouvez@ohchr.org
Web: <http://www2.ohchr.org/english/bodies/cerd/>

International Labour Organization

MANDATE

The International Labour Organization (ILO), located within the United Nations, is primarily concerned with respect for human rights in the field of labor. In 1989, they adopted the Convention concerning Indigenous and Tribal Peoples in Independent Countries. States must provide periodic reports on their compliance with the convention to the ILO and to national employers' and workers' associations. National employers' and workers' associations may submit comments on these reports to the ILO. The ILO Committee of Experts (CE) evaluates the reports and may send “Direct Requests” to governments for additional information. The CE then publishes its “observations” in a report, which is presented at the International Labour Conference. On the basis of this report, the Conference Committee on the Application of Standards may decide to more carefully analyze certain individual cases and publishes its conclusions. Additionally, an association of workers or employers may submit a representation to the ILO alleging that a member state has failed to comply with the convention, and a member state may file a complaint against another member state.

CIVIL SOCIETY PARTICIPATION

The convention encourages governments to consult indigenous peoples in preparing their reports. Indigenous peoples may also affiliate with a workers' association or form their own workers' association in order to more directly communicate with the ILO. The CE meets in November and December of each year, and the International Labour Conference is held in June.

CONTACT

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Email: RELOFF@ilo.org
Web: www.ilo.org/public/english/index.htm

Committee on the Elimination of All Forms of Discrimination Against Woman

MANDATE

The Committee on the Elimination of All Forms of Discrimination Against Women oversees government compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The committee has three mandates: to monitor country progress on CEDAW by examining periodic reports submitted by governments, to examine individual complaints of violations of women's rights under the Optional Protocol to CEDAW, and to conduct missions to state parties in the context of concerns about systematic or grave violations of treaty rights.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the committee on any aspect of a government's compliance with CEDAW. Shadow reports should be submitted through the Division for the Advancement of Women in New York, which also keeps a calendar of when governments come before the committee. The committee meets twice a year. Individuals and NGOs can also submit complaints to the committee under the Optional Protocol or they can encourage the committee to undertake country missions as part of its inquiry procedure.

CONTACT

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Email: changt@un.org
Web: <http://www.un.org/womenwatch/daw/cedaw/cedaw38/NGOnote.pdf>

Committee on the Rights of the Child

MANDATE

The Committee on the Rights of the Child oversees government compliance with the Convention on the Rights of the Child (CRC). It monitors country progress on the CRC by examining periodic reports submitted by governments.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the committee on any aspect of a government's compliance with the convention. Shadow reports should be submitted through the CRC Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. The committee meets three times a year.

CONTACT

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 Web: www2.ohchr.org/english/bodies/crc/index.htm

UN Charter Bodies

In addition to the treaty bodies listed above, there are a number of bodies created for the protection and promotion of human rights under the Charter of the United Nations.

The principal charter body is the Human Rights Council (HRC), which replaced the Commission on Human Rights (CHR) in 2006. The HRC is a subsidiary organ of the United Nations General Assembly with a mandate “to address situations of violations of human rights, including gross and systematic violations.”

The responsibilities of the HRC include: the Universal Periodic Review (UPR), the Special Procedures, the Human Rights Council Advisory Committee (formerly the Sub-Commission on the Promotion and Protection of Human Rights), and the Complaints Procedure. These responsibilities are summarized at <http://www2.ohchr.org/english/bodies/hrcouncil/>.

UNIVERSAL PERIODIC REVIEW (UPR)

Beginning in 2008, the HRC will periodically review the human rights obligations and commitments of all countries. All UN member states will be reviewed for the first time within four years. A working group will meet for two weeks, three times a year, to carry out the review. The review will take into account a report from the state concerned, recommendations from the Special Procedures and Treaty Bodies, and information from nongovernmental organizations and national human rights institutions.

SPECIAL PROCEDURES

“Special Procedures” is the general term given to individuals (known as Special Rapporteurs, Special Representatives, or Independent Experts) or to groups (known as Working Groups) that are mandated by the HRC to address specific country situations or thematic issues throughout the world. The HRC currently includes 28 thematic and 10 country Special Procedures.

Special Procedures activities include responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities. The Special Procedures are considered “the most effective, flexible, and responsive mechanisms within the UN system.”

Special Procedures cited in this practitioner guide include:

- Working Group on Arbitrary Detention
- Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions
- Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
- Special Rapporteur on Violence against Women, Its Causes and Consequences
- For more information about the Special Procedures, see <http://www.ohchr.org/english/bodies/hr/special/index.htm>.

HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE

The Human Rights Council Advisory Committee functions like a think tank, providing expertise and advice and conducting substantive research and studies on issues of thematic interest to the HRC at its request. The committee is made up of 18 experts who serve in their personal capacity for a period of three years.

COMPLAINTS PROCEDURE

This confidential complaints procedure allows individuals or organizations to bring complaints about “gross and reliably attested violations of human rights” to the attention of the HRC. The procedure is intended to be “victims oriented” and is expected to conduct investigations in a timely manner. Complaints are reviewed by two working groups that meet for five days at least twice a year.

ECONOMIC AND SOCIAL COUNCIL

The UN Economic and Social Council (ECOSOC) coordinates the work of 14 specialized UN agencies, functional commissions, and regional commissions working on various international economic, social, cultural, educational, and health matters. The ECOSOC holds several short sessions per year and an annual substantive session for four weeks every July.

The ECOSOC consults regularly with civil society, and nearly 3,000 NGOs enjoy consultative status. ECOSOC-accredited NGOs are permitted to participate, present written contributions, and make statements to the council and its subsidiary bodies. Information about NGOs with consultative status can be found at <http://www.un.org/esa/coordination/ngo/>.

ECOSOC agencies and commissions that may be cited in or that may be relevant to this practitioner guide include the following:

- Commission on the Status of Women
- Commission on Narcotic Drugs
- Commission on Crime Prevention and Criminal Justice
- Committee on Economic, Social and Cultural Rights
- International Narcotics Control Board

4.3 The European System

European Court of Human Rights

MANDATE

The European Court of Human Rights (ECtHR), a body of the Council of Europe (COE), enforces the provisions of the European Convention on Human Rights (ECHR). The ECtHR adjudicates both disputes between states and complaints of individual human rights violations. The Committee of Ministers of the Council of Europe is responsible for monitoring the implementation of judgments made by the ECtHR. (See note on Committee of Ministers below.)

CIVIL SOCIETY PARTICIPATION

Any individual or government can lodge a complaint directly with the ECtHR alleging a violation of one of the rights guaranteed under the convention, provided they have exercised all other options available to them domestically. An application form may be obtained from the ECtHR website (www.echr.coe.int/echr/).

The COE has established a legal aid scheme for complainants who cannot afford legal representation. NGOs can file briefs on particular cases either at the invitation of the president of the court or as *amici curiae* ("friends of the court") if they can show that they have an interest in the case or have special knowledge of the subject matter and can also show that their intervention would serve the administration of justice. The hearings of the ECtHR are generally public.

CONTACT

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Council of Europe
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Web: www.echr.coe.int

European Committee of Social Rights

MANDATE

The European Committee of Social Rights (ECSR), also a body of the COE, conducts regular legal assessments of government compliance with provisions of the European Social Charter (ESC). These assessments are based on reports submitted by governments at regular two- to four-year intervals, known as supervision cycles. The governmental committee and the Committee of Ministers of the Council of Europe also evaluate government reports under the ECSR. (See note on Committee of Ministers below.)

CIVIL SOCIETY PARTICIPATION

Reports submitted by governments under the ESC are public and may be commented upon by individuals or NGOs. International NGOs with consultative status with the COE and national NGOs authorized by their government may also submit collective complaints to the COE alleging violations of the charter.

CONTACT

Web: www.humanrights.coe.int/cseweb/GB/index.htm

Committee of Ministers

The Committee of Ministers (www.coe.int/cm) is the decision-making body of the COE. It is composed of the foreign ministers of all COE member states (or their permanent representatives).

In addition to supervising judgments of the ECtHR and evaluating reports under the ECSR, the Committee of Ministers also makes separate recommendations to member states on matters for which the committee has agreed to a “common policy”—including matters related to health and human rights.

Some of these recommendations are provided by the Parliamentary Assembly of the Council of Europe (www.assembly.coe.int), which is a consultative body composed of representatives of the parliaments of member states.

Advisory Committee

MANDATE

The Advisory Committee (AC) assists the Committee of Ministers in monitoring compliance with the Framework Convention for the Protection of National Minorities (FCNM). It monitors country progress on the FCNM by examining periodic reports submitted by governments. Besides examining these reports, the AC may hold meetings with governments and request additional information from other sources. The AC then prepares an opinion, which is submitted to the Committee of Ministers. Based on this opinion, the Committee of Ministers issues conclusions concerning the adequacy of measures taken by each state party. The AC may be involved by the Committee of Ministers in the monitoring of the follow-up to the conclusions and recommendations.

CONTACT

Directorate General of Human Rights
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Email: minorities.fcnm@coe.int
Web: www.coe.int/minorities

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the AC on any aspect of a government’s compliance with the FCNM. Shadow reports should be submitted through the FCNM Secretariat. (http://www.coe.int/t/dghl/monitoring/minorities/2_Monitoring/NGO_Intro_en.asp)

4.4 Complaint Procedure: European Convention on Human Rights

This section excerpts and updates information from the publication *Reported Killing as Human Rights Violations* by Kate Thompson and Camille Giffard (published by the Human Rights Centre, University of Essex).

TABLE: BASIC FACTS ON THE EUROPEAN COURT OF HUMAN RIGHTS

Origin:	How was it created?	By the 1950 European Convention on Human Rights, revised by Protocol 11 to that convention, 1994
	When did it become operational?	In 1998, under the revised system
Composition:	How many persons is it composed of?	As many judges as there are states parties to the convention
	Are these persons independent experts or state representatives?	Independent experts
Purpose:	General objective	To examine complaints of violation of the ECHR
		Interstate complaints (compulsory) (Article 33, ECHR)
	Functions	Individual complaints (compulsory) (Article 34, ECHR) Fact finding (in the context of individual complaints only and an optional step in the procedure)

WHAT ARE THE ADMISSIBILITY REQUIREMENTS?

A communication will be declared *inadmissible* if:

- the communication is anonymous;
- the communication has not been submitted within six months of the date of the domestic authorities' final decision in the case;
- the communication is manifestly ill founded or an abuse of the right of petition;
- the communication is incompatible with the provisions of the Convention
- the application is substantially the same as one that has already been considered by the court or as another procedure of international investigation and contains no new and relevant information;
- domestic remedies have not been exhausted, except where the remedies are ineffective or unreasonably prolonged.

As of June 1, 2010, in accordance with Protocol 14 to the ECHR (Council of Europe Treaty Series No. 194), a new admissibility requirement allows the court to declare inadmissible applications where the applicant has not suffered a significant disadvantage, unless respect for human rights requires an examination of the application on the merits and provided that no case may be rejected on this ground that has not been duly considered by a domestic tribunal (Article 12 of Protocol 14, amending Article 35 of the ECHR). In order to avoid rejection of cases warranting an examination on the merits, single-judge formations and committees will not be able to apply this new criterion for the first two years after the entry into force of Protocol 14 (Article 20 of the protocol).

WHAT SHOULD YOUR APPLICATION CONTAIN?

Your initial letter should contain:

- a brief summary of your complaints;
- an indication of which convention rights you think have been violated;
- an indication of the remedies you have used;
- a list of the official decisions in your case, including the date of each decision, who it was made by, and an indication of what it said (attach a copy of each of these decisions).

If you later receive an application form, you should follow the instructions on that form and in the accompanying letter.

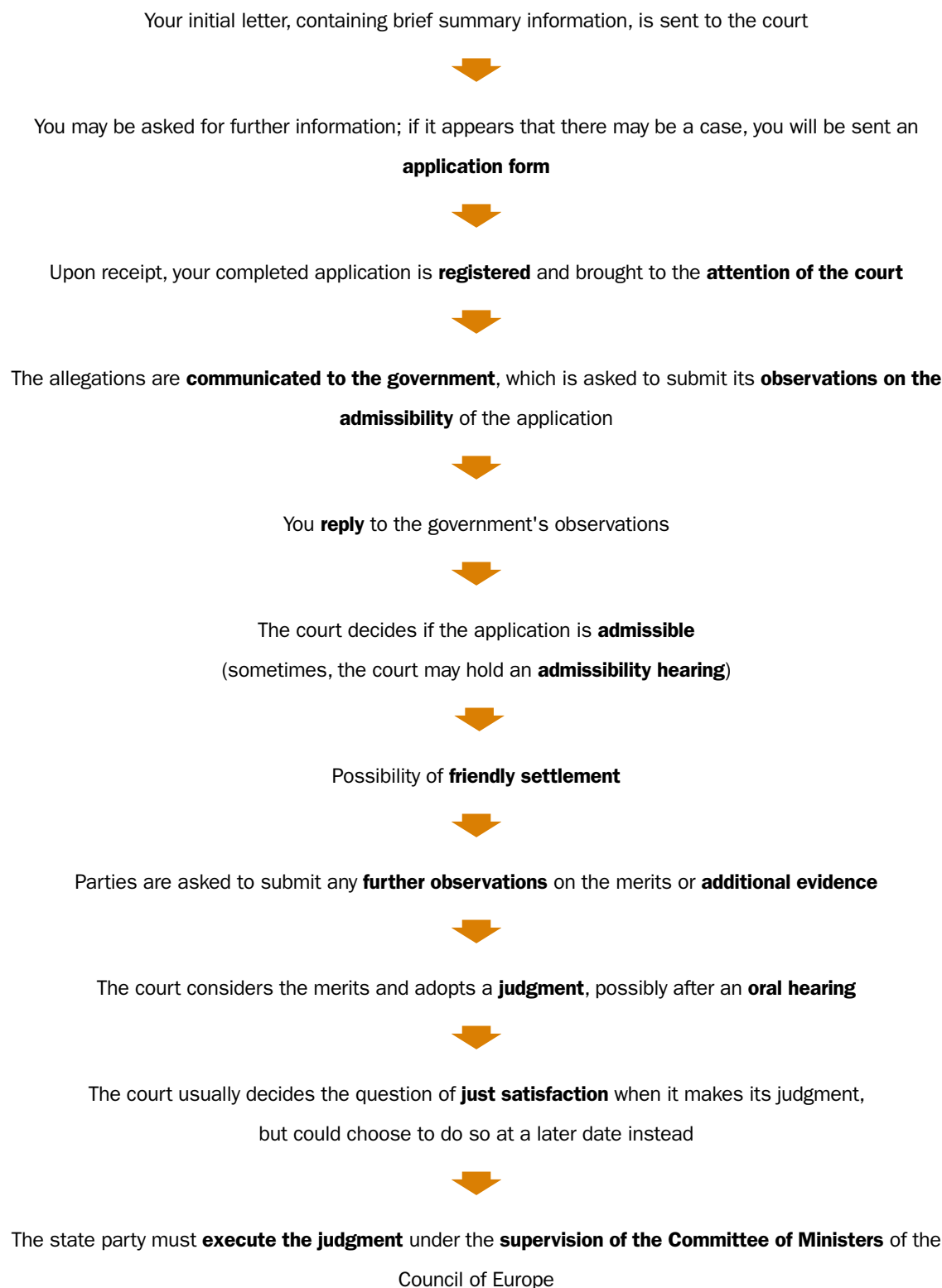
TABLE: BASIC CHRONOLOGY OF INDIVIDUAL COMPLAINT PROCEDURE TO THE ECHR

TABLE: PRACTICALITIES OF USE OF INDIVIDUAL COMPLAINT PROCEDURE TO THE ECHR

Who can bring a case under this procedure?	Individuals, NGOs, and groups of individuals claiming to be victim of a human rights violation; a case can be brought by a close relative of the victim where the victim cannot do so in person, for example, if he or she has disappeared or died
Is there a time limit for bringing an application?	Six months from the date of the final decision taken in the case by the state authorities
Can you bring a case under this procedure if you have already brought one under another procedure concerning the same set of facts? Do you need legal representation?	No
Is financial assistance available?	Legal representation is not necessary at the time of the application, but is required for proceedings after the case has been declared admissible, unless the president of the court gives exceptional permission for the applicant to present his or her own case
Are amicus curia briefs accepted?	Yes, but only if the application is communicated to the government; the applicant will need to fill out a statement of means, signed by a domestic legal aid board, as legal aid is only granted where there is a financial need
Who will know about the communication?	Yes, with permission (Rule 61 of the Rules of Court)
How long does the procedure take?	In principle, the proceedings are public unless the President of the Chamber decides otherwise. In exceptional cases, where an applicant does not wish his or her identity to be made public and submits a statement explaining the reasons for this, anonymity may be authorized by the president.
What measures, if any, can the mechanism take to assist the court in reaching a decision?	Several years Fact-finding hearings, expert evidence, written pleadings, and oral hearings
Are provisional or urgent measures available?	Yes, but they are practices that have been developed by the court and have no basis in the convention and are applied only in very specific cases, mainly immigration/deportation cases, where there is a “real risk” to a person (Rule 39 of the Rules of Court)

HELPFUL GUIDELINES

- Under the original procedure, which was replaced in 1998, the initial stages of the case took place before the European Commission on Human Rights. If you are researching a particular topic under the convention case law, remember to search for reports by the commission and also for court judgments.
- If the six-month period within which an application must be submitted is about to expire, and there is no time to prepare a full application, you can send a “stop the clock” application with a short summary of your complaint, which should be followed by the complete application as soon as possible.
- For the purpose of respecting the deadlines set by the court, keep in mind that the court considers the date of posting—not the date of receipt—as determinative. It is advisable, however, to notify the court on the day of the deadline that the submission has been posted, either via email or telephone or by faxing a copy of the application cover letter.
- The court may, on its own initiative or at the request of one of the parties, obtain any evidence it considers useful to the case, including by holding fact-finding hearings. Where such measures are requested by one of the parties, that party will normally be expected to bear the resulting costs, although the chamber may decide otherwise. If you do not wish to bear such costs, it is advisable to word your letter carefully—for example, suggest to the court that it might wish to exercise its discretion to take measures to obtain evidence.
- The court carries out most of its regular work in chambers of seven judges. Where a case is considered to raise a serious issue or might involve a change in the views of the court in relation to a particular subject, it can be referred to a grand chamber of 17 judges. Where a case has been considered by a chamber and a judgment delivered, it is possible, in exceptional cases, to request within three months of the judgment that the case be referred to the grand chamber for reconsideration (Rule 73 of the Rules of Court).
- As of June 1, 2010, in accordance with Protocol 14 to the ECHR (Article 6), the court will carry out its regular work in the following structures: (1) A single-judge formation, assisted by a non judicial rapporteur from the registry, will be able to declare inadmissible or strike out an individual application in clear-cut cases, where the inadmissibility of the application is manifest from the outset (Article 7 of Protocol 14 of the ECHR, which will become Article 27); (2) Three-judge committees will rule, in a simplified procedure, on both the admissibility and the merits of an application in cases where the underlying question falls under the already well-established case law of the court, that is, those cases consistently applied by a chamber (Article 8 of Protocol 14, which will become Article 28 of the ECHR); (3) Seven-judge chambers will rule, through joint decisions, on both the admissibility and merits of individual applications that have not been considered under Articles 27 or 28 (Article 9 of the Protocol 14, amending current Article 29 of the ECHR); (4) A seventeen-judge grand chamber will rule on cases referred by one chamber and raising a serious question about the interpretation of the convention or its protocols, or where the resolution of a question before the chamber might have a result inconsistent with a judgment previously delivered by the court (Articles 30 and 31 of the ECHR).
- In accordance with Protocol 14 to the ECHR, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings in all cases before a chamber or the grand chamber (Article 13, amending Article 31 of the ECHR). This factor becomes significant in cases where the commissioner’s experience may help the court by highlighting structural or systemic weaknesses in the respondent or other high-contracting parties (Article 13 of the protocol).
- It is possible to request the interpretation of a judgment within one year of its delivery (Rule 79 of the Rules of Court). It is also possible to request, within six months of the discovery, the revision of a judgment if important new facts are discovered that would have influenced the court’s findings (Rule 80 of the Rules of Court).

5.1 STATUS OF INTERNATIONAL AND REGIONAL LAW

5.2 STATUS OF PRECEDENT

5.3 HEALTH SYSTEM

5

Country-Specific Notes

5.1 Status of International and Regional Law

The Constitution of the Republic of Kazakhstan, 1995, states that the Republic of Kazakhstan respects the principles and rules of International Law (Article 8). According to the Constitutional Council, these rules mean that the Republic of Kazakhstan endeavors to consider the principles and rules of International Law in the process of domestic law development.

When the Constitution of the Republic of Kazakhstan was written, the basic international documents concerning the rights and freedom of the person and the citizen - and first of all, the General Declaration of Human Rights accepted by the Resolution 217 A (III) General Assembly of the United Nations, 10 December 1948 - were used. However, the current law of the Republic of Kazakhstan should comply with The Constitutional Provision of the Republic of Kazakhstan and only international treaties ratified by the Republic of Kazakhstan shall prevail over the laws.

Among important international conventions and treaties which Kazakhstan has ratified or has joined, it is necessary to note:

Documents	Date of Adoption/ Accession	Date of Signature	Date of Ratification	Entry into Force	Applicable In-country Legislation	Reservation Entered
Convention on the Rights of the Child	November 20, 1989		June 8, 1994			
International Covenant on Economic, Social and Cultural Rights	December 16, 1966		November 21, 2005	April 24, 2006		
International Covenant on Civil and Political Rights	December 16, 1966		November 28, 2005	April 24, 2006		
WHO Framework Convention on Tobacco Control	May 21, 2003		November 25, 2006			
Convention on Psychotropic Substances	February 21, 1971/ June 29, 1998					
UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	20.12.1988r. 29.06.1998r.					
Convention on the Rights of Persons with Disabilities	December 13, 2006	December 11, 2008				
A Model Law On the Protection of Human Rights and Dignity in Biomedical Research in CIS	November 18, 2005					
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	December 10, 1984/ June 29, 1998					
Single Convention on Narcotic Drugs of 1961	March 30, 1961/ July 01, 1998					
The Convention against convention to revise the Convention (Revised), 1952 Maternity Protection	June 15, 2000		February 14, 2012			

5.2 Status of Precedent

The legal system of the Republic of Kazakhstan belongs to the Romano-Germanic (continental) legal system where sources of law are legislative acts. It is the main distinctive feature of the legal system of the Republic of Kazakhstan.

In contrast to the Anglo-Saxon legal system which combines statutory law and court precedents, the legal system of Kazakhstan is based on the recognition of legislation as a source of law. Supporting regulations (bylaws, orders, etc.) should emanate from legislative acts and should not contradict the legislative acts. For the first time in Article 4 of the Constitution of RK, it was fixed that resolutions of the Supreme Court are part of the law in force, though they are not included in the hierarchy of sources of the law.

The Supreme Court of the Republic of Kazakhstan, on the basis of studying special cases, takes legislative resolutions, which judges can use in their practice. Still debatable remains the question of definition of a place of standard resolutions of the Supreme Court in the system of the law in force. According to one group of researchers, the highest judicial authority is not allocated with the right to publish new rules of law and therefore those resolutions contain recommendations, instead of rules of law. Another group of scientists considers that resolutions of the Supreme Court of the Republic of Kazakhstan, which had before a recommendatory character, became an officially-recognized form of regulatory legal acts in 1995. Supporters of the right to creative activity of the Supreme Court consider that standard resolution examples and exemplary decisions of the courts on the corresponding categories of affairs can be included in the text of the Supreme Court standard resolution or in the annex to it. Thereby, according to this interpretation, the possibility of use of judicial precedents in limited situations is not excluded.

5.3 The Legal and Health Care Systems

HIERARCHY OF THE SOURCES OF LAW IN THE RK LAW OF THE RK DATED 24 MARCH 1998 “ON REGULATORY LEGAL ACTS”

- ▶ **Article 4 of the Constitution of the Republic of Kazakhstan** says that the law in force in the Republic of Kazakhstan consists of the norms of the Constitution, laws corresponding to it, other legislative acts, international treaty obligations and other liabilities of the Republic, and legislative resolutions of the Constitutional Council and the Supreme Court of the Republic of Kazakhstan. The Constitution is the main legislative act and all laws must correspond to it. Its provisions always have priority over provisions of other laws.
- ▶ **A Regulatory Legal Act** is an act of law-development activity of the competent state bodies, which establishes or repeals provisions of law. A Regulatory Legal Act includes legislative acts and sub-legislative acts.



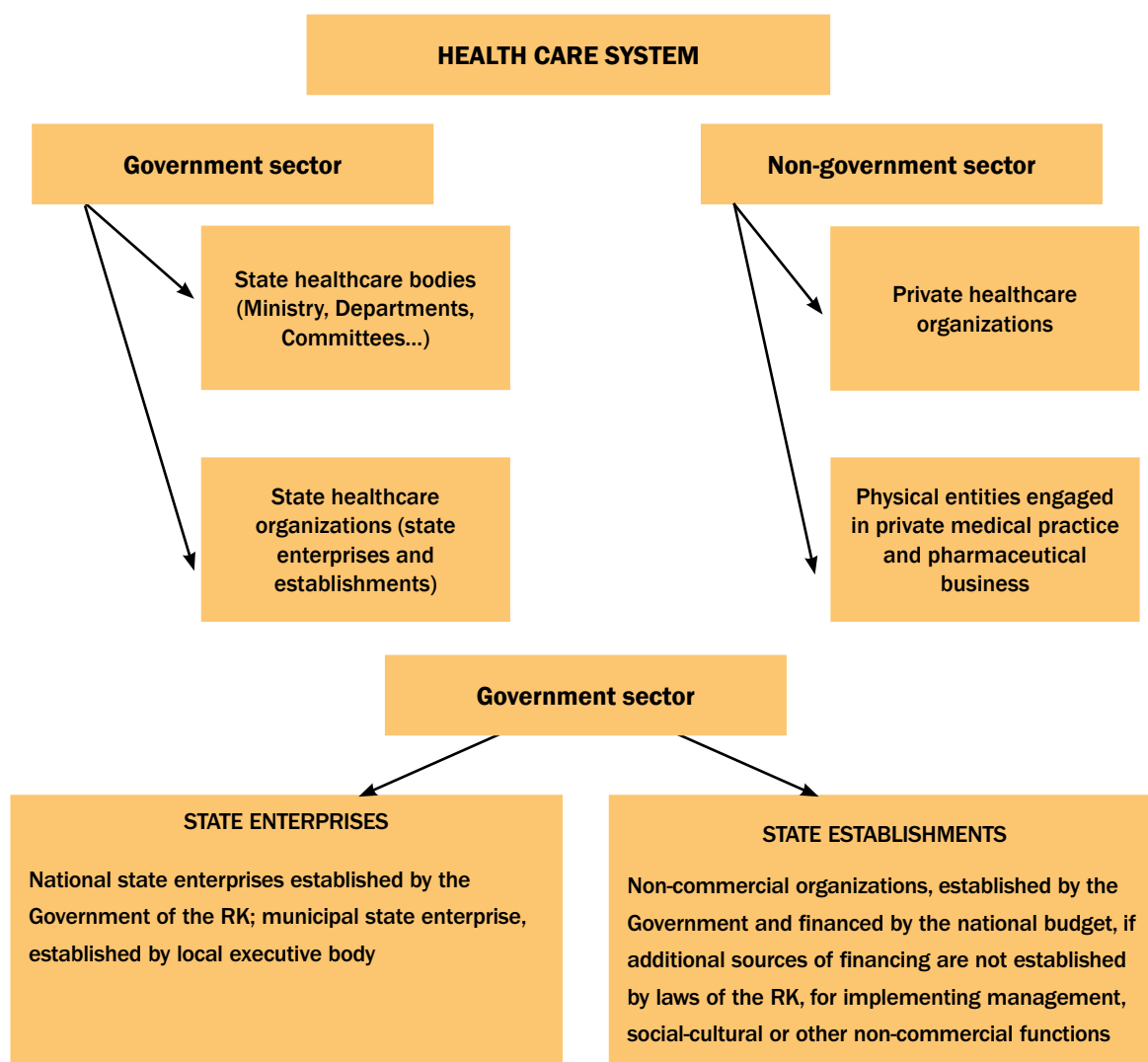
- ▶ **A Legislative Act** includes Constitutional laws, decrees of the President which have the force of constitutional law, codes of the Republic of Kazakhstan, laws and decrees of the Parliament of the Republic of Kazakhstan. (Note: There are two types of Presidential decrees: one has the force of **constitutional** law, while the other has the force of law.)
- ▶ **A Sub-legislative Regulatory Legal Act** is an act which is not legislative. For example, *The Code of the Republic of Kazakhstan On the Health of the People and the Healthcare System* is a legislative act, while the “*Rules of Conducting Biomedical Experiments, Pre-Clinical (Non-Clinical) and Clinical Studies*,” approved by the Order of the Minister of Health of the Republic of Kazakhstan, is a sub-legislative regulatory legal act.

Out of the specified hierarchy there are standard resolutions of the Constitutional Council of the Republic of Kazakhstan and the Supreme Court of the Republic of Kazakhstan. The status of standard resolutions of the Constitutional Council and the Supreme Court “out of the specified hierarchy” does not mean that other regulatory legal acts stand above them.

For example, resolutions of the Constitutional Council of the RK are based on the Constitution: and all standards of the law and an international treaty, recognized inappropriate to the Constitution in compliance with decisions of the Constitutional Council, cannot be signed or ratified and entered into legal action. Laws and other regulatory legal acts recognized as contradicting to the Constitution, are cancelled and are not subject to application.

In practice, for activity of the courts, standard resolutions of the Supreme Court have great value also. They can contain the provisions relating to solving discrepancies between standards of the Constitution and laws, provisions of acts or other regulations, and also to define the features of using legislation by courts.

If there are contradictions in provisions of legislative acts of different levels, provisions of the act of a higher level have priority. If there are contradictions in provisions of legislative acts of the same level, provisions of the act adopted later have priority (**Law on Legislative Acts, Article 6**)



Management of medical care is carried out by an authorized body, a local division or office of the state department of healthcare of a region, major city or the capital.

Subjects of health care are the health care organizations, and also physical persons who are engaged in private medical practice and pharmaceutical activity.

Legal Health Protection in the Republic of Kazakhstan

THE BASIC LAW OF THE REPUBLIC OF KAZAKHSTAN – THE CONSTITUTION

► Article 29

1. Citizens of the Republic of Kazakhstan have the right to health protection.
2. Citizens of the country have the right to free and legally-guaranteed medical assistance.
3. A fee-paying health service in public and private healthcare establishments and from private medical practitioners is received in line with procedures specified by law.

THE CODE OF THE REPUBLIC OF KAZAKHSTAN

- **Article 29 of the Constitution** of the RK secures the right to health protection. Citizens' right to health protection is covered in **Article 88 of the Code of the Republic of Kazakhstan “On the Health of the People and the Healthcare System”** of 18 September 2009.

► Article 88. Civil rights

Citizens of the Republic of Kazakhstan shall be entitled to:

- 1) *free guaranteed extensive medical assistance in accordance with the list approved by the Government of the Republic of Kazakhstan;*
- 2) *provision with medicinal products and medical devices within the limits of the free guaranteed medical assistance, including provision of certain categories of citizens having specified diseases (conditions) with free or beneficial (having special discounts) pharmaceutical products and specialized medicinal products at the ambulatory level according to the list approved by the authorized body;*
- 3) *free choice of medical organization and qualitative and timely medical assistance;*
- 4) *additional medical services over and above guaranteed free medical assistance at patients' own expense, using the funds of organizations, the voluntary insurance system and other unprohibited sources;*
- 5) *medical assistance abroad funded through the budget when clinically indicated in an order defined by the Government of the Republic of Kazakhstan;*
- 6) *compensation for damage caused to health due to incorrect prescription or use of medicinal products, medical devices and medical equipment by medical professionals;*

7) *ascertainment of temporary disability including issuance of a sheet of temporary disability form or temporary disability certificate (Authors' note: An employee holding a sheet of temporary disability form is paid by the employer, but a person holding a temporary disability certificate is not paid by the employer because it is not connected with working);*

8) *free obtaining of reliable information on preventive measures, diagnostics, treatment of diseases and medical rehabilitation, clinical researches, factors influencing health, including environmental conditions, conditions of work, household and leisure, healthy nutrition and food safety, including sanitary-epidemiological expertise from governmental bodies, organizations and the attending medical doctor within the limit of their competence;*

9) *obtaining free information on safety, efficiency and quality of distributed medicinal products, medical devices and medical equipment from governmental bodies, independent expert organizations and entities in the field of circulation of medicines, medical devices and medical equipment;*

10) *appeal against actions or omissions of medical and pharmaceutical personnel to a public health organization, a higher authority (Authors' note: An example of higher authorities are the district and then regional levels) and/or in a judicial procedure;*

11) *application for involvement of independent experts in case of disagreement with the conclusions of the State medical examination.*

KEY LEGISLATIVE ACTS IN THE HEALTHCARE SPHERE:

► **The Code of the Republic of Kazakhstan on the Health of the People and the Healthcare System of 18 September 2009 (the Health Code).**

The code regulates the public relations in the field of health care with the purpose of realization of a constitutional law of citizens on health protection. It is directed toward legislation systematization in the field of health care: its harmonization with the international norms and standards; the increase of the status of national medicine; and the increased quality of rendering of medical care and level of medical care of citizens, providing them with qualitative medicines, products of medical appointment and medical technology.

Since the Health Code was adopted, 11 Laws of the Republic of Kazakhstan (Article 186) that regulated public relations in the sphere of health care, rendering of medical care, providing with medicines, for carrying out preventive activity, etc. have been repealed:

1) *Law of the Republic of Kazakhstan on 5 October 1994 "About Prevention and Treatment HIV Infection and AIDS";*

2) *Law of the Republic of Kazakhstan on 16 April 1997 "About the Psychiatric Help and Guarantees of the Rights of Citizens at its Rendering";*

3) *Law of the Republic of Kazakhstan on 10 December 1999 "About Compulsory Treatment Patients with an Infectious Form of Tuberculosis";*

- 4) *Law of the Republic of Kazakhstan on 27 May 2002 “About Medico-Social Rehabilitation Persons with Drug Addiction”;*
- 5) *Law of the Republic of Kazakhstan on 10 July 2002 “About Prevention and Restriction Tobacco Smoking”;*
- 6) *Law of the Republic of Kazakhstan on 4 December 2002 “About Sanitary and Epidemiologic Wellbeing of the Population”;*
- 7) *Law of the Republic of Kazakhstan on 4 June 2003 “About Healthcare System”;*
- 8) *Law of the Republic of Kazakhstan on 13 January 2004 “About Medicines”;*
- 9) *Law of the Republic of Kazakhstan on 16 June 2004 “About the Reproductive Rights of Citizens and Guarantees of their Implementation”;*
- 10) *Law of the Republic of Kazakhstan on 28 June 2005 “About Donorship of Blood and its Components”;*
- 11) *Law of the Republic of Kazakhstan on 7 July 2006 “About Health Protection of Citizens”.*

► **Decree of Governmental Program of Public Health Development in the Republic of Kazakhstan “Salamatty Kazakhstan” for 2011-2015**

The state program is approved for the purpose of implementation of the Decree of the President of the Republic of Kazakhstan from of February 1, 2010 No. 922 «About the strategic development plan of the Republic of Kazakhstan till 2020».

Its main objective is improvement of health of citizens of Kazakhstan for ensuring sustainable social and demographic development of the country.

It is directed on:

- increase of efficiency intersectoral and interdepartmental interactions concerning protection of public health;
- strengthening of preventive actions, purposeful researches, improvement of diagnostics, treatment and rehabilitation of the main socially significant diseases;
- improvement of sanitary and epidemiologic service;
- improvement of the organization, management and financing of the medical help in a framework of Uniform national health system;
- improvement of medical, pharmaceutical education, development and introduction of innovative technologies in medicine;
- increase of availability of medicines to the population of the country and their quality, improvement of equipment of the organizations of health care.

AMONG HEALTH PROTECTION BY-LAWS, THE FOLLOWING SHOULD BE NOTED:

- **Decree No. 184 On Standardization in Health Protection**, issued by the Government of the Republic of Kazakhstan on 16 February 2004

- ▶ **Decree No. 1729 On Approving Rules of Organizing and Conducting Purchases of Medicines, Preventive (Immunobiological, Diagnostic, Disinfecting) Preparations, Products of Medical Purposes and Medical Equipment, Pharmaceutical Services for Rendering the Guaranteed Volume of Free Medical Services**, issued by the Government of the Republic of Kazakhstan on 30 October 2009
- ▶ **Order No. 481 On Approving Rules of Conducting Medical Examination with the Aim of Establishing a Citizen as a Sufferer from a Contagious Form of Tuberculosis**, issued by the Minister of Health of the Republic of Kazakhstan on 30 September 2009
- ▶ **Resolution No. 2136 On Approving the List of Guaranteed Volume of Free Medical Services**, issued by the Government of the Republic of Kazakhstan on December 15 2009
- ▶ **Resolution No. 2299 On Approving Rules and Conditions for Rendering Fee-paying Services in Medical Organizations**, issued by the Government of Kazakhstan on 30 December 2009
- ▶ **Decree No. 41 On Approving of the Plan of Measures for Realization of Governmental Program of Public Health Development in the Republic of Kazakhstan “Salamatty Kazakhstan” for 2011-2015**, issued by the Government of the Republic of Kazakhstan on 29 January 2011
- ▶ **Decree No. 72 Some Issues of Sanitary and Epidemiologic Services of the Republic of Kazakhstan**, issued by the Government of the Republic of Kazakhstan on 2 February 2011
- ▶ **Decree No. 183 On Strategic Plan of the Ministry of Health of the Republic of Kazakhstan for 2011-2015** issued by the Government of the Republic of Kazakhstan on 25 February 2011, as amended 23 May 2011
- ▶ **Resolution No. 366 On Approving of the Program of Development of the Oncological Help in the Republic of Kazakhstan for 2012-2016**, issued by the Government of the Republic of Kazakhstan on 29 March 2012

6.1 PATIENTS' RIGHTS

Right to Preventive Measures

Right to Access

Right to Information

Right to Consent

Right to Free Choice

Right to Privacy and Confidentiality

Right to Respect for Patients' Time

Right to Observance of Quality Standards

Right to Safety

Right to Innovation

Right to Avoid Unnecessary Suffering and Pain

Right to Personalized Treatment

Right to Complain

Right to Compensation

Additional Patient Rights

6.2 PATIENTS' RESPONSIBILITIES

Duty to Preserve and Improve Health

Duty to Observe Medical Prescriptions

Duty to Observe Internal Regulations

Duty to Inform about the State of One's Health

6

National Patients' Rights and Responsibilities

6.1 Patients' Rights

A patient is an individual who consumes medical services (Sub-item 87 Item 1 of Article 1 of the Health Code).

Right to Preventive Measures

a) Right as Stated in the European Charter of Patients' Rights

Every individual has the right to a proper service in order to prevent illness.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK provides for the right to health protection:

1. "Citizens of the Republic of Kazakhstan have the right to health protection."

The National Legislation

- ▶ **Sub-item 88 of Item 1 of Article 1 of the Health Code** (interprets preventive medicine as a complex of medical and non-medical measures, aimed to prevent disease, curb its progress at the earlier stages and controlexisting complications, injuries to organs and tissues)
- ▶ **Sub-item 5 of Article 112 of the Health Code** (conducting preventive measures to reduce the risks of transferring the HIV virus from mother to fetus; provides for the state guarantees on the prevention, diagnosis and treatment of HIV infection and AIDS)
- ▶ **Article 114 of the Health Code** (prevention of HIV virus)
- ▶ **Item 1 of Article 116 of the Health Code** (prevention of mental disorders)
- ▶ **Article of 153 of the Health Code** (aim and types of prevention of diseases)
- ▶ **Articles 155-161 of the Health Code** (medical examinations, vaccines, prevention of non-infectious diseases, prevention of addiction to psychoactive substances, prevention and restriction of tobacco smoking, alcoholism, prevention of iron-deficient conditions and iodine-deficient diseases)
- ▶ **Articles 37 and 38 of the Law of the RK On the Rights of the Child in the Republic of Kazakhstan**

c) Supporting Regulations / Bylaws / Orders

- ▶ **Decree No. 3 On Measures to Prevent Enterovirus - Infections**, issued by the Chief Public Sanitary Doctor of the Republic of Kazakhstan on 1 April 2009
- ▶ **Order No. 579 On Measures to Improve the Prevention of Circulatory System Diseases**, issued by the Minister of Health of the Republic of Kazakhstan on 27 September 2007
- ▶ **Resolution No. 1458 On Approving Rules of Distributing Milk and Clinical Preventive Nutrition, Working Clothes, Footwear and Other Means of Individual Safety, Providing Employees with Means of Collective Safety, Sanitary and Personal Service Rooms and Devices at Employers' Cost, Norms of Distributing Milk at Employers' Cost, Norms of Distributing Clinical Preventive Nutrition at Employers' Cost**, issued by the Government of the Republic of Kazakhstan on 5 December 2011
- ▶ **Order No. 35 On Tightening Measures to Prevent the Contraction of Infectious Diseases in Medical Organizations**, issued by the Minister of Health of the Republic of Kazakhstan on 22 January 2010

The Order is aimed at ensuring timely registration and accounting of all cases of nosocomial infections associated with medical care, with an emergency notification of the sanitary-epidemiological services, and with strengthening control over compliance with the anti-epidemic and disinfection-sterilization regimes in all health care organizations, especially the dressing wards, procedure and vaccination rooms, operating rooms and intensive care units, etc.

- ▶ **Resolution No. 2295 On Approving a List of Diseases That Should Be Vaccinated against, Rules for Carrying Them out and Population Groups That Are Subject to Scheduled Vaccinations**, issued by the Government of the Republic of Kazakhstan on 30 December 2009

Vaccinations are conducted by medical organizations that hold licenses to offer advisory-diagnostic and/or medical services in hospitals to adults and/or children. Medical immune-biological preparations registered in line with rules set by the legislation of the Republic of Kazakhstan in the medical sphere are used for vaccination. Vaccination is conducted parenterally using biodegradable syringes and orally.

d) Provider Code(s) of Ethics

The effective national legislation does not consider a Provider Code of Ethics as an independent document. At the same time, the code of ethics of medical and pharmaceutical workers of the Republic of Kazakhstan (hereafter the Code of Ethics) was incorporated into the Health Code and stipulated in **Article 184**. The Code of Ethics determines the moral responsibility of healthcare and pharmaceutical professionals in their activities before the citizens and society as a whole. *(There are some articles in the Administrative Code and the Criminal Code that can provide penalties, if a health care provider violates the provisions of the Code of Ethics. See Chapter 8 “National Procedures: Articles 85, 85-3, 324-1 of the Administrative Code; Articles 114, 118, 144 of the Criminal Code).*

- ▶ **Sub-item 2 of Item 2 of Article 184** provides that medical and pharmaceutical workers should help improve the health of citizens of the Republic of Kazakhstan.
- ▶ **Sub-item 7 of Item 2 of Article 184** obliges medical and pharmaceutical workers to prevent the advertisement and use of methods and means of prevention and treatment in the pursuit of personal gain.

e) Other Relevant Sources

Article 12 of the International Convention on Economic, Social and Cultural Rights (Provisions of Article 12 of the Covenant are discussed in detail in sections devoted to regional and international standards of medical services.)

f) Practical Examples

1. Example(s) of Compliance

Preventive examinations of women of reproductive age in remote rural areas are conducted by a central district clinic's/hospital's field medical brigade. The activities of the obstetrician-gynecologist in the field brigade are coordinated by a district obstetrician-gynecologist. The schedule for examination of women is presented to the chief doctors of local hospitals, family/outpatient clinics, polyclinics and polyclinic departments of central district hospitals/district hospitals, heads of paramedic and paramedic-obstetric points.

2. Example(s) of Violation

- Insufficient chemical thermal indicators in the hospital or clinic, which are necessary for controlling the temperature conditions of sterilization
- Cleaning hospital wards without using disinfectants

3. Actual Case(s)

Inspections by a commission of the Ministry of Health of the Republic of Kazakhstan in hospitals in Almaty revealed numerous violations of rules for HIV prevention and detection. The inspections revealed violations in detecting and preventing HIV infection, registering HIV patients and the improper use of blood preparations. It was also established that some hospitals had not followed the expiration dates of erythrocyte concentrate. Poor quality control of blood components also gave rise to inspectors' doubts. Inspections also revealed violations in the city center for preventing and fighting AIDS. The staff of the center refused to examine citizens in detention centers for HIV. Only half of the registered users of injection drugs underwent HIV examination. Pursuant to Sub-item 1) Article 112 of the Health Code, the state guarantees HIV-infected and AIDS patients the availability of and guarantees the quality of voluntary, anonymous and/or confidential medical examinations at no charge.

The commission concluded that it was obvious from the inspection that the prevention and revelation of HIV cases in the city were not satisfactory. The commission also drew up protocols on administrative law violations with regard to the heads of the inspected hospitals and clinics.¹ *(Authors note: Information that a protocol was drawn does not mean that it contains a specific penalty. A protocol contains only the description of the violation. It is the first step of the administrative procedure. Officials from the state bodies and judges of specialized administrative courts, if they find that a violation is committed, impose administrative penalties).*

g) Practice Notes for Lawyers

When the right to preventive measures is violated, the first step that can be taken is to appeal to the chief doctor of a hospital and to the healthcare department. If these measures do not yield desirable results, one should appeal to the Control Committee for Control over Medical and Pharmaceutical Activities. Following these steps sometimes makes it possible to solve the situation without the necessity of a court decision. Of course, the patient has a right to file a complaint immediately with a judicial or out-of-court body. Rules for appealing to judicial bodies and bodies of out-of-court protection (health departments, prosecutors' offices, control committees, for example) are given in Chapter 8 - National Procedures and Appendixes.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Preventative Measures under the Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3.

¹ <http://www.mz.gov.kz>

Right to Access

a) Right as Stated in the European Charter of Patients' Rights

Every individual has the right of access to the health services that his or her health needs require. The health services must guarantee equal access to everyone, without discriminating on the basis of financial resources, place of residence, kind of illness or time of access to services.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

- ▶ **Article 29:** Citizens of the Republic of Kazakhstan have the right to health protection.
- ▶ **Item 2 of Article 14** of the Constitution of the Republic of Kazakhstan states that no one shall be subjected to any discrimination on grounds of origin, social or property status, sex, race, nationality, language, religion, creed, place of residence or any other circumstances.
- ▶ **Item 3 of Article 39** of the Constitution of the Republic of Kazakhstan establishes the prohibition on restriction of the rights and freedoms provided by a number of articles of the Constitution, including Article 14.

The National Legislation

- ▶ **Sub-items 2) and 3) of Article 87 of the Health Code** (providing a guaranteed volume of free medical services and equal access to medical care)

A guaranteed volume of free medical care is provided free of charge at medical organizations regardless of their ownership, in accordance with the profile of their activities as per their license and subject to the conclusion of a contract for the provision of guaranteed free medical assistance with the territorial Department of the Committee for Payment of Medical Services of the Ministry of Health or with the oblast health authorities (*Rules ensuring the provision of citizens with a guaranteed volume of free medical services of November 19, 2009*).

According to **Article 88 of the Health Code**, the citizens of the Republic of Kazakhstan shall be entitled to provision with medicinal products and medical devices within the limits of free guaranteed medical assistance, including provision of certain categories of citizens with specified diseases (conditions), with free or beneficial pharmaceutical products and specialized medicinal products at the ambulatory level.

For the purpose of population drug coverage system-development within the framework of guaranteed free medical assistance, the following Lists were approved:

- 1) The List of medicinal products and medical devices for free and reduced-price provision to the population within the limit of guaranteed free medical assistance at the ambulatory level

with certain diseases/conditions and specialized dietary products with the reimbursement rate of **1,0**; and

2) The List of medicinal products and medical devices for free and reduced-price provision to the population within the limit of guaranteed free medical assistance at the ambulatory level with certain diseases/conditions and specialized dietary products with the reimbursement rate of **0,5**.

- ▶ **Sub-item 2 of Item 1 of Article 91 of the Health Code** (rendering medical services in order of priority defined exclusively by medical criteria without the influence of any discriminatory factors)
- ▶ **Sub-items 1 and 4 of Article 112 of the Health Code** (accessibility and quality of voluntary anonymous and/or confidential medical examination on a non-paying basis for HIV-positive and AIDS patients; prevention of any forms of discrimination because of the nature of the disease)
- ▶ **Article 15 of the Law of the RK on Social, Medical and Educational Health Improvement Support for Disabled Children**

Excerpt: Article 15. Rights of children with disabilities

“1. Children with disabilities have the right to receive:

- 1) guaranteed free social and medical-pedagogical treatment support (*Authors' note: this means that children with disabilities can receive medical and pedagogical support at the same time while they are in the special educational organizations*);
- 2) free examination in state-run medical organizations, psychological-medical-pedagogical advice centers or medical-social expertise departments and free medical services in line with the legislation of the Republic of Kazakhstan;
- 3) free medical-psychological-pedagogical treatment of physical and mental disability from the moment of discovery, regardless of the degree of seriousness, in line with conclusions of psychological-medical-pedagogical advice centers;
- 4) free provision of prosthetic-orthopedic products and shoes, print publications with special fonts, sound-amplifying devices and alarms, compensatory technical means in services in line with the legislation of the Republic of Kazakhstan;
- 5) free education in specialized educational organizations or state-run secondary schools in line with the legislation of the Republic of Kazakhstan;
- 6) free, based on competition, professional education in state-run educational establishments within state educational programs;
- 7) employment after studies in line with education and/or professional training received within the legislation of the Republic of Kazakhstan.

c) Supporting Regulations/Bylaws/Orders

- ▶ **Resolution No. 2136 “On the Approval of the List of Guaranteed Volume of Free Medical Services,”** issued by the Government of the Republic of Kazakhstan on December 15, 2009

- ▶ **Resolution No. 1263 “On the Approval of the Rules of Health Care and Attaching of Citizens to Organizations of Primary Health Care,”** issued by the Government of the Republic of Kazakhstan on December 15, 2009

Specified rules determine the order of primary health care (hereinafter PHC) and the order of assigning of citizens to PHC organizations.

Article 45 of the Health Code of the Republic of Kazakhstan explains that PHC is before-doctor or qualified medical assistance without round-the-clock medical monitoring, including a complex of available medical services provided to a human being, family and public (diagnosis and treatment of the most common diseases as well as injuries, poisoning and other medical emergencies; sanitary anti-epidemic/preventive measures in the hotbeds of contagious diseases; hygienic education of the population, protection of family, motherhood, fatherhood and childhood; explanatory work on safe and sensible nutrition of population).

According to Article 45 of the Health Code of the Republic of Kazakhstan, PHC shall be provided by primary health physicians, pediatricians, general practitioners, paramedics, obstetricians and nurses.

Article 45 also states that the organizations providing PHC carry out their activities on a geographic area basis to enable availability of medical assistance to members of the population according to their residence and/or by assignment that takes into consideration the right of free choice of medical organization.

d) Provider Code(s) of Ethics

Sub-item 2 of Item 3 of Article 184 of the Health Code (rendering medical services to anyone who needs them)

e) Other Relevant Sources

- **Article 26 of the International Covenant on Civil and Political Rights**
- **Item 2 of Article 2 of the International Covenant on Economic, Social and Cultural Rights**
- **Article 13 of the European Social Charter**
- **Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

f) Practical Examples

1. Example(s) of Compliance

- ▶ Rehabilitation centers for children with disabilities operate in cities and towns in the country. Treatment programs were developed by centers taking into account the age specifics of children and the seriousness of diseases (for example, the SATR center in Almaty - Center for Social Adaptation and Professional Rehabilitation of Children and Adolescents with Developmental Problems).

- ▶ On 11 July 2009, the grandmother took Timur and his five-month-old sister to visit their parents, who were in Turkey at that time. After their long flight, the boy fainted in the hotel. He was taken to a nearby clinic and placed in the intensive care unit. He stayed there for three days. Staying a day in the unit cost \$1,500. In addition, they were required to pay for 10 days of staying in the clinic. When the child became conscious, he could not speak. He also partially lost his memory. Because of his condition, it was only possible to take Timur home by land. The Kazakh consular service helped to find a Russian-speaking doctor to hospitalize the boy, to treat him and to pay the transportation costs. Doctors have now assessed the boy's condition as safe. Assistance of the Kazakhstan consulate in finding a doctor and treatment payment promoted realization of the right of the patient to access medical services.

2. Example(s) of Violation

- Refusal of a doctor to admit a patient to hospital because of his/her age
- Refusal of a doctor of a health care facility to provide health care services because of the patient's lack of registration in a residence
- Provision on a paying basis of medicinal products included into the list of free guaranteed medical assistance
- A young woman suffering from epilepsy does not receive Topamax medicine. One pack of it costs about \$200: she needs 8 packs a month.
- A disabled woman (3rd group of disability), after having encephalitis, spent 2 hours in a queue to see the doctor, who finally did not receive her.
- A woman, born in 1962, could not get the quota for a heart operation during 7 years. She died from heart failure due to rheumatic heart disease which could have been remedied by the operation.

3. Actual Case(s)

A routine inspection by the prosecutor's office of North Kazakhstan Oblast revealed that 30 outpatient records in a city children's hospital have notes about the return of prescriptions for free medications. The head of the children's hospital explained that the prescriptions had been returned because of the lack of medications in the drug stores of the pharmaceutical company's supplier. Only three preparations from a list of preparations for bronchial asthma (20 items) were available. Thus, because of the Company's failure to implement the terms of its medication supply agreement, children's right to free and low-cost medications was violated. The right to access in this case has been violated by the actions causing the impossibility of getting free medicines for young patients. Information on whether legal procedures have been initiated regarding this situation is unknown.

g) Practice Notes for Lawyers

In order to restore violated rights immediately, citizens can turn to health protection bodies and the prosecutor's office. Item 2 of Article 9 of the Civil Code of the Republic of Kazakhstan stipulates that appealing for the protection of a violated right to a government body or department does not exclude filing a suit in court to protect the right, if legislative acts do not state otherwise. A patient, whose rights were violated, may appeal to a court independently or may be represented by a lawyer. (See the *Civil Proceedings* section of Chapter 8 - National Procedures and Appendixes).

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right of Access under the Right to Nondiscrimination and Equality in Chapter 2 and Chapter 3.

Right to Information

a) Right as Stated in the European Charter of Patients' Rights

Every individual has the right to access to all kinds of information regarding his/her state of health, the health services and how to use them, and all that scientific research and technological innovation makes available.

According to the laws of the Republic of Kazakhstan, medical organizations and specialists should provide a patient with all information concerning the methods of treatment or forthcoming surgery, including information on possible risks, discomfort, side effects and alternatives. Medical organizations and specialists should provide the information in a language known to the patient and in a form that is understandable by the person not being a specialist in this field (summary of the National Legislation).

b) Right as Stated in the Constitution and National Legislation

The Constitutional Provision

- ▶ **Item 2 of Article 20** of the Constitution of the RK provides for the right of free access to and distribution of information under conditions established by the national laws.
- ▶ **Item 3 of Article 18** of the Constitution of RK obliges state authorities, public associations, officials and mass media to provide to each citizen the possibility to familiarize himself/herself with documents, decisions and information sources about infringement of his/her rights and interests.

The National Legislation

- ▶ **Sub-item 9 of Item 1 of Article 88 of the Health Code** (accessing information on the safety, efficiency and quality of medicines, products for medical purposes and medical equipment for patients to purchase)
- ▶ **Sub-item 6 of Item 1 of Article 91 of the Health Code** (obtaining an independent opinion on the state of health and conducting counseling)
- ▶ **Item 2 of Article 91 of the Health Code** (obtaining information about rights and duties, services offered, fee-paying services and the rules of their provision)
- ▶ **Item 4 of Article 91 of the Health Code**

While receiving medical services, patients have the right to comprehensive information about the state of their health, including information on possible risks and the advantages of available and alternative methods of treatment, information about possible consequences of the refusal of treatment, information on diagnosis, prognosis and a program of treatment. The information must be in a form accessible to patients. This right includes the explanation of reasons for discharging patients to their homes or transferring to another medical organization.

- ▶ **Sub-item 3 of Item 1 of Article 96 of the Health Code** (receiving accurate and full information about the state of reproductive health)
- ▶ **Article 98 of the Health Code** (providing comprehensive information relating to the treatment of infertility)
- ▶ **Sub-item 2 of Article 114 of the Health Code** (informing the population, through the media, about the epidemiological situation on the HIV virus and measures of prevention)
- ▶ **Item 5 of Article 115 of the Health Code** (healthcare establishments that detect the HIV virus during medical examination must notify patients about the results obtained in writing and inform them about precaution measures to protect their health and the health of people around them and warn about their administrative and criminal responsibility in the event of avoiding treatment and infecting other people)
- ▶ **Item 5 of Article 119 of the Health Code** (an obligation to provide information about the nature of mental disorder/disease, aims and methods of treatment and information about the duration of recommended treatment, about possible pain, side effects and results expected)
- ▶ **Sub-item 3 of Item 1 of Article 133 of the Health Code** (receiving information about rights, the nature of narcological disorders, methods of treatment applied and the medical and social rehabilitation of people suffering from alcoholism, drug addiction and toxicomania)
- ▶ **Sub-item 1 of Item 1 of Article 157 of the Health Code** (the prevention of non-contagious diseases by informing the population through the media and training programs on the prevention of disease)

- ▶ **Sub-item 1 of Item 2 of Article 171 of the Health Code** (informing the recipient about possible complications in connection with surgical intervention on transplantation)
- ▶ **Item 9 of Article 91 of the Health Code** (the right to comprehensive information about prescribed medicines)

c) Supporting Regulations / Bylaws / Orders

- ▶ **Item 2 of the Bird-flu Action Plan of the Republic of Kazakhstan**, approved by Government decree No. 288 of 17 April 2006 (provides for public awareness activities on prevention and combat of avian flu, including publication of relevant materials in media)
- ▶ **Items 37-38 of the Rules of Preclinical Research, Medical and Biological Experiments and Clinical Trial in the Republic of Kazakhstan**, approved by an order by the Minister of Health on 12 November 2009 (information should include the informed consent form; a researcher or the person authorized by the researcher informs the person included in research or his / her authorized representative, about all aspects of the research)
- ▶ **Sub-item 3) of Item 6 of the Rules of Rendering of the Stationary Help**, approved by the resolution of the Government of the Republic of Kazakhstan on December 5, 2011 (upon planned hospitalization of the patient in a hospital, the medical organization informs the patient of the hospitalization date)
- ▶ **Item 16 of the Rules of Rendering of the Stationary Help**, approved by the resolution of the Government of the Republic of Kazakhstan on December 5, 2011 (upon admission in a hospital the patient should be informed about regulations of the medical organization, first and last name of medical workers who will render medical services and their professional status)

d) Provider Code(s) of Ethics

The Code of Ethics of medical and pharmaceutical workers does not contain a separate clause on the provision of necessary information to a patient. However, the provision of such information is part of their professional and official duties. That is why the requirement of honest and quality fulfillment of official duties, provided in **Sub-item 5 of Item 2 of Article 184 of the Health Code**, can be considered as the implementation of medical ethics. *(As mentioned above, Kazakhstan does not have a Code of Ethics as a separate document or law, order, etc. However, Article 184 of the Health Code contains statements that can be considered as a Code of Ethics. The actual title of the Article 184 is "Code of Honour of Medical and Pharmaceutical Workers.")*

e) Other Relevant Sources

- **Article 19 of the Universal Declaration of Human Rights**
- **Item 2 of Article 19 of the International Covenant on Civil and Political Rights**
- **Article 12 of the International Convention on Economic, Social and Cultural Rights**
- **Item 1 of Article 10 of the European Convention for the Protection of Human Rights**

f) Practical Examples

1. Example(s) of Compliance

One of the most important aspects of the Almaty Center for Human Reproduction is the provision of active treatment and prevention assistance to teenage girls on the diagnosis and treatment of gynecological diseases and a broad information and educational program on sex education and the prevention of abortions among teenagers.

2. Example(s) of Violation

- A patient is not provided information by medical workers about his health condition.
 - Patients are banned from familiarizing themselves with their clinical records or making photocopies.
 - The patient is not given information about health services or how to get them (or there is no access to this information).
- A young woman with a diagnosis of a polyp on her womb's neck was operated on in the clinic. The woman died due to the anaphylactic shock due to a reaction to the narcotic substance Profol. The doctors did not take an interest in the patient; they did not check to see whether allergic reactions to medicines were noted in her medical chart.

3. Actual Case(s)

There is no court decision relevant to this right at this time.

g) Practice Notes for Lawyers

The violated right to information can be restored by an adequate inquiry by the patient to regional health bodies, as shown in our example; and, if the claim is not satisfied, further to the Ministry of Health. Complaints can also be submitted to the National Center for Human Rights, prosecutors' offices, and non-governmental organizations, which can act as the patient's legal representatives.

One of the ways of restoring the violated right is to complain to courts. When a suit is filed with a specialized administrative court, it will be considered under Article 84 of the Code of Administrative Offences for refusal to provide information to an individual. Persons specified in Article 59 of the Code of Civil Procedure may represent the claimant in court.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Information in Chapter 2 and Chapter 3.

Right to Consent

a) Right as Stated in the European Charter of Patients' Rights

Every individual has the right of access to all information that might enable him or her to actively participate in decision-making regarding his or her health; this information is a prerequisite for any procedure and treatment, including the participation in scientific research.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

- ▶ **Item 1 of Article 16** of the Constitution of the Republic of Kazakhstan provides for the right to personal liberty.
- ▶ **Article 17** of the Constitution of the Republic of Kazakhstan stipulates that human dignity is inviolable. No one shall be subjected to torture or to cruel or degrading treatment or punishment.
- ▶ **Article 29** of the Constitution of the Republic of Kazakhstan provides for the right to health protection.

The National Legislation

- ▶ **Sub-item 3 of Article 91 of the Health Code** (medical assistance should be provided after obtaining informed oral or written voluntary agreement from a patient)
- ▶ **Item 1 of Article 93 of the Health Code** (the patient can reject a health service with the exception of the cases provided for by Article 94)
- ▶ **Item 3 of Article 97 of the Health Code**
During pregnancy, the examination, treatment and medical intervention can be carried out only with agreement of a woman or her legal representative. In cases when a delay in examination, treatment or medical intervention threatens the lives of a pregnant woman and her child (fetus), a decision on examination, treatment and medical intervention can be made by a doctor or a medical commission.
- ▶ **Item 2 of Article 103 of the Health Code** (surgical sterilization can be conducted only by written agreement of a citizen)
- ▶ **Item 3 of Article 104 of the Health Code** (abortions on minors can be conducted only by agreement of their parents or other legal representatives)
- ▶ **Item 4 of Article 115 of the Health Code** states that the consent to examination of children under 18 and incapacitated people for HIV is carried out by their legal representatives or at their

own will (*Authors' note: This means that examination of children under 18 can be carried out only when consent of their representatives will be received*).

- ▶ **Item 2 of Article 116 of the Health Code** (psychiatric assistance is provided only after voluntary request of an individual and with their written consent)
- ▶ **Item 2 of Article 123 of the Health Code** (psychiatric examination and preventive examinations are conducted at the request or written consent of an individual examined)
- ▶ **Item 3 of Article 125 of the Health Code** (written consent for admittance to a psychiatric hospital, except for cases specified in Article 94 of the Code)
- ▶ **Item 1 of Article 139 of the Health Code** (surgical intervention, transfusion of blood, its components and the use of invasive diagnostic methods are conducted with a patient's written consent)
- ▶ **Item 8 of Article 169 of the Health Code** (removal of tissues and/or organs/parts of organs from a living donor can be done only with his/her written notary-certified consent)
- ▶ **Item 2 of Article 170 of the Health Code** (transplantation can be conducted only with written consent of recipients or their legal representatives)
- ▶ **Items 3 and 4 of Article 180 of the Health Code** (clinical research involving human beings can be conducted only with their written informed consent)
- ▶ **Article 15 of the Law of the RK on Social, Medical and Educational Support for Handicapped Children**

Article 94 of the Code of the Republic of Kazakhstan on the Health of the People and the Healthcare System "Provision of Medical Assistance without Citizens' Consent"

1. The provision of medical assistance without citizens' consent is allowed only in regard to people:

- 1) in shock, or comatose state who are not able to express their will;
- 2) suffering from diseases which pose a threat to surrounding people;
- 3) suffering from serious mental disorders/diseases;
- 4) suffering from mental disorders/diseases and who committed socially dangerous acts.

2. The consent for medical assistance with respect to under-age children and persons who have been acknowledged by a court to be legally incapacitated shall be given by their legal representatives. In the absence of legal representatives, the decision on medical assistance shall be taken by the board of doctors; and if gathering of the board of doctors is impossible, directly by a medical professional with further notification to medical organization authorities and legal representatives of the patient.

3. Delivery of health care without the consent of citizens shall be continued until disappearance of bases provided for by the Clause 1 of this Article.

c) Supporting Regulations / Bylaws / Orders

- ▶ **Item 41 of the Rules of Conducting Biomedical Experiments, Pre-Clinical (Non-Clinical) and Clinical Studies**, approved by the Order of the Minister of Health of the Republic of Kazakhstan of 12 November 2009
- ▶ **Item 17 of the Rules of Rendering of the Stationary Help**, approved by the resolution of the Government of the Republic of Kazakhstan on December 5, 2011 (medical care is provided after receiving a written voluntary consent of the patient or his lawful representative)

d) Provider Code(s) of Ethics

Sub-item 3 of Item 2 of Article 184 of the Health Code (in their work medical and pharmaceutical workers should take decisions only in the interests of patients)

e) Other Relevant Sources

Article 7 of the International Covenant on Civil and Political Rights:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected **without his free consent** to medical or scientific experimentation.”

(Authors' note: From the abovementioned, it can be concluded: In medical practice, according to the ICCPR, informed consent means the patient's voluntary acceptance of treatment procedures after the doctor's providing the patient with adequate information. Researches in the biomedical field attach special importance to receiving patient informed consent. Voluntary informed consent means health care providers' non-use of force, lies, threats, etc., during the patient's decision-making).

f) Practical Examples

1. Example(s) of Compliance

An example of compliance relevant to this right is unavailable.

2. Example(s) of Violation

- The lack of informed consent from the patient when consent is clearly ensured by laws
- Consent received as a result of misinformation, deception or enforcement
- Forcing a patient to give consent by using physical or moral means
- To communicate information in a language not known to the patient, or using terms incomprehensible to him/her resulting in the patient's inability to express his/her attitude towards the treatment applied
- Application of tested (passing laboratory researches) drugs without a consent of the patient and without informing him about it

3. Actual Cases

- ▶ Citizen A. complained to the ombudsman about doctors at the Children's city clinical infectious hospital who performed a puncture of the spinal channel (spinal tap) on her five-month-old daughter without the consent of the child's parents. Upon the ombudsman's request, the Ministry of Health carried out an inspection and confirmed the violation of Item 2 of Article 17 of the Law of the RK On Citizens' Health Protection. It was established that the puncture was performed without notifying the parents and obtaining their written consent. After the inspection, the statement to apply administrative punishment for the blamed was made by the MOH and sent to the top-management of the hospital. In addition, in order to receive hospital treatment, the claimant's daughter was sent to a diagnostics hospital of the Scientific Center of Pediatrics and Children's Surgery. Specific information concerning punishment for failure of the first hospital to notify or to obtain consent from the child's parents or regarding compensation is unknown (although the complaint is registered in the National Center for Human Rights).
- ▶ A young woman, being in a coma, without receiving informed consent from her close relatives, was operated on and her womb was removed and the ureter was connected to the peritoneum. After that she had to have two surgeries on the bladder. The woman addressed "Aman-Saulyk," a public organization, where she was advised to contact the Department Committee of Control of Medical and Pharmaceutical Activity. In response to her request, the answer came from Committee stating that because of the shown violations by medical workers, measures of disciplinary punishment were applied to them. The chief physician was dismissed and another doctor was forbidden to have night watches.

g) Practice Notes for Lawyers

In a situation requiring the consent of a patient or his/her representative for medical treatment, it is necessary to rely on a written consent. The absence of a written consent gives the opportunity to say that doctors performed their actions with violations. Exceptions include only the cases of rendering a health service without a patient's consent under conditions established by laws (Article 94 of the Health Code).

If the right to consent is violated, a patient can submit a claim to regional healthcare bodies and, if their response is unsatisfactory, to the Ministry of Health. The state-run (the National Center for Human Rights, the Prosecutor-General's Office) and public organizations can also appeal to these bodies on behalf of the claimant. A patient can also file a court case.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Consent under:

- Right to Liberty and Security of the Person in Chapter 2 and Chapter 3
- Right to Privacy in Chapter 2 and Chapter 3

- Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment in Chapter 2 and Chapter 3
- Right to Bodily Integrity in Chapter 2 and Chapter 3
- Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3

Right to Free Choice

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to freely choose from among different treatment procedures and providers on the basis of adequate information.

According to the laws of the Republic of Kazakhstan, a patient shall have the right to decide which diagnostic examinations and types of treatment he/she will undergo and which health care professional and hospital he/she will consult and visit. Health authorities must ensure this right for patients by providing them with the information on different medical centers and doctors, which offer certain types of treatment, as well as about the results of their activities. Any obstacles interfering with the realization of this right should be eliminated. A patient who distrusts his/her physician shall have the right to choose another physician. (This is a summary of several Articles of the Health Code discussed below.)

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Citizens of the Republic of Kazakhstan have the right to health protection (**Article 29** of the Constitution of the RK).

The National Legislation

- ▶ **Sub-item 8 of Article 87; Sub-item 1 of Item 1 of Article 96 of the Health Code** (freedom of reproductive choice)
- ▶ **Sub-item 3 of Item 1 of Article 88 of the Health Code** (free choice of medical organization, quality and timely medical services)
- ▶ **Item 2 of Article 88 of the Health Code** (free choice of modern methods of prevention of unwanted pregnancy with the aim of family planning and health protection)
- ▶ **Sub-item 3 of Item 1 of Article 91 of the Health Code** (free choice and replacement of a doctor or a medical organization)
- ▶ **Item 1 of Article 102 of the Health Code** (ensuring the right to choose methods and means of contraception, including medical contraception)

- **Sub-item 2 of Item 1 of Article 133 of the Health Code** states that individuals suffering from alcoholism, drug addiction and toxicomania have the right to choose a narcological organization in which to receive treatment. (*Authors' note: Such a patient has a right to refuse treatment according to **Item 2 of Article 133 of the Health Code**. Compulsory measures of a medical character for patients who committed a crime and need special treatment can be used only in compliance with a court decision, according to **Item 2 of Article 130 of the Health Code***).

c) Supporting Regulations / Bylaws / Orders

Item 36 of the Rules of Conducting Biomedical Experiments, Pre-Clinical (Non-Clinical) and Clinical Studies, approved by Order of the Minister of Health of the Republic of Kazakhstan of 12 November 2009 (the person makes his or her own decision about participation or refusal to participate in the clinical trial)

d) Provider Code(s) of Ethics

Sub-item 2 of Item 3 of Article 184 of the Health Code obligates medical and pharmaceutical workers, in their interactions with patients, to offer medical services to everyone who needs them. This is a general requirement set in the ethics of medical and pharmaceutical workers' behavior.

e) Other Relevant Sources

- **Article 12 of the International Covenant on Economic, Social and Cultural Rights.** Provisions of Article 12 of the Covenant are discussed in detail in sections devoted to regional and international standards of medical services.
- **Item 2 of the "12 Principles of Provision of Medical Assistance in any National Healthcare System"** (based on a resolution adopted by the 27th World Medical Assembly in Munich, Germany, in October 1973; any healthcare system should ensure the patient's right to choose a doctor)

f) Practical Examples

1. Example(s) of Compliance

According to Ministry of Health information, for 11 months in 2011, the right to free choice of a hospital was exercised by more than 664,000 of the persons who received treatment in hospitals: 45,5 % of those hospital visits (and exercises of free choice) were made by citizens of Kazakhstan. (*Authors' note: This does not include the numbers of persons who chose to visit private clinics*).

2. Example(s) of Violation

- A patient is refused health services at the medical organization of his choice.

(Short summary about the assignment of citizens to PMA: Assignment of citizens to primary medical aid (PMA) organizations is carried out on the basis of permanent or temporary address, work or study, taking into consideration the right to free choice of a doctor and medical organization within one

administrative-territorial unit. The citizens are assigned to primary medical aid organizations in line with the assigned population quantity norms. Information on the number of the assigned population is given in the mass media and put in the easily accessible places and PMA organizations).

Changes in the assignment of the citizens to the PMA organizations are made not more than once a year, observing the free choice of a doctor and medical organization. The polyclinic is entitled to refuse to accept a patient if the number of the already-assigned patients exceed the norm (*Order of the Acting Minister of Health of the Republic of Kazakhstan of 26 November 2009, № 794*).

3. Actual Cases

Citizen A complained to the ombudsman about the violation of her right to freely choose a medical establishment. In recent years, the complainant received treatment in the outpatient clinic where she was not satisfied with treatment. She requested the healthcare department to transfer her to another clinic and she was sent to clinic No 6. However, the head of this clinic refused to register the patient, saying that the clinic did not receive a corresponding instruction from the city health department. When the patient went back to the previous clinic to continue her treatment, she was refused health services because her name had been removed from the register.

As a result of the ombudsman's request, the patient was registered for treatment at clinic No 6, following a written order from the healthcare department's director. This case showed that the head of the clinic used the healthcare department director's written instruction, but not law, as a crucial factor to remove violations.

g) Practice Notes for Lawyers

In order to restore the violated right to free choice, the patient or his/her legal representative can file a claim to healthcare bodies, prosecutors' offices and courts. Appealing against a violation of this right to a government body or department does not rule out filing a lawsuit to protect the right in court. In other words, the patient may simultaneously appeal to several bodies to protect the right violated.

The situation with prisoners receiving treatment in prisons can be more complicated. Serving prison terms under custodial control shrinks the opportunity to exercise this right.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Free Choice under:

- Right to Liberty and Security of the Person in Chapter 2 and Chapter 3
- Right to Privacy in Chapter 2 and Chapter 3
- Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment in Chapter 2 and Chapter 3
- Right to Bodily Integrity in Chapter 2 and Chapter 3
- Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3.

Right to Privacy and Confidentiality

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to the confidentiality of personal information, including information regarding his or her state of health and potential diagnostic and therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Item 1 of Article 18 of the Constitution of the Republic of Kazakhstan provides for the right to privacy, personal and family confidential information, protection of honor and dignity.

The National Legislation

- ▶ **Sub-item 7 of Item 1 of Article 87 of the Health Code** (the state gives guarantees to citizens of the Republic of Kazakhstan that information classified as medical secrecy will be preserved)
- ▶ **Item 3 of Article 95 of the Health Code**, entitled “Medical Secrecy,” defines: “With the consent of a patient or his/her lawful representative, it is allowed to disclose information classified as medical secrecy to other individuals and/or legal entities in the interest of the examination and treatment of the patient and for scientific research and the use of this information for educational or other purposes.”
- ▶ **Article 95 of the Health Code** (general provisions on medical secrecy):

Without the consent of a citizen or his/her lawful representative, the disclosure of information classified as medical secrecy is allowed in the following cases:

- 1) with the aim of examining and treating a citizen who cannot express his will because of the state of his health;
 - 2) under the threat of the spread of a disease that is dangerous to other people;
 - 3) at the request of investigation bodies, a prosecutor, a lawyer (in certain instances) and/or a court in connection with an investigation or trial;
 - 4) while offering medical assistance to a minor or an incapacitated person, informing their lawful representatives;
 - 5) if there are grounds to suggest that a citizen's health was damaged as a result of unlawful actions (*Item 4 of Article 95 of the Health Code*).
- ▶ **Sub-item 1 of Article 112 of the Health Code** (anonymity and/or confidentiality of medical examination of HIV positive and AIDS patients)
 - ▶ **Item 1 of Article 115 of the Health Code** (anonymity of HIV tests)

- ▶ **Item 1 of Article 131 of the Health Code** (anonymity of provision of medical and social rehabilitation at a patient's request)
- ▶ **Item 2 of Article 142 of the Health Code** (information on anatomic specifics should not be made public)
- ▶ **Item 3 of Article 171 of the Health Code** (a ban on medical and other workers of healthcare establishments disclosing information about the donor and the recipient)
- ▶ **Article 144 of the Criminal Code of the RK** ("Disclosing medical secret")

c) Supporting Regulations / Bylaws / Orders

Decree of the Government of the Republic of Kazakhstan No. 2294 "On Approving the Order and Conditions of Performing and Transfer of Anatomical Gift," dated 30 December, 2009

d) Provider Code(s) of Ethics

Article 184 of the Health Code, entitled "*Code of Ethics of Medical and Pharmaceutical Workers of the Republic of Kazakhstan*," does not have a provision that specifically secures this right of a patient. However, **Sub-item 4 of Item 2 of Article 184**, which obliges medical and pharmaceutical personnel to prevent actions that may discredit the high status of a medical and pharmaceutical worker in the Republic of Kazakhstan, may be considered as a guarantee that ensures this right. In other words, the disclosure of confidential information about a patient, on the one hand, is a violation of ethics, and, on the other, it violates a patient's right to privacy and confidentiality.

e) Other Relevant Sources

- **Article 17 of the International Covenant on Civil and Political Rights** states that no one shall be subjected to wanton or unlawful interference with his personal life and family's privacy, wanton or unlawful attacks on his home or the confidentiality of correspondence, or to unlawful attacks on his/her honor and reputation.
- **Item 6 of the "12 Principles of Provision of Medical Assistance in any National Healthcare System"** (based on a resolution adopted by the 27th World Medical Assembly in Munich, Germany, in October 1973)

This states that everyone who takes part in the process of treatment or its control should understand, respect and protect confidentiality of relations between the doctor and the patient. Citing this document, we draw attention to the fact that the national Republic of Kazakhstan legislation, with the relevant legislative provisions on privacy and confidentiality, aims at observing international standards in the healthcare sphere.

f) Practical Examples

1. Example(s) of Compliance

Patients of the National Scientific Center for Emergency Medical Assistance are told when and in which circumstances information about them can be disclosed and the process of obtaining their

consent to disclose information. A patient is asked permission for examination and study of his/her medical records by students or cadets. Information on the state of a patient is released only in line with the legislation if a court or other law-enforcement bodies issue a warrant. While conducting research, materials and articles do not mention personal information about a patient. Information about a patient is kept in a place that is not accessible to visitors and other patients.

2. Example(s) of Violation

- Issuing an outpatient's records to a different patient by mistake
- Unnecessary, outside-of-job discussion between medical workers of diagnosis and methods of treatment of a patient
- In his speech to a scientific and practical conference devoted to HIV prevention, the chief doctor of the medical center gave examples of effective treatment, mentioning the names of specific patients, without their consent, who received health services at the center.

3. Actual Cases

There is no court decision relevant to this right at this time.

g) Practice Notes for Lawyers

Ethical norms play an important role in regulating the interaction between a doctor and a patient. Information about the state of a patient's health and the diagnosis, prognosis and treatment of the disease, like any other information of personal nature, should be kept secret, even after the death of a patient.

In connection with violations of a patient's right to privacy and confidentiality, even unintentional violations, a patient can be advised to file a lawsuit to protect his/her honor and dignity. Cases on the protection of honor and dignity are heard in a civil trial. The claimant has the right to demand compensation for moral damages. The rules for filing a suit are discussed in Chapter 8 – National Procedures and Appendixes (See *section on Civil Proceedings*).

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Privacy in Chapter 2 and Chapter 3.

Right to Respect for Patients' Time

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to receive necessary treatment within a swift and predetermined period of time. This right applies to each phase of the treatment.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection. The country's Constitution does not stipulate a separate right to respect for patients' time. It may be considered in the context of the general understanding of the right to health protection.

The National Legislation

- ▶ **Sub-item 3 of Item 1 of Article 88 of the Health Code** (the right to quality and timely medical assistance)
- ▶ **Sub-item 2 of Item 1 of Article 91 of the Health Code** (provision of medical services in queue exclusively based on medical criteria without the involvement of any discriminatory factors)
- ▶ **Paragraph 2 of Item 3 of Article 97 of the Health Code** requires that in cases when delaying examination, treatment and medical intervention threatens the life of a pregnant woman and her child (fetus), the decision on examination, treatment and medical intervention is taken by a doctor or a commission of doctors
- ▶ **Item 2 of Article 104 of the Health Code** (abortion with taking into account the duration of pregnancy)

c) Supporting Regulations / Bylaws / Orders

Resolution of the Government of RK No. 1463 On Approval of the Rules of Providing Acute Aid and Medical Assistance by Air Ambulance, issued by the Government of the Republic of Kazakhstan on December 5, 2011

d) Provider Code(s) of Ethics

Sub-items 2 and 3 of Item 3 of Article 184 discuss the provision of medical assistance to anyone who needs it and the constant realization of the duty to preserve human life. These provisions should be interpreted in the way that in some cases the life and health of an individual depend on how quickly medical assistance is offered (*Authors' opinion*).

e) Other Relevant Sources

Article 12 of the International Covenant on Economic, Social and Cultural Rights.

The physical and mental health of an individual may be achieved only as a result of the timeliness of measures aimed at preventing and treating various diseases. Provisions of Article 12 of the Covenant are discussed in detail in sections devoted to regional and international standards of medical services.

f) Practical Examples

1. Example(s) of Compliance

For minimization of waiting time for medical services, to simplification and acceleration of procedures of registration of patients and restriction of transfers (redirection) of patients, the principle of the "patient-focused" processes takes root into other divisions in clinics of the «National Medical Holding». (Authors' note: «National Medical Holding» was created in 2008. It includes six innovative facilities in Astana: National Scientific Center of Motherhood and Childhood, Republican Children's Rehabilitation Center, Republican Diagnostic Center, Republican Scientific Center of Neurosurgery, Republican Scientific Center of Emergency Medical Service and National Scientific Cardiac Center of Medical Care and National Scientific Cardiac Center.)

"Patient-focused" process means that corresponding standards will provide the maximum concentration of all medical-diagnostic and other services and procedures around the patient i.e. in regard to the patient in a clinic (planned, emergency) for example, all necessary procedures and services will be "confined" to the place of its current or forthcoming finding, including consultations of profile doctors. In other words, those clinics will provide all necessary medical services in one place. A patient will not need to get an examination or some medical services in other places (hospitals).

2. Example(s) of Violation

- A patient's unreasonably long waiting for his/her hospitalization
- Staying in a queue for a health service for too long (in the state-run sector) during which patients feel discomfort or endure pain because of their illness

3. Actual Cases

- ▶ In December 2007, a 50-year-old woman came from Kyzylorda to Almaty for a heart surgery on quota. When she went to the Surgery Center, she was told that it had used up its quota and advised her to come back in 2012. The woman turned to the "Aman-Saulyk" public foundation, whose staff spoke to the Minister of Health's aide. The woman had successful surgery in January 2008. It was not necessary to file a legal action.
- ▶ Citizen A2 (born in 1992) complained to the ombudsman about the violation of her right to respect for her time. The complainant was supposed to be sent to a medical center in Astana but the healthcare department in Semei did nothing to send her for over two months. At the ombudsman's request, the Ministry of Health (MoH) conducted an inspection, which established that Ms. A could receive similar services not only in Astana but also in her town of Semei. In the meantime, it should be noted that it was learned that the health care department in Astana city gave her false information about the possibility of receiving treatment only in the capital. In addition, the examination of the complainant's condition was delayed by medical workers for a long time. This led to a conclusion by the MoH that medical officials approached their duties with indifference, which had made the complaint to wait too long for her hospitalization. However, there is no information about any penalty.

- ▶ Since she was three years old, Citizen A³ has been registered (*diagnosed and her name placed on a registry of patients with this disease*) with kyphoscoliosis (curvature of the spine with aggravated stoop) and she needs endo-correction. She was put in a queue for free treatment under quota only in 2008 when she was almost 16 years old, but with this illness she could not receive necessary treatment until she was 17. Unfortunately, she had limited time to wait because she was to turn 17 in 2009. Her turn was coming up slowly. In 2009 patients who had been in the queue since 2001 were undergoing operations for this same condition. Ms. A was offered treatment, for which she would have to pay, that could be provided without her waiting in a queue. Inquiring to the healthcare department about free medical services for her was in vain, and the inquirer decided to receive fee-paying services because delayed treatment could produce no positive results. In this case, most probably, the girl originally would not have had to hurry to undergo an operation and would have received it for free if she had been registered on time, much earlier than in 2008. It is the authors' opinion that it is evident from this example that the right to respect for the patient's time was violated. A complaint was directed to the public foundation "Aman-Saulyk," whose staff sent letters to the Ministry of Health and to the Republican Hospital asking for a free-of-pay surgery. Agreement was reached, but A. needed to wait some time. She and her family refused because she did not want to wait again. Surgery was made but the patient paid money.

g) Practice Notes for Lawyers

Kazakhstan's legislation indirectly ensures the right to respect for the patient's time. Therefore, it is quite complicated to protect this right. As a rule, government agencies consider this kind of complaint together with other cases of violations of rights if, for example, harm was caused to the patient's health because of waiting for medical procedures for a long time.

When the right to respect patients' time is violated, a complaint can first be filed with regional healthcare bodies and, if their answer is not satisfactory, further to the Ministry of Health. Also, various organizations, including the state-run organizations, such as the National Center for Human Rights, and public ones, can make an inquiry on behalf of the complainant. The procedure of inquiring and requirements on submitting applications/complaints are discussed in Chapter 8 – National Procedures and Appendixes.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Respect for Patients' Time under the Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3.

3 The complaint was filed in the Public Foundation Aman-Saulyk on 29 October 2008

Right to the Observance of Quality Standards

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right of access to high quality health services on the basis of specification and observance of precise standards.

Access to health services, their quality and timeliness are determined by one of the fundamental principles of the state policy of the Republic of Kazakhstan in the area of health protection. The quality of medical assistance is the level of correspondence of medical services to standards adopted by an authorized body and based on the modern level of the development of medical science and technology.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection.

The National Legislation

- ▶ **Sub-item 1 of Item 2 of Article 33 of the Health Code** (healthcare entities should offer quality medical services in line with licenses)
- ▶ **Sub-item 4 of Article 87 of the Health Code** (the state guarantees quality medical services for citizens of the Republic of Kazakhstan)
- ▶ **Sub-item 3 of Item 1 of Article 88 of the Health Code** (the right to quality and timely medical assistance)
- ▶ **Article 114 of the Criminal Code of the RK** ("Inadequate performance of professional duties by medical and pharmaceutical workers")

c) Supporting Regulations / Bylaws / Orders

- ▶ **Resolution No. 2296 On Approval of the Rules for Executing State Control in the Healthcare Sector**, issued by the Government of the Republic of Kazakhstan on 30 December 2009
- ▶ **Resolution No. 1577 On Approval of the Rules of Organizing and Executing External and Internal Expert Opinion on the Quality of Medical Services**, issued by the Government of the Republic of Kazakhstan on 22 December 2011.

Provisions of these acts secure guarantees of the quality, content and volume of medical services rendered on a free and/or fee-paying basis in line with the single healthcare standards, the establishment of control over the quality of medical services offered and, in some cases, checks on the quality of these services.

d) Provider Code(s) of Ethics

Sub-item 5 of Item 2 of Article 184 of the Health Code requires medical and pharmaceutical workers to perform their official duties honestly and qualitatively.

e) Other Relevant Sources

- **Article 12 of the International Covenant on Economic, Social and Cultural Rights**
The states that signed this Covenant should create conditions to ensure medical services and medical treatment for everyone in the case of disease. Provisions of Article 12 of the Covenant are discussed in detail in sections devoted to regional and international standards of medical services.
- **The International Code of Medical Ethics, adopted by the third General Assembly of the World Medical Association**, Geneva, Switzerland, in October 1949 (a doctor should always maintain the highest professional standards)

f) Practical Examples

1. Example(s) of Compliance

B. complained to a clinic's doctor about his cough. Considering complaints of the patient and his condition the doctor did not treat him for acute respiratory diseases, bronchitis and so on, but prescribed a three-day examination for tuberculosis mycobacteria. Tests proved positive. The teenager was taken to a tuberculosis hospital on time where, after examination, the correct diagnosis was established on time (an area of infiltration was discovered in the lower part of the left lung) and the relevant treatment was prescribed.⁴

2. Example(s) of Violation

- Using medications unsuitable for the diagnosis
 - Prescribing the wrong dosages of medications
 - The lack of proper qualification of a health worker
- A young man (born in 1980) with acute pains in the stomach and chest was taken to the central hospital in the small town of Kaskelen. There a physician examined him and made an injection of the pain medicine NO-SPA and sent him back home. At night, his two friends took him to the hospital again. They carried him to the reception hall, an X-ray and electrocardiogram were made, and the physician could not diagnose extensive heart failure. A surgeon also examined him and sent him back home. In the morning, his condition worsened; he was taken to the resuscitation unit, where he died on the next day. As determined in medical documents, the cause of his death was myocardial infarction.

3. Actual Cases

- ▶ Citizen D⁵ filed a suit in a district court against the Central Clinical Hospital of the Medical Center of the Presidential Administration of the Republic of Kazakhstan, demanding moral and material compensation for damage caused to her husband. He received paid treatment in this hospital's therapeutics department. He and his wife paid for the treatment, tomography and professors' consultations. However, the hospital did not place the husband in a fee-paying ward; the doctors in the ward where he was placed made an incorrect diagnosis and used and overdosed contraindicated drugs. On weekends, doctors on duty did not offer any services. D complained about this several times to the chief doctor of the hospital, K, and his deputy, I. However, there was no response.

Therefore, D had to take her husband home on weekends. On 19 March 2007, when the patient was spending another weekend at home, he felt unwell and his wife had to call for an ambulance. They took him to the Central Clinical Hospital, where he was operated on; but he died following the operation without regaining consciousness. A commission set up under the Ministry of Health of the Republic of Kazakhstan confirmed the fact of improper examination and treatment of her husband at the Central Clinical Hospital. The poor quality health services supplied by the Central Clinical Hospital caused moral damage to the family (they are still suffering morally and physically). D filed a claim in a district court and demanded that the court award the recovery of funds paid for the treatment, representation expenses and compensation for moral damage. The resolution of the Supervisory Board of the Supreme Court of the RK overruled the previous two decisions on this case and issued a new decision partially satisfying D's demands (the court awarded compensation for the moral damage and her legal representative's expenses). While considering the complaint and setting damages, the Supervisory Board of the Supreme Court proceeded from provisions of the Civil Code of the RK.

- ▶ In the morning of 26 January 2008, four-year-old B. had fever and his mother took him to get first aid in the village where they lived. A paramedic (status is lower than a doctor) diagnosed him as suffering from flu and prescribed antipyretic preparations. As the child's health did not improve, the mother took the child to the other paramedic, who confirmed the diagnosis. But the child felt worse in the evening. A paramedic examined the patient in his house that evening and recommended that he be taken to a district hospital, assuming latent appendicitis. Before leaving the patient's house, the paramedic gave the child an injection to ease pain, but he did not issue an appointment card. Later, the patient was taken to the village hospital, where he was injected with ampicillin and placed in a ward. In the morning of 31 January, a pediatrician examined the child in the ward and wrote out an appointment card for a blood test and fluorography. As doctors did not do anything else and the child continued to feel from bad to worse, the mother decided to take him to the regional center. The regional hospital established that, in addition to his bronchial pneumonia, the child was also suffering from appendicitis (his appendix had burst by that time) and from peritonitis. The child was in a grave condition. Doctors kept the child on a medicinal drip the whole night and operated on him in the morning. The head of the surgery department of the regional children's hospital, I.B., made the final diagnosis for the child: "acute

5 Practices of the Supreme Court of the Republic of Kazakhstan's supervisory board in 2009

gangrenous perforated appendicitis; purulent fibrous omentitis; general fibrous peritonitis; double bronchial pneumonia.”⁶ The child was saved, but he needs constant medical observation. In addition to the violation of the patient’s right to the observance of quality standards, the right to respect for the patient’s time was also breached. The bureaucracy and alleged incompetence or negligence of the local doctors put the child’s life under threat. In February 2008 the child’s mother complained about the doctors in the district hospital to the regional committee for control in the healthcare sphere. The committee’s inspection showed a number of gross organizational, diagnostic and tactical violations by doctors in this hospital while treating the four-year-old B. In late March 2008 the findings of the committee’s inspection were sent to the district department of internal affairs for a more detailed investigation. Further information about investigation results is unknown.

- ▶ Citizen K.A.⁷ applied to the public reception office of the Children’s Foundation of the Republic of Kazakhstan after delivering a child. As a result of a powerful stimulation during her delivery on 5 August 2009, her child sustained birth injuries – brain hypoxia, hemorrhage of the brain and purulent meningitis. The child was facing the threat of lifelong disability, but there was a chance to avoid it.

Using new technologies in private clinics yields positive results, but they are expensive. The public foundation drafted and filed an appeal to the Almaty city healthcare department to use the quota for free treatment in one of the clinics. In this example, the right to quality health services was violated during labor. Although the newborn baby’s mother was informed about innovations, she was not able to exercise her right to access the innovative methods because of the lack of funds. However no further legal action was taken because the patient was satisfied that she finally received medical help after the appeal to the city health department, and therefore there was no penalty for the alleged violation of the right.

g) Practice Notes for Lawyers

In line with the Republic of Kazakhstan’s Government Order No. 1541 “Certain Issues Relating to the Ministry of Health of the Republic of Kazakhstan” of 7 October 2009, the Committee for Health Services Quality Control has been reorganized. It became the Committee for Control over Medical and Pharmaceutical Activities. It is still responsible for considering complaints filed by citizens on issues relating to the quality of medical services provided. As a result, it is recommended that a complaint about a medical worker or an establishment that provided a medical service of poor quality should be filed with this Committee or the relevant departments in localities.

For their improper performance of professional duties, which causes damage, medical workers also bear criminal responsibility (**Article 114 of the Criminal Code of the RK**).

In such situations, one should file a criminal case. A range of the functional duties of medical and pharmaceutical workers are defined by the relevant rules, instructions and charters. In deciding whether to open a criminal case, an investigator should establish whether all the necessary actions, stipulated by these documents, were taken on time. If the health of a patient is damaged, the cause

⁶ Based on publications published in the *Nasha Gazeta* weekly, issue No 11 (363) of 12 March 2009

⁷ Based on reports by the public reception office of the Children’s Foundation of Kazakhstan in 2009

should be established to prove that it was definitely incorrect or untimely actions by a medical worker that led to these consequences. More detailed information on criminal and procedural issues can be found in Chapter 8 – National Procedures and Appendixes.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Observance of Quality Standards under the Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3 and under the Right to Life in Chapter 2 and Chapter 3.

Right to Safety

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to be free from harm caused by the poor functioning of health services, medical malpractices and errors, and the right of access to health services and treatment that meet high safety standards.

b) Right as Stated in Constitution and National Legislation

In the context of the constitutional right to health protection, the implementation of the right to safety means that healthcare procedures should include the diagnostic, treatment and preventive procedures, medications, items and equipment used in medicine that have passed standardization and quality control. The right to safety should be understood in the way that allows only professional health establishments to provide health services. Medical and pharmaceutical activities need to be licensed (**Article 13 of the Health Code**). If medical workers are doing their jobs without licenses, it is probable that they do not have enough knowledge, education, or practice in the particular sphere to ensure the rights to safety. If a medical organization does not have a license for medical activity, it hardly can ensure the right to safety (*Authors' opinion*).

The Constitutional Provision

- ▶ **Item 1 of Article 15** of the Constitution of RK: Everyone has the right to life.
- ▶ **Article 29** of the Constitution of the RK: Citizens of the Republic of Kazakhstan have the right to health protection.

The National Legislation

- ▶ **Article 84 of the Health Code** (prohibition, suspension or seizure of medicines, products for medical purposes and medical equipment that do not meet the safety standards for health of a human being)

- ▶ **Sub-item 5 of Article 87 of the Health Code** (accessibility, quality, efficiency and safety of medicines as a guarantee of ensuring rights in the healthcare sphere)
- ▶ **Item 1 of Article 98 and Item 1 of Article 99 of the Health Code** (treatment of infertility with safe and efficient methods, including the use of additional reproductive methods and technologies, the use of which is permitted in the Republic of Kazakhstan)
- ▶ **Item 1 of Article 127 of the Health Code** (provision of in-patient mental services in conditions that ensure the safety of a hospitalized individual and other people)
- ▶ **Article 164 of the Health Code** (ensuring the safety and quality of donor blood, its components and preparations)
- ▶ **Item 4 of Article 170 of the Health Code** (transplanting contagious tissues and/or bodies/parts of bodies is banned)
- ▶ **Sub-item 4 of Item 1 of Article 174 of the Health Code** (receiving conclusion on biological safety of imported/exported tissues and organs/parts of organs, blood and its components)

c) Supporting Regulations / Bylaws / Orders

- ▶ **Resolution No. 1729 On Approval of the Rules of Organizing and Conducting Purchases of Medicines, Preventive (Immunobiological, Diagnostic, Disinfecting) Preparations, Products for Medical Purposes and Medical Equipment, Pharmaceutical Services for Rendering the Guaranteed Volume of Free Medical Services**, issued by the Government of the Republic of Kazakhstan on 30 October 2009
- ▶ **Resolution No. 2135 On Approval of the Rules for the Provision of Medicines to Citizens**, issued by the Government of the Republic of Kazakhstan on 15 December 2009
- ▶ **Resolution No. 2296 On Approval of the Rules for Executing State Control in the Healthcare Sector**, issued by the Government of the Republic of Kazakhstan on 30 December 2009
- ▶ **Resolution No. 856 On Approval of the Rules of Ensuring Timely Preventive, Preliminary and Mandatory Medical Examinations of Individuals Subject to These Examinations**, issued by the Government of the Republic of Kazakhstan on 8 September 2006

d) Provider Code(s) of Ethics

Article 184 of the Health Code does not have direct references to ethical standards in the context of “the right to safety.” But Sub-item 1 of Item 2 of Article 184 obliges medical and pharmaceutical workers to observe the present Code and the Code of Honor in their practice. Because a number of articles of the Health Code listed in the above section entitled “The National Legislation” directly stipulate the observance of the right to safety, Sub-item 1 of Item 2 of Article 184 can be regarded as a significant condition of the code of medical ethics.

e) Other Relevant Sources

There are no other relevant sources to this right.

f) Practical Examples

1. Example(s) of Compliance

The city Department of Control of Medical and Pharmaceutical activity during the inspection of a drugstore discovered expired medicines. All expired medicines were removed from the drugstore.

2. Example(s) of Violation

- Harm to the life and health of a patient as a result of medical workers' negligence and mistakes
 - Harm to the life and health of a patient as a result of medical equipment's improper functioning
 - The sale of medical preparations without certificates of compliance
 - The sale of expired medications, breaching conditions of storing medications
- A boy (born in 2004) underwent an operation for removing a cyst in the lower jaw. One and a half months later, extensive bleeding occurred. When the ambulance arrived, the ambulance doctor found that there was a foreign body in the wound. The boy had to be operated on again.
- A young man (born in 1976) underwent an operation to remove his gall bladder. Half a year later, pains appeared again. At repeated ultrasonography stones were found in the gall bladder.

3. Actual Cases

- In September 2009, officers from the Almaty city department of the National Security Committee of the Republic of Kazakhstan discovered an illegal drug-producing enterprise. Without a proper state license for producing and storing medicines, the company produced drugs in breach of the existing legislation. The Almaty city directorate for pharmaceutical control and the national security department took measures to withdraw these products from circulation. As a result of the check, it was decided to open a criminal case. An investigation was arranged but the court decision is unknown. This example shows compliance by the Almaty City Directorate, although it also shows violation by the drug producers. The emergence of the drugs, manufactured under violations of the production and quality control rules, in the pharmaceutical market poses a real threat to patient safety.
- Citizen B⁸ filed a complaint about actions of doctors in a hospital in the town of Tekeli. Because of their alleged negligence, doctors made a wrong diagnosis for his son. They did not perform the necessary treatment, and that failure led to the child's death. As a result of an investigation into this case, hospital doctor Sh. was brought to trial under Item 1 of Article 114 of the Criminal Code of the RK. Examination by experts from the Central Forensic Medicine Laboratory of the Defense Ministry and the Forensic Examination Center of the Ministry of Health sparked controversies during the court trial. In connection with the need to conduct an additional investigation and

8 See page 28 of the Report on the Ombudsman's Activities in 2007

a comprehensive forensic medical examination to set new questions for experts, the city court sent the criminal case for additional investigation on 18 October 2006. On 1 December 2006, the investigative police body suspended the investigation into the case and sent it for a comprehensive forensic examination. In April 2007, the criminal case against Sh. was dropped “due to a lack of evidence.”

In the meantime, the Center for Forensic Medicine of the Ministry of Health concluded that the performed treatment did not correspond with the diagnosis, and the possibility of a fatal outcome would have been minimal if the diagnosis had been made on time.

Considering the new circumstances and taking into account the conclusion by the Center for Forensic Medicine of the Ministry of Health of the RK, the National Center on Human Rights requested the Prosecutor-General’s Office of the RK to consider the possibility of resuming the investigation into the death of B’s son. The request was acted on by the Prosecutor-General’s Office.

- ▶ The specialized inter-district administrative court of Almaty has made a Kazakh pharmaceutical company answerable under Item 2 of Article 324 of the Code of Administrative Offences, fined it and suspended its license to sell pharmaceuticals for six months.

In accordance with the protocol on the administrative wrongdoing, inspectors from the Almaty city directorate for pharmaceutical control checked the records of the company’s drug inventory. The inspection revealed the sale of 205 packs of expired Sandoglobulin, a medication from the Novartis Company (based in Basel, Switzerland). This is a violation of Sub-item 4 of Item 4 of Article 69 of the Health Code. This sub-item bans the wholesale and retail sales of expired medicines, products for medical purpose and medical equipment. The Almaty city court then ruled that there was a lack of proof of an administrative offense by the pharmaceutical company. Finally, the supervisory board of the Almaty city court quashed the Almaty city court’s ruling against the pharmaceutical company for the lack of an administrative offence, and upheld the decision by the specialized inter-district administrative court of Almaty.

The court of second instance (Almaty city court) did not take into consideration the fact that expired medications cannot be sold or used for treatment but instead must be terminated in line with Item 3 of Article 27 of the law (Article 79 of the Health Code). In this case, the wrongdoer sold expired Sandoglobulin preparations to the National Center for Pediatrics and Pediatric Surgery. In other words, the sale or use of this preparation is not allowed. Thus, the court of appeal upheld the decision of the lower court of first instance to fine the pharmaceutical company and to suspend its license for six months under Part 2 of Article 324 of the Code of Administrative Offences of the Republic of Kazakhstan.⁹ (In summary: This administrative offence was reviewed three times. The Inter-district Administrative Court made the company answerable. The Almaty City Court cancelled this decision. And finally the supervisory board of the Almaty City Court quashed the Almaty City Court’s ruling and agreed with the decision of the Inter-district Administrative Court.)

9 See page 28 of the Report on the Ombudsman’s Activities in 2007

g) Practice Notes for Lawyers

This right is fully regulated by the legislation of the RK. It can be difficult to prove this violation in cases of medical workers' unwritten "corporate" behavior (Authors' opinion: *"Corporate" behavior in this instance means that if one medical worker is guilty of a violation, others will try to support morally, thinking that such a situation can happen to them as well*).

The launch of an administrative or criminal case largely depends on the damage inflicted. If it is proved that a person is involved in medical and pharmaceutical activities without a proper certificate and/or a license and inflicted damage by carelessness, he/she will be made answerable under Article 266 of the Criminal Code of the Republic of Kazakhstan.

Civil claims for compensation for property and moral damages, which are directly caused by a crime, are also considered in a criminal process. A civil claim is filed against the accused or persons bearing financial responsibility for actions by the accused person, and is considered jointly with a criminal case (Article 162 of the Criminal Procedure Code of the Republic of Kazakhstan).

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Safety under the Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3 and under the Right to Life in Chapter 2 and Chapter 3.

Right to Innovation

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations.

The information on the results of scientific researches should be distributed and be available to patients.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection.

The National Legislation

- ▶ **Sub-item 54 of Item 1 of Article 1 of the Health Code** (innovative medical technologies include a whole range of methods and means of scientific and technical activities, the implementation of which in the spheres of medicine/biomedicine, pharmacy, information technology and healthcare is economically feasible and /or socially important)
- ▶ **Sub-item 4 of Item 1 of Article 29 of the Health Code** (adoption of global innovative technologies and the modernization of the healthcare system)
- ▶ **Sub-item 5 of Item 1 of Article 88 of the Health Code** (the right to receive medical services abroad paid for by budget funds if there are conditions defined by the Government of the Republic of Kazakhstan)
- ▶ **Sub-item 1 of Item 1 of Article 89 of the Health Code** (a child's right to use modern and efficient services of the healthcare system for means of treating diseases and recovering health)
- ▶ **Item 1 of Article 98 and Item 1 of Article 99 of the Health Code** (treatment of infertility with safe and efficient methods, including the use of additional reproductive methods and technologies, the use of which is permitted in the Republic of Kazakhstan)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, or orders to this right.

d) Provider Code(s) of Ethics

Sub-item 7 of Item 2 of Article 184 of the Health Code includes the prevention of advertising and using methods and means of prevention and treatment with the aim of personal benefit. Even the emergence of new innovative medical technologies and treatment methods does not give medical and pharmaceutical workers the right to advertise them for personal benefits and interests.

e) Other Relevant Sources

There are no other relevant sources to this right.

f) Practical Examples

1. Example(s) of Compliance

In order to ensure the quality of medical services, the central clinic hospital under the Medical Center of the Presidential Property Management Department of the Republic of Kazakhstan has stepped up work to adopt modern, highly-efficient, innovative technologies in medical practice; has created an internal control and quality rating system of medical services; and has developed a system of economic incentives for quality and productive work.

2. Example(s) of Violation

Example of violation relevant to this right is unknown.

3. Actual Cases

Citizen C¹⁰ complained to the ombudsman about the violation of his right to innovation. The complainant had asked for help to send him to Novosibirsk for an angioplasty of the carotid artery using laser technology. Mr. C believes that laser treatment is painless and more innovative than cleaning arteries with a scalpel. The ombudsman's request was refused by the Ministry of Health because Kazakhstan offers surgery for cleaning of the blockage of carotid arteries. Considering this fact and the economic expediency, it was decided to turn down Mr. C's request to be sent abroad for treatment. The claimant's appeals to the Ministry of Health and other government agencies produced no different results.

g) Practice Notes for Lawyers

Kazakhstan's legislation does not literally provide for the right to innovation and therefore this right is observed indirectly at present. If patients or their representatives believe that a tested and widely-applied method of treatment or medical service is available and used to treat other patients, they have the right to demand the same method be used for them, too.

At the same time, arguments by certain medical workers that they are short of specialists and technicians significantly hinder the use of this right. Not all hospitals have enough such specialists and technicians who know how to provide these particular medical services.

This right can also be defended judicially. However, one should remember that when there is no damage (deterioration of health), it is quite difficult to win a court case. The burden of proof that a patient's health deteriorated because of the non-use of new technologies becomes the claimant's (patient's) responsibility (Article 65 of the Code of Civil Procedure of the Republic of Kazakhstan).

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Innovation under the Right to the Highest Attainable Standard of Health in Chapters 2 and 3.

Right to Avoid Unnecessary Suffering and Pain

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.

Medical organizations and facilities should assume the obligation to take all reasonable measures in this regard, such as palliative treatment and facilitating of patients' access to such treatment. The observance of this right is especially important for terminally ill patients who suffer from chronic pain. All of the actions of medical workers must focus on facilitating their relief from suffering.

¹⁰ The complaint is registered in the Ombudsman's office

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection

The National Legislation

- ▶ **Sub-item 6 of Item 2 of Article 34 of the Health Code** (the guaranteed volume of free medical services includes palliative assistance and nursing for groups of the population, specified by the Government of the Republic of Kazakhstan)
- ▶ **Article 53 of the Health Code (palliative assistance and nursing)**
Palliative care is provided under the guidance of a doctor to patients who are in terminal (final) stage of the disease in the specialized divisions of hospitals, independent health care organizations (hospices) or at home. Nursing care is provided in cases that do not require medical supervision, in the specialized divisions of hospitals, independent medical organizations (nursing homes) or at home.
- ▶ **Sub-item 5 of Item 1 of Article 91 of the Health Code** (easing sufferings to the extent allowed by existing medical technologies)
- ▶ **Article 141 of the Health Code** (euthanasia is banned)

c) Supporting Regulations / Bylaws / Orders

- ▶ **Decree No. 1938 On Approval of List of Categories of the Population, Entitled to Palliative and Nursing Care**, issued by the Government of the Republic of Kazakhstan on 26 November 2009
- ▶ **Decree No. 1343 On Approval of the Rules of Executing Palliative and Nursing Care**, issued by the Government of the Republic of Kazakhstan on 15 November 2011

d) Provider Code(s) of Ethics

Sub-item 3 of Item 2 of Article 184 of the Health Code (taking a decision exclusively in the interests of a patient)

e) Other Relevant Sources

Introduction of the **Unified Convention on Narcotic Substances of 1961**: "... the use of narcotic substances in medicine continues to be necessary to alleviate pain and suffering and adequate measures should be taken to cover the need in narcotic substances in these aims..." (*Authors' note: The Republic of Kazakhstan joined the Unified Convention on Narcotic Substances of 1961 in 1998.*)

f) Practical Examples

1. Example(s) of Compliance

An example of compliance relevant to this right is unknown.

2. Example(s) of Violation

The oncological patient in a terminal stage is unreasonably refused strong, anesthetizing drugs.

3. Actual Cases

C¹¹ complained to a public foundation that he did not receive medical aid after his legs were frostbitten. His legs started to fester following the development of gangrene, which caused him to suffer pain and anguish. The patient was refused medical aid because he did not have registration in the city. Relatives of the complainant had to resort to a fee-paying surgery - skin transplantation. At present, C needs skin transplantation but his relatives do not have enough money. The patient has applied to public organizations and healthcare establishments for help with his open wounds but there has been no reply. Hospitals refused surgery because he is not registered with them. The patient has the right to file a suit to claim material and/or moral damage for the refusal to provide treatment because of the lack of registration. However, suit has not been filed.

g) Practice Notes for Lawyers

As shown in the above case, relatives of patients in the same or similar situation as C are advised to get his power of attorney to reregister him from his current residence to their address. The lawyer, in turn, should help by drawing up a statement of claim to be submitted to the court for reimbursement of damage. The claims can include compensation for both material and moral damage. The basis of such a claim to the court is Civil Law.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Avoid Unnecessary Suffering and Pain under the Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3.

Right to Personalized Treatment

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to diagnostic or therapeutic programs tailored as much as possible to his or her personal needs.

¹¹ The complaint was filed through the hotline of the Public Foundation Aman-Saulyk in 2009

A patient should be ensured an individual approach to treatment, based on his personal needs. Economic factors should not prevail over the right to high-quality medical care. Every patient should be ensured an individual approach in terms of treatment methods, the seriousness of disease, the age, the individual specifics of organisms, adjustment to medicines and so on (Authors' explanation).

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection.

The National Legislation

- ▶ **Article 52 of the Health Code** (recovery treatment and medical rehabilitation are offered to citizens suffering from inborn and acquired illnesses and from consequences of acute, chronic diseases and injuries)
- ▶ **Item 5 of Article 54 of the Health Code** (banning the holding of mass healing sessions, including the use of media)
- ▶ **Item 4 of Article 89 of the Health Code** (disabled children, HIV carriers and AIDS patients have the right to receive free medical and pedagogical corrective support in educational and medical establishments in line with the Republic of Kazakhstan's legislation in the healthcare sphere)
- ▶ **Sub-item 1 of Item 1 of Article 91 of the Health Code** (decent handling in the process of diagnostics, treatment and care and respectful treatment of cultural and personal values)
- ▶ **Sub-item 2 of Article 102 of the Health Code** (citizens are offered medical assistance by an individual selection of appropriate methods and means of contraception taking into account the state of health, age and individual specifics)

c) Supporting Regulations / Bylaws / Orders

- ▶ **Resolution No. 166 On Approving the List of Occupational Hazard Factors and Occupations Which Require Mandatory Medical Examinations and the Rules Regulating the Conducting of Mandatory Medical Examinations**, issued by the Government of the Republic of Kazakhstan on 25 January 2012
- ▶ **Decree No. 754 On Approval of Rules of Providing the Disabled Patients with Special Means of Transportation**, issued by the Government of the Republic of Kazakhstan on 20 July 2005

d) Provider Code(s) of Ethics

Sub-item of 3 of Item 2 of Article 184 of the Health Code (taking a decision exclusively in the interests of a patient)

e) Other Relevant Sources

There are no other significant sources relevant to this right.

f) Practical Examples

1. Example(s) of Compliance

A patient who applied to a doctor of a district clinic with complaints about heart pains and high blood pressure was assigned to a special course of treatment suitable for her age and psycho-physiological condition.

2. Example(s) of Violation

- A standard approach to prescribing medications on the general basis of nature of illnesses
- Services of mass healing over TV

3. Actual Cases

There is no court decision relevant to this right at this time.

g) Practice Notes for Lawyers

The right to an individual approach to treatment may be violated by those who attempt to treat by the holding of mass sessions by folk healers, for example. If damage to health is caused as a result of this “treatment,” it is necessary to establish whether this practice was carried out under approval of a corresponding certificate issued by healthcare organizations, accredited by an authorized body. Otherwise, the folk healer can be made answerable in line with the legislation of the Republic of Kazakhstan. Item 4 of Article 322 of the Code of Administrative Offences of the Republic of Kazakhstan provides for liability for holding mass healing sessions, including the use of mass media. (*Authors’ note: There is no specific article which allows punishing mass media for broadcasting the mass healing sessions.*)

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Personalized Treatment under the Right to the Highest Attainable Standard of Health in Chapter 2 and Chapter 3, and under the Right to Nondiscrimination and Equality in Chapter 2 and Chapter 3.

Right to Complain

a) Right as Stated in the European Charter of Patients’ Rights

Each individual has the right to complain whenever he or she has suffered harm, and the right to receive a response or other feedback.

The complaints should be submitted in accordance with the procedure established by law. The management of the corresponding health care provider should give a comprehensive written response within the specified period of time.

The submittal of a complaint shall not prevent a patient from realization of his/her right to use alternative methods of a dispute settlement or a judicial defense.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

- ▶ **Item 2 of Article 7** of the Constitution of RK:
“In state organizations and local government, on a level with Kazakh, Russian is officially used.”
- ▶ **Item 1 of Article 33** of the Constitution of the RK secures the right to complain:
“Citizens of the Republic of Kazakhstan shall have the right to participate in the government of the state's affairs directly and through their representatives, to address personally as well as to direct individual and collective appeals to public and local self-government bodies.”

The National Legislation

- ▶ **The Law of the RK On Procedures for Considering Appeals by Individuals and Legal Entities**
- ▶ **Sub-item 10 of Item 1 of Article 88 of the Health Code** (appealing against actions/inactions by medical and pharmaceutical workers to a healthcare establishment, a higher body and/or to court)
- ▶ **Item 3 of Article 106 of the Health Code** (a citizen who is diagnosed with a contagious form of tuberculosis may appeal against a healthcare organization's decision to a higher body and/or to court)
- ▶ **Item 1 of Article 117 of the Health Code** (appealing to court against a decision by a commission of doctors on recognizing professional disability)
- ▶ **Item 3 of Article 123 of the Health Code** (in case of disagreement or the absence of a legal representative, mental examination of a minor is conducted in line with a decision by a body of guardianship which may be appealed against in court)
- ▶ **Item 6 of Article 125 of the Health Code** (in case of disagreement or the absence of a legal representative, the admittance of a minor to a mental hospital is conducted in line with a decision by a body of legal guardianship which may be appealed against in court)
- ▶ **Item 11 of Article 125 of the Health Code** (in case of disagreement with voluntary hospitalization, a person suffering from mental disorders/diseases or their legal representatives have the right to appeal to court)

- ▶ **Item 2 of Article 132 of the Health Code** (in case of disagreement of a person with his diagnosis of alcoholism, drug addiction and toxicomania, this decision may be appealed against to a higher healthcare body and/or court)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, or orders on this right.

d) Provider Code(s) of Ethics

Sub-item 4 of Item 2 of Article 184 of the Health Code addresses the prevention of actions that may discredit the prestige of a medical or pharmaceutical worker of the Republic of Kazakhstan. The compliance of this provision with this right is about the honest fulfillment of professional duties by medical and pharmaceutical workers, and this may serve as a guarantee for a decrease in the number of patient complaints about low-quality medical services.

e) Other Relevant Sources

Article 13 of the European Convention on Human Rights:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.”

f) Practical Examples

1. Example(s) of Compliance

After an appointment with a gynecologist, a woman complained to the chief doctor of the women's consultancy clinic about the gynecologist's inappropriate and rude behavior during the appointment. After carefully listening to the patient, the chief doctor promised to investigate the situation and take necessary disciplinary measures against the doctor. (*Authors' note: If a chief doctor does not realize her promise, the patient has a right to complain to the territorial health care department.*)

2. Example(s) of Violation

- A patient does not receive a response to his/her complaint.
- Proper investigation into a complaint is not conducted.
- Patients do not have information about their rights to complain about health workers' behavior.
- Refusing to provide a patient with a necessary health service following his/her complaint to the healthcare department or the court, for example

3. Actual Cases

Citizen G¹² complained to the ombudsman about the violation of her right to complain. Earlier the woman complained to the Ministry of Health about the inadequate treatment of her five-year-old

¹² The complaint is registered in the National Center for Human Rights

child by doctors of a scientific center for pediatrics. Half a year after she had complained to the MOH, she came back to this clinic with her son for maintenance therapy. The doctor in charge did not receive the boy for over four hours. In addition, the clinic's administration was outraged by G.'s complaining to the Ministry of Health. The child was still offered medical assistance, which came after a great delay (more than 4 hours while his mother had a conversation with the clinic's administration).

g) Practice Notes for Lawyers

In the case above, the complainant has the right to complain repeatedly about the behavior of the state-run clinic's staff and to apply to the court. In order to restore her violated right to complain, the claimant can apply to regional healthcare bodies and, in case of receiving an unsatisfactory response, further to the Ministry of Health. The main requirements set for filing complaints are discussed in Chapter 8 – National Procedures and Appendixes.

Right to Compensation

a) Right as Stated in the European Charter of Patients' Rights

Each individual has the right to receive sufficient compensation within a reasonably short time whenever he or she has suffered physical or moral and psychological harm caused by a health service treatment.

Guilty persons shall compensate the injured persons for damage according to the scope and in the manner established under legislation of RK. Paying compensation for damage shall not release medical and pharmaceutical personnel from disciplinary, administrative or criminal responsibility in accordance with the law of the Republic of Kazakhstan (*Short summary of what is detailed below*).

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 13 of the Constitution of the RK ensures the right to judicial protection of one's rights:

“1. Everyone shall have the right to be recognized as a subject of the law and to protect his rights and freedoms with all means not contradicting the law including self-defense.

2. Everyone shall have the right to judicial defense of his rights and freedoms.”

The National Legislation

- ▶ **Articles 917 and 921 of the Civil Code of the RK** (common conditions for compensation for caused harm; medical organization's responsibility for harm caused by its medical workers)

- ▶ **Sub-item 6 of Item 1 of Article 88 of the Health Code** (compensation for damage caused to health by wrong prescription and application of medicines, products of medical purposes and medical equipment by medical workers)
- ▶ **Sub-item 9 of Item 1 of Article 99 of the Health Code** (the right to protect reproductive rights)
- ▶ **Item 3 of Article 113 of the Health Code** (people infected with HIV or in whom AIDS was a result of improper execution of duties by medical workers have the right to compensation for damage caused to their lives or health)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, or orders on this right.

d) Provider Code(s) of Ethics

There is no article in the code of ethics of medical and pharmaceutical workers that has a specific provision on the relevant right to compensation, but **Item 1 of Article 184 of the Health Code** defines moral responsibility of medical and pharmaceutical workers for their activities before citizens and society in general. Claims of compensation are largely defined by how honestly a medical worker performs his/her duties.

e) Other Relevant Sources

- **Legislative act No. 3** of 21 June 2001, by the Supreme Court of the Republic of Kazakhstan *On Court's Administration of the Law on Compensation for Moral Damages*
- **Legislative act No. 9** of 9 July 1999, by the Supreme Court of the Republic of Kazakhstan *On Some Issues Related to Kazakh Courts' Administration of the Law On Compensation for Harm Caused to Health*
- **Legislative act No. 7** of 25 July 1996, by the Supreme Court of the Republic of Kazakhstan *On Courts' Administration of the Law On the Protection of Consumers' Rights*

f) Practical Examples

1. Example(s) of Compliance

A dental clinic, having recognized the fault of the doctor in inadequate removal of the tooth of a child which caused him physical harm, paid (or compensated) for this harm before the child's parents appealed to court.

2. Example(s) of Violation

- A patient with medical insurance fails to receive insurance money - money to be paid directly to the health care provider/institution for providing health care services to the patient.
- A clinic refuses to pay compensation in breach of its health services agreement including items on compensation.

3. Actual Cases

A female resident of the town of Derzhavinsk filed a lawsuit to claim compensation for moral damage against the Zharkain central district hospital. The claims were satisfied. Akmol Oblast's Zharkain District Court awarded 150,000 tenge in damages to the woman. On 3 November 2008, N., who suffered a brain injury in a traffic accident in 2005, had a convulsion with a high temperature due to this injury. Her parents called an ambulance and the patient was taken to the Zharkain central district hospital. She was examined by a doctor and then was given an intravenous anti-convulsive preparation. The patient remained in the hospital. The diagnosis was identified on 5 November 2008 after consultations with a neurologist, who recommended a spinal puncture in order to make a more accurate diagnosis. The test of the spinal fluid established purulent meningitis. After this, the patient was placed in the infectious diseases unit. Despite the more precise diagnosis and the patient's grave condition, an infectious diseases doctor neither prescribed an adequate treatment nor insisted on performing treatment in the Zharkain hospital because the patient was not transportable. Fearing for her daughter's life and health, the parent took her to the Arkalyk town hospital where the patient underwent a course of treatment.

The claimant believes that doctors' careless and improper performance of professional duties caused her physical suffering and moral damage, for which she claimed compensation from the defendant, the Zharkain hospital, and reimbursement of material damage, or money spent on drugs.

A report by the Akmol Oblast department for control in the healthcare sphere proved the guilt of doctors and specified the violations established at the Zharkain hospital. Under resolutions issued by the director of the Akmol Oblast department for control in the healthcare sphere, doctors of the Zharkain hospital were made answerable for administrative offences under Article 85 of the Code of Administrative Offences of the RK that envisages responsibility for failing to observe the order, standards and quality of medical services.¹³ The penalty in such instances is usually in the form of a fine, and the money paid is deposited into the state budget funds. The plaintiff/patient will claim for compensation for moral damages.

g) Practice Notes for Lawyers

If the patient was refused compensation for the caused harm, his/her violated right to compensation may be corrected by the patient's complaint to healthcare bodies if the patient and a medical establishment signed a contract on rendering medical services. If consideration of the complainant's case is refused by the healthcare bodies, the complainant should take the matter to court.

The recovery of damages should be solved in court. This may be a civil case. If a criminal case is opened, the civil case for damages will be heard at the same time. The recovery of damages is made in the sum of the money they paid or have to pay to restore the damaged health because of low quality medical services or medicines and compensation for lost earnings and moral damages (*moral damage includes moral sufferings such as anger, shame, or discomfort in addition to the suffering of actual physical pain*).

13 <http://www.supcourt.kz>

6.2 Patients' Responsibilities

Duty to Preserve and Improve Health

a) The Health Code provides for citizens' duty to preserve their health (Sub-item 1 of Item 1 of Article 90).

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Item 1 of Article 34 of the Constitution of the RK:

"Everyone must observe the Constitution, legislation of the Republic of Kazakhstan and respect the rights, freedoms, honor and dignity of other persons."

The National Legislation

- ▶ **Sub-item 1 of Item 1 of Article 92 of the Health Code** (adoption of measures to preserve and strengthen one's health)
- ▶ **Item 2 of Article 115 of the Health Code** (a duty to undergo a confidential HIV test for certain groups of individuals)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, orders on this responsibility/duty.

d) Other Relevant Sources

References to other important sources are unavailable for this section.

e) Practical Examples

1. Example(s) of Compliance

Health improvement centers (HIC) function at 28 medical organizations in the city of Almaty. These centers are key subdivisions of the Almaty city center for the formation of a healthy lifestyle and carry out health education work to prevent behavioral risk factors and diseases, and ensure the adoption of a more responsible attitude towards personal health among the people assigned to the center. These centers' basic functional subdivisions include: 1) healthy-lifestyle wards; 2) healthy-child wards; 3) family-planning wards; 4) anti-tobacco wards; and 5) food-correction wards.

2. Example(s) of Violation

- avoiding compulsory medical examination
- deliberate abuse of bad habits such as drinking, smoking

3. Actual Cases

There is no court decision relevant to this responsibility/duty.

f) Practice Notes for Lawyers

Patients do not only enjoy certain rights. Lawyers must familiarize patients not only with their rights but also with their duties specified in Article 92 of the Health Code. They must observe these duties while receiving medical services. When establishing violations of patients' rights, one should also remember to specify what duties patients possibly might have violated, which might have caused harm (*a full list of duties can be found in Annex No 5*).

Duty to Observe Medical Prescriptions

a) Being aware of their diseases and having received the necessary recommendations and orders from medical professionals, patients must observe prescriptions related to individual and public health issued by doctors and healthcare organizations and bodies (Sub-item 4 of Item 1 of Article 90 of the Health Code).

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Item 1 of Article 34 of the Constitution of the RK (duty to observe the legislation of the Republic of Kazakhstan)

The National Legislation

- ▶ **Sub-item 3 of Item 1 of Article 92 of the Health Code** (strict execution of all prescriptions by a doctor in charge)
- ▶ **Item 2 of Article 105 of the Health Code** (patients with a contagious form of tuberculosis have to be admitted to hospital, treated and rehabilitated)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, orders on this responsibility/duty.

d) Other Relevant Sources

World Health Organization interim guidance of 3 May 2009, “Advice on the Use of Masks in the Community Setting in Influenza A (H1N1) Outbreaks”

e) Practical Examples

1. Example(s) of Compliance

A cardiology center admitted citizen B. in a pre-heart attack condition. The treatment prescription included an intravenous drip to restore cardiac performance and reduce arterial pressure, intramuscular injection and intake of drugs. Acupuncture and diet were recommended for better efficiency. Patient B. followed the medical prescriptions honestly, which was reflected by the treatment results.

2. Example(s) of Violations

- refusal to intake prescribed drugs or to undergo recommended procedures
- refusal to take prescription drugs because of fear of becoming addicted to a drug

3. Actual Cases

A young mother, R, went to a district pediatrician complaining that her child, who is on an artificial feeding, felt unwell. The doctor established that the mother had broken the rules of feeding, including food that is not recommended for children of early ages. She fed the child milk and milk products, which she bought from her acquaintances, without heating them. She did not observe personal hygiene while feeding and caring for the child. Despite a doctor's prohibitions regarding activities of child care and nursing, R. grossly violated medical prescriptions, causing her child's sickness. There was no legal action, as the mother received new medical prescriptions again which she followed.

f) Practice Notes for Lawyers

Any right carries with it a corresponding duty. Enjoying a package of rights, a patient also must observe his/her duties. As a rule, the patient's duties are stipulated by internal regulations of a healthcare facility or by a health service contract. It should be explained to a patient that, if his/her health deteriorates after receiving health services, he/she should not always blame it on healthcare workers. In certain situations, ignoring medical prescriptions and recommendations can directly lead to a health failure. In such cases, claims for compensation for damages will be turned down.

Duty to Observe Internal Regulations

a) The most important duty of a patient while receiving medical assistance is the observation of internal regulations adopted in a medical establishment (Sub-item 4 of Item 1 of Article 92 of the Health Code)

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Item 1 of Article 34 of the Constitution of the RK (constitutional duty to observe the legislation of the Republic of Kazakhstan)

This article of the Constitution of the Republic of Kazakhstan does not directly indicate the duty to observe internal regulations. However, because the Health Code is part of Kazakhstan's current legal system, patients must observe it and implement relevant duties provided by the code.

The National Legislation

- ▶ **Paragraph 2 of Item 2 of Article 91 of the Health Code** (when admitted to a medical organization, the patient should be provided with information on internal regulations of a medical organization)
- ▶ **Sub-item 4 of Item 1 of Article 92 of the Health Code** (observation of internal regulations and careful treatment of the property of a medical organization; cooperation with the medical personal while receiving medical services)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, orders on this responsibility/duty.

d) Other Relevant Sources

There are no other relevant sources on this responsibility/duty.

e) Practical Examples

1. Example(s) of Compliance

Pensioner I. was receiving a course of treatment at a town cardiologic center. The patient observed the center's internal regulations: she restricted visits by her relatives and friends, did not smoke, observed the daily schedule and day rest time and restricted her movements inside the department. As a result of the treatment and her observation of internal regulations in the aggregate, the patient's health improved significantly.

2. Example(s) of Violation

- A patient leaves the medical establishment against regulations without the staff's knowledge or permission.
- A patient drinks spirits, while being on treatment in a medical institution.

3. Actual Cases

There is no court decision relevant to this responsibility/duty.

f) Practice Notes for Lawyers

Attention should be paid to the inclusion of this duty in contracts on provision of fee-paying medical services in case of the emergence of conflict situations. A lawyer must draw a client's attention to the fact that, if a patient violates a relevant item of a contract for health services, this may cause the termination of the contract and the patient's payment of a penalty worth 0.01% of the contract value. This provision is provided by the Terms and Conditions of Fee-paying Medical Services, a resolution, issued by the Government of the Republic of Kazakhstan, approved on 30 December 2009.

Duty to Inform about the State of Health

a) For receiving qualified medical assistance, the patients should provide all the necessary information about the state of their health (Sub-item 3, Item 1 of Article 92 of the Health Code)

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Item 1 of Article 34 of the Constitution of the Republic of Kazakhstan establishes a constitutional duty to observe legislation, including legislative acts in the healthcare sphere.

The National Legislation

- ▶ **Sub-item 5 of Item 1 of Article 92 of the Health Code** (timely informing medical personnel about changes in the state of health in the process of diagnostics and treatment and cases of diseases which pose a threat to surrounding people or suspicions about these diseases)
- ▶ **Item 3 of Article 165 of the Health Code** (a donor's duty to inform doctors about all present and past diseases of which they are aware, as well as the use of drugs, psychotropic substances and precursors)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, orders on this responsibility/duty.

d) Other Relevant Sources

There are no other relevant sources on this responsibility/duty.

e) Practical Examples

1. Example(s) of Compliance

An example of compliance relevant to this responsibility/duty is unknown.

2. Example(s) of Violation

- A patient conceals from doctors his/her previous diseases linked to his/her current diseases.
- A patient conceals from doctors the past or current diseases of his/her close relatives (such as mental diseases or history of heart problems, diabetes and cancer).

3. Actual Cases

There is no court decision relevant to this responsibility/duty.

f) Practice Notes for Lawyers

The patient's concealment of certain information about certain present or past diseases may become a serious obstacle to issues relating to compensation for harm caused to health. A lawyer must draw a client's attention to the fact that concealing this sort of information can cause negative consequences to his/her health which cannot be blamed on the doctor in charge or other medical workers.

7.1 PROVIDERS' RIGHTS

Right to Work in Decent Conditions

Right to Freedom of Association

Right to Due Process

Right to Compensation for Damage

7.2 PROVIDERS' RESPONSIBILITIES

Responsibility to Comply with Licensing and Accreditation Requirements

Informing the Patient about the Opportunity to Choose Treatment Methods

Obligation of Health Workers to Properly Execute Their Professional Responsibilities

Safeguarding Medical Secrecy

Observance of Sanitary and Epidemiological Rules and Regulations, Hygiene Standards

Rendering Emergency Medical Aid in Emergency Situations

7

National Providers' Rights and Responsibilities

7.1 Providers' Rights

This section focuses on providers' rights, including the rights to work in decent conditions, freedom of association, due process, and other relevant country-specific rights. The concept of human rights in patient care refers to the application of general human rights principles to all stakeholders in the delivery of health care and recognizes the interdependence of patients' and providers' rights. Health workers are unable to provide patients with good care unless their rights are also respected and unless they can work under safe and respectful conditions. For each right outlined in this section, there is a brief explanation of how that right relates to health providers; an examination of its basis in country legislation, regulations, and ethical codes; examples of compliance and violation; and practical notes for lawyers on litigation to protect provider rights.

Right to Work in Decent Conditions

a) Health workers enjoy a range of rights related to decent - safe and healthy - working conditions when providing care.

According to the Convention of the International Labor Organization On Occupational Safety and Health No.155 of 1981, ratified by the Law of the Republic of Kazakhstan No. 7-1, dated June 13 1996, each member of the ILO shall develop, maintain and review from time to time the approved national policy in the field of labor safety, hygiene and environment, by taking into consideration national conditions and upon the agreement with the representative bodies of entrepreneurs and working persons.

Occupational safety means protection of workers provided by the complex of means of protecting them from influence of harmful and/or dangerous process factors on workers in their working activity (**Sub-clause 26) Clause 1 Article 1 LC RK**).

Labor safety conditions mean compliance of working process and manufacturing environment with health and safety procedures during performance by the employee of his/her working duties (**Sub-clause 27) Clause 1 Article 1 LC RK**).

Labor hygiene includes a complex of sanitary and epidemiological measures and means of preservation of health of employees and preventive measures against adverse effects of the occupational environment and workflow (**Sub-clause 18) Clause 1 Article 1 LC RK**).

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Items 1 and 2 of Article 24 of the Constitution of the RK

Everyone has the right to safe and hygienic working conditions, to remuneration for labor without discrimination, as well as to social protection against unemployment.

The National Legislation

- ▶ **Sub-item 1 of Item 1 of Article 182 of the Health Code** (ensuring necessary conditions for the conducting of professional activities)
- ▶ **Articles 311 and 314 of the Labor Code** of the RK stipulate the guarantees of the rights to labor safety and protection during labor activities and workers' rights to security and labor safety.

c) Supporting Regulations / Bylaws / Orders

- ▶ **Sanitary Rules of Organizing and Maintaining Preventive Treatment Establishments**, approved by the chief sanitary doctor of the RK on 2 July 1997

- ▶ **Sanitary-Epidemiological Requirements to Objects in the Area of Circulation of Medicine (Drugs), Medical Goods and Medical Equipment**, approved by Regulation No. 91 of the Republic of Kazakhstan, dated 17 January 2012
- ▶ **Sanitary-Epidemiological Requirements to Healthcare Facilities**, approved by Regulation No. 87 of the Republic of Kazakhstan, dated 17 January 2012

d) Provider Code(s) of Ethics

No relevant provisions of the provider code of ethics exist at this time.

e) Other Relevant Sources

- **Item 1 of Article 23 of the Universal Declaration of Human Rights** proclaims the right to labor, free choice of labor, fair and favorable labor conditions and protection against unemployment.
- **Article 7 of the International Covenant on Economic, Social and Cultural Rights** provides that the state should recognize the right of each citizen to just and favorable labor conditions, including just salary and equal remuneration for work of equal value without any discrimination, as well as labor conditions in conformity with safety and hygiene requirements.
- **Article 3 of the European Social Charter** directs towards improvement of labor sanitary conditions and prevention of diseases as a priority of the national policy on labor safety and hygiene and labor environment.

f) Practical Examples

1. Example(s) of Compliance

As part of healthcare reforms, a differentiated system of remuneration of labor was introduced for the staff of state-run healthcare organizations in 2007. In other words, official salaries of healthcare workers include additional allowances and payments for mental and emotional stress and physical workload. In addition, in 2009 the list of experts entitled to additional payments for mental and emotional stress and physical workload was supplemented with neonatologists, forensic staff and onco-hematologists. Payments were increased for those who work in harmful conditions: tuberculosis specialists, depending on the level of risk of infection while contacting TB patients; X-ray diagnostics experts (radiologists, roentgenologists); and ultrasonic examination experts.¹

2. Example(s) of Violation

- Excessive workload for district doctors
- Difference in payments to workers with the same qualifications

1 Kazakhstanskaya Pravda 21 November, 2009

3. Actual Cases

The Control and Social Protection Department of the Ministry of Labor and Social Protection (MOLSP) received a complaint from the staff of a regional children's hospital. The hospital staff complained that they were not paid for overtime at the hospital. Those who were not paid overtime included surgeons, intensive care specialists, pulmonologists and psycho-neurologists - experts whose attendance is necessary for patients 24 hours a day. A state labor inspector ordered that overtime money must be paid to the staff, thus meeting lawful demands of the hospital workers. But the situation did not change. A healthcare trade union and the regional healthcare department were involved in the dispute. The management of the Control and Social Protection Department of the MOLSP organized an unscheduled inspection of the children's hospital. The inspection revealed a number of violations. The department director stated that the hospital staff's demands were lawful. The problem was only resolved a year later,² with MOLSP help.

g) Practice Notes for Lawyers

The rights to favorable work conditions for persons who deliver health care can be protected by both judicial and extrajudicial means. It is recommended to learn how to submit complaints and petitions included in Section 8 - National Procedures and Appendixes.

h) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Work in Decent Conditions in Chapter 2 and Chapter 3.

Right to Freedom of Association

a) Health workers' ability to form, join, and run associations without undue interference is critical to their ability to effectively defend their rights and provide good care.

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

► **Item 2 of Article 5** of the Constitution of the Republic of Kazakhstan:

"Public associations shall be equal before the law. Illegal interference of the state in the affairs of public associations and of public associations in the affairs of the state, imposing the functions of state institutions on public associations, and financing of public associations by the state shall not be permitted."

2 <http://i-news.kz>

- ▶ **Item 1 of Article 23** of the Constitution of the Republic of Kazakhstan:

“Citizens of the Republic of Kazakhstan shall have the right to the freedom to form associations. The activities of public associations shall be regulated by law.”

The National Legislation

- ▶ **Article 8 of the Law of the RK On Public Associations** of 31 May 1996 (public associations have the right to set up unions of public associations on the basis of founding agreements and charters, and to be members of international unions)
- ▶ **Sub-item 8 of Item 1 of Article 22 of the Labor Code of the RK** (employees have the right to association, including the right to form trade unions or other associations, and membership in them, to provide and protect their employment rights, unless otherwise stipulated by the laws of the Republic of Kazakhstan)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, by laws, or orders at this time.

d) Provider Code(s) of Ethics

There are no relevant provisions of the provider code of ethics at this time.

e) Other Relevant Sources

- **Item 1 of Article 20 of the Universal Declaration of Human Rights** (everyone has a right to peaceful meetings and associations)
- **Article 22 of the International Covenant on Civil and Political Rights:**
 1. Everyone has the right to freedom of association with others, including the right to establish trade unions and join such unions to protect his interests.
 2. This right should not be subject to any limitations, except those envisaged by the law and necessary in a democratic society in the interests of the state and public security, public order, health and morals of the population and protection of rights and freedoms of others. The present article is not an impediment to the introduction of lawful limitations for the use of this right for those serving in the army and police.
- **Article 8 of the International Covenant on Economic, Social and Cultural Rights**
This Article secures the right of each one to establish trade unions for implementation and protection of his economic and social interests and to join such unions by his own choice, and should not be subject to any limitations, except those envisaged by the law and necessary in a democratic society in the interests of the state and public security or protection of the rights and freedoms of others.

f) Practical Examples

1. Example(s) of Compliance

A regional association of independent expert doctors was set up in the town of C.³ The association will be engaged in considering people's complaints about poor quality medical services. The association includes 22 doctors of various specialties, who underwent training and received licenses to work in their fields of expertise. These independent experts will be selected for an expert commission to consider grievances based on the fact that none of the commission members have personal interest in a relevant case; in other words, the commission will not include experts working in an establishment against which a grievance case was filed.

2. Example(s) of Violation

Refusal to register an association officially by the justice bodies.

3. Actual Cases

There is no court decision relevant to this right.

g) Practice Notes for Lawyers

In addition to the Constitution of the RK, a number of other legislative acts also guarantee the implementation of this right. Therefore it is not difficult to protect a health worker's violated right to freedom to establish and participate in medical associations.

If a government official hinders a public association from its legal activity using his/her official position, which is the same as interfering in an association's lawful activity, thus violating rights and legal interests, he/she will be liable in conformity with Article 83-1 of the Administrative Codex of the RK. Such violation is punishable by fine or simple detention.

h) Cross-referencing Relevant International and Regional Rights

General provisions on the Right to Freedom of Association and/or the Right to Strike that apply equally to health professionals include:

- Article 5(d)(ix) of the CERD
- Article 22 of the ICCPR
- Article 8 of the ICES CR
- Article 11 of the ECHR
- Articles 5 and 6 of the ES C
- ILO Convention 87
- ILO Convention 98

Please find a discussion of international and regional standards relevant to the Right to Freedom of Association in Chapter 2 and Chapter 3.

3 <http://www.meta.kz/85452-v-semee-sozdana-regionalnaja-associacija.html>

Right to Due Process

a) Health care and service providers are potentially subject to a range of civil proceedings – disciplinary, medical negligence suits, etc. – and are entitled to enjoyment of due process and a fair hearing.

b) Rights as Stated in Constitution and National Legislation

The Constitutional Provision

▶ **Article 13** of the Constitution of the Republic of Kazakhstan:

- “2. Everyone shall have the right to judicial defense of his rights and freedoms.
- 3. Everyone shall have the right to qualified legal assistance. In cases where stipulated by law, legal assistance shall be provided free of charge.”

▶ **Article 14 of the Constitution of the Republic of Kazakhstan:**

- “1. Everyone shall be equal before the law and court.
- 2. No one shall be subject to any discrimination for reasons of national origin, social status, property status, occupation, sex, race, nationality, language and attitude towards religion, convictions and place of residence or any other circumstances.”

The National Legislation

- ▶ **Sub-item 10 of Item 1 of Article 182 of the Health Code** (the right to professional honor and dignity)
- ▶ **Part 1 of Article 8 of the Code of Civil Procedure of the RK** (the right to file a court case for protection of the violated or disputed constitutional rights, freedoms or interests protected by the law)
- ▶ **Part 1 of Article 12 of the Code of Criminal Procedure of the RK** (the right to in-court protection of one’s rights and freedoms)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws, orders on this right.

d) Provider Code(s) of Ethics

There are no relevant provisions of the provider code of ethics at this time.

e) Other Relevant Sources

▶ **Article 8 of the Universal Declaration of Human Rights:**

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to them by the constitution or by law.”

f) Practical Examples

1. Examples(s) of Compliance

In the city of T., a doctor was sentenced for misdiagnosing the disease of a rural patient who subsequently died from Congo-Crimean hemorrhagic fever. In the summer of 2009, the chief doctor of an outpatient clinic misdiagnosed the 49-year-old man's disease. For improper performance of his professional medical and pharmaceutical duties (Article 114 of the Criminal Code of the Republic of Kazakhstan), the doctor was given an 18-month prison term by a local court to serve in open prison and was deprived of his right to practice medicine for three years. If the accused does not consent to the court ruling, he has the right to appeal against it to a higher level court.

2. Example(s) of Violation

The administration of the medical organization threatens its worker with dismissal if the worker files a court case to restore his violated right.

3. Actual Cases

The non-state clinic was reorganized as a private clinic in 2003; this was reported promptly to the city health care department. The Department continued to send all of its correspondence to the former non-state top management. Bank transfers from the department were made sometimes to the private, sometimes to the non-state entity. In reality, both variants were right, since it was one and same organization. In 2007, as a result of internal conflicts between the founders, the civil court ruled that the clinic should be re-established as a non-state clinic from a private clinic. The healthcare department supported the former founders, trying to annul unilaterally its contract with the non-state clinic for providing services regarding the guaranteed volume of medical assistance. In addition, the department tried to suspend the clinic's medical license in every possible way. The department groundlessly stopped compensating for the state-funded health services that already had been provided. On 24 August 2007, the inter-district economic court No 2 of Karaganda satisfied all claims made by the clinic against the Karaganda Oblast healthcare department.⁴ The claims about suspension of the clinic's medical license and compensation of 18 million tenge were satisfied by court's decision.

g) Practice Notes for Lawyers

The abovementioned case is a civil dispute. When one defends one's rights judicially, one should remember that the civil law applies presumption of guilt.

Presumption of guilt means that the guilt of a medical establishment, in which a problem emerged or treatment did not yield a desired result, is presumed. If a defendant (healthcare establishment) does not refute competently the legal assumption (presumption), its guilt will be considered to have been established.

In civil cases, legal entities, healthcare establishments, and individual persons (medical workers) can be defendants. Court decisions are based on evidence provided by the parties involved.

4 Based on reports on the website www.internews.kz

Therefore, how convincingly a representative of the medical establishment defends its viewpoint is crucial in medical disputes.

h) Cross-referencing Relevant International and Regional Rights

Consider *general fair trial* provisions:

- Articles 2(3) and 14(1) of the ICCPR
- Articles 6 and 13 of the ECHR

Consider *freedom of expression* issues:

- Article 19(3) of the ICCPR, limiting free expression to protect the rights and reputation of others
- Article 10(2) of the ECHR

Please find a discussion of international and regional standards relevant to the Right to Due Process and Related Rights in Chapter 2 and Chapter 3.

Right to Compensation for Damage

a) Everyone has the right to judicial protection of their rights and freedoms. Everyone has the right to receive qualified legal assistance

b) Right as Stated in Constitution and National Legislation

The Constitutional Provision

Article 13 of the Constitution of the Republic of Kazakhstan:

“2. Everyone shall have the right to judicial defense of his rights and freedoms.”
Defending their rights in court, persons implement their right to compensation for damages stipulated by the Civil Code of the Republic of Kazakhstan.

The National Legislation

Sub-item 5 of Item 1 of Article 182 of the Health Code (the right to compensation for damage caused to life or health relating to the fulfillment of official work duties)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws or orders on this right.

d) Provider Code(s) of Ethics

There are no relevant provisions of the provider code of ethics at this time.

e) Other Relevant Sources

- **Article 26 of the International Covenant on Civil and Political Rights** (all are equal before the law and are entitled to equal protection by the law without any discrimination)
- **The Supreme Court of the Republic of Kazakhstan's legislative resolution of 21 June 2001 No. 3 On Courts' Application of Legislation on Compensation for Moral Damages**
- **The Supreme Court of the Republic of Kazakhstan's legislative resolution of 9 July 1999 No. 9 On Some Issues of Courts' Application of Legislation on Compensation for Damage Caused to Health**
- **The Supreme Court of the Republic of Kazakhstan's legislative resolution of 25 July 1996 No. 7 On Practice of Courts' Application of Legislation on Protection of Consumers' Rights**

f) Practical Examples

1. Example(s) of Compliance

An example of compliance relevant to this right is unavailable.

2. Example(s) of Violation

The court's unwarranted reducing the amount of reimbursement for the damage incurred by a worker during performance of his labor responsibilities

3. Actual Cases

K. was dismissed from a district clinic, where she worked as a physician, for her refusal to come to work on holidays and weekends to draft reports and other documents and for her complaints to the chief doctor about demands to work on weekends. K filed a lawsuit to a local court demanding reinstatement and compensation for damages incurred during her forced absence. Her lawsuit was satisfied. She was reinstated and received money for her time away. *(Authors' note: This is an example of compliance with the right or of taking legal action to uphold the right to compensation. Of course it also could be considered as a violation of a worker's right by the clinic.)*

g) Practice Notes for Lawyers

The right to damage compensation is exercised not only by patients but also by both medical and pharmaceutical workers. This compensation may be linked to violations of labor legislation by employers or to the protection of honor and dignity of personality. Labor grievance procedures are regulated by Chapter 15 of the Labor Code of the Republic of Kazakhstan.

Under Item 2 of Article 161 of the Labor Code of the Republic of Kazakhstan, an employer is responsible to an employee for:

- 1) damages caused by the illegal deprivation of an employee of an opportunity to work in the workplace;
- 2) damages caused to the property of an employee;
- 3) damages caused to the life and/or health of an employee.

The protection of honor, dignity and business reputation of a medical or pharmaceutical worker implies the right to demand not only the denial of defamatory information but also compensation for material and moral damages caused by distributing this kind of information (Item 6 of Article 143 of the Civil Code of the Republic of Kazakhstan). Legal procedures on filing a suit are given in Chapter 8 – National Procedures and Appendixes.

7.2 Providers' Responsibilities

The responsibility of the persons providing medical care is regulated by the legal acts of the Republic of Kazakhstan. The moral responsibility of medical and pharmaceutical workers for their activities before citizens and the society as a whole is regulated by the Code of Ethics of Medical and Pharmaceutical Workers of the Republic of Kazakhstan (**Article 184 of the Health Code**).

Responsibility to Comply with Licensing and Accreditation Requirements

a) Licensing for conducting medical and pharmaceutical activities is established with the aim of ensuring the protection of lives and health of citizens. This obligation is related to the Patient's Right to Safety.

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

The Constitution of the Republic of Kazakhstan does not have clear provisions determining the duty to license medical activity. On the contrary, **Item 1 of Article 24** of the Constitution reads that everyone has the right to freedom of labor, freedom to choose a job and profession. However, the freedom to choose a profession does not rule out the duty to license certain types of activity, particularly in the medical and pharmaceutical spheres, in order to ensure protection of citizens' lives and health.

The National Legislation

- ▶ **Article 13 of the Health Code** (medical and pharmaceutical activities are subject to licensing according to the legislation of the Republic of Kazakhstan on licensing)

- ▶ **Article 14 of the Health Code** (medical, pharmaceutical and other organizations involved in trade in drugs, products of medical purpose and equipment are subject to accreditation in order to acknowledge that medical and pharmaceutical services are compliant with existing requirements and standards in the healthcare sphere)
- ▶ **Article 15 of the Health Code** (attestation in the healthcare sphere)
- ▶ **Article 16 of the Health Code** (standards in the healthcare sphere)
- ▶ **Article 17 of the Health Code** (confirmation of the compliance of goods/services in the healthcare sphere)
- ▶ **Sub-item 1 of Item 2 of Article 33 of the Health Code** (healthcare entities should ensure quality medical services in line with their licenses)
- ▶ **Item 1 of Article 35 of the Health Code** (licensing of fee-paying medical services)
- ▶ **Item 2 of Article 54 of the Health Code** (the right to conduct activities in the sphere of traditional medicine is exercised by individuals with medical education who receive relevant licenses)
- ▶ **Item 2 of Article 67 of the Health Code** (licensing of the production of medicines, products for medical purposes and medical equipment in line with licenses obtained)
- ▶ **The Law of the RK on Licensing**

In line with **Sub-item 15 of Article 11** of this law, healthcare activities are subject to licensing. Subtypes of medical and pharmaceutical activities listed in **Article 26** of the law are also subject to licensing

c) Supporting Regulations / Bylaws / Orders

- ▶ **Qualification Requirements and Rules for Licensing Medical and Pharmaceutical Activities**, approved by the Government of the Republic of Kazakhstan by resolution No. 2301 of 30 December 2009
- ▶ **Accreditation Rules in the Healthcare Sphere**, approved by the Government of the Republic of Kazakhstan by resolution No. 1559 of 12 October 2009

d) Provider Code(s) of Ethics

There is no specific provision in Article 184 of the Health Code on this responsibility/duty.

e) Other Relevant Sources

There are no supporting regulations, bylaws or orders on this responsibility/duty.

f) Practical Examples

1. Example(s) of Compliance

An example of compliance relevant to this responsibility/duty is unavailable.

2. Example(s) of Violation

- Conducting medical activities without a license or with violations of license terms
- An inadequate professional qualification level of a specialist (medical education, qualification, specialization)
- Offices inadequate to meet sanitary requirements
- The prosecutor's office in Mangistau checked an orphanage. The inspection revealed that the orphans were treated with out-of-date medicines, and that the medical unit did not have a license. It was found that 13 medicines were 2 months expired at the moment of inspection.

3. Actual Cases

- ▶ The Ministry of Health closed down the Senim private clinic in Taldykorgan. Several patients contracted Hepatitis C through the fault of medical staff. After being discharged from the clinic, patients felt unwell and were taken to an infectious diseases hospital. When they learned their diagnoses, they complained to the Committee for Health Services Quality Control and the Regional Sanitary and Epidemiological Control Service. An investigation by the Committee for Health Services Quality Control revealed a number of violations. As a result of the investigation, the committee decided to revoke the clinic's license. The violation was that medical activities were performed in defiance of licensing conditions.
- ▶ The prosecutor's office of Aktau⁵ submitted results of a sudden, unannounced inspection for illegal health services in the city to the head of the regional directorate of the Committee for Health Services Control. A particular company's basic function is pharmaceutical activity. "Retail sale of medicines" is fixed in its charter and state license. A license to sell medicines also allows selling of medical equipment and medical items in Kazakhstan. However, before selling its products, the company carried out the so-called testing of its products' effects on the human body. The company serviced about 150-200 people every day in its showroom, performing health improvement and treatment sessions using body massage beds that mainly affect the spinal column. However, there was no doctor observing the sessions. The massaging bed's effect on a human body is none other than physical therapy. Physical therapy is prescribed by a physical therapist, an expert the company did not have. In addition, it was necessary to determine the admissibility/appropriateness of mechanical massage for each patient individually, taking into account the state of his/her health and the number of treatment sessions needed for each patient; but this was not done either.

Checks established that the company held treatment sessions without a proper license. The company worked in breach of the provisions of Sub-item 1 of Article 26 of the Law of the Republic of Kazakhstan On Licensing. It was also established that the company violated Item 1 of Article 322 of the Code of Administrative Offences of the Republic of Kazakhstan. This provision implies the use of administrative penalties for conducting illegal medical and/or pharmaceutical activities without a proper certificate or license. The submission suggested that the violations

should be corrected (to obtain a license for conducting treatment sessions) and the company be brought to account. Punishment for this violation is a fine.

g) Practice Notes for Lawyers

Law services of medical establishments must strictly control licensing and the observance of license terms. Failure to fulfill these duties can lead to not only the revocation of the license but also to administrative responsibility for violations. A lawyer must make it clear that receiving a license is a must, whereas accreditation is a voluntary procedure. For a patient, accreditation means an important step to provide safety because accreditation of a medical organization is official acknowledgement that a hospital (an outpatient clinic, a center) meets existing standards of treatment and diagnostics. In addition, this gives the medical organizations the privilege to receive state orders. Accreditation recognizes the compliance of rendered medical as well as pharmaceutical services to the established requirements and standards in the field of health care.

Informing the Patient about the Opportunity to Choose Treatment Methods

a) The quality of health services is determined by the level of complication of a disease and its duration, from which treatment methods are determined. This obligation is related to the Patient's Right to Free Choice.

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

The Constitution of the Republic of Kazakhstan does not have direct provisions on a medical worker's duty to inform patients about the right to choose treatment methods and techniques. **Article 88 of the Health Code** discloses the content of the right to health protection, which is stipulated by **Article 29** of the Constitution of the Republic of Kazakhstan. Specifically, **Sub-item 8 of Item 1 of Article 88 of the Health Code** provides for the right to receive free information about methods of prevention, diagnostics, treatment and medical rehabilitation from state bodies, organizations and an attending doctor.

The National Legislation

- ▶ **Sub-item 5 of Item 2 of Article 33 of the Health Code** (healthcare entities should provide citizens with free, quick and accurate information about forms and types of medical assistance)
- ▶ **Paragraph 2 of Item 2 of Article 91 of the Health Code** (when admitted to a medical organization, the patient should be provided with information about the names and professional statuses of those who will offer medical services)

- ▶ **Item 5 of Article 119 of the Health Code** (a doctor should provide a person suffering from a mental disorder/disease with information about the nature of the mental disorder/disease, aims and methods of treatments and information about the duration of recommended treatment, about possible pains, side effects and results expected)
- ▶ **Sub-item 3 of Item 1 of Article 133 of the Health Code** (providing people suffering from alcoholism, drug addiction and toxicomania with information about their rights, the nature of narcological disorders, methods of treatment applied and the medical and social rehabilitation)
- ▶ **Sub-item 1 of Item 1 of Article 171 of the Health Code** (the donor has the right to demand that healthcare organizations provide full information about possible complications for the donor's health because of the expected surgical intervention to remove tissues and/or organs/parts of organs)
- ▶ **Sub-item 1 of Item 2 of Article 171 of the Health Code** (the recipient has the right to demand that healthcare organizations provide full information about possible complications for the recipient's health because of the expected surgical intervention on transplantation tissues and/or organs/parts of organs)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws or orders on this responsibility/duty.

d) Provider Code(s) of Ethics

There is no specific provision in Article 184 of the Health Code on this responsibility/duty.

e) Other Relevant Sources

References to other significant sources relevant to this responsibility/duty are unavailable.

f) Practical Examples

1. Example(s) of Compliance

During an appointment a patient asked a dentist what filling material was preferable. The dentist explained to the patient that amalgam filling is quite solid but its thermal conductivity was high. In addition, amalgam filling does not look very aesthetically pleasing. The dentist recommended other filling materials, used by the clinic dentists, to the patient, saying that they are as strong as amalgam and can be chosen to match the color of a tooth and therefore look more aesthetically pleasing.

2. Example(s) of Violation

- Concealing - not informing the patient about alternative treatment methods
- Imposing upon the patient of a private clinic a more expensive, but not surely more effective, treatment
- A young woman gave birth to a baby in the hospital. When the baby was taken to her for feeding, doctors recommended to her not to remove swaddling clothes because of the catheter in the baby's sub-collarbone vein. The woman obediently followed the recommendations, did not

change the swaddling clothes, and was very careful. On the 15th day, before checking out of the hospital, the woman was told by the doctors of the maternal clinic that a “staphylococci burn” appeared on the right hand of the baby. The doctors gave the young mother an ointment and sent her and the baby home. Only at home did the woman see how awful this burn was. The baby’s hand was deformed and crippled, and his fingers did not straighten. In the medical statement which the hospital doctors gave her upon her leave, there was not written anything about the baby’s hand and there was no recommendation to consult a surgeon. The pediatrician from the polyclinic which came to the baby’s home to check the newly-born baby recommended consulting a surgeon. After the consultation with the surgeon, the baby was operated on, but with no positive results. About all these events the woman told the doctor of the “Hot line” at PA “Aman-Saulyk.” The “Aman-Saulyk” doctor noted that such concept as «a staphylococcal burn» in medicine does not exist at all. To clear a situation, the inquiry was sent to Committee of control of medical and pharmaceutical activity of MZ RK.

3. Actual Cases

C⁶, a three-month-old from an orphanage, was placed on 14 November in an isolation ward of the orphanage. She had fever and was diagnosed as having an acute respiratory infectious virus. The orphanage’s doctor prescribed medications for the girl and she was given them for eight days by the orphanage staff. At the same time, despite the fact that the child’s condition did not improve, it was not discussed by doctors whether the medications or her treatment on the whole should be changed. Moreover, blood tests and X-ray study of the child’s chest had not been made during her examination and treatment in the orphanage.

A week later the girl’s temperature rose to 38 degrees Centigrade again and she started suffering from apnea. An ambulance took the child to the somatic diseases unit of a children’s hospital. Despite the fact that the child was taken to the hospital urgently, doctors only examined her the following day. The examination records did not include notes about the girl’s health condition and her diagnosis. The records did not contain examination and treatment plans either. Analyses were only carried out a day after she arrived at the hospital, when her health condition sharply deteriorated. Then doctors diagnosed her as having “acute community-acquired pneumonia on the right side, respiratory failure of the second and third degree of severity, and congenital heart disease,” and the girl was taken to the regional hospital’s intensive care unit in an ambulance. Doctors of this hospital did not find indications for resuscitation though the child was examined at the reception department, confirming the diagnosis of pneumonia of proximal bronchus. However, doctors did not give any recommendation as to its treatment.

The same day, the child was taken back to the children’s hospital and doctors re-examined her and indicated the severity of her condition without correcting the treatment and redoing the X-ray of her chest. In spite of her severe condition, the child was left without a duty doctor’s surveillance and was only examined once a day. A repeated council of doctors was not held.

Only on one day, 27 November, did a duty doctor examine the patient, evaluating her condition as severe; but he did not do anything to treat her. Six hours later, the same doctor unsuccessfully

6 Based on reports by www.ukg.kz

tried to resuscitate the girl, but she died. During the autopsy, it was revealed that the child had had double-sided viral and bacterial bronchial pneumonia and a number of other diseases of respiratory tract, which resulted in serous and purulent meningitis.

When the child died, the prosecutor's office began checking this case. It reported that doctors had not prescribed medications corresponding to the severity of the little patient's illness, applied preparations for her de-intoxication and improving her metabolism, or consulted a cardiologist, neurologist and other specialists. Moreover, the patient's medical records did not include the dosage of the prescribed medications. *(Please see practice notes below.)*

g) Practice Notes for Lawyers

The hospital staff in the above case did not adequately control the child's condition because the child's rights were not protected and represented by her parents. This was one of the reasons for the outcome. The three-month-old C was not able to protect her rights and interests independently. However, she was under the guardianship of the orphanage, whose medical workers were responsible for taking care of their children, to ensure their treatment and protect their rights and interests. The guardian's temporary placement of a child in a hospital does not suspend the guardian's rights and duties with regard to the child. However, the orphanage administrators never showed their interest in the child's condition and treatment during the child's stay in the hospital. Moreover, health workers were obligated to inform the orphanage about the opportunity to choose treatment methods.

The medical commission, after the prosecutor's office intervention, came to a conclusion that "the allowed shortcomings of medical and diagnostic processes at all stages of rendering of medical care caused death of the child. The death of the child could have been avoided." A further public prosecutor's check - at the same time as medical commission work - nevertheless did not find evidence of a crime in the actions/inactions of the doctors but the prosecutor's office suggested the corrections of violations of legality in the Department of health care, the children's hospital and the children's home.

Obligation of Health Workers to Properly Execute Their Professional Responsibilities

a) Non-fulfillment or inadequate fulfillment of these duties makes health workers answerable in line with the legislation of the Republic of Kazakhstan. First medical aid is included in a list of the guaranteed volume of free health services. This obligation is related to the Patient's Right to Observance of Quality Standards.

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection. The right to health protection is directly linked to the observation of Item 6 of Article 182 of the Health Code that provides for duties of medical and pharmaceutical workers

The National Legislation

Sub-item 1 of Item 6 of Article 182 of the Health Code (a duty to properly fulfill professional duties by medical and pharmaceutical workers, respectful and humane behavior towards patients, guided by principles of medical ethics and deontology)

c) Supporting Regulations / Bylaws / Orders

There are no supporting regulations, bylaws or orders on this responsibility/duty.

d) Provider Code(s) of Ethics

Sub-item 5 of Item 2 of Article 184 (honest and quality fulfillment of professional duties)

e) Other Relevant Sources

Item 2 of the “12 Principles of Provision of Health Care in Any National Healthcare System,” based on a resolution adopted by the 27th World Medical Assembly in Munich, Germany, in October 1973 (physicians have a compelling professional and ethical duty to attend to a patient in an emergency)

f) Practical Examples

1. Example(s) of Compliance

T, a child diagnosed with acute lymphoblastic leukemia, underwent in-home examination and treatment for more than 18 months. A deputy chief doctor, the head of department, a beat children's doctor and a laboratory assistant attended to the boy over this period. They visited the boy and took tests every day. A hematologist from the second city hospital of Astana every three months recounted the dosage of supporting chemotherapy, wrote letters to make appointments with specialized doctors and accompanied him during those visits so that the boy did not have to queue.

2. Example(s) of Violation

- When a patient visited a general practitioner, the examination of the patient was carried out superficially and too fast.
- A nurse did not carry out her functions in fulfilling what was prescribed to the patient by the doctor in a timely manner.
- A man born in 1956 and disabled since childhood (child cerebral paralysis) complained of weakness and nausea. He went to the hospital where samples of his blood and urine were taken for analysis. His erythrocyte index was too high, but still doctors refused to put him in the hospital. When his relatives asked what his problem was, the doctor answered “maybe gastritis or pancreatitis” and refused to give any medical statement. At home the man was in bed all the

time, could not get up and could not even drink water, because whenever he tried to drink water, he vomited. After two days, he phoned the doctor from the polyclinic who insisted on an urgent ultra-sound inspection and advised to phone for a health ambulance in case of deterioration of health. Relatives brought the man to the diagnostic center. Ultra-sound inspection revealed pancreatitis. Relatives called the ambulance which took the patient to the same hospital where he went two days before. This time he had an operation. However, time was lost and as a result of delayed reaction of the doctors – and wrong diagnosis – the operation did not have desired results. After 15 days, the man died.

3. Actual Cases

- ▶ A court in Semei found a specialist of a family-run outpatients' clinic guilty of negligent fulfillment of his service duties (Item 4 of Article 114 of the Criminal Code of the RK), which led to a child's death. The court sentenced the defendant to one year in prison and deprived him of the right to work as a doctor for three years. The court also ruled that he should compensate for moral and material damages to the relatives of the boy who died at age nine. The boy, accompanied by his parents, first visited family doctor A. in November 2006 complaining about general indisposition and frequent fevers. Later, the boy continued visiting the doctor for six months, but the physician did not detect anything alarming in the tests of the boy, repeatedly making the same diagnosis – acute respiratory disease or acute respiratory infectious virus. The doctor never examined the child properly or palpated his lymph nodes, the liver or the spleen. A complete blood test was not prescribed. Only after the parents, who were anxious about their child's deteriorating health, insisted, did the family doctor send the patient to specialized doctors. When a cardiologist examined and performed an ECG, she urgently invited a surgeon for consultation the same day. The surgeon discovered an enlarged liver and spleen. The boy was first taken to the city's infectious diseases hospital and then to the regional hospital, where it was established that the number of cancer cells in his blood exceeded the acceptable levels by 500 times. In spite of the intensive treatment in the clinic's hematology unit, the boy died two days later. The mother said that doctors ignored her complaints about her son's frequent nosebleeds. Between March 2006 and January 2007, the boy was registered in a tuberculosis clinic for his positive reaction to a tuberculosis test. Comprehensive forensic examination showed that the boy was correctly diagnosed as having "acute lymphoblastic leukemia of high risk at its full scale." However, "delayed diagnosis and undervaluation of the severity level did not make it possible to make the clinical diagnosis correctly and timely, which caused the development of the final stage and severity of the disease and led to the fatal outcome." Violation of duty to properly execute professional responsibility in this case consisted of the superficial examination of the patient, resulting in failure to send the child for a full clinical examination, despite the lengthy malaise of the child.
- ▶ Several children were born in a town's maternity hospital between 3 and 10 October 2008. When children were brought to their mothers for breastfeeding the following day after their births, each mother detected skin pustular eruptions on their children's skins. Doctors explained that this was caused by a fetal infection, and that there was no reason for panic. On 10 October, all of the women were discharged from the hospital despite the fact that their children had been diagnosed as suffering from vesicular pustule. The hospital appointed a nurse, who for additional payment visited the children's homes to treat their pustules and to give them injections. Between 15 and 17 October, a district pediatrician urgently sent 11 children to the

regional hospital for inpatient treatment. Their mothers learned that vesicular pustule is a hospital-acquired staphylococcus infection. Doctors in the obstetrical pathology unit battled for the health of the infants. But time was wasted and the disease turned the eruptions into ulcers. The parents were absolutely shocked when doctors from the maternity hospital said that the children contracted vesicular pustules at home.⁷ It is obvious from this example that the right to safety, the observance of quality standards and respect for patients' time were violated (Authors' opinion). In a letter to the editorial office of a newspaper, several women from the maternity hospital (mothers of the newborn children) said sanitary doctors checked the town maternity hospital. The inspection did not reveal hospital-acquired infections or, moreover, an outbreak of staphylococcus. Meanwhile, the sick children's mothers were waiting for test results to finally obtain an answer to the question of what caused the children's disease. Any later determination is unknown.

g) Practice Notes for Lawyers

If a patient dies or his/her health is harmed, the patient (or his relatives, if the patient died) may appeal to corresponding bodies (the police, the prosecutor's office) to open a criminal case on charges of harming health. If the corresponding bodies find signs of a crime, then a criminal case will be opened. Forensic examination results are crucial in these kinds of cases. Investigative bodies will have to establish what actions or inactions caused the damage.

Safeguarding Medical Secrecy

a) Medical secrecy means keeping confidential the information about requests for health services, about the health conditions of citizens, diagnosis of their diseases and other information received during examination and (or) treatment. This obligation is related to the Patient's Right to Privacy and Confidentiality.

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Article 18 of the Constitution of the RK ensures the right to inviolability of private life, personal or family secrets, protection of honor and dignity.

The National Legislation

- ▶ **Article 28 of the Health Code** (ensuring confidentiality of information about patients)
- ▶ **Sub-item 7 of Article 87 of the Health Code** (guarantees of preserving information which constitutes medical secrecy)

⁷ Based on reports by the Nasha Gazeta weekly on 23 October 2008

- ▶ **Article 95 of the Health Code** (medical secrecy)
- ▶ **Item 2 of Article 142 of the Health Code** (information on anatomic specifics should not be made public)
- ▶ **Item 3 of Article 171 of the Health Code** (a ban on publicizing information on the donor and recipient by medical and other staff of healthcare organizations)
- ▶ **Sub-item 5 of Item 6 of Article 182 of the Health Code** (medical and pharmaceutical staff should preserve medical secrecy, not publicize information about illnesses and about the private and family life of citizens)
- ▶ **Article 85-3 of the Code of Administrative Offences of the RK** (“Disclosing medical secret”)
- ▶ **Article 144 of the Criminal Code of the RK** (“Disclosing medical secret”)

c) Supporting Regulations / Bylaws / Orders

- ▶ **Order No. 623 On Approving the Rules for the Elimination, Preservation, Transplantation of Tissues and/or Organs/Parts of Organs from a Human to a Human, from a Corpse to a Human and from an Animal to a Human**, issued by the Minister of Health of the Republic of Kazakhstan on 30 October 2009
- ▶ **Order On Approving the Rules of Preclinical Research, Medical and Biological Experiments and Clinical Trial in the Republic of Kazakhstan**, issued by the Minister of Health of the Republic of Kazakhstan on 12 November 2009 (Item 30 - confidentiality of data that can be used to identify the person must be protected pursuant to the rules of privacy as per the relevant requirements of the legislation of the Republic of Kazakhstan)

d) Provider Code(s) of Ethics

- **Sub-item 4 of Item 2 of Article 184 of the Health Code** (prevention of actions that may discredit the prestige of a medical or pharmaceutical worker of the Republic of Kazakhstan)
- **Sub-item 11 of Item 2 of Article 184 of the Health Code** (prevention of the use of professional information for personal or other purposes)

e) Other Relevant Sources

- **Article 17 of the International Covenant on Civil and Political Rights**
- **Item 6 of “12 Principles of Provision of Medical Assistance in Any National Healthcare System”** (based on a resolution adopted by the 27th World Medical Assembly in Munich, Germany, in October 1973)
- **International Code of Medical Ethics, adopted by the third General Assembly of the World Medical Association, Geneva, Switzerland, in October 1949** (“The death of a patient does not free a doctor from a duty to preserve medical secrecy.”) The duty of safeguarding medical secrecy is not just a professional duty but also a moral and ethical duty of a health worker. National legislation - not this code of ethics -

provides for legal responsibility up to criminal liability for violating this duty. **Article 85-3 of the Administrative Violations Code of the RK** envisages liability for disclosing medical secrecy. **Article 144 of the Criminal Code of the RK** provides legal responsibility of a health worker for disclosing, without professional or official service need, data on disease or results of medical check-up, manifested in informing data on HIV/AIDS presence. At the same time, one should remember that disclosing secret medical information without the consent of a citizen or his/her legal representative is allowed in the following cases (**Item 4 of Article 95 of the Health Code**):

- with the aim of examining and treating a citizen who is not capable of expressing his/her will because of the state of his/her health (among colleagues inside a medical community, for example)
- the threat of the spread of diseases that pose a danger to the surrounding people
- at the request of investigative bodies, a prosecutor, a lawyer and /or court in connection with an investigation or court hearings
- while providing medical assistance to a minor or a mentally incapacitated individual - to inform their legal representatives
- when there are grounds to assume that damage to the health of a citizen was a result of unlawful actions

f) Practical Examples

1. Example(s) of Compliance

The head of a center for people who use drugs in the North Kazakhstan Region, under the requirement of keeping medical secrecy, refused to give a Karavan newspaper reporter information about the condition of an accused, B., who was suffering lymphogranulomatosis and was held in a detention center.

2. Example(s) of Violation

- Free access to outpatients' records kept in the registry
- Giving outpatient's records to another person by mistake
- Medical workers' discussion with other medical workers of diagnosis and treatment methods without professional need for that
- At the court session, the surgeon, who operated on the patient, announced that the patient was HIV-infected.

3. Actual Cases

- ▶ In Aktobe, members of the city perinatal center took video pictures of laboring women against their will. The mother of one of the women, who had recently given birth, said that a doctor on duty had allowed her daughter to be photographed with a mobile phone camera when she was laboring. Relatives of the patient complained to the healthcare department and law-enforcement bodies of Aktobe Oblast.⁸ At the time of this writing, there still is no decision, as the facts are being checked. (*Authors' note: The purpose of the videotaping is unknown at this time, although*

8 <http://news.gazeta.kz/> 19.09.2008

it may have been for teaching purposes. However, even in that case, a woman's consent is necessary.)

- ▶ During an inspection of medical organizations in the Aktobe Oblast, the prosecutor's office discovered a case of disclosing medical secrets by staff of a healthcare organization. According to the requirements of Article 29 of the Law of the RK *On Citizens' Health Protection* (the law that was valid at the moment of the inspection), sending replies to employers' inquiries about the reliability of medical certificates issued by health organizations, indicating diagnosis, prescribed treatment etc., is a widespread violation in health organizations' practice. At the prosecutor's request, the regional healthcare department considered the case and took measures to prevent this kind of violations in the future. Disciplinary proceedings were instigated against two persons. The result of the disciplinary proceedings was to place blame. *(Authors' note: If it had been determined to be an administrative violation or a crime, then the guilty person would have been dealt punishment or penalty. In 2011, Article 85-3, "Disclosing medical secret," was added to the Administrative Code of the RK; the Criminal Code of the RK contains Article 144 "Disclosing medical secret.")*

g) Practice Notes for Lawyers

Failure of a health care provider to fulfill this duty makes it possible to appeal to court to protect a patient's right to confidentiality. Not only a civil case but an administrative and a criminal case can also be brought against alleged culprits. In order to institute criminal proceedings, the body of the crime must be established. The degree of social danger of a crime is always higher than the degree of danger of a legal wrongdoing. After a claim is filed with law-enforcement bodies and the relevant inspection is conducted, a criminal case will be opened or the case will be dropped. This, however, does not deprive a patient of the right to file a civil case to protect his/her honor and dignity. See questions related to relevant proceedings in Chapter 8 – National Procedures and Appendixes.

Observance of Sanitary and Epidemiological Rules and Regulations, Hygiene Standards

a) This is the general requirement that influences the quality of health services. This obligation is related to the Patient's Right to Preventive Measures.

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

Article 29 of the Constitution of the RK ensures the right to health protection.

The National Legislation

Articles 143-152 of the Health Code (activities in the sphere of the epidemiological wellbeing of the population)

These provisions ensure: the system of the state sanitary and epidemiological service; sanitary and epidemiological requirements; and conditions for introducing restrictions, including quarantine, in case of epidemics. They provide for actions to prevent outbreaks of infectious and parasitic diseases and poisoning of the population.

c) Supporting Regulations / Bylaws / Orders

- ▶ **Sanitary Rules of Functioning and Maintenance of Medical Facilities and Organizations**, approved by the Chief Sanitary Doctor on 2 July 1997
- ▶ **Sanitary-Epidemiological Requirements to Objects in the Sphere of Circulation of Medicine (Drugs), Medical Goods and Medical Equipment**, approved by Regulation No. 91 of the Government of the Republic of Kazakhstan on 17 January 2012
- ▶ **Sanitary-Epidemiological Requirements to Healthcare Objects**, approved by Regulation No. 87 of the Government of the Republic of Kazakhstan on 17 January 2012

d) Provider Code(s) of Ethics

There are no relevant provisions of the provider code of ethics on this responsibility/duty.

e) Other Relevant Sources

There are no other relevant sources on this responsibility/duty.

f) Practical Examples

1. Example(s) of Compliance

According to the Health Code of the RK state authorities of sanitary-and-epidemiologic service carry out supervision according to the prevention, identification, suppression of violations of the law of the Republic of Kazakhstan in the field of sanitary-and-epidemiologic wellbeing of the population with a view of health protection and population habitat.

During inspection of one of the city snack bar's about observance of requirements of the legislation of RK in the sphere of sanitary-and-epidemiologic wellbeing of the population, violations of standards of the Health Code of the RK and sanitary-and-epidemiologic requirements to objects of public catering were revealed: persons who do not have documents were allowed to work, indicating the false certifying of passing of medical examinations by those persons; the goods, products, and raw materials not corresponding to hygienic standards were not destroyed in time; and disinfection events were not held. Upon repeated check of the snack bar, it was determined that all prior revealed violations were eliminated in full, as confirmed by the act of sanitary-and-epidemiologic inspection.

2. Example(s) of Violation

- Poor performance by sanitary services

- An insufficient number of laboratories which study food products for genetically- modified ingredients
- In violation of item 29 of the Health regulations for objects of health care, six beds instead of four were established in patient rooms in a hospital

3. Actual Cases

There is no court decision relevant to this responsibility/duty at this time.

g) Practice Notes for Lawyers

Cases of violations of sanitary requirements and hygienic norms demand that lawyers be particularly meticulous because of the numerous legislative acts in this sphere. That is why it is necessary to check their legal force at the time of uncovering violations. If appropriate legislative acts are legitimate, lawyers should report the provisions violated or not fully performed by the actions or omissions of health care providers. If a violation of sanitary and epidemiologic rules caused the sickness or poisoning of the people, providing presence of other necessary conditions – age of a person, his/her guilt, criminal ability and criminal actions (*a person can be guilty and punished not only if he/she caused the sickness or poisoning of the people, but also in certain instances when investigators have adjusted for other necessary conditions as mentioned here*) - this can be a basis for criminal prosecution of the accused persons in compliance with **Article 267 of the Criminal Code of the Republic of Kazakhstan**. If there are no such consequences, such as sickness or poisoning of the people, those guilty of violation of the rules can be brought to administrative account under **Article 323 of the Code of Administrative Offences of the Republic of Kazakhstan**. The main result of being brought to administrative account is the imposition of a fine; an additional punishment can be a stay of business activity. Even if there are consequences such as sickness or poisoning of the people, however, those consequences alone are not enough to open a criminal case. Harmful consequences without proof of guilt, a causal link and some other necessary factors will not establish a right to open a criminal case.

Rendering Emergency Medical Aid in Emergency Situations

a) Emergency aid is a form of provision of medical assistance when the emergence of diseases and conditions demand urgent medical assistance to prevent significant damage to health or eliminate a threat to life. This obligation is related to the Patient's Rights to Respect for Patient's Time and to Avoid Unnecessary Suffering and Pain.

b) Duties and Responsibilities as Stated in Constitution and National Legislation

The Constitutional Provision

► **Article 29** of the Constitution of the RK guarantees the right to health protection:

Item 2: "Citizens of the Republic of Kazakhstan shall be entitled to free, guaranteed, extensive medical assistance as established by law."

In line with Sub-item 1 of Item 2 of Article 34 of the Health Code, the guaranteed volume of free medical services includes emergency medical aid.

The National Legislation

- ▶ **Sub-item 1 of Item 2 of Article 34 of the Health Code** (the guaranteed volume of free medical services includes first aid services)
- ▶ **Article 49 of the Health Code** (opens the maintenance of the first aid and the order of its rendering)
- ▶ **Sub-item 3 of Item 6 of Article 182 of the Health Code** (provision of first aid services to the population in emergency situations)

c) Supporting Regulations / Bylaws / Orders

- ▶ **Resolution No. 2136 On Approving the List of Guaranteed Volume of Free Medical Services**, issued by the Government of the Republic of Kazakhstan on December 15, 2009
- ▶ **Regulations for the Provision of Emergency Aid and Emergency Medical Services** (annex to Order No. 641 by the Acting Minister of Health of the RK on 25 December 2006)

d) Provider Code(s) of Ethics

Sub-item 2 of Item 4 of Article 184 (medical and pharmaceutical workers should not refuse to provide “no-strings attached” assistance – disinterested aid - and ask colleagues for advice if the interests of a patient demand this)

e) Other Relevant Sources

Item 2 of “12 Principles of Provision of Medical Assistance in Any National Healthcare System,” based on a resolution adopted by the 27th World Medical Assembly in Munich, Germany, in October 1973 (it is a professional and ethical duty of a doctor to provide any person with emergency medical aid without exception)

f) Practical Examples

1. Example(s) of Compliance

According to emergency indications, more than 1,5 million Kazakhstan citizens are annually hospitalized; daily in Almaty alone about 14000 ambulance calls are served.

2. Example(s) of Violation

Inadequate qualification of emergency medical personnel

3. Actual Cases

At night on December 10, 2011, a pregnant woman started laboring. Her relatives called an ambulance, but the woman gave birth before the ambulance arrived. The baby did not breathe. When the ambulance arrived, the ambulance doctor stated to the woman and her husband that their

child had died, put the baby in a plastic bag and took him, with his parents, to the maternal clinic. The woman was put in the hospital, and the baby was given to the father to bury him. However, the man felt the baby's pulse. The baby was immediately put in the resuscitation department of the hospital.

Later the Director of the Department of Health Care of Almaty explained that the death was stated by the ambulance doctor: there was no breathing or heartbeat, the baby's breathing was not restored during 19 minutes. There was no pulsation on the navel vein. The baby's temperature went down. There were no muscle motions. (Please see practice notes below.)

g) Practice Notes for Lawyers

In this case, official investigation by management of the health care facility and the Department of the Committee of Control of Medical and Pharmaceutical Activities for Almaty was made. The ambulance doctor, who stated the death of the baby, was dismissed for the improper, negligent relation to the duties. In addition, a criminal case was filed against that doctor (*Article 114 of the Criminal Code - "Inadequate performance of professional duties by medical and pharmaceutical workers"*).

8.1 MECHANISMS TO PROTECT/ENFORCE RIGHTS AND RESPONSIBILITIES IN COURT

8.2 ADMINISTRATIVE PROCEDURE

8.3 CIVIL PROCEDURE

8.4 CRIMINAL PROCEDURE

8.5 ALTERNATIVE MECHANISMS TO PROTECT/ENFORCE RIGHTS AND RESPONSIBILITIES

Appeal to the Prosecutor's Office

Appeal to the Ombudsman

Appeal to the Bodies of Internal Affairs

Appeal to the Ethics Commission

Appealing to the Service for Supervision over Healthcare Establishments

Mediation

Other

8.6 APPENDIXES

8

National Procedures and Appendixes

8.1 Mechanisms to Protect/Enforce Rights and Responsibilities in Court

Protecting patients' and medical workers' rights in Kazakhstan is a complex of judicial and non-judicial mechanisms to ensure availability of high-quality and accessible medical services for patients and the restoration of rights and damage compensation for patients, as well as medical and pharmaceutical workers. The legal basis for this protection is enshrined by provisions of the Constitution of the Republic of Kazakhstan, as well as by the civil, administrative and criminal law. Procedural matters are governed by civil procedure and criminal procedure codes. Extra-judicial means of protecting human rights in patient care include applications to the Committee for Control of Medical and Pharmaceutical Activities of the Health Ministry, to the Ombudsman, prosecutors and non-governmental organizations (NGOs, foundations).

ARTICLE 13 OF THE CONSTITUTION OF THE RK:

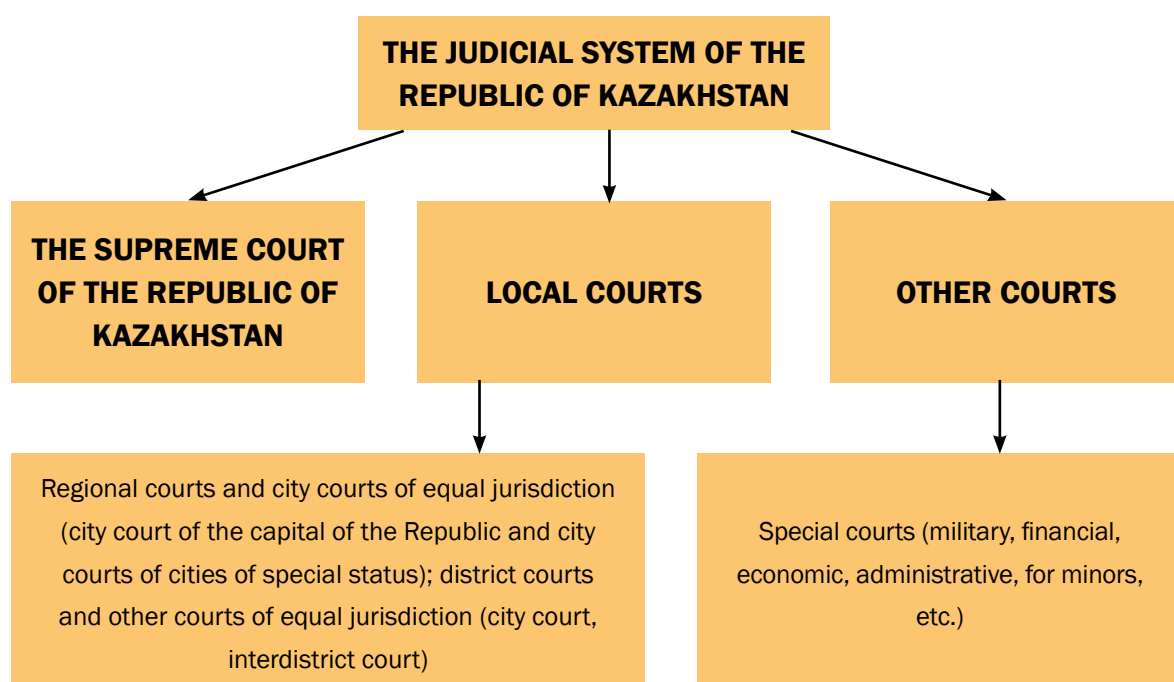
“Everyone shall have the right to judicial defense of his rights and freedoms.”

“Everyone shall have the right to qualified legal assistance. In cases stipulated by law, legal assistance shall be provided free of charge.”

In line with **Sub-item 10 of Item 1 of Article 88 of the Health Code**, citizens of the Republic of Kazakhstan have the right to complain about actions/inactions of medical and pharmaceutical staff to healthcare organizations, or to a higher body which can be a regional health care department or the Ministry of Health Care and/or to court. The analysis of citizens’ complaints shows that filing a court case is the most effective way of defending rights in this area. In contrast to non-judicial forms, this mechanism creates more guarantees to protect human rights in patient care, although it can be paired with lengthy process and cumbersome judicial procedures. The judiciary is the branch of government that is authorized to resolve disputes. This makes it possible to regard court proceedings as the main part of the system of protection of patients’ and medical providers’ rights. In line with the existing legislation, any citizen of Kazakhstan with legal capacity has the right to file a court case if a defendant’s actions or inaction violated their rights or caused damage.

ASSIGNMENT OF JUDICIAL AUTHORITY

The judicial authority in the Republic of Kazakhstan is acknowledged to protect the rights, freedoms and legitimate interests of citizens and organizations, and to ensure the implementation of the Constitution, laws, other legislative acts and international agreements.



Basic patients' reasons for the appealing for court protection:

- Inadequate health services
- Medical mistakes

Basic medical providers' reasons for the appealing for court protection:

- Reinstatement in a job
- Arrears of payments

Poor quality medical services and medical errors in most cases lead to physical harm and sometimes to a lethal outcome to patients. The border separating innocent harm from criminally-negligent actions is very vague. Only the court can resolve the question of whether someone is guilty. In addition to this, the compensation for material and/or moral damage is also determined by the court. Patients' and medical providers' rights are defended directly during the application of provisions of substantive and procedural law.

Who considers a case in substance?

District courts - courts of first instance - consider civil and criminal cases and materials, which are under their jurisdiction.

Can a court order (judicial act) be appealed?

A court order (judicial act) which has no legal power still can be appealed in courts of appeal (**Article 332 of the Civil Procedure Code** of the RK and **Article 396-1 of the Criminal Procedure Code** of the RK). The appeal or protest moves on the decisions, resolutions and definitions of the courts of first and appeal instances which have already legal power (**Article 383-1 of the Civil Procedure Code** of the RK and **Article 446-1 of the Criminal Procedure Code** of the RK).

Legislative Acts Regulating Court and Enforcement Proceedings in the Republic of Kazakhstan

- Constitutional Law of the Republic of Kazakhstan of 25 December 2000, № 132-II "On the Judicial System and Judge Status of the Republic of Kazakhstan"
- The Code of Civil Procedure of the Republic of Kazakhstan of 13 July 1999
- The Code of Administrative Offences of the Republic of Kazakhstan of 30 January 2001
- The Code of Criminal Procedure of the Republic of Kazakhstan of 13 December 1997
- The Code of Criminal-Executive of the Republic of Kazakhstan of 13 December 1997
- Law of the Republic of Kazakhstan of 2 April 2010 "On Proceeding and Bailiff Status"

8.2 Administrative Procedure

The occurrence of an alleged administrative violation is a reason for filing an administrative case. In line with **Article 28 of the Code of Administrative Offences of the RK**, an administrative violation is an illegal and culpable (deliberate or negligent) action or inaction by an individual or an unlawful action or inaction by a legal entity, as provided for by the Code.

Cases considered by administrative courts

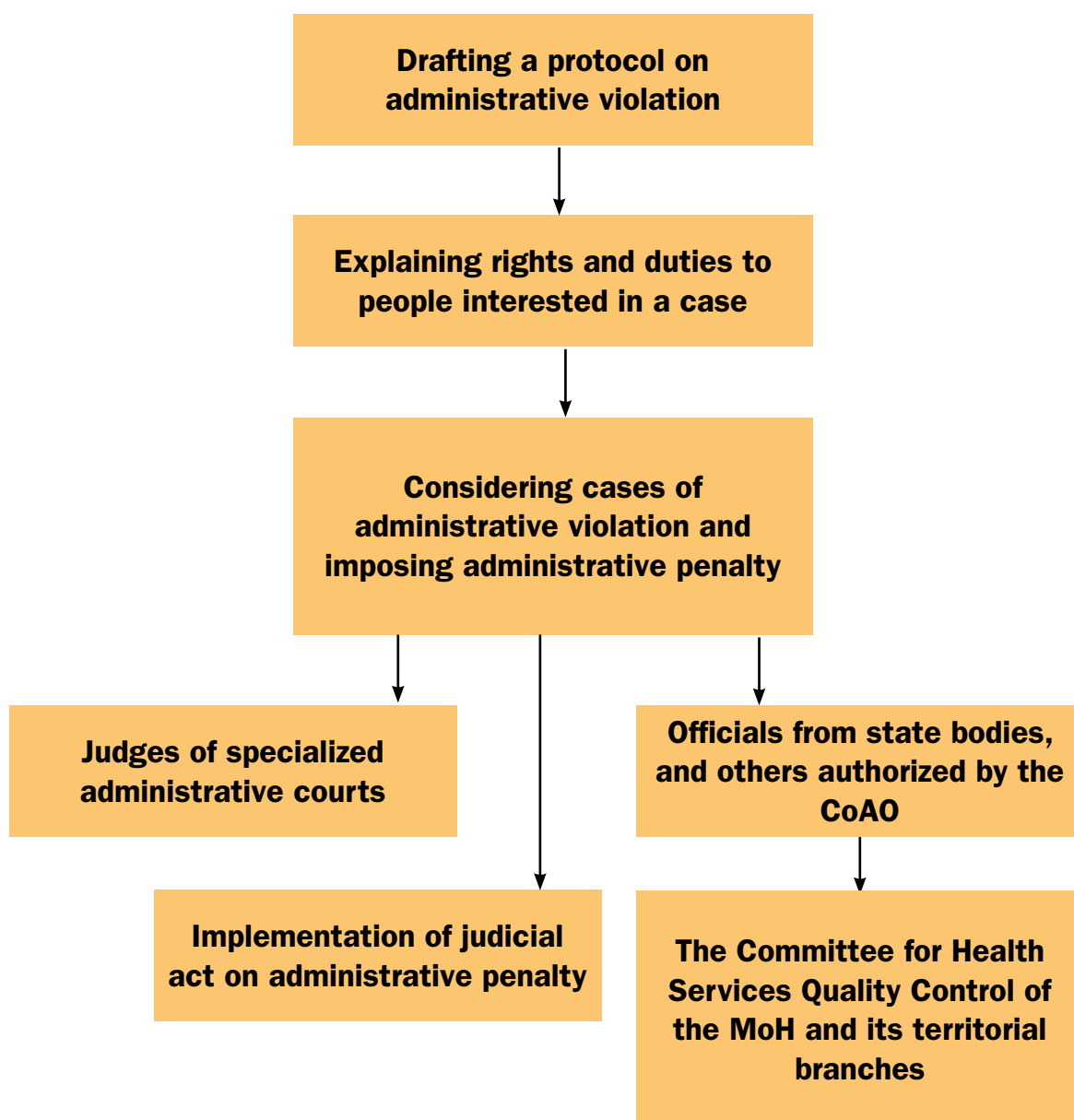
Administrative courts consider those types of unlawful actions which by their severity are not regarded as crimes, included into the Code of Administrative Offences (CoAO) of the Republic of Kazakhstan (**Article 541 CoAO of the RK**).

Provisions of the administrative legislation regulating protection of citizens' rights in the area of health care

- ▶ **Chapter 10 “Administrative offences encroaching on an individual’s rights”:**
 - “Failure to observe rules and standards, and poor-quality health services” (**Article 85**)
 - “A health worker’s violation of the rules of issuing a medical certificate on temporary loss of ability to work” (**Article 85-1**)
 - “A health worker’s violation of the rule of prescription and selling medications” (**Article 85-2**)
 - “Disclosing medical secret” (**Article 85-3**)
- ▶ **Chapter 12 “Administrative violations encroaching on minors’ rights”:**
 - “Sale of tobacco and tobacco products to individuals under 18” (**Article 114**)
- ▶ **Chapter 21 “Administrative violations encroaching on public safety and the population’s health”:**
 - “Unlawful medical and/or pharmaceutical activities” (**Article 322**)
 - “Violation of the legislation on the population’s sanitary and epidemiological wellbeing, and hygienic standards” (**Article 323**)
 - “Violation of the rules of pharmaceutical activity” (**Article 324**)
 - “Unlawful health care activity and unlawful writing or forgery of prescriptions or other documents, enabling one to receive narcotic drugs and psychotropic substances” (**Art.324-1**)
 - “Inaccurate advertisement in the healthcare sphere” (**Article 325**)
 - “Evasion of medical examination and treatment by individuals in contact with patients with HIV/AIDS, tuberculosis, venereal diseases and people consuming drugs and psychotropic substances without doctor’s prescription” (**Article 326**)

- “Evasion of treatment by individuals suffering from diseases that threaten people around them” (**Article 327**)
- “Concealment by individuals suffering from diseases that threaten people around them, sources of infection and individuals whom they have contacted” (**Article 328**)
- “Provision by healthcare organizations of deliberately false information to obtain a medical license”: if there is no evidence of criminally-liable acts, this is punished by a fine (**Article 328-1**)

Stages of administrative proceedings against violation of healthcare legislation



Within what period can a court decision on an administrative violation be appealed?

Complaint and protest against the ruling on an administrative violation can be filed within 10 days from the day of receiving a copy of the court ruling by the person who wishes to appeal. The complaint against the ruling on an administrative violation is directed to the judge, to the body (official) which has taken out the resolution on business. They are obliged within a three-day term from the date of receiving the complaint and protest to send them with all materials of business to the relevant court or higher body (the higher official).

8.3 Civil Proceedings

If a patient's or medical provider's rights are violated, compensation for property and non-property damages can be claimed through civil proceedings. The implementation of the right to proceed through civil proceedings is based on the provisions of the Civil Code of the Republic of Kazakhstan (the CC of the RK).

The legislation envisages the possibility of compensating not only property damage, but also non-property damage. Compensation of non-property damage is implemented irrespective of property damage, which has to be compensated. In determining the amount of compensation, the degree of fault of the offender is taken into account, as well as the circumstances under which the damage was made.

The judicial protection of a person's rights, freedoms and legal interests is regulated by Article 8 of the Code of Civil Procedure of the Republic of Kazakhstan (the CCP of the RK). The protection of this right starts with filing a claim.

What is a court lawsuit?

A court lawsuit is a legal demand by a person to another person submitted to a court, observing established procedural rules. A court lawsuit can be filed when material or non-material damages were caused. A person's life and health is a non-material good, but compensation for damage is determined in monetary terms.

Who can file a lawsuit?

Anybody, either by him/herself or with legal representation, is entitled to appeal to court for protecting the violated or disputed constitutional rights, freedoms or lawful interests. A prosecutor could file a lawsuit within the framework of his professional duties and to protect rights of citizens, legal entities, public and national interests.

What does a claim represent?

Claim: a form of manifesting a claim - a document containing demands of the plaintiff, observing the established requirements of the legislation.

In what form should a claim be submitted?

A claim should be submitted either in written or electronic form.

What requirements must a claimant follow in preparing a claim?

- Indicate claimant's name and address; the claimant must include the same information about the defendant;
- State the point of the claim: to show what right was violated and what is demanded from the defendant;
- To substantiate the claim, that is to indicate circumstances on which the claimant bases the claim against the defendant;
- The amount of the claim if it is subject to assessment; and
- A list of documents that the claimant attaches to the claim.
- Copies of the claim and documents are submitted to the court depending on the number of defendants and other persons whose interests are affected by the claim. There is a copy for each of those persons or legal entities.

Legal sources which can be used to protect violated rights

- The Civil Code of the RK
- The Code of Civil Procedure of the RK
- Law of the RK «On Protection of Rights of Consumers» of 4 May 2010
- The Supreme Court's legislative resolution of 21 June 2001 "On Some Issues Related to the Courts' Application of Legislation on Compensation for Moral Damage"
- The Supreme Court's legislative resolution of 9 July 1999 "On Some Issues Related to the Courts' Application of Legislation on Compensation for Health Harms"

8.4 Criminal Proceedings

A CRIMINAL PROCEEDING:

the practice by a specially-authorized body regulated by the Code of Criminal Procedure to establish a crime, persons guilty of this crime, and to take all legal measures to punish them in line with criminal legislation.

In accordance with the proclaimed principles of civil society, the legal protection of a person is the priority.

The Criminal Code of the RK includes special standards regulating the protection of patients' rights from health workers' criminal actions:

- **Article 114 of the Criminal Code of the RK** “Inadequate performance of professional duties by medical and pharmaceutical workers”
- **Article 114-1 of the Criminal Code of the RK** “Violation of the procedures of clinical research and the application of new methods of prevention, diagnostics, treatment and medical rehabilitation”
- **Part 4 of Article 116 of the Criminal Code of the RK** “Infecting with HIV/AIDS”
- **Article 117 of the Criminal Code of the RK** “Conducting illegal abortion”
- **Article 118 of the Criminal Code of the RK** “Failure to provide assistance to a patient”
- **Article 127 of the Criminal Code of the RK** “Unlawful placement in a psychiatric clinic”
- **Article 144 of the Criminal Code of the RK** “Disclosing medical secret”
- **Article 266 of the Criminal Code of the RK** “Illegal medical and pharmaceutical activity, and the illegal issue of or counterfeiting of prescriptions and other documents granting the right to obtain narcotics and psychotropic substances”
- **Article 267 of the Criminal Code of the RK** “Violation of sanitary and epidemiological rules”

In Kazakhstan, criminal proceedings are regulated by the Code of Criminal Procedure of the RK. A criminal case could be opened on the grounds of available, sufficient evidence indicating the signs of a crime, if there are no circumstances ruling out criminal proceedings.

Grounds for Opening a Criminal Case

Reasons and Grounds for Opening a Criminal Case (Article 177 of the Code of Criminal Procedure of the RK)

REASONS	GROUND
1) A statement from a citizen; 2) Acknowledgement of guilt; 3) A report by an official of a government body or a person fulfilling managerial functions in an organization; 4) A media report; or 5) Discovery of information about a crime by officials or bodies authorized to institute criminal proceedings.	1) Available sufficient evidence indicating the signs of a crime if there are no circumstances ruling out criminal proceedings; 2) Disappearance of a person, if during two months from the moment of filing an application for an investigation into his/her disappearance, the operational investigation carried out during this term to establish location did not produce any results and it was not possible to identify his/her location.

A Defender (defense attorney) is a person, defending rights and interests of the suspected and accused and providing them legal services. A lawyer (the defense) is provided from the moment of accusation or recognizing a person as suspected in conformity with **Part 1 Article 68 of the Code of Criminal Procedure of the RK.**

Criminal proceedings recognize as a victim a person in relation to whom there are grounds to consider that he/she directly suffered moral, physical or property damage as the result of the crime.

Rights of victims are listed in **Item 6 of Article 75 of the Code of Criminal Procedure of the RK.**

Does a victim get compensation for sustained damages?

The victim is ensured, based upon the Civil Code, that he/she receives compensation for property damage caused by a crime, as well as for expenses incurred by his participation in the preliminary investigation and in the court sessions.

What is a civil claim in a criminal case?

A person who causes moral, physical or property damage to a person or his/her relatives bears not only criminal responsibility, but is also answerable for the damages; and the victim has the right to file a claim. This claim, within a criminal case, is referred to as a civil claim, and the person who files this suit is called a “civil claimant.” A civil claim could be filed for covering expenses for burial, medical treatment of the victim, amounts paid to him as insurance compensation, allowance or pension, as well as expenses incurred in connection with participation in criminal proceedings, preliminary investigation and court sessions.

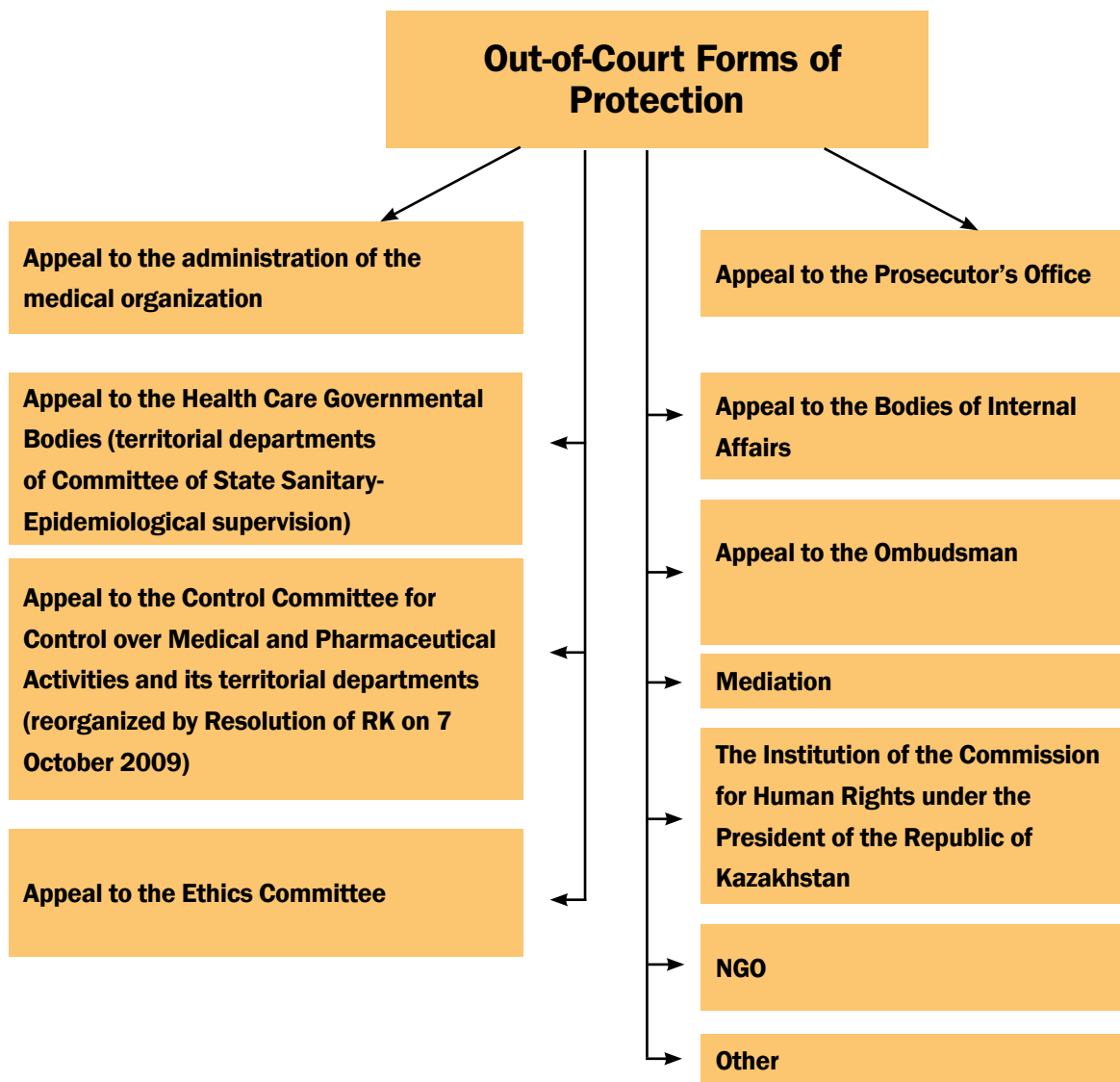
Against whom is a civil claim brought?

- A claim is brought against the accused or persons who bear material responsibility for the actions of the accused, and it is considered jointly with the criminal case.
- If a civil claim has not been filed during the criminal proceedings, or the court dismissed the claim, the claimant has the right to file the claim to a civil court.
- If a civil claimant is not satisfied with a court ruling on the case, the claimant has the right to appeal against the part of the ruling related to the civil claim.

In providing legal assistance in cases of the mentioned categories, it is reasonable to refer to the following legislative acts:

- The Supreme Court of the Republic of Kazakhstan’s legislative resolution of 11 May 2007 On the Qualification of Some Crimes against a Human’s Life and Health
- The Supreme Court of the Republic of Kazakhstan’s legislative resolution of 25 December 2006 On Court Practice in Cases of Private Prosecution
- The Supreme Court of the Republic of Kazakhstan’s legislative resolution of 9 July 1999 On Court Practice to Apply Forced Healthcare Measures

8.5 Alternative Mechanisms to Protect/Enforce Rights and Responsibilities



GENERAL PROCEDURE FOR OUT-OF-COURT FORMS OF PROTECTION

The general procedure of considering citizens' appeals is established by the Law of the Republic of Kazakhstan of 12 January 2007 On Procedures for Considering Appeals from Individuals and Legal Entities. This law regulates public relations linked to the filing and consideration of appeals from individuals and legal entities in order to implement and protect their rights, freedoms and legitimate interests. This law does not apply to the appeals by individuals and legal entities if procedures for these appeals are established by the legislation of the Republic of Kazakhstan On Administrative Offences, On Criminal Procedure and On Civil Procedure.

APPEAL TO THE ADMINISTRATION OF THE MEDICAL ORGANIZATION

At the emergence of a disputable situation connected with receiving poor-quality medical care, the patient has the right to address or complain to the administration of the medical organization. The patient can make a written address /complaint on the site of the medical organization, in the box for messages/ addresses/complaints placed at the entrance of the medical organization, or directly in the office of the medical organization. For objective and high-quality analysis, the address/complaint is considered by a commission of doctors and administrators. Along with written addresses/complaints, oral addresses/complaints of patients who were treated at the medical organization, or their lawful representatives, are considered also. Addresses/complaints of the patients who were on treatment will be registered in the Magazine of addresses of citizens. According to item 3 of Article 58 of the of the Health Code, addresses /complaints of the patients being treated, are to be considered in a time not exceeding five calendar days, providing the answer to the applicant.

APPEAL TO THE HEALTH CARE GOVERNMENTAL BODIES

In a case when the patient is not satisfied with the decision of the administration of the medical organization, he/she can address/complain to the territorial administration of the health care body to profile experts (the main therapist, the main surgeon, the main pediatricist, the main obstetrician-gynecologist) or directly to the health care management.

Healthcare department of Astana:

Address: 010000, Astana, Beybitshilyk str., 11
 Tel.: +7 (717 2) 55-68-23
www.densaulyk.astana.kz

Healthcare department of Almaty

Address: 050040, Dzhandosov str., 6
 Tel.: (727) 274-72-07; (727) 274-46-02
www.almatyzdrav.kz

Healthcare department of North-Kazakhstan region:

Address: 150000, Petropavlovsk, Theatre str., 56A
 Tel.: +7 7152 46-35-80
www.zdrav.sko.kz

Healthcare department of East-Kazakhstan region:

Address: 070002, Ust-Kamenogorsk, Gogol Street, 36
 Tel.: 8(7232) 52-32-06
www.densaulik.gov.kz

Healthcare department of West-Kazakhstan region:

Address: Uralsk, Dostyk-Friendship, 201

Tel.:51-28-88

www.bko.gov.kz

Healthcare department of South-Kazakhstan region:

Address: 160050, Shymkent, Republic Aven., 12 a

Tel.: 8 (7252) 50-09-94, 56-00-470

www.ru.ontustik.gov.kz/gw/zdrav_rus

Healthcare department of Akmola region:

Address: Kokshetau, Satpaev str.,11

Tel.: 8-7162-25-51-87,

Fax: 402773

oblzdrav@kokshetauonlain.kz

www.akmzdrav.kz

Healthcare department of Almaty region:

Address: 040000, Taldy-Korgan, Gaukhar ana 87,

Tel.: 8 7282 21-07-63

almoblzdrav@mail.ru

www.zdrav.zhetysu-gov.kz

Healthcare department of Aktyube region:

Address: 030010, Aktyube,pr. Abylkhair khan, 40

Tel.: 8 7132 56-30-55

Fax: 56-53-44

aktobezdrav@mail.kz

Healthcare department of Atyrau region:

Address: Atyrau, Aiteke bi, 77

Tel.: 8 7122 35-45-71

Fax: 27-09-62

oblzdrav_atyrau@asdc.kz

www.oblzdrav-atyrau.interesnet.kz/

Healthcare department of Zhambul region:

Address: 080012, Taraz, Zheltoksan str., 72

Tel.: 8 72- 62 43-36-36

Fax:43-27-49

oblzdrav@taraz.kz

Healthcare department of Karaganda region:

Address: 100000, Karaganda, Alihanov str., 2

Tel.: 8 7212 41-14-13

Fax: 41-14-17

info@zdravkrk.kz

Healthcare department of Kostanai region:

Address: 110000, Kostanai, Bikovskiy str., 4a

Tel.: 8-7142-533-250

Fax: 390-522

obzkost@yandex.ru

Healthcare department of Kyzyl Horde region:

Address: 120008, Kyzyl Horde, Abai aven., 60

Tel.: 8-7242-23-71-32

Fax: 40-04-51

zdrav@zdravkorda.kz

Healthcare department of Mangistau region:

Address: 130000, Aktau, 3 Microdistrict, house 100

Tel.: 8 7292 50-45-65

Fax: 30-20-54

oblzdrav_kanz@mail.ru

www.mangistau-oblzdrav.kz

Healthcare department of Pavlodar region:

Address: 140000, Pavlodar, 1 May, 7

Tel.: 87182 55-96-52 55-83-34

Fax: 51-23-99

kense.dz@pavlodar.gov.kz

www.depzdrav.gov.kz/

The patient has the right to address cases of the following in territorial departments of committees of the state sanitary-and-epidemiologic supervision:

- intrahospital infection;
- poisonings with poor-quality food;
- violations of requirements of safe working conditions;
- poor-quality water supply.

Appeal to the Control Committee for Control over Medical and Pharmaceutical Activities and its Territorial Departments

Which body considers complaints about violations of the quality of medical services?

The Committee for Control over Medical and Pharmaceutical Activities of the Ministry of Health of the Republic of Kazakhstan and its territorial departments

Which legislative acts regulate procedures for complaints about the quality of medical services?

This legislative act is the **Instruction on the Rules for Considering Complaints of Individuals and Legal Entities and Controlling Their Implementation**, approved by the Minister of Health of the Republic of Kazakhstan of 27 May 2009.

Deadlines for making decisions

Decisions on complaints should be made no later than **30 calendar days**; but for those not demanding additional study and checks, no later than **15 calendar days** after the day of the complaint's registration.

In which form should the complainant receive a response?

Responses should be grounded and motivated in content in the state language or the language of the complainant, with citations of the legislation of the Republic of Kazakhstan, containing specific facts denying or confirming arguments of the complainant, with explanation of the complainant's rights to appeal against the decision adopted.

The consideration of the appeal should not be regarded as complete if the response does not contain information on measures taken for the practical solution of questions asked in complaints.

What decisions are taken on the results of the investigations of complaints?

On the results of investigation of complaints one of the following decisions is taken:

- 1) full or partial satisfaction of complaints;
- 2) refusal to satisfy the complaint with the explanation of this decision;

- 3) offer of explanation on the point of the complaint; or
- 4) ending the consideration of the complaint.

Telephone of the Committee for Control over

Medical and Pharmaceutical Activities of the

Ministry of Health of the Republic of Kazakhstan

+8 (7172) 74-32-79

Appeal to the Ethics Commission

Ethics commissions are independent expert bodies that protect rights, safety and wellbeing of the human subjects in research and the researchers and give moral and ethical and legal assessment of materials of clinic research (**Article 181 of the Health Code**).

- Ethics commissions aim to protect human rights and dignity using achievements of biology and medicines.
- Ethics commissions' tasks:
 - 1) to conduct independent expert examination of research documents;
 - 2) independently to assess the safety and observation of human rights at the stages of planning and conducting research;
 - 3) to assess the compliance of a clinical research program with standards of proper clinical and scientific practice and qualifications of researches and technical infrastructure of healthcare organizations involved in this research;
 - 4) to assess the compliance between international and national ethical requirements in conducting clinic research;
 - 5) to be involved in drafting documents on issues of biological and medical ethics.
- Ethics commissions may consist of specialists in the spheres of healthcare, science, culture, law, religion and public organizations.
- The Republic of Kazakhstan has the Central Ethics Commission and local ethics commissions.
- The Central Ethics Commission is set up under an authorized body for the independent assessment of research conducted at international and national levels.
- Local ethics commissions are set up under healthcare organizations for the independent assessment of research conducted in these organizations.

Appeal to the Prosecutor's Office

What kind of applications do the prosecution bodies consider?

According to **Article 7 of the Law of the Republic of Kazakhstan On Prosecutor's Office**, when exercising supervisory activities the prosecution bodies should consider the applications stating violations of the law, take measures to eliminate violations of the rights and lawful interests of the individual and the citizen, and restore the violated rights

What legislative act regulates the procedure of appealing to the Prosecutor's Office?

Instruction on the work organization with appeals in bodies, departments and establishments of the Prosecutor's Office of the Republic of Kazakhstan of 20 January 2012 regulates the procedure of appealing to the Prosecutor's Office.

What is the Instruction's scope of validity?

Provisions of the Instruction are applied on appeals from individuals, legal entities, businessmen, and also on deputy¹ inquiries and appeals

What is the form of filing an appeal?

Appeals are addressed to a prosecution body or an official authorized to resolve issues brought up in the appeals. Appeals can be filed in a written form, or as an electronic document

What should be reflected in an appeal?

An appeal must indicate a claimant's name and postal address. The appeal must be signed by the applicant's original written signature or with the claimant's electronic signature. The appeal must point out the name of the body or the position, name of an official whose actions are being complained about, reasons for the appeal, and demands

What is the period of the consideration of appeals?

It takes **15 calendar days** to consider an appeal that does not require receiving information (materials, cases) from lower prosecution agencies and state bodies, officials and others persons, or field inspection

After an appeal is filed to prosecution agencies (establishments), it takes **30 calendar days** to consider the appeal for which such information is needed

What response should be given to an appeal?

Responses to appeals must be grounded and motivated in content. They must be written in the state language or in the language of the appeal, referring to the legislation of the Republic of Kazakhstan Responses must include specific facts that deny or confirm a claimant's arguments and explain his/her right to appeal against the decision

¹ Person who is elected to the Parliament or local representative bodies (Maslihat)

Prosecutor General's Office of the RK

tel.: +7 (7172) 71-22-00

www.prokuror.kz

procuror@nursat.kz

Appeal to the Bodies of Internal Affairs

Instructions on how to consider and resolve appeals from individuals and legal entities to the bodies of internal affairs of the Republic of Kazakhstan (approved by Order No 225 of 04 April 2012 of the Minister of Internal Affairs of the Republic of Kazakhstan)

How is an appeal registered?

All of the received appeals must be registered in the office of the body of internal affairs on the day of receipt. Registered appeals are immediately submitted to the heads of bodies of internal affairs, who are obligated to write out instructions on each complaint to executing officers.

What should be included in an appeal?

An appeal includes a complainant's surname, name, patronymic, and postal address. An appeal must have the complainant's signature or his/her electronic signature. A complaint should include the name of the body or the position, surname and initials of an official against whom the complaint is filed, and motives and claims.

Can appeals be rejected?

Refusing to receive appeals is prohibited.

What requirements must decisions on appeals meet?

Responses to appeals must have grounded and motivated content. They must be written in the state language or in the language of the appeal, referring to the legislation of the Republic of Kazakhstan. Responses must include specific facts that deny or confirm claimants' arguments and explain the complainant's right to appeal against the decision.

If the head of a body decides to satisfy an appeal/complaint, he or she is obligated to ensure the timely and correct execution of the decision.

If an oral response is given, an appropriate certificate is to be attached to the materials of the investigation into a complaint. A note saying that the results of the inspection were reported during a private discussion is entered in the registration card (log).

What are periods of the consideration of appeals?

It takes **15 calendar days** to consider an appeal that does not require additional information or field inspection.

It takes **30 calendar days** to consider and make a decision with regard to an appeal that requires additional information or field inspection.

What decisions can be made as a result of the consideration of an appeal?

As a result of their consideration of appeals, bodies of internal affairs take one of the following decisions:

- 1) to satisfy an appeal fully or partially and to take measures within the competence of the body of internal affairs;
- 2) to refuse to satisfy claims in the complaint or to confirm a previous decision on the same complaint;
- 3) to explain the procedure of resolving the complainant's questions that are not under the authority of bodies and organizations of internal affairs; or
- 4) to dismiss the complaint.

Appeals from foreigners and stateless persons

Appeals from foreigners and stateless persons are considered in the order established by the legislation unless international agreements ratified by the Republic of Kazakhstan provide for other rules of consideration. Foreigners and stateless persons are also received in line with the established order, and a translator can be present in this case.

Ministry of Internal Affairs

Confidence phone line: (7172) 72 24 93

www.mvd.gov.kz

Appeal to the Ombudsman

The position of Ombudsman was founded in conformity with the Decree of the President of the Republic of Kazakhstan dated 19 September 2002.

Who is the Ombudsman?

The Ombudsman supervises the observance of human rights and freedoms and the rights and freedoms of a citizen, and takes measures to restore violated rights and freedoms of a human being and citizen within the Ombudsman's authority.

What does the Ombudsman do?

The Ombudsman receives and considers complaints if the Ombudsman believes that human rights were violated, without restricting the authority of other government bodies that protect human rights and freedoms, in line with the legislation of the Republic of Kazakhstan.

Who appeals to the Ombudsman?

Any citizen of the Republic of Kazakhstan, foreigner or stateless person can appeal to the Ombudsman.

In what instances can one file a complaint?

A person can file a complaint against actions or decisions of officials and organizations allegedly violating his rights and freedoms guaranteed by the Constitution, legislative acts and international agreements of the RK.

Forms of complaints

A complaint to the Ombudsman is filed in writing, in the state language or in Russian and in any form or in a recommended form (See www.ombudsman.kz)

Complainants can personally bring their complaints to the Ombudsman's office or send by mail. The Ombudsman notifies complainants of the course of the administration of complaints, or of the decision to dismiss the case, within one month.

To whom should appeals (complaints) be addressed?

Ombudsman

Commissioner for Human Rights

010000, the House of Ministries, entrance 15, Left Bank,

Astana, the Republic of Kazakhstan

tel.: (7172) 74 01 69

Mediation

Law of the RK «On Mediation» was adopted on January 28, 2011, and became valid on August 5, 2011.

MEDIATION is a process of setting dispute (conflict) between the parties with the help of a mediator (mediators) in order to achieve a mutually-acceptable decision, implemented by voluntary agreement of the parties.

A mediator is an independent physical entity, invited by the parties for mediation on a professional or non-professional basis, in conformity with requirements of Law.

If one becomes a party to a dispute/conflict, arising from civil, labor, family or other legal relations with participation of physical and/or legal entities, as well as disputes reviewed in the course of criminal proceedings of cases of light and moderate gravity, then he/she has an opportunity to appeal to a mediator for qualified aid in resolving this conflict.

Mediation is carried out by mutual consent of the parties and at the conclusion between them of the contract on mediation. With the consent of the parties, the mediator defines the date and time of carrying out mediation. At their discretion, the parties can agree about the language or languages to be used during mediation. When mediation is used to settle disputes arising from civil, labor, family and other legal relationships with participation of physical and/or legal entities, the mediation process can begin before the start of a court trial or after the beginning of a trial. Judges and officials of the bodies carrying out criminal prosecutions do not have the right in any form to force the parties to mediation, even though mediation is possible in criminal cases of light or moderate gravity.

The process of mediation is directed toward the achievement of settlement of a dispute/conflict. It has to help both parties to reach a decision that is comfortable for both of them.

The Institution of the Commission for Human Rights under the President of the Republic of Kazakhstan

The Commission for Human Rights under the President of the Republic of Kazakhstan was set up by the Decree of the President of 12 February 1994.

What was the purpose in establishing the Commission?

Strengthening state and public mechanisms to support and protect human rights

What legal acts regulate the activities of the Commission?

Regulation concerning the Human Rights Commission under the President of Kazakhstan is approved by the Decree of the President of the Republic of Kazakhstan of 19 March 2003.

What is the competence of the Commission?

Considering complaints of citizens of the RK, foreign citizens, or stateless persons on violations of human rights

What documents are adopted by the Commission?

The Commission's decisions are written recommendations and conclusions adopted at its meetings and brought to the attention of the President of the Republic of Kazakhstan.

To whom are the recommendations and conclusions of the Commission addressed?

The recommendations and conclusions of the Commission, taken within its powers, are submitted to the competent public authority whose jurisdiction allows resolving the given

issue. A state body and its officers, upon receipt of the Commission's recommendations and conclusions, shall review them in due time and notify the Commission of the decision taken.

Non-Governmental Organizations

Protection of the rights of the patient can be carried out through appeals to various human rights organizations. You can address these in the following public organizations which are carrying out patient protection activity:

Public Fund “Amansaulyk”

tel.: 279-39-94

www.amansaulyk.kz

www.medpravo.kz

Public Association “The Kazakhstan Association of Disabled People - Patients with Hemophilia”

tel.: 277-02-07

kazgemo@mail.ru

www.hemophilia.kz

Association of Legal Entities “RK Diabetic Association”

tel.: 240-08-10, 256 04 62

dark.almaty@mail.ru

www.dark-diabet.kz

Republican Public Association “Association of Disabled People, Patients with Hemoblastoses”

tel.: 2612731, 2614342

LKmizinova@mail.ru

www.cml-stop.kz

Public Fund “Together Against a Cancer”

tel.: 291 37 49

oncologykz@gmail.com

www.oncology.kz

Public Association “Protection of the Patients’ Rights in the Sphere of Mental Health “Overcoming”

tel.: 272 48 73

viktor733@mail.ru

Public Fund “AGEPC”

tel.: 87272-70-68-47

www.hepatit.kz,

hepatitis@rambler.ru

Kazakhstan Union “People, living with HIV”

kazsouz@mail.ru

mob.: 8-701 170 67 08

nurali70@mail.ru

www.plwh.kz

Medical and pharmaceutical workers can address for protection of the rights and interests also to:

Republican Public Association “National Medical Association”

tel.: 279-86-05, 279-92-91, 233-19-41

Association of Independent Experts “Zdrav Expert”

tel.: 2331890, 2331941

doktor_sadykova@mail.ru

www.nma.org.kz

Other

It is possible also to address or enter a complaint on the blog of the Minister of Health on the website of the Ministry of Health of the RK:

www.mz.gov.kz.

You may also address a complaint to the Public Council on Protection of the Rights of Patients at Ministry of Health of the Republic of Kazakhstan:

Tel.: 8 (7172) 743 490

i.balagazy@mz.gov.kz

and also in territorial Public Councils at healthcare departments.

8.6 Appendixes

Appendix No. 1

To _____ district (city)

court _____ oblast (city)

Complainant: _____

Name and address

Defendant: _____

(organization)

_____ or name, address)

Amount of the claim _____

Claim on protection of honor, dignity and business reputation

_____ (indicate when, by whom and where was information damaging,

_____ as the claimant believes, the claimant's honor and dignity (business reputation), was spread

_____ what this information is and why it does not correspond to

_____ reality; provide proofs and

_____ confirm the indicated)

As a result of the actions of the defendant I faced losses in the amount _____

_____, as well as moral damages

(provide calculations)

(physical pain or moral damages), which I estimate at

_____ tenge

In line with Article 143 of the Civil Code of the Republic of Kazakhstan

I ask to:

obligate _____

(name of organization or citizen)

to deny information damaging my honor and dignity (business reputation)

_____ (indicate nature of information and ways of denying it)

Claim from the defendant as compensation for moral damages

_____ tenge

In confirmation of the claim, witnesses should be summoned to trial _____

(names and addresses)

Annex:

1. The claimant's proofs of the spread of information discrediting the claimant (cutting or extract from publications, extracts from protocols of meetings, sittings and so on with the provision of the defendant's speeches; written requests to organizations, citizens' letters and so on).

2. State levy.

3. A copy of the claim.

Signature

Date

Appendix №2

To _____ district (city)

court _____ oblast (city)

Complainant: _____

(Name and address)

Defendant: _____

(name of organization)

Amount of the claim _____

Claim**on compensation for material damages caused by crime**

Investigation bodies (court) are investigating a criminal case against

(name(s) of suspect(s))

on charges under Item _____ Article _____ of the Criminal Code of the RK.

As a result of this crime I faced material damages in the amount _____

(in writing)

provide calculations of material damages and proofs of them _____

(provide calculations of material damages and proofs of them)

In line with Articles 77, 162-164, 169-171 of the Code of Criminal Procedure of the RK

I request:

1. To recognize _____

(name)

as a civil claimant.

2. Demand compensation from the defendant in the amount of _____ tenge.

Adopt measures to satisfy this claim.

Annexes:

1. Copy of the claim.

2. Written and other proofs of material damages and their sizes.

(Signature)_____
(date)

Appendix №3

To _____ district (city)

court _____ Oblast

Claimant: _____
(Name and address)Defendant: _____
(Legal entity, address)

Amount of the claim _____

Claim on compensating damage caused by harm to health

I (name) was admitted to _____ unit of hospital № _____ on _____ for receiving treatment from Date _____. I was treated with:

While conducting medical measures (indicate which measures precisely) by health workers (name) the following mistakes were made: (indicate which).

After these actions happened (indicate nature of consequences).

Harm to health is proved by the following documents (name medical documents attached).

At present I am experiencing the following moral and physical sufferings

_____ (indicate which)

To restore my health I need the following treatment:

The loss of income totaled (based on the employer's wage payment records)

I think damage to my health was inflicted as a result of improper medical assistance in hospital No.

The defendant violated his/her obligation on the quality and safe provision of medical assistance specified by the legislation of the RK (indicate).

Based on the aforementioned, in line with Articles 937-938 of the Civil Code of the RK

I request to:

1. Claim from the defendant _____ (amount of the claim) tenge as compensation for moral damages caused by harm to health.
2. Obligate the defendant to compensate me for the loss of income for a period from _____ to _____ in the amount of _____.
3. Claim from the defendant the costs of medications bought by me in the amount of _____ tenge

Annexes:

1. Copy of the claim.
2. Copy of medical documents.
3. Copy of checks for medications purchased.
4. Copy of the employer's letter indicating the average salary

(Signature)

(date)

ATTENTION!

Forms of standard suit on the claim as samples are put up on notice boards for the public in courtroom receptions and can be available to law consultancies or lawyers

Appendix № 4

Sample of complaint on violation of right to

To (the Ministry of Health, the healthcare department, the local administration, the Commission for Human Rights under the President of the Republic of Kazakhstan, the National Center for Human Rights, the Prosecutor-General's Office, the regional prosecutor's office, non-governmental organization, court) from NAME, living at address

Complaint

I am complaining about a violation made by (name of organization) of my right to obtain information (to consent, to freedom of choice, to safety, to avoid sufferings and pains, to file complaint and so on) in form of (explain the violation).

I took measures to protect my right through (which measures were taken) which have not produced results, which is why I ask you to help to solve the situation that has emerged and help obtain information on

 (Signature)

 (date)

There is no strict form for submitting a complaint. It is composed in an individual manner, but with the compulsory indication of the name of the complainant, their address, the name of entity or position, the names of people in authority whose actions are contested, the motives of the complaint and demands.

Article 92. Patients' duties

1. In addition to duties stipulated in Article 90 of the present Code, the patient must:

- 1) take measures to preserve and strengthen his/her health;
- 2) show respect and tact in communication with medical workers;
- 3) provide a doctor with all available information that is necessary for the diagnosis and treatment of the disease, and strictly implement all prescriptions by a doctor in charge after giving consent to medical intervention;
- 4) observe internal regulations and take good care of property of the medical organization, cooperate with medical staff while receiving medical assistance;
- 5) timely inform medical workers about a change in their health condition during diagnostics and treatment, and in case of contracting, or suspecting, a disease that poses a threat to people around them;
- 6) not carry out activities that violate other patients' rights;
- 7) implement other duties stipulated by the laws of the Republic of Kazakhstan.

2. Patients' duties stipulated by Sub-items 2-4 of Item 1 of the present article apply to parents and other persons that carry out the in-patient nursing of a sick child.

Glossary of Terms

Related to Human Rights in Patient Care

International

A

Acceptability

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest attainable standard of health. Acceptability: means that all health facilities, goods and services must be respectful of medical ethics, culturally appropriate, sensitive to gender and life-cycle requirements, as well as designed to respect confidentiality and improve the health status of those concerned (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Accessibility” “Availability,” and “Quality.”

Accessibility

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest attainable standard of health. Accessibility: means that health facilities, goods and services have to be accessible to everyone without discrimination. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic feasibility (affordability), and information accessibility (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Acceptability,” Availability,” and “Quality.”

Accession

Acceptance by a non-signatory State of the opportunity to become a party to a treaty and be legally bound by it. This is achieved by depositing an “instrument of accession.” It has the same legal effect as ratification. Unlike ratification, this is a one-step process

Actio Popularis (public action)

A legal action brought by any member of a community in vindication of a public interest

Adoption

Formal act by which negotiating parties establish the form and content of a treaty. The treaty is adopted through a specific act expressing the will of the States and the international organizations participating in the negotiation of that treaty, e.g., by voting on the text, initialing, signing, etc. Adoption may also be the mechanism used to establish the form and content of amendments to a treaty, or regulations under a treaty.

Treaties that are negotiated within an international organization are usually adopted by resolution of the representative organ of that organization. For example, treaties negotiated under the auspices of the United Nations, or any of its bodies, are adopted by a resolution of the General Assembly of the United Nations

Adoption Theory

A theory maintaining that international law becomes an automatic part of domestic law following treaty accession or ratification, without further domestication

Amicus Curiae (Friend of the court)

A legal document filed with the court by a third party generally advocating a particular legal position or interpretation. The plural form is amici curiae

Ambulatory Care

Medical care including diagnosis, observation, treatment and rehabilitation provided on an outpatient basis

Availability

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest attainable standard of health. Availability: means that functioning public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantity. This should include the underlying determinants of health, such as safe drinking water, adequate sanitation facilities, clinics and health-related buildings, trained medical personnel, and essential drugs (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Acceptability,” “Accessibility,” and “Quality.”

B

Basic Needs

Used largely in the development of community to refer to basic health services, education, housing, and other goods necessary for a person to live

Bioethics

Refers to “the broad terrain of the moral problems of the life sciences, ordinarily taken to encompass medicine, biology, and some important aspects of the environmental, population and social sciences. The traditional domain of medical ethics would be included in this array, accompanied now by many other topics and problems.” (Encyclopedia of Bioethics, Warren T. Reich, editor-in-chief, New York: Simon & Schuster Macmillan, 1995, page 250)

Biomedicine

The term unifies fields of clinical medicine and research for health purposes. Broadly it is also defined as the application of the principles of the natural sciences, especially biology and physiology, to clinical medicine.

C

Concluding Observations

Recommendations by a treaty's enforcement mechanism on the actions a state should take in ensuring compliance with the treaty's obligations. This generally follows both submission of a state's country report and a constructive dialogue with state representatives.

Country Report

A state's report to the enforcement mechanism of a particular treaty on the progress it has made in implementing it

Convention

This term is used interchangeably with treaty, but it can also have a specific meaning as a treaty binding a broad number of nations. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually instruments negotiated under the auspices of an international organization are entitled conventions. The same holds true for instruments adopted by an organ of an international organization

Customary International Law

One of the sources of international law. It consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way. It follows that customary international law can be discerned by a widespread repetition by States of similar international acts over time (State practice). Acts must occur out of a sense of obligation and must be taken by a significant number of States and not be rejected by a significant number of States. A particular category of customary international law, *jus cogens* refers to a principle of international law so fundamental that no state may opt out by way of treaty or otherwise. Examples might include prohibitions against slavery, genocide, torture and crimes against humanity. Other examples of customary international law include the principle of non-refoulement and, debatably, the right to humanitarian intervention.

D

De Facto (In fact, in reality)

A situation or condition that exists that may not be explicitly expressed by law. For example, a law that is neutral on paper may be enforced in a discriminatory manner based on social or cultural contexts

De Jure (by right, lawful)

A situation or condition that is based on a matter of law, such as those detailed in ratified treaties

Declaration

An interpretative declaration is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a State's position and do not purport to exclude or modify the legal effect of a treaty

Dignity

The quality of being worthy, honored, or esteemed. Human rights are based on inherent human dignity and aim to protect and promote it.

Discrimination

Making a distinction between persons on the basis of race, sex, religion, political opinions, national or social origin, minority status, or personal antipathy

Domestication

The process by which an international treaty is incorporated into domestic legislation

Dual Loyalty

Role conflict between professional duties to a patient and obligations—express or implied, real or perceived—to the interests of a third party such as an employer, insurer, or the state

E

Entry into Force

The moment in time when a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine the moment of its entry into force. This may be a date specified in the treaty or a date on which a specified number of ratifications, approvals, acceptances or accessions have been deposited with the depositary

Essential Medicines

Medicines that satisfy the priority health care needs of the population. Essential medicines are intended to be available at all times in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and the community can afford.

Exhaustion of Domestic Remedies

Refers to the process required before submitting a complaint on behalf of a victim to any regional or international tribunal. All available procedures must first be used to seek protection from future human rights violations and to obtain justice for past abuses. There are limited exceptions to the requirement that domestic remedies be exhausted: remedies may be unavailable, ineffective (i.e. a sham proceeding) or unreasonably delayed.

G

General Comments/Recommendations

Interpretive texts issued by a treaty's enforcement mechanism on the content of particular rights. Although these are not legally binding, they are widely regarded as authoritative and have significant legal weight.

H

Health

A state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity (WHO)

Health Care

1. The prevention, treatment, and management of illness and the preservation of mental and physical well-being through the services offered by the medical, nursing, and allied health professions. This definition and similar ones sometimes are given for "patient care" as well. The World Health Organization states that this embraces all the goods and services designed to promote health, including preventive, curative, and palliative interventions, whether directed to individuals or populations.
2. Any type of services provided by professionals or paraprofessionals with an impact on health status (Online Glossary, European Observatory on Health Systems and Policy).
3. Medical, nursing or allied services dispensed by health care providers and health care establishments (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994). See also "Patient Care."

Health Care Establishment

Any health care facility such as a hospital, nursing home, or establishment for disabled persons (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994)

Health Care Providers

Physicians, nurses, dentists, or other health professionals (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994)

Health Care System

The organized provision of health care services

Human Rights

Entitlements, freedoms, and privileges which adhere to all human beings regardless of jurisdiction or other factors such as ethnicity, nationality, religion, or sex

Human Rights are universal legal guarantees protecting individuals and groups from interference with fundamental freedoms and human dignity. Some important characteristics of human rights include the following:

- Guaranteed by international standards
- Legally protected

- Focus on the dignity of humans
- Oblige states and state actors
- Cannot be waived or taken away
- Interdependent and interrelated
- Universal

(The United Nations System and Human Rights: Guidelines and information for the Resident Coordinator System, Geneva, March 2000)

Human Rights Indicators

Criteria used to measure compliance with international human rights standards.

Concept that refers to the application of basic human rights principles to all stakeholders in the delivery of health care services, including patients and health care providers. It is complementary to bioethics but provides a set of universally accepted norms and procedures for making conclusions about abuses within health care settings and providing remedies. It uses standards contained in the international human rights framework, which are often mirrored in regional treaties and national constitutions. It differs from patients' rights, which codify particular rights that are relevant only to patients. It draws on concepts such as dual loyalty, in which health care providers have simultaneous and often conflicting obligations to their patients and to the State. See also "Dual Loyalty."



Interdependent/Indivisible

The term used to describe the relationship between civil and political rights and economic and social rights.

Interdependence and indivisibility mean that one set of rights does not take precedence over the other, and that guaranteeing each set of rights is contingent upon guaranteeing the other.

Indirect Discrimination

Descriptive term for a situation in which the effect of certain imposed requirements, conditions, or practices has a disproportionately adverse impact on a particular group. It generally occurs when a rule or condition applying to everyone is met by a considerably smaller proportion of people from a particular group, the rule is to their disadvantage, and it cannot be justified on other grounds.

Individual Rights in Patient Care

More readily expressed in absolute terms than are social rights in health care. When made operational, can be made enforceable on behalf of an individual patient (Declaration on the Promotion of Patients' Rights in Europe, WHO Amsterdam, 1994, Guiding Principles). See also "Social Rights in Health Care" and "Patients' Rights."

Informed Consent

A legal condition in which a person can be said to agree to a course of action based upon an appreciation and understanding of the facts and implications. The individual needs to be in possession of relevant facts and the ability to reason.

Informed Consent in the Health Care Context

A process by which a patient participates in health care choices. A patient must be provided with adequate and understandable information on matters such as the treatment's purpose, alternative treatments, risks, and side-effects

In-patient

A patient whose care requires a stay in hospital or hospice facility for at least one night

International Human Rights Law

Codifies legal provisions governing human rights in various international and regional human rights instruments

International Law

The set of rules and legal instruments regarded and accepted as binding agreements between nations.

International law is typically divided into public international law and private international law. Sources are (a) custom; (b) treaties; (c) general principles of law and (d) judicial decisions and juristic writings (Article 38(1)(d) of the Statute of the International Court of Justice).

J

Jus Cogens

Peremptory principle of international law (e.g., prohibition on torture) from which no derogation by treaty is permitted

M

Maximum Available Resources

Key provision in Article 2 of International Covenant on Economic, Social and Cultural Rights obliging governments to devote the maximum of available government resources to realizing economic, social and cultural rights

Medical Intervention

Any examination, treatment, or other act having preventive, diagnostic, therapeutic or rehabilitative aims and which is carried out by a physician or other health care provider (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994)

Monitoring/Fact Finding/Investigation

Terms often used interchangeably, generally intended to mean the tracking and/or gathering of information about government practices and actions related to human rights

N

Negative Rights

Rights under which a State is obliged to refrain from unjustly interfering with a person and/or their attempt to do something

Neglected Diseases

Diseases affecting almost exclusively poor and powerless people in rural parts of low-income countries that receives less attention and resources

O

Out-patient

Patient receiving treatment without spending any nights at a health care institution

P

Party

A State or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the State is bound by the treaty under international law (Article 2(1)(g) of the Vienna Convention, 1969).

Patient

1. User(s) of health care services, whether healthy or sick (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam 1994).
2. A person in contact with the health system seeking attention for a health condition (Online Glossary, European Observatory on Health Systems and Policies)

Patient Autonomy

The right of patients to make decisions about their medical care. Providers can educate and inform patients, but cannot make decisions for them.

Patient Care

The services rendered by members of the health professions or non-professionals under their supervision for the benefit of the patient. See also "Health Care."

Patient-centered Care

Doctrine recognizing the provision of health care services as a partnership among health care providers and patients and their families. Decisions about medical treatments must respect patients' wants, needs, preferences, and values

Patient Confidentiality

Doctrine that holds that the physician has the duty to maintain patient confidences. This is to allow patients to make full and frank disclosure to their physician, enabling appropriate treatment and diagnosis

Patient Mobility

Concept describing patient movement beyond their catchment area or area of residence to access health care; mobility can take place within the same country or between countries.

Patient Responsibility

Doctrine recognizing the doctor/patient relationship as a partnership with each side assuming certain obligations. Patient responsibilities include communicating openly with the physician or provider, participating in decisions about diagnostic and treatment recommendations, and complying with the agreed-upon treatment program

Patients' Rights

1. A set of rights calling for government and health care provider accountability in the provision of quality health services. Associated with a movement that has emerged out of increasing concern about human rights abuses in health care settings, particularly in countries where patients are assuming a greater share of health care costs and thus expect to have their rights as "consumers" respected.
2. A set of rights, responsibilities, and duties under which individuals seek and receive health care services (Online Glossary, European Observatory on Health Systems and Policies).
3. What is owed to the patient as a human being by physicians and the State

Patient Safety

Freedom from accidental injury due to medical care or medical errors (Institute of Medicine)

Positive Rights

Rights under which a State is obliged to do something for someone.

Primary Health Care

General health services available in the community near places where people live and work; the first level of contact individuals and families have with the health system

Progressive Realization

The requirement in Article 2 of the International Covenant on Economic, Social and Cultural Rights that governments move as expeditiously and effectively as possible toward the goal of realizing economic, social and cultural rights, and to ensure there are no regressive developments

Protocol

Refers to a section in a treaty that clarifies terms, adds additional text as amendments, or establishes new obligations. These new obligations can be quantitative targets for nations to achieve.

Public Health

What we as a society do collectively to ensure the conditions in which people can be healthy (Institute of Medicine)

Public International Law

Establishes the framework and the criteria for identifying states as the principal actors in the international legal system. Deals with the acquisition of territory, state immunity and the legal responsibility of states in their conduct with each other. Also concerned with the treatment of individuals within state boundaries including human rights, the treatment of aliens, the rights of refugees, international crimes and nationality. It further includes the maintenance of international peace and security, arms control, the pacific settlement of disputes, and the regulation of the use of force in international relations. Branches, therefore, include international human rights law, international humanitarian law, refugee law, and international criminal law

Q

Quality

One of four criteria set out by Committee on Economic, Social, and Cultural Rights by which to evaluate the right to the highest attainable standard of health. Quality: means that health facilities, goods, and services must be scientifically and medically appropriate and of good quality. This requires skilled medical personnel, scientifically approved and unexpired drugs, and hospital equipment (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Acceptability,” “Accountability,” and “Availability.”

R

Ratification

The formal acceptance of the rights and obligations of a treaty. If the treaty has entered into force, the treaty thereafter becomes legally binding to parties that have ratified the treaty. Requires two steps: (a) the execution of an instrument of ratification, acceptance or approval by the Head of State, Head of Government or Minister for Foreign Affairs, expressing the intent of the State to be bound by the relevant treaty; and (b) for multilateral treaties, the deposit of the instrument with the depositary; and for bilateral treaties, the exchange of the instruments between parties.

Reservation

A statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. A reservation may enable a State to participate in a multilateral treaty in which it would otherwise be unable or unwilling to participate. States can make reservations to a treaty when they sign, ratify, accept, approve, or accede to it. When a State makes a reservation upon signing, it must confirm the reservation upon ratification, acceptance, or approval. Since a reservation purports to modify the legal obligations of a State, it must be signed by the Head of State, Head of Government or Minister for Foreign Affairs. Reservations cannot be contrary to the object and purpose of the treaty. Some treaties prohibit reservations or only permit specified reservations.

Respect, Protect, and Fulfill

Governments' obligations with respect to rights

Respect: Government must not act directly counter to the human rights standard.

Protect: Government must act to stop others from violating the human rights standard.

Fulfill: Government has an affirmative duty to take appropriate measures to ensure that the human rights standard is attained

Right to Health

Right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of physical and mental health (Committee on Economic, Social and Cultural Rights, General Comment 14)

S

Secondary Health Care

General health services available in hospitals

Social Rights in Health Care

Category of rights that relate to the societal obligation undertaken or otherwise enforced by government and other public or private bodies to make reasonable provision of health care for the whole population. They also relate to equal access to health care for all those living in a country or other geopolitical area and the elimination of unjustified discriminatory barriers, whether financial, geographical, cultural, social, or psychological. They are enjoyed collectively (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994, Guiding Principles) See also "Individual Rights in Patient Care."

Self-Executing Treaty

A treaty that does not require implementing legislation for its provisions to have effect in domestic law

Shadow Report

An independent NGO's submission to a treaty enforcement mechanism to help it assess a state's compliance with that treaty

Signatory

A party that has signed an agreement. In regards to a treaty, a signatory is not yet legally bound by the treaty. Instead, a signatory agrees to an obligation not to defeat the object and purpose of a signed treaty. See also Ratification

Special Rapporteurs

Individuals appointed by the Human Rights Council to investigate human rights violations and present an annual report with recommendations for action. There are both country-specific and thematic special rapporteurs, including one on the right to the highest attainable standard of health.

T

Terminal Care

Care given to a patient when it is no longer possible to improve the fatal prognosis of his or her illness/condition with available treatment methods, as well as care at the approach of death (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994)

Tertiary Health Care

Specialized health services available in hospitals

Transformation Theory

A theory maintaining that international law only becomes part of domestic law after domestication and the incorporation of treaty provisions into domestic legislation

Treaty

A formal agreement entered into by two or more nations which is binding upon them. A bilateral treaty is a treaty between two parties. A multilateral treaty is a treaty between more than two parties

W

Working Groups

Small committees appointed by the Human Rights Council on a particular human rights issue. Working groups write governments about urgent cases and help prevent future violations by developing clarifying criteria on what constitutes a violation

Country-Specific

A

Administrative responsibility

The responsibility of individuals and legal entities for committing administrative offence, one of the forms of legal responsibility, less strict than criminal liability

Administrative offence

A guilty (deliberate or accidental) action or inaction of a legal entity, for which the Code of Administrative Offences envisages administrative responsibility

Appeal

Individual or collective proposal, claim, complaint, inquiry or response in writing, verbally or electronic form with electronic digital signature sent to an entity that considers appeals or to a person in authority

B

Body of appeal

Court of second instance, which considers appeals (protests) against all rulings of court of first instance which are not yet in force

C

Claim

Motion of a person on assistance in the implementation of his/her rights and freedoms or rights and freedoms of other persons either in reporting about violations of laws or other legislative acts, shortcomings of the work of bodies that consider complaints, of officials or criticism of his/her activities

Claimant

Person who appealed to court or bodies of criminal prosecution for protection in criminal proceedings of their (or someone else's) actual or supposed right

Close relatives

Parents, children, adoptive parents, adopted children, siblings and half-siblings, grandparents, grandchildren

Code (Latin codex – a set of laws)

Consolidated legislative act, which unites and systematizes legal provisions that regulate similar, homogenous public relations. On hierarchy of regulatory legal acts in RK is situated above laws, decrees, resolutions of the government etc.

Cognizance

Distribution of cases that have to be heard in first instance between courts, i.e. the establishment of specific court that should solve this case

Complainant

A person who has grounds to assume that this person faced moral, physical or property damage as a result of crime

Compensation for damage

Compensation for property damage caused by the damage inflicted

Complaint, protest

Reaction of trial participants to actions of preliminary investigation, prosecutor or court taken within the limits of their power and in order established by the Code

Court

A body of the judicial branch, any legally established court that is part of the judicial system of the Republic of Kazakhstan and which considers cases collegially or individually

Court of first instance

Court that hears criminal / civil case in substance

Crime

A committed punishable, publicly dangerous, deed (action or inaction), which is banned by the Criminal Code under threat of punishment

D

Defendant

A citizen or legal entity against which a lawsuit is submitted

E

Entities considering appeals

State bodies, bodies of local self-government, legal entities with 100% involvement of the state or providing goods (services) in line with a state order and (or) state purchase which are authorized to take decisions on appeals by individuals and legal entities within their power

I

Indicators of the quality of health services

Criteria that reflect the efficiency, completeness and correspondence of medical services to standards in the healthcare sphere

Indicators of the result of health services

Criteria for the assessment of consequences for health as a result of provision or non-provision of health services by medical organizations or individuals

Individuals

Citizens of the Republic of Kazakhstan, citizens of other states, and stateless persons.

J

Judge

A carrier of judicial power; professional judge appointed or elected to this position in a legally-established manner (chair of court, chair of judicial college, member of court or another judge of corresponding court)

Justice

A system of common compulsory social norms (rules of behavior) established by the state and ensured by the force of its enforcement

Judicial precedent (from Latin *praecedentis* - previous)

A ruling, issued by court, on a specific case, the justification of which becomes a rule compulsory for all courts of same or lower instance in hearing similar cases. In some countries (Britain, the USA, Canada or Australia) it is recognized as a source of law and is one of the bases of the legal system

L

Law

A legal act adopted by the highest representative of government or direct expression of will of people (in referendum) and regulating, as a rule, the most important public relations

Lawsuit

In a procedural sense, the claimant's appeal to court with a request to consider a material and legal dispute with the defendant and protect a violated right or interest protected by law

Legal capacity

Capacity to have civil rights and fulfill duties (civil legal capacity)

Legal costs

A state duty and expenses related to a court case

Legal regulation

A process of the state's influence on public relations using legal provisions (provisions of law)

Legal representatives

Parents, adoptive parents, guardians, custodians, protecting the legally-guarded interests of incapable citizens and persons who do not possess full legal capacity or whose legal capacity is recognized as limited

Legal responsibility

The liability of a violator to face unfavorable consequences, established by legal provisions. Depending on the sphere and legal provisions that establish such responsibility, it can be criminal responsibility, administrative responsibility, civil responsibility and disciplinary responsibility.

M

Medical activities

Professional activities of individuals who obtained higher or vocational professional medical education and legal entities that aim to protect citizens' health

Medical assistance

A set of medical services aimed at preserving and recovering people's health

Medical services

Actions of medical workers who have preventive, diagnostic, treatment and rehabilitation specialties toward a certain person

Medical expert examination

A set of organizational, analytical and practical measures aimed at establishing the level, quality and degree of the state of various spheres of activities in the healthcare sphere

Motion

Request made by a side or complainant to a body that conducts a criminal or civil trial

P

Pact (from Latin pactum - agreement)

One of the names of an international agreement

Prosecutor-General's Office of the Republic of Kazakhstan

A state body accountable to the President of the Republic of Kazakhstan which conducts the highest supervision over the accurate and homogenous application of laws, decrees of the President of the Republic of Kazakhstan and other legislative acts in the territory of the Republic and the legality of a search operation, preliminary investigation and investigation and the administrative and executive proceedings

Protection

Procedural activities conducted by the defense to ensure rights and interests of persons who are suspected of committing crimes, denying or easing accusations and rehabilitating persons who are unlawfully subjected to criminal prosecution

Punishment

A measure of state enforcement appointed by a court ruling

Q

Quality of medical assistance

A measure of the correspondence of medical assistance provided to standards adopted by an authorized body in the healthcare sphere and based on the modern level of the development of medical science and technology

R

Record of appeals

Registration of information on the acceptance and hearing of appeals and their reflection in a state legal statistical report

Registration of appeal

Registration of brief information in a record information document on the content of appeal and assigning reference numbers to each appeal submitted

Relatives

People, related to one another and have common great-grandfather and great-grandmother

Right to health protection (and medical assistance)

One of the main constitutional social human rights, the possibility of receiving a free guaranteed volume of medical assistance set by law. This right corresponds to the state's duty to protect and strengthen citizens' health, to develop a system of healthcare and medical insurance and help the development of physical culture and sport, to ensure environmental and sanitary-epidemiological wellbeing.

S

Standards in the healthcare sphere

Legislative acts which define rules, general principles and characteristics in the spheres of medical and pharmaceutical activities and medical and pharmaceutical education

Supervisory instance

Court that considers a supervisory case in a complaint or protest of a litigant against court rulings of lower court instances that are in force

Human Rights in Patient Care: A Practitioner Guide” is a practical, “how-to” manual for lawyers taking human rights cases in health care settings. Each volume in the series contains information on both patient and provider rights and responsibilities, as well as procedures for ensuring that these rights are protected and enforced at the international, European and national levels. This is the first compilation of diverse constitutional provisions, statutes and regulations organized by right and responsibility, paired with practical examples of compliance, violation and enforcement. The Guide explores litigation and alternate forms for resolving claims, such as ombudspersons and ethics review committees. The Practitioner Guide is a useful reference for lawyers and other professionals working in a region where the legal landscape is often in flux. The full series is available at www.health-rights.org.

