

# Human Rights in Patient Care

**A PRACTITIONER GUIDE**

**ARMENIA**



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*A Practitioner Guide*

ARMENIA

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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 Institute 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*

## ACKNOWLEDGMENTS

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 Open Society Institute (OSI) Assistance Foundation Armenia, the Law and Health Initiative (LAHI) of the Open Society Institute Public Health Program, and the OSI Human Rights and Governance Grants Program (HRGGP). Much appreciation is owed to the individuals from these organizations who were most directly involved: **Anahit Papikyan, David Amiryan, and Larisa Minasyan** (OSI Assistance Foundation Armenia); **Tamar Ezer and Jonathan Cohen** (LAHI), who, in addition to fulfilling general oversight and editing responsibilities, coauthored the introduction with **Judith Overall** and also coauthored the international and regional procedures chapter;<sup>1</sup> **Mariana Berbec Rostas** (HRGGP), for updating the regional procedures section; **Paul Silva** (OSI Communications Officer), for his advice and coordination of work on the guide's design; and **Jeanne Criscola**, the designer.

Special thanks is owed to **Iain Byrne**, Senior Lawyer at INTERIGHTS, for writing the chapters on the international and regional frameworks for human rights in patient care, for preparing the glossary with **Judith Overall**, and for the editorial suggestions made to the domestic portions of the guide. Thanks are also due to **Sara Abiola** for the language and format editing of the international and regional framework chapters and to **Anna Kryukova** for preparing the ratification chart. Also deserving thanks are **Artur Sakunts** (Director, Helsinki Citizens Assembly, Vanadzor City, NGO) for legal review; **Arman Tatoyan** (Associate Professor, Yerevan State University, Law Department) for legal editing; **Artur Potosyan** and **Violeta Zopunyan** (Antidrug Civil Union NGO) for the final edits and updates.

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

Not listed, but still deserving our thanks, are the many others who supported our working group and its work.

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<sup>1</sup>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, P. McAdams, 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 Institute (OSI) Public Health Program, OSI's Human Rights and Governance Grants Program, OSI'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 Armenia; 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, and inspectorates of health facilities. 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](http://www.health-rights.org). The Armenia country

website is [www.healthrights.am](http://www.healthrights.am). 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 Armenia. 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 Armenia, 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
<b>INTERNATIONAL</b>						
International Covenant on Civil and Political Rights (ICCPR)	23.06.1993			23.09.1993		
Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP)	23.06.1993			23.09.1993		
International Covenant on Economic, Social and Cultural Rights (ICESCR)	13.09.1993			13.12.1993		
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	13.09.1993			13.10.1993		
Convention for the Elimination of All Forms of Racial Discrimination (CERD)	23.06.1993			23.07.1993		
Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)	13.09.1993			13.10.1993		
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT-OP)	14.09.2006			14.10.2006		
Convention on the Rights of the Child (CRC)	23.06.1993			22.07.1993		
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)						
Convention on the Rights of Persons with Disabilities (DRC)		30.03.2007				

DOCUMENTS	Date of Accession	Date of Signature	Date of Ratification	Entry into Force	Applicable In-country Legislation	Reservation Entered
EUROPEAN (REGIONAL)						
Convention on Human Rights and Biomedicine 1997						
Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, concerning Prohibition of Cloning Human Beings						
Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Transplantation of Organs and Tissues of Human Origin						
Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research						
Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Genetic Testing for Health Purposes						
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)		25.01.2001	26.04.2002	26.04.2002		The provisions of Article 5 (Right to Liberty and Security) shall not affect the operation of the Disciplinary Regulations of the Armed Forces of the Republic of Armenia, under which arrest and isolation as disciplinary penalties may be imposed on soldiers, sergeants, ensigns, and officers.
European Social Charter 1961						
European Social Charter 1996		18.10.2001	21.01.2004	01.03.2004		
Framework Convention for the Protection of National Minorities 1995		25.07.1997	20.07.1998	01.11.1998		
EU Charter of Fundamental Rights						

## **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.<sup>1</sup>

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 (ICESCR), 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.<sup>2</sup> 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 complaints

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.

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

▶ **International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup>**

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)<sup>5</sup>**

The ICESCR is monitored by the CESCR.

Key provision:

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

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.<sup>7</sup>

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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>.

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 Health<sup>8</sup>**

▶ **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>9</sup>**

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.)<sup>10</sup>

▶ **Convention for the Elimination of All Forms of Racial Discrimination (CERD)<sup>11</sup>**

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)<sup>12</sup>**

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

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.

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.

▶ **Convention on the Rights of the Child (CRC)<sup>14</sup>**

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)<sup>15</sup>**

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

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)<sup>16</sup>**

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.”<sup>17</sup> 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.)

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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.

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.

- 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)

## **NONTREATY INSTRUMENTS**

- ▶ **UN Standard Minimum Rules for the Treatment of Prisoners<sup>18</sup>**
- ▶ **UN Body of Principles for the Protection of All Persons Under Any Form of Detention<sup>19</sup>**
- ▶ **UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care<sup>20</sup>**

## **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 1978<sup>21</sup>**

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)<sup>22</sup>**

This charter addresses issues such as privacy and informed consent.

- ▶ **Declaration on the Rights of the Patients 2005 (revised) (World Medical Association (WMA)<sup>23</sup>**

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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.
  21. Declaration of Alma-Ata. September 6, 1978. [http://www.who.int/hpr/NPH/docs/declaration\\_almaata.pdf](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.uianet.org/documents/qquia/resolutions/Sante4GB.pdf](http://www.uianet.org/documents/qquia/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/I4/index.html>. Accessed November 15, 2009.

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)<sup>24</sup>**

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 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.*

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

- *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)<sup>25</sup>**

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)<sup>26</sup>**

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.

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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](http://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](http://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.<sup>27</sup> 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.<sup>28</sup>
  - 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:<sup>29</sup>

*[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.<sup>30</sup>*

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 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.*
- ▶ **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;<sup>31</sup> (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;<sup>32</sup> 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.<sup>33</sup>

## 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*:<sup>34</sup>

*“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.”*<sup>35</sup>

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).

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).

- ▶ **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.<sup>36</sup>*
- ▶ **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 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:<sup>37</sup>**

*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.*

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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).

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

**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,<sup>38</sup> including HIV/AIDS,<sup>39</sup> with such information also extending to children<sup>40</sup> and to people in areas with prevalent alcohol and tobacco use.<sup>41</sup>

## 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).

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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).

- ▶ **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.*
  - **ICESCR 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 Subjects**<sup>42</sup>
- ▶ **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.*

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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](http://www.cioms.ch/frame_guidelines_nov_2002.htm). Accessed November 15, 2009.

*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.<sup>43</sup>

## 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

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]).

- 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:

*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.*<sup>44</sup>

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.<sup>45</sup>
  - 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.<sup>46</sup>
- ▶ **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.*

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 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 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,<sup>47</sup> 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

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

condemned states for failing to devote adequate resources to health care and services because of the obviously detrimental impact of that failure on patients.<sup>48</sup>

- The CESCR has required that states should introduce appropriate legislation to safeguard patient rights, including redress for medical errors.<sup>49</sup>

▶ **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.*

- 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.<sup>50</sup> The committee went on to recommend that a study on the impact of trade standards should be carried out.<sup>51</sup>

▶ **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;*

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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).
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.”

- (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
- 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.<sup>52</sup>

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.<sup>53</sup> Often in conjunction with Article 7, it has gone on to find breaches of this obligation on numerous occasions.<sup>54</sup> Specifically, in relation to the mentally ill in detention facilities (both in prisons and mental health institutions), the HRC has required improvements in hygienic conditions and the provision of regular exercise and adequate treatment.<sup>55</sup> 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).<sup>56</sup>

In relation to Article 10(1), the HRC has found a violation where a prisoner on death row was denied medical treatment<sup>57</sup> and where severe overcrowding in a pretrial detention center

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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.
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.

resulted in inhumane and unhealthy conditions, eventually leading to the detainee's death.<sup>58</sup>

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 required<sup>59</sup> 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).<sup>60</sup>

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).<sup>61</sup>

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.<sup>62</sup>

- ▶ **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 instability 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*

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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.

*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.”<sup>63</sup> 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,<sup>64</sup> in addition to lack of medical attention.<sup>65</sup>

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

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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).

### **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.<sup>67</sup> Some of the worst abuses include: failure to provide new detainees with access to a medical professional and with sanitary living conditions;<sup>68</sup> failure to segregate those with contagious diseases such as tuberculosis;<sup>69</sup> completely unacceptable quarantine procedures;<sup>70</sup> and insufficient provision of food, leading in some instances to conditions approaching starvation.<sup>71</sup>

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.<sup>72</sup>

- ▶ **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.*

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).

▶ **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.*

▶ **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).<sup>73</sup>**

▶ **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<sup>74</sup>**

**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.

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>.

- ▶ **Physicians for Human Rights Principles on the Effective Investigation and Documentation of Torture: the Istanbul Protocol**<sup>75</sup>

## 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:**<sup>76</sup> **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*

75. Physicians for Human Rights. Istanbul Protocol. [www.physiciansforhumanrights.org/library/istanbul-protocol.html](http://www.physiciansforhumanrights.org/library/istanbul-protocol.html).

76. See also IAPO's Policy Statement on Patient Involvement at <http://www.patientsorganizations.org/showarticle.pl?id=590&n=962>.

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 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.”<sup>77</sup>

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.<sup>78</sup>

- ▶ **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*

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 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 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)<sup>79</sup>**  
*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*

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79. World Medical Association. Resolution on Medical Care for Refugees. [www.wma.net/e/policy/m10.htm](http://www.wma.net/e/policy/m10.htm). Accessed November 22, 2009.

*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**

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;<sup>80</sup> refugees of a particular nationality;<sup>81</sup> children, older persons, and persons with physical and mental disabilities;<sup>82</sup> and those living in rural areas where the geographical distribution of health services and personnel shows a heavy urban bias.<sup>83</sup> In one country, the CESCR noted with regret that 90 percent of the population had no access to health services.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup>

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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).

Two groups that continue to suffer from unequal access to health services are women and young people, which frequently leads to high mortality rates.<sup>87</sup> Both groups, particularly women living in rural areas<sup>88</sup> 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.<sup>89</sup>

## 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.

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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).

## 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;<sup>90</sup> (b) the disproportionate number of women in low paid part time work;<sup>91</sup> and (c) the downsizing of the public sector with significant social repercussions.<sup>92</sup>
- ▶ **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.<sup>93</sup>
  - 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.<sup>94</sup>

**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:**<sup>95</sup> *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*

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.

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;...

## 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;<sup>96</sup> disparities in pay and conditions between the private and public sectors (in teaching);<sup>97</sup> discrimination in employment on the grounds of political opinion;<sup>98</sup> 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;<sup>99</sup> ineffective campaigns to increase awareness of hygiene and safety in the workplace where they are frequently below established standards;<sup>100</sup> 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; 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;<sup>102</sup> unsafe working conditions and lack of compensation for workplace injury;<sup>103</sup>

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

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

the privatization of labor inspections and control systems;<sup>104</sup> legislation that favors individual negotiation with employers over collective bargaining;<sup>105</sup> the need for effective implementation of legislative provisions concerning job security;<sup>106</sup> and the allowance of excessive working hours in both the public and private sectors.<sup>107</sup>

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

- The UN Human Rights Council (HRC) has condemned sexual harassment in the workplace<sup>108</sup> 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.<sup>109</sup>

▶ **Article 4 International Labour Organization (ILO) Occupational Safety and Health**

**Convention No. 155, 1981.**<sup>110</sup> *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 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, 1985**<sup>111</sup>

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.**<sup>112</sup> *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.*

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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. I]).

109. ICCPR. Dominican Republic, 1993. (A/48/40 [vol. I]). 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](http://www.ilocarib.org.tt/projects/cariblex/conventions_19.shtml).

111. ILO. 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>

## Standards related to nursing staff

▶ **ILO Nursing Personnel Convention<sup>113</sup> No. 149, 1977:<sup>114</sup>**

**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.*

**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.<sup>115</sup> The failure to pay medical staff their salaries for extended periods

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>.

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

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.<sup>116</sup> The low wages of the medical staff and the suboptimal living and working conditions in hospitals have also generated concern.<sup>117</sup> 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.<sup>118</sup>

## 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.*
- **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*

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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).

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.<sup>119</sup> 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).<sup>120</sup>

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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]).

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 I]).

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

- CEDAW has also condemned: the lack of regulations to penalize and remedy sexual harassment in the workplace in the private sector;<sup>121, 122</sup> 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;<sup>123</sup> discrimination against women on the grounds of pregnancy and maternity in spite of policies that prohibit this practice;<sup>124</sup> the lack of affordable childcare;<sup>125</sup> and the need to expand the number of crèches available for working mothers.<sup>126</sup>

## Standards related to workers with disabilities

- ▶ **Article 7 CESCR:** *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*

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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]).

domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical 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.

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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.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En).

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.<sup>127</sup>

## 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.<sup>128</sup>
- ▶ **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*

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

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.<sup>129</sup>
  - Procedural formalities for recognition of associations must not be so onerous as to amount to a substantive restriction on Article 22 of the ICCPR.<sup>130</sup>
  - 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.<sup>131</sup>
- ▶ **Article 2 ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organize:**<sup>132</sup> *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.<sup>133</sup>
  - 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.<sup>134</sup>
- ▶ **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**<sup>135</sup>

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

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. II]).

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 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.*
  
- ▶ **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;<sup>136</sup> 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,<sup>137</sup> and the absence of enabling legislation has been condemned.<sup>138</sup>
  - 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 HRC<sup>139</sup> and the CESCR<sup>140</sup> 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.<sup>141</sup>

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]).

- Trade union protection includes ensuring that foreign workers are not barred from holding official positions and that unions are not dissolved by the executive.<sup>142</sup>
  - Article 22(3) does not implicitly guarantee the right to strike.<sup>143</sup>
  - 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.<sup>144</sup>
  - 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.<sup>145</sup>
- ▶ **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 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.*

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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]).

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.<sup>146</sup>
- "Consultation and co-operation are no substitute for the right to strike" under Article 8(1) of the ICESCR.<sup>147</sup>
- 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.<sup>148</sup>
- 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,<sup>149</sup> 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.<sup>150</sup>

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

**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 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.*

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>.

► **ILO Convention 98 on Right to Organize and Collective Bargaining:**<sup>152</sup>

**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 organizations<sup>153</sup> 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.<sup>154</sup>
- Persons employed in public hospitals should enjoy the right to collective bargaining as guaranteed by ILO Convention No. 98.<sup>155</sup>
- Recognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike.<sup>156</sup>
- 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 striking could cause serious hardship to the national community, provided that the limitations are accompanied by certain compensatory guarantees.<sup>157</sup>
- The ILO Committee has expressly stated that the hospital sector is considered an

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152. ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratifce.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.

essential service for the purposes of prohibiting work stoppages.<sup>158</sup> 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.<sup>159</sup> 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.<sup>160</sup> 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 whistleblowers 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.

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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).<sup>161</sup>
- The regulation of the activities of a professional body and the scrutiny of such regulations by the courts may raise issues under Article 14.<sup>162</sup>
- Purely administrative proceedings will fall outside the scope as not amounting to a determination of civil rights and obligations.<sup>163</sup>
- 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.<sup>164</sup>
- 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.

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.

- The right to a fair hearing in a civil suit encompasses:
    - ==> Equality before the courts:<sup>165</sup> 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.<sup>166</sup>
    - ==> Access to courts:<sup>167</sup> Access includes the provision of legal aid.<sup>168</sup> 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.<sup>169</sup>
      - 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.<sup>170</sup>
  - Elements of a fair hearing in a civil suit encompass equality of arms,<sup>171</sup> respect for the principle of adversarial proceedings, preclusion of ex officio worsening of an earlier verdict, and an expeditious procedure.<sup>172</sup>
  - Public hearings in civil suits have been explicitly recognized by the HRC, subject only to limited public interest exceptions.<sup>173</sup>
  - Placing the burden of proof on defendants in civil cases is permissible.<sup>174</sup>
  - 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,<sup>175</sup> failing to inform the author of his appeal date until after it has taken place,<sup>176</sup> refusal of an administrative tribunal to admit crucial evidence,<sup>177</sup> and failure to permit one litigant to submit comments on the other side's submissions.<sup>178</sup>
- ▶ **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*

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165. Ibid., paras. 3 and 7.

166. Ibid., para. 65.

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

168. Bahamonde v. Equatorial Guinea. (468/91); Avellanal 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.

172. 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).

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.

## Right to an Effective Remedy<sup>179</sup>

### 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.<sup>180</sup>
- 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.<sup>181</sup>
- 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,<sup>182</sup> a guarantee that would be void if it were not available in cases in which a

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.

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.<sup>183</sup>

▶ **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 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.<sup>184</sup>

▶ **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<sup>185</sup>**

- 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.

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183. Kazantzis v. Cyprus. (972/01).

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

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

## 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.<sup>186</sup>
  - 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; 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.<sup>187</sup>
  - 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.<sup>188</sup>
  - The state is obliged to provide protection under the law against any unauthorized interferences with correspondence<sup>189</sup> and to ensure strict and independent (ideally, judicial) regulation of any such practices, including wiretapping.<sup>190</sup>

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

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).

- Searches—of a home (and workplace) and of a person—should also be subject to appropriate safeguards.<sup>191</sup>
  - 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.<sup>192</sup> Given the HRC’s interpretation of “lawful” in the context of another ICCPR provision (Article 9[4]), the term may extend beyond domestic law.<sup>193</sup>
  - 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.<sup>194</sup>
- ▶ **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 Information<sup>195</sup>

### 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

### 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.<sup>196</sup>

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.

196. Laptsevich v. Belarus. (780/97).

- 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.<sup>197</sup>
  - 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.<sup>198</sup>
- ▶ **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**<sup>199</sup>

**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.*

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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)<sup>1</sup>**

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."<sup>2</sup> 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)<sup>3</sup>**

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

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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>.

through regular monitoring visits to places of detention. The rest of the treaty sets out the membership and working methods of the committee.

► **European Social Charter 1961 and 1996 (ESC)<sup>4</sup>**

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.”<sup>5</sup>

► **Framework Convention for the Protection of National Minorities 1995<sup>6</sup>**

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)

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4. Council of Europe (COE). European Social Charter. [http://www.coe.int/T/E/Human\\_Rights/Esc/](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>.

► **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**<sup>7</sup>

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 Rights**<sup>8</sup>

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)

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

8. Charter of Fundamental Rights of the European Union. [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm).

- Article 37 (the right to environmental protection)
- Article 38 (the right to consumer protection)

### ► **Proposed EU Directive on Patients' Rights in Cross Border Health Care**<sup>9</sup>

After repeated delays, the European Commission released this proposed directive, together with a communication on improving cooperation between member states in this area, on 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.”<sup>10</sup>

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**<sup>11</sup>

*“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,*

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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](http://ec.europa.eu/health/ph_overview/co_operation/healthcare/cross-border_healthcare_en.htm).

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](http://www.activecitizenship.net/health/european_charter.pdf).

*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.*"<sup>12</sup>

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

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.<sup>14</sup> 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, Amsterdam**<sup>15</sup>

*"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."*<sup>16</sup>

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

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12. Ibid., preamble.

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](http://www.who.int/genomics/public/eu_declaration1994.pdf).

16. Ibid.

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 1996**<sup>17</sup>

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.”<sup>18</sup> Specifically, it recommends that health care systems be people-centric and calls for patient participation in shaping improvements.

## 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 ESCR 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

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

18. Ibid.

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.<sup>19</sup>

## 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. ...*

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.

- The ECtHR has not defined the phrase "unsound mind" on the basis that its meaning is continually evolving.<sup>20</sup> 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).<sup>21</sup> 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.<sup>22</sup>
- 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.<sup>23</sup>
  - Any commitment must be subject to a speedy periodic legal review that incorporates the essential elements of due process.<sup>24</sup>
  - 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).<sup>25</sup>
- Detention under Article 5(1)(e) can be justified both in the interests of the individual and on public safety grounds.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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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. *Gajosi 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.

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).

## 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.”*<sup>29</sup>

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

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.”*<sup>31</sup> 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 life<sup>32</sup> so there are clear links between the right to privacy and the right to bodily integrity.<sup>33</sup>

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

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.

▶ **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:**<sup>34</sup> *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.*
- **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;*

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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>.

(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,<sup>35</sup> 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.*
  - 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.<sup>36</sup>

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.

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

▶ **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*

*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.*

## 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.<sup>37</sup> It has gone on to hold that a breach of physical

37. Y. F. v. Turkey. (24209/94).

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.<sup>38</sup>

- 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.<sup>39</sup>

▶ **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

### 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.*

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.]).

- 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.<sup>40</sup>

*"[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."<sup>41</sup>*

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"<sup>42</sup>—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.<sup>43</sup> 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."<sup>44</sup>
- 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.<sup>45</sup>
- 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.<sup>46</sup>

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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.

46. *Pretty v. UK*. (35 EHRR 1).

- 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.<sup>47</sup>

## 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.<sup>48</sup>
  - 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.<sup>49</sup>
  - 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

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).

upon at national level, taking into account the risk of deterioration in either clinical condition or quality of life.<sup>50</sup>

- 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.<sup>51</sup>

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.<sup>52</sup>

- ▶ **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.<sup>53</sup>

## **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](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."<sup>54</sup>
- 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.<sup>55</sup> 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."<sup>56</sup>
- In relation to prisoners' health and well-being, this condition includes the provision of requisite medical assistance.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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. Kudla 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).

- 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.<sup>61</sup>
- 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.<sup>62</sup>
- Examples of breaches of Article 3 include: the continued detention of a cancer sufferer, causing "particularly acute hardship;"<sup>63</sup> significant defects in the medical care provided to a mentally ill prisoner known to be suicide risk,<sup>64</sup> and systematic failings in relation to the death of a heroin addict in prison.<sup>65</sup>
- 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.<sup>66</sup>
- 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.<sup>67</sup>
- 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.<sup>68</sup> 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.<sup>69</sup>

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

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.

- 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.<sup>70</sup>
- 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.<sup>71</sup>
- 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 detention<sup>72</sup> and that the diagnoses and care are prompt and accurate.<sup>73</sup> 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.<sup>74</sup> Contradictions in medical records have been held to amount to a breach of Article 3.<sup>75</sup>
- Experimental medical treatment may amount to inhuman treatment in the absence of consent.<sup>76</sup> During the drafting of the convention, compulsory sterilization was considered to amount to a breach.<sup>77</sup>
- 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.<sup>78</sup>

The CPT has emphasized the impact of overcrowding on prisoners' health.<sup>79</sup> 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.<sup>80</sup>

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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).

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.

- ▶ **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.<sup>81</sup>

## 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.”**

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

▶ **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**<sup>82</sup>

*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;*
- *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**<sup>83</sup>

*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.*

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

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

## 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, 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.<sup>84</sup> 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.<sup>85</sup>
  - The court has also recently accepted the use of statistics to prove indirect discrimination,<sup>86</sup> a practice that in itself may not amount to impermissible discrimination but that disproportionately affects members of a particular group.

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).

▶ **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 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.<sup>87</sup>

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.<sup>88</sup>

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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).

- 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 13<sup>89</sup> of the Revised European Social Charter<sup>90</sup> by ending their exemption from charges for medical and hospital treatment<sup>91</sup> and (b) the rights of children of immigrants to protection under Article 17 of the revised charter<sup>92</sup> 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 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.<sup>93</sup>

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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.'*
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).

▶ **Article 3 European Convention on Human Rights and Biomedicine<sup>94</sup>**

*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 efficiency<sup>95</sup>**

*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.*

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.<sup>96</sup> 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.

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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](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;<sup>97</sup>
  - 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.<sup>98</sup> The assessment of whether a difference in treatment pursues a legitimate aim and is proportionate takes into account Article G,<sup>99</sup> the limitation provision of the ESC.<sup>100</sup>

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.

- 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.<sup>101</sup> 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.<sup>102</sup>
- 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.<sup>103</sup>
- 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.<sup>104</sup>
- 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.<sup>105</sup>
- 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;<sup>106</sup>
  - protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action;<sup>107</sup>
  - 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).<sup>108</sup>
- Domestic law should also provide for an alleviation of the burden of proof that rests with the plaintiff in discrimination cases.<sup>109</sup>

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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).

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).

- 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 individuals<sup>110</sup>
  - 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.<sup>111</sup>
- 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.<sup>112</sup>
- 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;<sup>113</sup>
  - 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.<sup>114</sup>

► **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*

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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).

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.

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.

## 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.<sup>115</sup>
  - 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 day<sup>116</sup> or, under certain conditions, more than 60 hours in one week<sup>117</sup> 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.<sup>118</sup>
  - 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.<sup>119</sup>

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).

- 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.<sup>120</sup>

## 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."<sup>121</sup>
- 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.<sup>122</sup>

119. Ibid.

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

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

- Article 3 ESC applies to both the public and private sectors.<sup>123</sup>
- 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.).<sup>124</sup> 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' accumulated periods of exposure to dangerous substances while working for different employers).<sup>125</sup>
- 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.<sup>126</sup> 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).<sup>127</sup>
- All workers, all workplaces, and all sectors of activity must be covered by occupational health and safety regulations.<sup>128</sup>
- There is a need for regular inspections and effective penalties for breaches.

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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.

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 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 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.<sup>129</sup>
- Employees who work overtime must be paid at a higher rate than the normal wage rate.<sup>130</sup> 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.<sup>131</sup>

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.”<sup>132</sup> With respect to state employees, confining exceptions to “senior officials” is compatible with Article 4(2).<sup>133</sup> Exceptions to receipt of a higher rate of overtime pay

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).

cannot, however, be applied to all state employees or public officials, irrespective of their level of responsibility.<sup>134</sup> 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.<sup>135</sup>

- Women and men are entitled to “equal pay for work of equal value,” and this right must be expressly provided for in legislation.<sup>136</sup> 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.<sup>137</sup> It must also apply to full-time and part-time employees, covering the calculation of hourly wages, pay increases, and the components of pay.<sup>138</sup>
- Domestic law must provide for appropriate and effective remedies in the event of alleged wage discrimination.<sup>139</sup> 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 be entitled to adequate compensation, sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender.<sup>140</sup> In cases of unequal pay, any compensation must, at minimum, cover the difference in pay.<sup>141</sup>

## 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.<sup>142</sup>

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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.

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. INTERRIGHTS 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 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 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.<sup>143</sup>
  - 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.<sup>144</sup>

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).

- The right also includes the freedom not to join an association or trade union.<sup>145</sup>
- 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."<sup>146</sup> The latter term should be narrowly interpreted, however; the ECtHR left open whether it should apply to teachers.<sup>147</sup>

## 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

### 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.<sup>148</sup> 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.

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.

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

- Under Article 5, workers must be free to join and free not to join a trade union.<sup>149</sup> Any form of compulsory trade union membership imposed by law is incompatible with Article 5.<sup>150</sup>
- Domestic law must clearly prohibit all preentry or postentry "closed shop" clauses and all union security clauses (automatic deductions from wages).<sup>151</sup> 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.<sup>152</sup>
- 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.<sup>153</sup>
- Trade unions and employers' organizations must be independent from excessive state interference in relation to their infrastructure or effective functioning.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup>
- 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 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.<sup>157</sup>
- 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.<sup>158</sup>
- Domestic law may restrict participation in various consultation and collective bargaining procedures to certain representative trade unions, subject to certain criteria being met.<sup>159</sup>
- 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

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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).

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

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

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

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.<sup>160</sup>

- 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).<sup>161</sup>

▶ **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.*

- 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.<sup>162</sup>
- 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

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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.

162. Ibid.

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).<sup>163</sup> Any deduction from strikers' wages should not exceed the proportion of their wage that would be attributable to the duration of their strike participation.<sup>164</sup>

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.<sup>165</sup>

▶ **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.*

▶ **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.<sup>166</sup>
- 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.<sup>167</sup> Trade unions, however, should be

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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).

166. National Union of Belgian Police v. Belgium. (1 EHRR 578).

167. Schmidt and Dahlstrom v. Sweden. (1 EHRR 632).

heard and should be permitted to take action to protect the occupational interests of their members.<sup>168</sup>

- This protection can include the right to strike, which may only be limited under certain circumstances.<sup>169</sup>

## 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.

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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.<sup>170</sup>
- In *Konig 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."<sup>171</sup>
- A merely investigative procedure will not engage Article 6(1),<sup>172</sup> even though pretrial proceedings may be determinative of civil rights and obligations under certain circumstances.<sup>173</sup>
- 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.<sup>174</sup> Licensing decisions are also covered.<sup>175</sup>

170. *Ringeisen v. Austria*. (1 EHRR 466).

171. *Konig v. Federal Republic of Germany*. (2 EHRR 170).

172. *Fayed v. UK*. (18 EHRR 393).

173. *Brennan v. UK*. (34 EHRR 50).

174. *Konig 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; *Wickramsinghe v. UK*. (31503/96).

175. *Konig v. Germany*. (2 EHRR 170). Disciplinary proceedings led to the withdrawal of the applicant's licence to run a medical clinic.

- 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.<sup>176</sup>
- Disputes relating to private law relations between private employers and employees fall within the scope of Article 6(1).<sup>177</sup> As a general rule, however, disputes relating to the employment of public servants fall outside of it.<sup>178</sup>
- 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;<sup>179</sup>
  - 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.<sup>180</sup>
- 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,<sup>181</sup> and can be violated by mere procedural inequality.<sup>182</sup>
- The same principle applies to the submissions of nonparties to the proceedings.<sup>183</sup>
- Both parties have a right to be informed of the other's submissions and other written material and have a right to reply.<sup>184</sup> Disclosure is crucial for a fair hearing.<sup>185</sup>
- Although there is no obligation on a court to obtain an expert report merely because one party seeks it,<sup>186</sup> where an expert is appointed, there must be compliance with the equality of arms principle.<sup>187</sup>
- 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.<sup>188</sup>

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176. H v. France. (12 EHRR 74).

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. Dombó 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).

- 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.<sup>189</sup>
- 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.<sup>190</sup>
- The right to a public hearing includes disciplinary hearings of professionals.<sup>191</sup>
- 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.<sup>192</sup> The time period begins at the moment when proceedings are instituted<sup>193</sup> and does not end until all matters—including appeals and determination of costs—have been completed.<sup>194</sup>

## 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.<sup>195</sup> All procedures, including judicial and nonjudicial, will be examined.<sup>196</sup>

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).

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).

- Formal remedies that prevent examination of the merits of the claim, including judicial review, may not comply with Article 13.<sup>197</sup>
- 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.<sup>198</sup>
- The authority with the ability to provide the remedy must be independent of the body alleged to have committed the breach.<sup>199</sup>

## 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.<sup>200</sup> 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.<sup>201</sup> It has been held, however, that private life is not engaged by "real time" closed-circuit television if no images are recorded,

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).

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).

although once a systematic record is made or the image is processed in some way, it will be engaged.<sup>202</sup>

▶ **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.*

## 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.<sup>203</sup>
- 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.<sup>204</sup>

202. Peck v. UK. (36 EHRR 41).

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.

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 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.

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## 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.

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Web: [www.ilo.org/public/english/index.htm](http://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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**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.

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## 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/chr/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/](http://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.

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### 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](http://www.humanrights.coe.int/cseweb/GB/index.htm)

## Committee of Ministers

The Committee of Ministers ([www.coe.int/cm](http://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](http://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.

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### 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](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
	Functions	Interstate complaints (compulsory) (Article 33, ECHR)
		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.

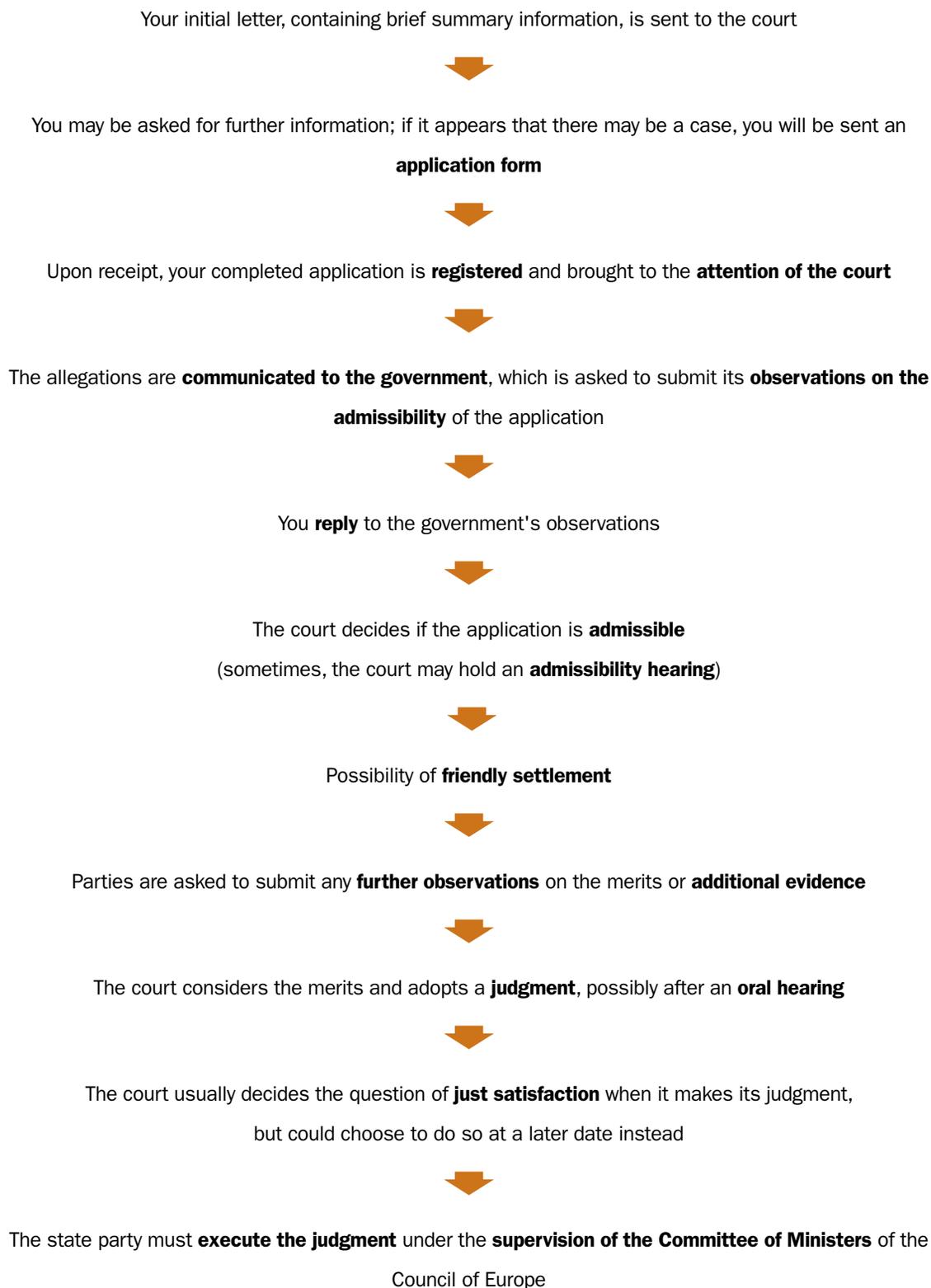
As of June 1, 2010, in accordance with Protocol 14 to the ECHR (Council of Europe Treaty Series No. 194), a new admissibility requirement allows the court to declare inadmissible applications where the applicant has not suffered a significant disadvantage, unless respect for human rights requires an 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?	No
Do you need legal representation?	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
Is financial assistance available?	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
Are amicus curia briefs accepted?	Yes, with permission (Rule 61 of the Rules of Court)
Who will know about the communication?	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.
How long does the procedure take?	Several years
What measures, if any, can the mechanism take to assist the court in reaching a decision?	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 nonjudicial 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

International law in the Armenian legal framework includes a variety of instruments: contracts, agreements, conventions, protocols, and other documents established by an exchange of notes or letters (RA Law on International Treaties, Article 2). No distinction is made between international and regional law. As regional instruments are not domestic, they are considered international.

An international instrument becomes binding on the Republic of Armenia (RA) after it is ratified by the RA National Assembly, in the case of treaties or conventions, or approved by the RA President, in the case of contracts (RA Law on International Treaties, Article 22). Under public international law, Armenia is considered a “monist state.” Upon ratification or approval, international treaties become an integral part of Armenia’s legal framework and are subject to direct application (RA Constitution, Article 6; RA Law on International Treaties, Articles 5 and 22).

International treaties ratified by the RA National Assembly and binding on Armenia are considered to be the supreme law of the country, i.e., the provisions of a ratified international instrument prevail over all domestic legal acts. In addition, the norms of an international instrument approved by the president prevail over all legal acts except for the acts of the RA Parliament (RA Law on International Treaties, Article 5). Pursuant to the RA Law on Legal Acts, international instruments are also legal acts and prevail in the hierarchy of legal acts (RA Law on Legal Acts, Article 4).<sup>1</sup>

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1. The RA Constitution and domestic legislation, however, always prevail over an international instrument that is only executed by the president—a contract, for example—although this type of international instrument will prevail over domestic regulations or decrees when a conflict exists (RA Law on International Treaties, Article 5).

For these reasons, a judge must abide by the provisions and norms of a binding international instrument when arriving at a judicial decision and interpret domestic provisions accordingly. Also, pursuant to Article 15 of the RA Judicial Code, judges must follow the decisions of the ECtHR when deciding a domestic case when the fact patterns are the same.

Furthermore, judges must abide by international customary law. Pursuant to the RA Law on Legal Acts, “The principles and norms of international law that have obtained universal recognition, as well as the international treaties of the Republic of Armenia, are the constituent part of the legal system of the Republic of Armenia” (RA Law on Legal Acts, Article 21, para. 2). Thus, if an attorney successfully argues, and a judge accepts, that a norm has obtained universal recognition, such customary rule enjoys the same binding status in the RA court as any domestic law.<sup>2</sup>

In addition, and when necessary, attorneys should remind judges that they are obliged to consider nonbinding but persuasive international instruments when arriving at a decision on a case based on the RA Code of Judicial Conduct, Rule 13, which states: “A judge shall be informed about the developmental trends of international law and must continually utilize knowledge obtained in this sphere when implementing his/her professional activities.” Thus, when RA legislation and binding international instruments are silent as to the scope of specific rights or standards of evidence or treatment, attorneys may cite nonbinding international instruments and ask that judges consider them, based on the requirements of Rule 13 above.<sup>3</sup>

## 5.2 Status of Precedent

### CASE LAW IN ARMENIA

In today's global world most judicial systems have become mixed or hybrid systems that incorporate aspects of both the civil law and the common law systems. Common law jurisdictions have undergone a long process of writing down in codes rules that were originally only known through case law. In these common law jurisdictions, attorneys and judges now start their research with statutes (as in a civil law system) and then review prior judicial decisions to discover how the statutes have been interpreted by courts of higher authority. In Europe, the European Convention of Human Rights and Fundamental Freedoms has been conceived of by the ECtHR as a “living instrument,” meaning that it should be interpreted dynamically and progressively over time to ensure effective protection. At the domestic level, the living instrument doctrine has meant that the judicial decisions of the ECtHR are sources that attorneys and judges can, and should, apply to understand the changing scope of application of the convention's articles.

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2. Rules of customary international law include, but are not limited to, the right to life, prohibition on torture and cruelty, inhuman or degrading treatment, protection against discrimination, right to liberty, and security of person and others.
  3. Examples of such instruments include UN, WHO, and COE declarations, recommendations, standard rules and principles, etc.

Armenia has now joined this trend toward hybrid systems by incorporating the use of case law in its judicial system. The RA Constitution states that the Court of Cassation shall ensure uniformity in the implementation of law.<sup>4</sup> This means that rules must be applied to certain types of disputes in the same way, so that, substantively, the same result is reached in disputes containing the same set of determinative facts.

To further this goal, in Article 15(3) and 15(4), the RA Judicial Code provides that:

- In the hearing of his/her legal dispute before a court, everyone has the right to invoke, as legal argument, the reasoning of a final judicial act (for example, a decision) of an RA court, including its construal of the law, in another case with identical/similar factual circumstances.
- The reasoning of a judicial act of the Court of Cassation or the ECtHR in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand.

This provision means that an attorney who presents a case to any RA court must look for judicial decisions from the Court of Cassation and from the ECtHR that are *relevant* to the dispute or problem that he or she has brought to the court. A judicial decision is *relevant* if the principal reason why the court decided for or against a certain party in the case directly relates to the court's application of a rule to a particular fact in the problem *and* the same question about whether to apply the rule to a particular fact exists in the case the attorney is now presenting to the court. If the judicial decision of the Court of Cassation or ECtHR was in favor of a person in a same or similar position to the attorney's client, then the attorney will argue that the problem resolved in the judicial decision and the client's problem are substantially the same; therefore, the decision must also be the same. If the judicial decision was not in favor of a person such as the attorney's client, then the attorney must argue that the problem resolved in the judicial decision and the client's problem are different; therefore, the decision must also be different.<sup>5</sup>

### PRACTICE ADVICE

To make such arguments, attorneys must compare the problem resolved in the judicial decision with their client's problem. When comparing judicial decisions with their client's problem, attorneys may make three different types of arguments, ranked here as follows:

- ▶ **Factual Comparison Argument:** Attorneys should compare the facts of the problem in the judicial decision and the facts of their client's problem and then make **one** of the following arguments:

4. RA Constitution, Article 92.

5. No two legal problems are ever exactly the same, because life provides for a multitude of factual patterns. What is important is to identify how the facts of the two legal problems are the same or different, in important and substantial ways.

- the facts of the two problems are substantially the same; the new decision must be the same as the prior judicial decision, or
  - the facts of the two problems are substantially different because of a new or different determinative fact; the new decision must be different from that of the prior judicial decision.
- ▶ **Statutory Goal Argument:** Attorneys must analyze how the prior judicial decision promoted the underlying social goal of the rule applied, in other words, answer how the decision promotes the reason why the rule was adopted. Then the attorneys should argue either that:
- by applying the rule to this type of factual problem, the prior judicial decision achieved a certain statutory goal, and making the same decision in this case promotes and achieves the same goal of the statute, or
  - by not applying the rule to this type of factual problem, the prior judicial decision creates an exception that promotes a competing, or more important, social goal, and this competing social goal must also be achieved in this case by following the same (or creating a new) exception to the general rule.
- ▶ **Justice Argument:** The general aim of all courts is to achieve justice. Attorneys should analyze how the prior judicial decision creates fairness or justice for the individuals involved and for society. Then the attorneys may argue either that:
- the prior judicial decision applied the rule to create justice because it ... (see bulleted reasons below), or
  - the prior judicial decision, if followed in the present case, would not create justice because it ... (see bulleted reasons below).
    - regulates the balance of power between two parties of unequal power
    - recognizes that the two parties are of equal power and regulation is unwarranted
    - ensures stability and foreseeability as between the economic and/or social relations of these two types of parties in society
    - recognizes that economic and/or social relations in society have evolved between these two types of parties and regulatory change is warranted
    - other reason

## CONCLUSION

The practice advice offered above describes how attorneys and judges generally make case law arguments. Although Article 86 of the RA Law on Legal Acts states that the words in legal acts must be interpreted literally, it also states that the interpretation cannot change the meaning of a legal act.<sup>6</sup> The latter point reflects a general legal principle, which is that a legal interpretation must be true to the purpose of a statute. In other words, the job of any judge is to interpret a statute so that the goal of the rule is achieved; the interpretation and the judicial decision must provide the result intended by the statute. This principle is true in common law and also in civil

6. RA Law on Legal Acts, Article 86.

law jurisdictions. For these reasons, Article 86 of the RA Law on Legal Acts does not limit the range of case law arguments in Armenia, and attorneys and judges are free to consider all of the types of arguments described above.

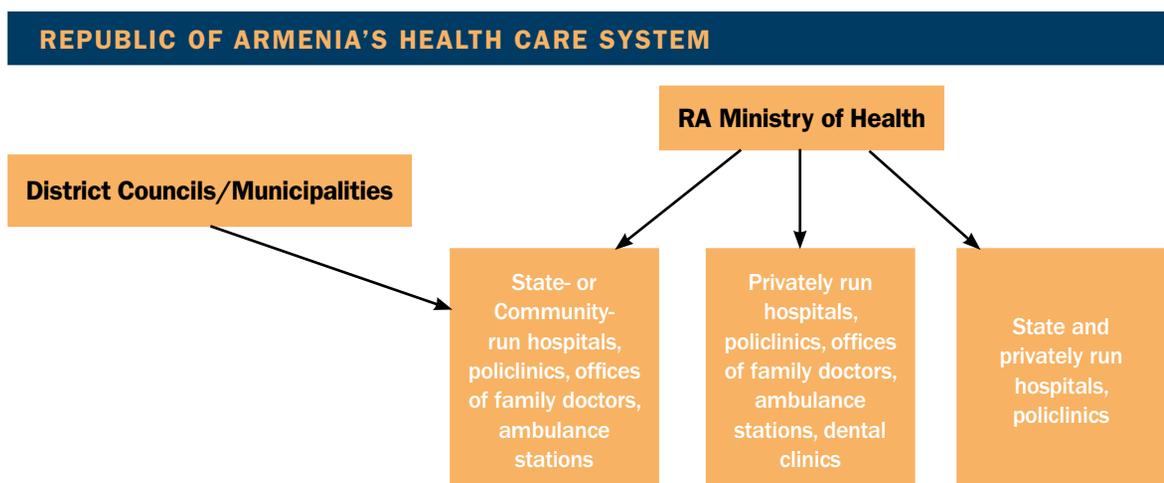
Although no RA precedent decisions yet exist in the field of patient rights, with the help of this practitioner guide, favorable precedent decisions may soon be achieved and, where appropriate, be based on comparative and international human rights law.

## 5.3 Health System

The RA health care system comprises (a) state and local self-governing bodies, together with the organizations and institutions under their supervision; (b) both public and private health care undertakings; and (c) health care staff, who are responsible for the care and treatment of patients.

The RA Ministry of Health is the national executive authority responsible for the elaboration and implementation of the Armenian government's policy in the area of health. It grants licenses to health care programs, oversees the observance of the license terms and conditions, and imposes relevant sanctions in case of violations. Through the State Health Agency and State Hygiene and Anti-Epidemic Inspectorate, included within its structure, the Ministry of Health also supervises compliance with the state's obligations to provide guaranteed free medical care and compliance with relevant sanitary and hygiene regulations.

Health care undertakings in Armenia are created mainly in the form of limited liability companies or joint stock companies. They are owned either by the state/local community or by private persons. Some of them are owned jointly by private persons and the state. Whereas the RA Ministry of Health is entrusted with the task of licensing and supervising the whole sector, the owners of private health care programs are responsible for the governance and day-to-day operations of their own programs. District councils and municipalities supervise the arrangements for, and governance of, health care undertakings under their jurisdiction.



## **6.1 PATIENTS' RIGHTS**

**Right to Preventive Measures**

**Right of 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**

# 6

## National Patients' Rights and Responsibilities

### 6.1 Patients' Rights

#### Right to Preventive Measures

##### a) Right 1 as Stated in the European Charter of Patients' Rights (ECPR)

*Every individual has the right to proper service in order to prevent illness.*

##### b) Right as Stated in Country Constitution/Legislation

###### ▶ RA Constitution

**Article 38:** *Everyone shall have the right of benefit from medical aid and service under the conditions prescribed by law. Everyone shall have the right to free-of-charge benefit from the basic medical aid and services. The list and the procedure of the services shall be prescribed by law.*

###### ▶ RA Law on Medical Care and Services to the Population (Medical Care Law)

- At the statutory level, organization of the medical care and services—the legal, economic and financial foundation that ensures implementation of the constitutional right for the protection of a person's health—is provided by the RA Law on Medical Care and Services

to the Population (the Medical Care Law), which was adopted by the RA National Assembly on March 4, 1996.

- **Article 1:** This article provides for definitions of medical care and services. Specifically, the Medical Care Law describes medical care and services as the provision of care to the population in disease prevention, treatment with medications, execution of diagnostic examinations, rehabilitation treatment, medical expert examination, and provision of other medicine-related and noncurative services.
- **Article 2:** This article of the law describes the main types of medical care and services, in which the primary role is given to primary health care as a free-of-charge-for-everyone type of medical care and services, based on less expensive methods and technologies guaranteed by the state. The list and structure of medical care and services is defined by the Government of the Republic of Armenia, which means that every person is entitled to receive respective services to prevent diseases (including timely vaccination, information on risk factors, etc.). The responsibilities of health services include raising public awareness on risk factors through conducting free-of-charge health care measures covered by insurance among different risk groups of the population.
- **Article 20:** The Medical Care Law provides mandatory medical examination of persons involved in specific types of activity. Although not mentioned explicitly in the article, this requirement is also aimed at providing preventive measures. Thus, for the protection of people's health and prevention of infections and occupational diseases, employees of different professions and persons employed by different enterprises, agencies, and organizations—before their appointment to work and during their employment—are obliged to periodically undergo medical examination in a procedure set out by the RA legislation. The list of professions and organizations and the implementation mechanism was adopted by Government Decision 347-N, dated March 3, 2003.<sup>1</sup> Employers must reimburse their employees for mandatory medical examination expenses.
- ▶ **Article 21 of the RA Law on Keeping Arrested and Detained Persons:** *Medical-sanitary aid to arrestees and detainees shall be provided in accordance with the legislation of the Republic of Armenia and internal regulations.*

### c) Supporting Regulations/Bylaws/Orders

- ▶ RA Government Decree 318-N, dated March 4, 2004, approved the scope of state-guaranteed free-of-charge public health care services (including hygiene and antiepidemic services) determined by the RA Ministry of Health.

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1. See Section 8, Appendix 1.

## d) Relevant Provisions of Provider Code of Ethics

Although the Republic of Armenia does not have an approved code of ethics, the Medical Association of Armenia is a member of the World Medical Association (WMA), and the latter adopted its Medical Ethics Manual in 2005.<sup>2</sup> In addition, the WMA has adopted policies on a large number of ethical issues. With the exception of the International Code of Medical Ethics, the most important of these have been given the title "declaration." Although not necessarily legally binding, these documents establish respected standards for medical professionals to follow.

In the first paragraph of its Statement on Health Promotion, the WMA notes: *Medical practitioners and their professional associations have an ethical duty and professional responsibility to act in the best interests of their patients at all times and to integrate this responsibility with a broader concern for and involvement in promoting and assuring the health of the public.*

As the WMA explains in its Medical Ethics Manual, all physicians need to be aware of the social and environmental determinants that influence the health status of their individual patients. Although physicians are seldom able to treat the social causes of their individual patients' illnesses, they should refer the patients to whatever social services are available. In addition, they can contribute, even if indirectly, to long-term solutions to these problems by participating in public health and health education activities, monitoring and reporting environmental hazards, identifying and publicizing adverse health effects from social problems such as abuse and violence, and advocating for improvements in public health services.

## e) Practical Examples

### 1. Example(s) of Compliance

As reported by the RA Ministry of Health, Citizen D. appealed to the RA Ministry of Health with a complaint that his child did not undergo vaccination, which resulted in the child's serious illness. Later it became clear that the applicant was invited to the clinic with the child for vaccination, but the man refused the vaccination. The physician informed the parent of all possible consequences; afterward, the parent signed a paper that he was refusing vaccination of the child and was aware of the consequences. Therefore, the physician's activities were justified, and patient's right was not violated.

### 2. Example(s) of Violation

Citizen A. visits a precinct polyclinic for a routine vaccination of her child. The physician tells the citizen that the polyclinic has not received the relevant vaccines from the Ministry of Health for that month and that the only option available is for her to pay and to use the vaccine purchased by the physician on his own behalf. In this hypothetical case, the patient's right to preventive measures has been violated.

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2. World Medical Association. [http://www.wma.net/en/70education/30print/10medical\\_ethics/index.html](http://www.wma.net/en/70education/30print/10medical_ethics/index.html) and <http://www.wma.net/en/60about/10members/20memberlist/index.html>.

### 3. Actual Case(s)

As this area of law is still developing, no real cases were available to cite as examples for this section. Readers may offer examples of real cases for future editions of this practitioner guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

#### f) Practice Notes

- In cases related to the right to preventive measures, lawyers should obtain expert medical evidence—in this case, in relation to the appropriate services/treatment/medicines that should have been provided to prevent the illness in question.
- Be aware that the state will be providing its own expert medical opinions to contest your experts. Therefore, it is important to try to obtain more than one opinion to corroborate.
- Because some vaccines/treatments are very costly, one question that lawyers should consider is whether state medical personnel have done all they can reasonably do in circumstances within the limited resources.
- Lawyers must also evaluate the impact that any violation of this right might have on the victim: both pecuniary consequences (for example, loss of earnings) and nonpecuniary consequences (for example, physical or mental damage).

#### g) 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.

## Right of Access

### a) Right 2 as Stated in the ECPR

*Every individual has the right of access to the health services that his or her health needs require. The health services must antee 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 Country Constitution/Legislation

#### ▶ RA Constitution

The charter's apparently limited grounds for prohibition of discrimination are expanded by the RA constitutional and legislative provisions.

- **Article 38:** *Everyone shall have the right to benefit from medical aid and service under the conditions prescribed by law. Everyone shall have the right to free-of-charge benefit from*

basic medical aid and services. The list and the procedure of the services shall be prescribed by law.

- **Article 14.1:** Everyone shall be equal before the law. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or other personal or social circumstances shall be prohibited.

It could be argued that, under Article 14.1, “personal or social circumstances” include such issues as sexual orientation and HIV status, thus providing a broad guarantee against discrimination.

### ▶ **RA Medical Care Law**

Statutory provisions regarding the organization and provision of medical care and services are stated in the Medical Care Law, which contains an entire chapter on human rights in the area of medical care and services, among which special attention is given to *the accessibility of medical care and services*.

- **Article 4:** The Medical Care Law guarantees everyone’s right to receive medical care and services, irrespective of nationality, race, sex, language, religion, age, health status, political or other views, social origin, property, or other status. So, both the RA Constitution and the Medical Care Law provide for a wider scope of nondiscrimination grounds than the European Charter of Patients’ Rights.

Moreover, state health target programs ensure free medical care and services for everyone. Medical Care Law does not clearly define the concepts of “medical care and services” and “state health target programs.” Guidance on these guarantees may be provided in the future through relevant case law or by amending the law. In accordance with Article 1, the concept of “medical care and services” is defined as the provision of care to the population regarding disease prevention, treatment and medicated treatment, execution of diagnostic examination, rehabilitation treatment, medical expert examination, and provision of medicine-related and noncurative services.

- **Article 2:** The Medical Care Law distinguishes the following main types of medical care and services:
  - *Primary medical care:* a free-of-charge-for-everyone type of medical care and services based on less expensive methods and technologies, guaranteed by the state
  - *Specialist medical care:* a type of medical care and services based on special methods of diagnostics and medicine and sophisticated medical technologies

The list of the types and structure of the medical care and services is defined by the RA Government (as per Article 2 of the Medical Care Law). There are two *administrative frameworks* for medical care and services in Armenia:

- *Inpatient:* treatment requires complex medical services that could be provided at hospitals (such as diagnostics, treatment, long-term supervision, and special care)
- *Outpatient:* treatment does not require hospitalization but is regulated by the Medical Care Law

► State Health Target Programs are annual programs aimed at protecting public health, and the funding thereof is reflected in the RA State Budget. The RA Government submits the annual state health target programs to the National Assembly within the framework of a draft budget (Article 1 of the Medical Care Law). So, the state ensures the maintenance and development of the health care sector through targeted budgetary funding, the scope of which is determined in accordance with State Health Target Programs. In addition, each person is entitled to receive medical care and service outside this scope and is covered under health insurance, personal payments, or other sources provided for by the RA legislation. Thus, in accordance with Article 25 of the Medical Care Law, sources of funding are as follows:

1. Allocations from the RA State Budget
2. Insurance payments
3. Direct payments from persons
4. Other sources not prohibited by the RA legislation

In addition to defining human rights in the area of health care and services, Chapter 2 of the Medical Care Law also provides for particular enforcement of those rights by certain categories of persons—such as those who are suffering from diseases that endanger the health of others;<sup>3</sup> arrested, detained, and convicted persons; servicemen and conscripts; foreign citizens; stateless persons; and persons that have suffered from emergency situations.

Specifically, Article 10 guarantees free medical care and services for every child under the State Health Target Programs (according to the CRC and the RA Law on the Rights of the Child, a child is defined as a human being under age 18, unless majority is attained earlier).

A person suffering from a disease that endangers the health of other persons is entitled to free medical care and services and to treatment at special facilities that provide medical care and services specifically for such purposes (Article 11, Medical Care Law). The list of diseases endangering others is defined by the RA Government Decree No. 1286 of December 27, 2001.

Persons arrested or serving their sentences in places of imprisonment have the right to receive medical care and services as per procedures established by the RA legislation (Article 12, Medical Care Law). Article 21 of the RA Law on Keeping Arrested and Detained Persons is related to medical-sanitary aid and personal hygiene. It provides that medical-sanitary aid to arrestees and detainees shall be provided in accordance with the RA legislation and internal regulations. The administrative staff of arrest and detention facilities shall ensure that sanitary-hygienic and antiepidemic requirements for maintaining the health of arrestees and detainees are met. Places of detention must have at least one general practitioner. Arrestees and detainees who need specialized medical aid shall be transferred to a civilian medical institution. The authorized body shall determine the procedures for rendering medical, including physiological, aid to arrestees and detainees; the conditions of their stay in medical institutions; and the degree of involvement of the employees of such institutions in medical services.

Servicemen and conscripts have the right to receive medical care and services in the procedure established by the RA legislation (Article 13, Medical Care Law).

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3. See Section 8, Appendix 3.

Foreign citizens and stateless persons staying in Armenia have the right to receive medical care and services under the RA legislation and in accordance with international treaties (Article 15, Medical Care Law). In other countries, understandably, medical care and services to Armenian citizens are provided in compliance with the legislation of that country and with international treaties concluded between the relevant country and Armenia.

People injured in emergency situations receive free-of-charge medical care and services guaranteed by the state (Article 14, Medical Care Law).

During pregnancy, every woman is entitled to medical care and services connected with the pregnancy and child delivery, as per the framework of State Health Target Programs (Article 9, Medical Care Law).

As is clear from the above-mentioned provisions, the right to medical care and services is constitutionally guaranteed by the state, and persons are free to accept it, to refuse to receive medical services, or to demand that care and services cease. A patient's refusal to receive medical intervention, together with the indication of the possible consequences of the refusal, must be recorded in medical documents and certified by the patient or his/her legally authorized representative (Article 17, Medical Care Law). In addition, according to Article 16 of the Medical Care Law, in the absence of consent by the patient or by his or her legally authorized representative, provision of medical care and services is authorized if there is a danger threatening the patient's life or if the disease is endangering the health of other people, in accordance with procedure established by the RA legislation. Currently, only the RA Criminal Code (Articles 97–103) provides for compulsory treatment of persons who are suffering from a psychiatric disease and who have committed acts prohibited by the RA Criminal Code.<sup>4</sup>

### **c) Supporting Regulations/Bylaws/Orders**

The RA Government Decree No. 318-N, dated March 4, 2004, approved the scope of state-guaranteed free-of-charge health care services for the population. The decree clearly sets forth the list of socially vulnerable and specific groups of the population (Appendix 3) that are entitled to the state-guaranteed free medical care and services. (The groups are defined based on medical status and social functioning and on severity of disease). There is also a list of services, approved by the Minister of Health in coordination with the Minister of Finance and Economy, that are not free for the entire population, including the above-mentioned groups.

Other annexes to the decree respectively define:

- procedures for organizing and financing free-of-charge medical care and services within the framework of annual State Health Target Programs;
- procedures for the application of copayment in the organizations providing state-guaranteed free-of-charge inpatient medical care and services in Yerevan;

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4. According to RA Criminal Code (Articles 97–103), compulsory treatment is provided to those persons who suffer from psychiatric illness if they commit a crime. According to RA Civil Procedures Code (Articles 174–177), compulsory treatment is provided to persons suffering from psychiatric illness if they are aggressive and dangerous to others.

- procedures for placing persons on the waiting list for state-guaranteed medical aid and services at health care facilities; and
  - procedures for centralized acquisition and distribution of medical equipment and utilities within the framework of state-guaranteed free medical care and services.<sup>5</sup>
- ▶ In addition, on May 26, 2006, the RA Government adopted Decree No. 825-N, Approving the Procedure of Organizing Medical and Sanitary and Medical Preventive Assistance to Detained and Convicted Persons Using Medical Facilities of Health Care Entities and Involving Health Care Personnel for These Purposes. This decree approves the:
- procedures for organizing medical and sanitary and medical and preventive assistance to detained and convicted persons using medical facilities of health care entities and involving health care personnel for these purposes, in accordance with Annex 1 of the decree;
  - list of severe diseases hindering the serving of sentence, in accordance with Annex 2; and
  - timetable of continuous control over persons who are suffering from somatic diseases; continuous control over patients with psychiatric diseases; continuous control over persons dependent on, and disposed to, psychoactive materials (drugs, alcohol, and toxic and other materials); continuous control over persons suffering from dermatological diseases and sexual infections; continuous control over persons suffering from infections of intestinal diseases.<sup>6</sup>

#### **d) Relevant Provisions of Provider Code of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the World Medical Association (WMA) provide guidance to practitioners (see Right to Preventive Measures, part d, above). The WMA Declaration of Geneva encourages health professionals not to “permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene” between their duty and their patient.

The WMA International Code of Medical Ethics implies that the only reason for ending a physician-patient relationship is if the patient requires another physician with different skills. The code, in particular, states that “a physician shall owe his/her patients complete loyalty and all the scientific resources available to him/her. Whenever an examination or treatment is beyond the physician’s capacity, he/she should consult with or refer to another physician who has the necessary ability.”

Moreover, in ending a physician-patient relationship, physicians should be prepared to justify their decisions—to themselves, to the patient, and to a third party, if appropriate. If the motive is legitimate, the physician should help the patient find another suitable physician, or, if not possible, should give the patient adequate notice of withdrawal of services so that the patient can find alternative medical care. If the motive is not legitimate (based, for example, on racial prejudice),

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5. RA Government Decree No. 318-N.

6. RA Government Decree No. 825-N.

then the physician should take steps to address this issue. See WMA Medical Ethics Manual, pages 39–40.

Finally, the WMA Statement on HIV/AIDS and the Medical Profession states that unfair discrimination against HIV/AIDS patients by physicians must be eliminated completely from the practice of medicine. All persons infected or affected by HIV/AIDS are entitled to adequate prevention, support, treatment, and care, with compassion and respect for human dignity.

A physician may not ethically refuse to treat a patient whose condition is within his or her current realm of competence, solely because the patient is HIV-positive. A physician who is not able to provide the care and services required by patients with HIV/AIDS should make an appropriate referral to those physicians or facilities that are equipped to provide such services. Unless or until the referral can be accomplished, however, the physician must care for the patient to the best of his or her ability.

## **e) Practical Examples**

### **1. Example(s) of Compliance**

A citizen born in 1972 did not apply to medical facilities for a long period of time as he was frightened that he would be refused the necessary medical assistance because he had HIV and was lacking the necessary financial resources. At his friend's insistence, he finally applied to the AIDS Prevention Center and was informed about his medical condition. After the center's staff provided the necessary clarifications, he applied to Armenicum, following the procedure set out by RA legislation, and received the required free medical assistance. (Reported by the AIDS Prevention Center)

### **2. Example(s) of Violation**

In 2006, a citizen born in 1970 applied to a cardiovascular facility, where he was refused provision of the necessary assistance based on the rationale that he was HIV-positive. Because he did not receive the required assistance, the person died. (Actual but unreported case)

### **3. Actual Case(s)**

A person of limited income who was a resident of the Kotayk region went to the local polyclinic for a medical examination to diagnose his health problem. The examination is supposedly free of charge, however, the health practitioners at the polyclinic refused to provide the service without first receiving a “facilitation fee.” Their action amounted to a violation of the patient's right to access because the patient's health care options were limited or negated both by the circumstance of living in a region where alternative medical facilities did not exist and the demand for a “facilitation fee” despite the patient's limited income. The patient did not pursue any action to remedy the situation. (Reported by the patient anonymously)

## f) Practice Notes for Lawyers

- When representing individuals who are part of a group that is often subject to discrimination, lawyers will need to first ensure that the individual's status or condition qualifies the individual to receive the treatment that has been denied. Making this determination requires development of extensive supporting documentation, such as economic, social, and/or medical evidence.

## g) 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 3 as Stated in the ECPR

*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.*

### b) Right as Stated in Country Constitution/Legislation

#### ► RA Constitution

Article 23 of the Constitution states:

*Everyone shall have the right to become acquainted with the data concerning him/her available at the state and local self-government bodies.*

Article 27 states:

*Everyone shall have the right to freedom of expression including freedom to search for, receive and impart information and ideas by any medium of information regardless of state borders.*

Article 23 appears to be the article most directly applicable to the interests of patients, as doctors are required to keep records, and most health care facilities are affiliated with the state, which qualifies doctor's records as data concerning the individual available at the state level. If there is no state entity involved in the dispute between the record holder and the patient, then Article 27 has greater significance because it guarantees an individual's right to inquire or search for information.

▶ **RA Medical Care Law**

Article 7 of the law states:

*Everyone shall have the right to easy access to information on the state of one's health, results of examinations, methods of diagnosis and treatment of disease and related risk, possible options for medical intervention, consequences and results of treatment. The information on the state of health of a person may not be communicated to that person or other persons against that person's will, except for cases stipulated by the legislation of Armenia.*

*Information on the state of health of persons under 18 or persons declared legally incapable in accordance with the law shall be given to their legally authorized representative.*

In general, Article 7 directly guarantees a patient's right to information in a wide variety of contexts, clearly listed in the legislative provision itself. Although the RA legislation does not specifically provide for an individual's right to access to information related to technological innovation or science, Article 7 is broad enough to include the core rights related to access to information, as indicated in the ECPR.

- ▶ Article 21 of the RA Law on Keeping Arrested and Detained Persons states: *The results of the medical examination shall be recorded in the personal file in accordance with specific procedures and reported to the patient, as well as to the body conducting the criminal proceedings.*
- ▶ Article 10 of the RA Law on Prevention of Disease Caused by HIV states: *Laboratory testing on HIV infection shall be accompanied by pre-testing and post-testing counseling.* Persons infected with HIV have the right to "receive written note on examination results" (Article 14[1]) and also the right to "receive relevant counseling" and "become familiar with HIV transmission preventive means."
- ▶ Article 13 of the RA Psychiatric Care Law states that, in special cases stipulated by the RA legislation, information about a patient's mental health status is to be provided to the patient and to his or her legally authorized representative upon the patient's request.

### **c) Supporting Regulations/Bylaws/Orders**

No specific regulations apply in this context.

### **d) Relevant Provisions of Provider Code of Ethics**

- ▶ Although the Republic of Armenia has no approved code of ethics, the ethics document of the WMA provides guidance to practitioners (see Right to Preventive Measures, part d, above). The WMA Declaration on the Rights of the Patient states:

*The patient has the right to the information necessary to make his/her decisions. The patient should understand clearly what the purpose of any test or treatment is, what the results would imply, and what the implications of withholding consent would be.*

- ▶ The WMA Medical Ethics Manual (pages 42–43) states:

*A necessary condition for informed consent is good communication between physician and patient. Physicians must provide patients with all the information they need to make their decisions. This involves explaining complex medical diagnoses, prognoses and treatment regimes in simple language, ensuring that patients understand the treatment options, including the advantages and disadvantages of each, answering any questions they may have, and understanding whatever decision the patient has reached and, if possible, the reasons for it. Good communication skills do not come naturally to most people; they must be developed and maintained with conscious effort and periodic review.*

## e) Practical Examples

### 1. Example(s) of Compliance

Citizen N. consulted a doctor, complaining of an extreme headache. After a thorough examination, the patient was diagnosed with brain cancer. Based on that patient's request, the doctor informed the patient of the status of his health. The patient's relatives complained to the management of the medical institution, asserting that the patient should not have been told and claiming that the patient was subjected to strong emotional distress as a result of the news about his disease.

The physician abided by the law in this case. The patient had the right to be informed about all the details regarding his disease, no matter how harsh, in order to be able to appropriately assess his situation and to make the right choice about his treatment method. (Actual but unreported case)

### 2. Example(s) of Violation

If the state were to ban publications about the potential harm of illegal drug use, under the pretext that any discussion of drugs promotes experimentation with and use of drugs, such action would violate an individual's right to information. Likewise, if the state banned information about sexual reproductive health, sexually transmitted diseases, and the use of condoms, with the rationale that the information promotes sexual experimentation, such action would violate an individual's right to information. In one instance, a foreign court found that a minority group's lack of access to information about sexual and reproductive health constituted an infringement of such individuals' right to information.

### 3. Actual Case(s)

Twelve-year-old M.-yan suffered grave complications after being vaccinated. The child's parents complained to the management of the medical institution, claiming that the physician had not informed them about possible complications and had not taken into account the child's predisposition to allergic reactions. The doctor was subject to disciplinary review. (Reported by Avan Polyclinic)

## f) Practice Notes for Lawyers

- After thoroughly interviewing a client, lawyers should obtain an affidavit from an expert as to whether the client was provided with all appropriate health care information. Lawyers should also attempt to discover which private centers offer doctors payment in exchange for referrals and discover whether public facilities that are not recommended to the patient offer the same level of service. Referring a patient to only one service provider in exchange for a commission may violate a patient's right to information. Lawyers should also consider that a violation of the right to access to information often coincides with a violation of the patient's right to free choice (see Right to Free Choice, below) and the patient's right to personalized treatment (see Right to Personalized Treatment, below).

## g) 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 4 as Stated in the ECPR

*Every individual has the **right to access to all information that might enable him or her to actively participate in the decisions 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 Country Constitution/Legislation

#### ▶ RA Constitution

With regard to a patient's consent, Article 19 of the Constitution states:

*No one may be subjected to torture and to treatment and punishment that are cruel or degrading to the individual's dignity. No one may be subjected to medical or scientific experimentation without his or her consent.*

Although most medical procedures would not qualify as experimentation, this provision lays the foundation for a patient's right to consent, which is further developed in RA legislation.

#### ▶ RA Medical Care Law

RA legislation regarding patient consent is much more specific than the Constitution. Article 8 of the Medical Care Law states:

*Consent of a person to medical intervention is a necessary condition, except in cases stipulated by this law. At the request of the doctor or the patient, the consent is recorded in*

*a written form. If a person is under 18 or has been declared legally incapable in accordance with the law, as well as in cases when the condition of the patient does not allow him to express his will, the consent for medical intervention shall be given by his/her legally authorized representative.*

*In case of absence of a legally authorized representative, if medical intervention cannot be postponed any longer, the decision on medical intervention shall be made for the benefit of the patient by a medical council (committee) and, if that is not possible, by the doctor.*

Note that consent may be granted orally and that consent in writing only occurs upon the request of one of the parties. When a patient is unable to consent due to his or her medical condition, consent may be granted by a third party. Furthermore, Article 16 of the Medical Care law states:

*It shall be permitted to provide medical care and services without the consent of the patient or his legally authorized representatives, when there is a danger threatening his/her life, as well as in case of diseases dangerous for the health of other people, in accordance with the legislation of Armenia.*

Thus, two exceptions to the consent rule exist, and, in an emergency situation in which loss of life is threatened, medical practitioners may act without consent of the patient.

- ▶ In conjunction with the Medical Care Law, the RA Criminal Code sets limits as to what acts medical professionals might perform without a patient's consent. In effect, Article 126 of the RA Criminal Code criminalizes the taking of body parts or tissues without consent or in cases in which the patient cannot give consent or the patient is too young to consent. Specifically, this provision states that:

*1. Making a person donate parts of the body or tissues for transplantation or experimental purposes by violence or threat of violence is punishable by imprisonment for a term of up to 4 years, together with deprivation of the right to hold certain posts and practice certain activities for a term of up to 3 years, or without such deprivation.*

*2. The same action committed:*

*(1) against a person being in a helpless condition, or;*

*(2) against a person financially or otherwise dependent on the perpetrator, or;*

*(3) against a minor*

*is punishable by imprisonment for a term of 2 to 5 years, together with deprivation of the right to hold certain posts and practice certain activities for a term of up to 3 years, or without such deprivation.*

*3. The action envisaged by parts 1 or 2 of this Article, if committed by an organized group, is punishable by imprisonment for a term of 4 to 10 years.*

The RA Criminal Code also expands upon the Constitution's prohibition on medical experimentation without consent and specifies that this prohibition applies to instances when the patient cannot give consent or when the patient is too young to consent. Article 127 of the RA Criminal Code states:

*1. Subjecting a person to medical or scientific experiment without free expression of will and informed consent of the latter is punished by a fine of the amount of 200 to 400 fold the minimum salary, together with deprivation of the right to hold certain posts and practice certain activities for the term of up to 3 years, or without such deprivation.*

*2. The same act committed:*

*(1) against a person being in a helpless condition, or;*

*(2) against a person financially or otherwise dependent on the perpetrator, or;*

*(3) against a minor*

*is punishable by imprisonment for 1 to 3 years, together with deprivation of the right to hold certain posts and practice certain activities for a term of up to 3 years, or without such deprivation.*

*3. The same act committed by an organized group which caused grave consequences by negligence is punishable by imprisonment for 2 to 6 years, together with deprivation of the right to hold certain posts and practice certain activities for a term of up to 3 years, or without such deprivation.*

Together, the Medical Care Law and the RA Criminal Code establish that consent is required and set out the parameters for when medical care can be provided without consent.

- ▶ Article 14 of the RA Law on Prevention of Disease Caused by HIV states that no one infected with HIV shall be to subject to medical or scientific experiments without his or her informed consent.
  - Article 11 of this law establishes two specific cases for mandatory medical examination for detection of HIV: (1) donors of blood, biological liquids, tissues, and organs; and (2) children born of HIV-infected mothers. This article also specifies population groups to whom physicians are to provide HIV counseling and testing, namely (1) pregnant women, (2) children born of HIV-infected mothers, (3) drug users, and (4) arrested and detained people.
- ▶ Article 21 of the RA Law on Keeping Arrested and Detained Persons states: *It shall be forbidden to subject arrestees or detainees to any medical or scientific experiments regardless of whether or not they have given their consent.*
- ▶ Article 6 of the RA Law on Psychiatric Care provides the complete list of rights and freedoms of people with mental disorders as stipulated by the RA legislation. Particularly, point seven of this article states that mentally ill persons have the right "to consent on cancellation of treatment methods and means ... conducted for medical or experimental purposes. ... "

- Article 15 further stipulates consent on medical procedures.
  - Chapters 5 (Articles 18–21) and 6 (Articles 22–23) of the law set provisions for voluntary and mandatory hospitalization of persons with psychiatric disorders.
  - Article 25 states that violation of the above requirements leads to the liability stipulated by the RA Law on Psychiatric Care.
- ▶ Article 49(4) of the RA Law on Narcotic Drugs and Psychotropic (Psychoactive) Substances establishes a key provision for compulsory treatment of drug addiction: *To those drug addicts, who are under the medical examination and without medical prescription continue to use the narcotic drugs or psychotropic (psychoactive) substances, as well as those individuals, who have been condemned for execution of crime and need treatment, may have compulsory treatment measures established upon the court ruling.* Thus, in practice and based on the recommendation of a medical commission, a court can rule that treatment is compulsory without regard to the defendant's consent.

### c) Supporting Regulations/Bylaws/Orders

- ▶ Article 54.7 of the Minister of Justice Order No. 44, dated May 30, 2008, states that enrollment of arrestees and detainees in medical, scientific, or other experimentation is prohibited, regardless of their consent.

### d) Relevant Provisions of Provider Code of Ethics

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). As stated in the WMA Medical Ethics Manual (page 44), evidence of consent can be explicit or implicit (implied). Explicit consent is given orally or in writing. Consent is implicit when the patient indicates a willingness to undergo a certain procedure or treatment by his or her behavior. For example, consent for vein puncture is implied by the action of presenting one's arm.<sup>7</sup> For treatments that entail risk or involve more than mild discomfort, it is preferable to obtain explicit rather than implicit consent.

Because of the complexity of the matter or because the patient has complete confidence in the physician's judgment, the patient may tell the physician, "Do what you think is best." Physicians should not be eager to act on such requests but should instead provide patients with basic information about the treatment options and encourage them to make their own decisions. If after such encouragement the patient still wants the physician to decide, however, the physician should do so according to the best interests of the patient. (WMA Medical Ethics Manual, page 44)

As to making decisions for incompetent patients, the WMA Declaration on the Rights of the Patient states the physician's duty in this matter as follows: *If the patient is unconscious or otherwise unable to express his/her will, informed consent must be obtained, whenever possible,*

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7. Vein puncture is the process of obtaining intravenous access for the purpose of intravenous therapy or obtaining a sample of blood (mostly applicable for treatment with intravenous infusion therapy).

*from a legally entitled representative. 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. The WMA Declaration also offers the following advice: 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 addition, the WMA Declaration states that, in any case, the patient must be involved in the decision making to the fullest extent allowed by his or her capacity. The principal criteria for making treatment decisions for an incompetent patient are his or her preferences, if known.

The preferences may be found in an advance directive or may have been communicated to the designated substitute decision maker, the physician, or other members of the health care team. When an incompetent patient's preferences are not known, treatment decisions should be based on the patient's best interests, taking into account: (a) the patient's diagnosis and prognosis; (b) the patient's known values; (c) information received from those who are significant in the patient's life and who could help in determining his or her best interests; and (d) aspects of the patient's culture and religion that would influence a treatment decision.

## **e) Practical Examples**

### **1. Example(s) of Compliance**

Before consenting to treatment, a patient with cancer must be informed of the illness, the stage of the illness, all available methods of treatment, the prognosis relative to the method of treatment, and the side effects of the method of treatment. Despite the pain associated with chemotherapy, patients regularly consent to chemotherapy because of the potential long-term benefits. (Hypothetical case)

### **2. Example(s) of Violation**

Patients are given ECT (electroconvulsive therapy) but are told that the treatment is "sleep therapy." (Hypothetical case)

### **3. Actual Case(s)**

Seventy-five-year-old H.-yan applied to the Nork-Marash cardiological center. An examination revealed that all of the blood vessels nourishing his heart were blocked. The patient was informed about a treatment method that involves placing a stint in the veins, a difficult and complex intervention that requires surgery but which has long-lasting results. Health care providers also explained to the patient that he had diabetes, another serious condition and one that would negatively affect the recovery period and might also lead to unexpected complications. After considering these explanations, the patient chose surgery and provided his consent in writing. He died during the surgery, and his relatives submitted a complaint to the Ministry of Health.

In this case, no violation of patient rights was recorded. The patient was informed about the consequences and complications of his decision, and he signed a letter of consent. The complaint did not undergo further processing (submitted by Nork-Marash cardiological surgical clinic).

### f) Practice Notes for Lawyers

- After thoroughly interviewing the client, lawyers should obtain affidavit expert evidence as to whether the client was provided with all appropriate health care information before the patient gave consent. Failure to adequately inform a patient as to options may render the consent invalid (see Right to Information, above).
- Performing medical treatment on a subject who did not give informed consent—because the individual was not fully informed of the consequences when he or she gave consent—does not necessarily constitute “medical or scientific experimentation without free expression of will,” conduct outlawed by the RA Criminal Code. A legal argument still could be made, however, that the treatment performed with not-fully-informed consent should be treated as criminal activity under the code when one possible motivation of those performing the treatment was to gain professional experience. Whether the court would find criminal liability or not would depend on how narrowly or broadly the term “experimentation” is interpreted. Regardless of viability, the person who brings this charge may substantiate it in conjunction with any other possible criminal charges. If the motive was merely financial, however, it would not be valid to attempt this argument.
- It could be argued that taking body parts or tissue without consent and when the person is unable to consent constitutes “making a person donate ... by violence,” an action in violation of the criminal code, in which the “violence” is the surgical operation itself. Under such circumstances, the policy behind erring on the side of treatment without consent ends when the purpose of the treatment changes to removing parts or tissue.

### g) 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 5 as Stated in the ECPR

*Each individual has the right to freely choose from among different treatment procedures and providers on the basis of adequate information.*

### b) Right as Stated in Country Constitution/Legislation

- ▶ Although the RA Constitution does not specifically address the issue of choice, the aspect of right to access to information, which serves as a foundation for choice, is addressed by Articles 23 and 27 of the RA Constitution, which are discussed above under Right to Information.
- ▶ Additionally, RA legislation addresses the right to access to information, an underlying basis for the right to choose in Article 7 of the Medical Care Law, addressed above. In direct relation to the issue of choice, Article 5 of the Medical Care Law plainly states that everyone has the right to choose his or her own medical care and service provider. The scope of this provision is dependent on the government regulations reported below.
- ▶ Article 13 of the RA Law on Keeping Arrested and Detained Persons states that an arrested and detained person has the right “to protect his/her health ... as well as to be examined by the doctor selected by him/her ... [payment of] which is to be covered on his/her own.”

### c) Supporting Regulations/Bylaws/Orders

- ▶ RA Government Decree on Approving Procedure of Selection of a Physician Providing Primary Health Care Services and Registration of Population with Him/Her, dated March 30, 2006, states that each person has the right to choose and register with any physician providing primary health care in any medical institution in the region of his/her residence. Persons also are free to change their physician any time without any explanation as to the reasons for such change.
- ▶ For the purpose of ensuring the implementation of the above-mentioned decree, the RA Minister of Health adopted Order No. 57 on Approving the Registration and Transfer Forms Verifying Selection of a Physician Providing Primary Health Protection Services and Change of Selection, As Well As Guidelines for Completing Them, dated January 18, 2007.

### d) Relevant Provisions of Provider Code of Ethics

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). Because one must have information in order to exercise choice, the discussion under Right to Access to Information, above, is applicable here and incorporated by reference. In addition, the WMA International Code of Medical Ethics states that a physician should not receive any financial benefits or other incentives solely for referring patients or prescribing specific products.

## e) Practical Examples

### 1. Example(s) of Compliance

In general, before surgery a patient is provided with the comprehensive information about his or her diagnosis and about options and objectives of relevant surgical interventions so that he or she is able to make an informed choice regarding certain treatment options. (Hypothetical case)

### 2. Example(s) of Violation

In Armenia there exist both public and private centers for undergoing specific medical examinations (for example, an echocardiogram). Some doctors develop business relationships with private centers and may receive up to 3,000 Armenian Dram (AMD) per patient referred. Referring a patient to a specific private center on this basis alone is a violation of the patient's right to free choice, because the patient has a right to know about all the available options and to make his or her own choices based on adequate information, including whether public or less expensive services of similar quality exist. (Reported by Saint Mariam Medical Union)

### 3. Actual Case(s)

After a traffic accident in Moscow, G.-yan underwent two consecutive traumatologic operations on his leg. After returning to Yerevan, G.-yan experienced some limitation with walking and was advised by his family doctor that additional reconstructive surgery was probably required. The doctor did not mention that four hospitals in Yerevan have orthopedics departments with modern equipment and competent professionals, but instead strongly and exclusively recommended that G.-yan consult the doctor's colleague, an experienced orthopedist. Later G.-yan discovered that there were a number of competent orthopedists with whom he could consult. The patient did not pursue any action to correct this situation. (Reported by G.-yan)

## f) Practice Notes for Lawyers

- Lawyers should consider that many rights are interconnected with and interdependent on other rights and so should consider making claims that identify the violation of several rights when such rights are interconnected. For example, violation of the right to access to information usually creates a violation of the right to free choice, because without adequate information a patient cannot choose among health care options (see Right to Personalized Treatment, below). At the same time, however, lawyers may need to make strategic decisions as to which elements of the claim present the strongest arguments based on the available evidence and/or precedent.

## g) 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 6 as Stated in the ECPR

*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.*

### b) Right as Stated in Country Constitution/Legislation

#### ▶ RA Constitution

The right to privacy is reflected in Article 23 of the RA Constitution, which states:

*Everyone shall have the right to respect for his/her private and family life.*

*The collection, maintenance, use or dissemination of any information about the person other than that stipulated by law without the person's consent shall be prohibited. The use and dissemination of information relating to the person for purposes contravening the aims of their collection or not provided for by law shall be prohibited.*

*Everyone shall have the right to become acquainted with data concerning him/her available in the state and local self-government bodies.*

*Everyone shall have the right to correct any non-verified information and eliminate the illegally obtained information about him/her.*

*Everyone shall have the right to secrecy of correspondence, telephone conversations, mail, telegraph and other communications, which may be restricted only by court order in cases and in conformity with the procedure prescribed by law.*

Although the individual rights described under this provision are in relation to the state and not in relation to private entities, most entities providing medical services are affiliated with state or public bodies. An individual's privacy rights in the medical care context are further developed in RA legislation.

#### ▶ RA Medical Care Law

This general constitutional provision has been further detailed through different legislative acts governing various sectors. The medical care and services area is not an exception.

Particularly, Article 5(c) of the Medical Care Law stipulates that, while receiving medical care and services, everyone has the right to demand confidentiality regarding consultation with a physician, the state of his or her health, and information gained during examinations, diagnostics, and treatment, except in cases stipulated by the RA legislation.

The above-mentioned right of the person requesting medical care and receiving medical care and services logically leads to related duties for medical care and service providers.

Specifically, Article 19(e) obliges the providers of medical care and services to ensure the confidentiality of the fact of applying for medical care and of the information obtained in the course of examination of the patients' state of health, diagnostics, and treatment, except in cases stipulated by the RA legislation. Article 19(2) provides for liability for respective persons for not adhering to the above-mentioned requirements, in a procedure set forth by the RA legislation. In accordance with legislation, this liability may qualify as criminal liability.

For example, Article 145 of the RA Criminal Code provides for liability for medical personnel's disclosure of information about a patient's illness or the results of medical tests, without professional or official need. This provision means that information deemed medically confidential may be provided only at the request of the court (judge), prosecutor's office, authorities carrying out inquest and investigation, or other authorized entities, in cases and procedure set forth by law. When the patient consents to disclose information about his/her illness or the results of medical tests, there is no crime.

Disclosure of information regarding a patient's illness or the results of medical tests is defined as the communication of information to a third person by any means (orally, in writing, etc.).

The subjective aspect of the referred crime is characterized by direct intent—in other words, the criminal intentionally discloses information about the patient's illness or the results of medical tests.

Article 145(2) of the RA Criminal Code provides for more serious criminal liability for cases when actions stipulated under Article 145(1) have led to grave consequences due to negligence. In this respect, it is necessary not only to establish the guilt of the criminal, but also to establish the causal link between his or her act and its grave consequences.

In addition, provisions regarding limiting the publicity of court hearings and adhering to the principle of respect for a person's rights, freedoms, and dignity during the court examination of cases, stipulated by the RA Judicial Code and area legislation, may be considered as guarantees for ensuring confidentiality of information related to personal life and, specifically, to health secrets (Article 20 of the RA Judicial Code; Articles 16, 170, 201 of the RA Criminal Code).

- ▶ Article 10 of the RA Law on Prevention of Disease Caused by HIV stipulates that, except for cases set by Article 11 (“mandatory medical examination”), laboratory testing for HIV detection shall be voluntary and anonymous. Article 14(3) of this law further guarantees the right of people infected with HIV to medical confidentiality.

- ▶ Article 13 of the RA Psychiatric Care Law guarantees the confidentiality of information about the mental health status of a person. In special cases stipulated by the RA legislation, such information is provided to the patients and to their legal representative at patients' request.

### **c) Supporting Regulations/Bylaws/Orders**

No specific regulations apply in this context.

### **d) Relevant Provisions of Provider Code of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). The WMA Declaration on the Rights of the Patient states that 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.

The WMA Medical Ethics Manual (pages 53–54) states that physicians should be aware of the specific legal requirements at their place of employment regarding the disclosure of patient information. Legal requirements, however, can conflict with the respect for human rights that underlies medical ethics. Therefore, physicians should view with a critical eye any legal requirement to breach confidentiality and assure themselves that the breach is justified before adhering to it. If physicians are persuaded to comply with legal requirements to disclose their patients' medical information, it is desirable that they discuss with those patients the necessity of any disclosure before it occurs and also enlist their cooperation.

In addition to those breaches of confidentiality that are required by law, physicians may have an ethical duty to impart confidential information to others who could be at risk of harm because of the patient's health condition. There are two situations in which this can occur: when a patient tells a psychiatrist that he intends to harm another person and when a physician is convinced that a HIV-positive patient is going to continue to have unprotected sexual intercourse with his spouse or other partners. Conditions for breaching confidentiality, when not required by law, occur when the expected harm is believed to be (1) imminent, serious (and irreversible), and unavoidable, except with unauthorized disclosure; and (2) greater than the harm that is likely to result from disclosure. In determining the relative proportionality of these expected harms, the physician needs to assess and compare the seriousness of the harms and the likelihood of their occurrence. In cases of doubt, it would be wise for the physician to seek expert advice. The physician must inform the patient about his intent to disclose the relevant information to a third party.

### **e) Practical Examples**

#### **1. Example(s) of Compliance**

Spouses decide to undergo regular medical examination before going on a business trip to the United States for a long period of time, and, together, they visit a certain facility providing medical

services. After all the necessary diagnostic tests, the physician asks the couple to come to the office, each on different days or at different times within the same day, to learn about the results. The spouses are hesitant to comply with the physician's request, but do not resist. While explaining the woman's examination results to her, the physician indicates that she has some health problems that may be negatively affected by a long airplane flight. The woman asks to be provided with clarifications about her health condition in the presence of her husband. Receiving the woman's consent, the physician provides the same clarifications to the spouse. (Actual but unreported case)

## 2. Example(s) of Violation

- If, in the example of compliance cited above, the physician had given the exam results to both spouses at the same time, or before the wife had consented to share the information with her husband, the physician would have violated the wife's right to privacy.
- A citizen visits and undergoes an examination at a facility that treats infectious diseases. Examination results show that, in general, the patient is healthy. Relatives who are aware of the man's willingness to apply to a physician want to check on the situation. They visit the facility on their own initiative and, without their relative's consent, learn from the examining physician about the relative's visit and details related to his health. (Hypothetical case)

## 3. Actual Case(s)

On October 3, 2004, a citizen applied to the Yerevan State University legal clinic for legal advice. She was an arts critic by profession and worked at a state institution. During the interview, she related that, on January 15, 2004, her son had come running home, recounting that his sister had fallen down and broken her arm and leg. The mother was shocked by the unexpected news and, imagining the possible state of her daughter, lost her mental balance, without checking the accuracy of the news communicated by her son. The grandfather found his granddaughter on the ground, crying, but, at first, the girl did not seem to have any serious injuries. He calmed the crying child, and they went home together, where they found the mother singing. The woman did not seem to recognize them and did not respond to questions. They immediately informed the father about the situation, and he consulted a relative, who was a psychiatrist and who suggested taking the woman to one of Yerevan's psychiatric hospitals for specialized treatment and care. Later, one of the neighbors, concerned about the woman's two-week-long absence, learned of the whereabouts of the woman during a conversation with one of the woman's relatives, who worked at the health care facility. Gradually, this information reached the patient's workplace and the children's school, where the children were asked questions about their mother. No complaint was made or action taken. (Actual but unreported case)

## f) Practice Notes for Lawyers

- In cases of disclosure, lawyers need to ascertain whether the disclosure was intentional or negligent so as to determine the extent of criminal liability.
- Article 25 of the Law of the Republic of Armenia on the Profession of Advocate states: *Advocate-client privilege shall cover the information that clients provide to advocates, as*

*well as the information and evidence not known to the public and obtained by advocates independently during the practice of their profession. Interrogation of advocates on circumstances which became known to them in connection with the request to provide legal assistance or in connection with providing such assistance shall be prohibited.*

*Advocates shall disclose information covered by advocate-client privilege when:*

- (1) the client gives his/her consent;*
  - (2) it is necessary in supporting claims made in a court dispute between the advocate and the client, or for the advocate's defense;*
  - (3) there exists information on grave or particularly grave anticipatory criminal offence provided for by the Criminal Code of the Republic of Armenia, which is certain to occur.*
- The duty to observe advocate-client privilege shall have no time limit.*

- Because of the tension between freedom of expression and the right to privacy, lawyers need to ascertain the scope of the public media's duty to uphold confidentiality, and should note that there might be frequent need to obtain injunctions preventing disclosure.
- Lawyers should note possible disclosure exceptions, such as serious risk to public health.

## **g) 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 7 as Stated in the ECPR**

*Each individual has the right to receive necessary treatment within a swift and predetermined period of time.*

### **b) Right as Stated in Country Constitution/Legislation**

There is no direct stipulation of the referred right in the Republic of Armenia.

### **c) Supporting Regulations/Bylaws/Orders**

- ▶ RA Government Decree No. 318-N, dated March 4, 2004, approves the procedure for putting people on a waiting list for state-guaranteed free medical care and services. This procedure regulates the registration of persons who have applied to medical facilities within the framework of state-guaranteed free medical care and services. Specifically, it states that, when the monthly budget of the facility is exhausted (i.e., the monthly budget of the contract is concluded within the framework of the basic benefit package), the facility hospitalizes people through a planned process (registration). Concurrently, the same legal procedure

defines the cases in which treatment through registration is not allowed, such as the following:

- Diseases of special social importance, such as AIDS, tuberculosis, etc.
- Diseases that are dangerous to others
- Maternity care
- Medical care for children ages 0–7
- Medical care in urgent cases

Therefore, in emergency cases, such as those described above, it appears that access and entitlement to medical assistance are ensured. In addition, Clause 4 of the procedure provides that “in cases of patient registration the health care facility ensures the patient with free consultation on medical (professional) and pharmaceutical treatment.” Clause 5 provides that “before the deadline for receiving medical assistance through registration, patients may receive free medical care at other health care facilities and district ambulatory-polyclinic facilities providing basic benefit package services.” This clause corroborates the patient's option to apply to another health care facility, as set forth in the European Charter of Patients' Rights. In accordance with Clause 8, “registration with the purpose of patient's hospitalization shall be performed on the 'first come, first served' basis and patients shall be provided with a registration paper stamped with the medical organization's stamp, and a record shall be made in the registration ledger of patients entitled to free medical care.” This clause guarantees the right to immediate registration set forth in the European Charter on Patients' Rights. In compliance with Clauses 9 and 10, the timetable (turn) of registered patients may be changed, and the patient may be hospitalized sooner only based on his or her condition and the existence of respective medical instructions. Clause 10 provides that “based on the patient's condition a decision on early hospitalization is made by the commission and with the participation of respective specialists. The commission's decision is verified by at least 3 physician-specialists by making a respective note in the registration ledger.”

In accordance with Clause 11, hospitalization of patients is made based on the hospital's invitation (made in writing or by telephone). This clause guarantees the patient's right to health care in case of registration.

According to Clause 12, the health care facility shall ensure the distribution of the necessary information on the registration procedure of patient hospitalization, the procedure for the functioning and structure of the registration commission, and the registration lists, by posting them in the reception area of the medical organization in a visible place. According to Clause 13, it is mandatory to inform the population when the quarterly budget is exhausted. The relevant announcement is signed and stamped by the head of the medical facility and posted in the reception area of medical organization in a place visible for applicants. The indicated clauses guarantee the patient's right to receive information about registration.

According to Clause 14, out-of-registration medical assistance is provided to registered patients and to those subject to registration who are entitled to state-guaranteed free medical care and services in the manner established at a given health care facility. This

clause means that patients who are willing to get out-of-registration treatment may receive the treatment on a paid basis.

Summarizing the issue of legal regulation in respect to the patient's time, it should be also noted that there is no proper and complete regulation of respect for patients' time in the RA legislation. It is stipulated only for those patients who are receiving treatment within the framework of the basic benefit package.

#### **d) Relevant Provisions of Provider Code of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). The WMA International Code of Medical Ethics states that physicians owe their patients complete loyalty and all the scientific resources available to them. Whenever an examination or treatment is beyond the physician's capacity, he or she should consult with or refer to another physician who has the necessary ability, thereby exercising, among other things, respect for the patient's time.

#### **e) Practical Examples**

##### **1. Example(s) of Compliance**

Citizen A. applied to a health care facility for rehabilitative care. She was examined and told that her treatment was not of an urgent nature and that it was impossible to provide her with state-guaranteed free medical care during the quarter, as funds allocated for that quarter were already spent. She was offered registration or charged treatment. The citizen chose registration. She was registered at the health care facilities and provided with a registration coupon. After a month and a half, the medical facility called the citizen, and she received free rehabilitative services. (Hypothetical case)

##### **2. Example(s) of Violation**

Applying to the Minister of Health, Citizen B. was informed that he was registered with the health care facility for eye surgery within the framework of the basic benefit package. He was registered because the case was not of an urgent nature. After one month, he called the medical facility but was told that he had to wait until they call and invite him. After eight months, the patient called the facility, but he was told that he had missed his turn. After he applied to the Minister of Health, the patient's problem was addressed and his rights were restored, according to the Ministry of Health's specified complaint procedure. (Reported by the RA Ministry of Health)

##### **3. Actual Case(s)**

As this area of law is still developing, no actual cases are available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

## f) Practice Notes for Lawyers

- When an aspect of the violation is related to an excessive delay in treatment or to a failure to recognize a medical condition as urgent and needing immediate treatment, lawyers must consult with medical experts and obtain an affidavit as evidence.
- An affidavit from a medical expert will also be necessary when the lawyer must establish what damages or losses resulted from the violation, so that the lawyer may request the appropriate compensation.
- Other issues to be considered include: (a) whether a delay is the result of an intentional or negligent act of state or of limited resources; (b) whether the state has done everything it can reasonably do in the given circumstances.
- When the rights indicated in this section are infringed in practice, the patient or his legally authorized representative may apply to the RA Ministry of Health with a request to restore a patient's right, as the contract for providing medical care and services within the framework of the basic benefit package is concluded between the RA Ministry of Health and the medical facility. The Ministry of Health, as a contractor, is authorized to require from the provider performance of the responsibilities assumed by the contract. The person protecting the patient's rights must remember that the procedure approved by the government provides for cases when provision of health care through registration is not allowed. Also, if the patient is registered, the registration paper stamped with the stamp of the medical facility shall be requested and kept to prove the fact of registration.

## g) 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.

## Right to Observance of Quality Standards

### a) Right 8 as Stated in the ECPR

*Each individual has the right of access to high quality health services on the basis of the specification and observance of precise standards.*

### b) Right as Stated in Country Constitution/Legislation

#### ▶ RA Constitution

Compliance with this right is implicitly found in Article 38 of the RA Constitution:

*Everyone shall have the right of benefit from medical aid and service under the conditions prescribed by law.*

*Everyone shall have the right to free-of-charge benefit from the basic medical aid and services. The list and the procedure of the services shall be prescribed by law.*

#### ▶ **RA Medical Care Law**

One of the main legal measures employed by the state to ensure the quality of provided medical care and services is licensing. According to Article 18 of the Medical Care Law, medical care and service providers in Armenia may provide respective medical care and treatment after getting a license in the selected area in the procedure established by the RA legislation. Compliance with the terms and requirements of the license is one of the indicators of quality of provided medical care and services, and noncompliance with these terms and requirements may result in the withdrawal of the license.

Persons having respective education, specialization, and license for being involved in specific types of medical activities obtained in the procedure established by the RA legislation may be involved in medical activities in the Republic of Armenia.

Persons having medical education from other countries may be involved in medical activities in the Republic of Armenia in the procedure established by the government of Armenia in compliance with the international treaties of Armenia.

In order to ensure the quality of the medical care and service, Article 19 provides that medical care and service providers must:

- ensure that the quantitative and qualitative indicators of provided medical care and services meet the established standards;
- keep each patient informed of the type and methods of medical care and services provided to him; and
- provide each patient or other people paying for the medical care with necessary information on the quantitative and qualitative features of medical care and services and the expenses made for that purpose.

### **c) Supporting Regulations/Bylaws/Orders**

- ▶ Currently, normative legal acts of Armenia do not set out medical standards or norms. The indicated standards will be approved in compliance with the timetable approved by the Government of Armenia Decree No. 1841-N, dated December 21, 2006.
- ▶ The Government of Armenia Decree No. 318-N, dated March 4, 2004, approved the procedure for the centralized acquisition and distribution of medical equipment and utilities within the framework of state-guaranteed free medical care and services. Such procedure established equal conditions for health care facilities and is aimed at improving quality of health care. Clause 2 of the procedure provides that acquisition of medical equipment at the health care facilities is performed with the perspective of conducting proper laboratory diagnostic examination and improving the quality of medical care delivery. It is also indicated that the list of medical equipment is determined with the principle of meeting the basic sociomedical

needs of the population, ensuring quality medical care with the use of simple, affordable, and relatively reasonably priced technologies.

#### **d) Relevant Provisions of Provider Code of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). Principle 1 of the WMA Declaration on the Rights of the Patient states that the patient shall always be treated in accordance with his or her best interests. The treatment applied shall be in accordance with generally approved medical principles.

Quality assurance should always be a part of health care. Physicians, in particular, should accept responsibility for being guardians of the quality of medical services. In addition, the patient has the right to continuity of health care. The physician has an obligation to cooperate in the coordination of medically indicated care with the other health care providers treating the patient. The physician may not discontinue treatment of a patient, as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care.

#### **e) Practical Examples**

##### **1. Example(s) of Compliance**

Citizen L. applied to the RA Ministry of Health, complaining that in the precinct polyclinic he was refused the provision of complete examination under the basic benefit package. Later, it was found that L. underwent all the required tests, his disease was clearly diagnosed, and treatment was assigned. Because no problem was registered, the patient's request for expensive examination (computer tomography) was groundless and not necessary for diagnosis. (Reported by the RA Ministry of Health)

##### **2. Example(s) of Violation**

Citizen S. applied to the physician of a precinct polyclinic complaining of terrible headaches and mentioning that she had never had such headaches previously. The physician did not pay attention to the patient's words, measured her blood pressure, prescribed anesthetics, and sent her home. S. suffered from headaches for two months; she returned to the polyclinic, but no new examination or diagnosis was made. Finally, she decided to undergo examination at a private diagnostic center, where a diagnosis of craniocerebral tumor was made.

As a result, S. lost valuable time, suffered pain for two months, and was transferred to hospital for inpatient treatment. (Hypothetical case)

##### **3. Actual Case(s)**

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

## f) Practice Notes for Lawyers

Given how rights are framed—that is, high-quality health services are provided on the basis of the specification and observance of precise standards—it is particularly important to obtain expert medical opinion on the appropriate nature and level of treatment that should have been made available and to corroborate this opinion with other opinion and/or evidence.

## g) 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 9 as Stated in the ECPR

*Each individual has the right to be free from harm caused by the poor functioning of health services, medical malpractice and errors, and the right of access to health services and treatment that meet high safety standards.*

### b) Right as Stated in Country Constitution/Legislation

#### ▶ RA Constitution

Compliance with this right may be implied from Article 38 of the RA Constitution, which states:

*Everyone shall have the right to benefit from medical aid and service under the conditions prescribed by law.*

When considering this provision in conjunction with the discussion above regarding quality standards for medical service, a right to safety in terms of medical treatment is implied.

#### ▶ RA Medical Care Law

Likewise, although no specific legislative provision addresses a patient's right to safety, it is implied when one considers the legislative provisions discussed under the right to observance of quality standards, discussed above. In addition, Article 5 of the law stipulates: *While requesting medical care, as well as while receiving medical care and services, everybody has the right to:*

- *Receive medical care and services in conditions meeting the requirements of hygiene.*
- *Be treated with respect by medical care and service providers.*

Furthermore, Article 6 states that the person has the right to receive compensation for the harm caused by the medical care and services (see Right to Compensation).

Article 19 stipulates the obligation and responsibility of medical care and service providers to show care and a respectful attitude toward patients. Under the procedure established by the RA legislation, persons illegally conducting medical activities are held liable for the harm caused to a patient's health through their own fault, as are health care and service providers who unlawfully disclose information on a patient's health condition. This liability includes both criminal liability (Articles 112, 113, 117, 120, 121, 122, 125, 130 of the RA Criminal Code) and civil liability (Articles 1077–1087 of the RA Civil Code).

- ▶ Article 13 of the RA Law on Keeping Arrested and Detained Persons states that an arrested and detained person has the right “to protect his/her health, including to receive sufficient food and urgent medical care” and also the right “to personal safety.” Further, Article 19 states: *It shall be forbidden to reduce the quality of food or the size of minimal portions, including as a way of punishment. Arrested or detained pregnant women, nursing mothers, juveniles, as well as sick arrestees and detainees shall get special food free of charge; the selection and the minimum size of portions shall be defined by the Government of the Republic of Armenia.*

### c) Supporting Regulations/Bylaws/Orders

No specific regulations apply in this context.

### d) Relevant Provisions of Provider Code of Ethics

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). The WMA International Code of Medical Ethics states that physicians shall always bear in mind the obligation to respect human life and shall act in the patient's best interest when providing medical care (also consider Right to Observance of Quality Standards, part d, above).

### e) Practical Examples

#### 1. Example(s) of Compliance

Citizen G. applied to a private medical center for dermatological problems and concluded a contract. On the 10th day of the treatment after regular intervention, the patient's hand was injured as a result of a hemorrhage. G. requested a refund of the amount he had paid and compensation for the damage. Any medical intervention has a potential risk of complications. The patient received high-quality professional service, and the treatment was complete. In addition, all the complications that could occur during the treatment were indicated in the contract. G. was notified about them and had signed the contract. In this case, there was no violation of rights. (Hypothetical case)

## 2. Example(s) of Violation

Twelve-year-old B.'s leg was amputated as a result of vaccination. The grave damage caused to his health was due to the following violations: vaccination contraindications were not taken into account and first aid was not provided during the development of allergic reaction. The medical facility must provide compensation for nonpecuniary and physical harm caused to the child's family according to the RA Civil Code, the RA Civil Procedures Code, and the RA Law on Medical Care and Services. (Hypothetical case)

## 3. Actual Case(s)

See the actual case cited under the Right to Observance of Quality Standards.

Prisoners infected with tuberculosis (TB), including those with multidrug-resistant TB, and prisoners addicted to drugs and alcohol received their treatment in the same building of the Hospital of Detainees of the Ministry of Health. That building was originally established by the support of the International Committee of Red Cross (ICRC), Armenia, as a unique department for TB patients. The hospital administration explained the need to share the facility, rationalizing that there was a scarcity of wards. The South Caucasus Anti-Drug (SCAD) V Programme, implemented by the United Nations Development Programme (UNDP) jointly with the ICRC, supported the Ministry of Justice in creating a new narcological department within the hospital, where drug- and alcohol-addicted prisoners could be referred for addiction treatment, thus resolving the violation of the right to safety. (Reported by the UNDP/SCAD-V Programme Local Expert on Treatment and Rehabilitation of Drug Addicted People)

## f) Practice Notes for Lawyers

Lawyers need to assess both pecuniary and nonpecuniary loss in drafting claim for damages.

Credible expert evidence is vital regarding a medical malpractice claim as the opposing side will obtain its own expert evidence when presenting its defense.

## g) 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 10 as Stated in the ECPR

***Each individual has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations.***

## b) Right as Stated in Country Constitution/Legislation

This right, as described in the European Charter of Patient's Rights, is not directly reflected in RA legislation. It can be implied, however, in Article 38 of the RA Constitution and in Articles 4 and 5 of the Medical Care Law.

- ▶ Article 38 of the RA Constitution stipulates that everyone has a right to medical care. Article 4 of the Medical Care Law states that everyone has a right to medical care, free from discrimination. Article 5 of the Medical Care Law states that everyone has a right to medical care that meets the standards set by law.
- ▶ In addition, the right to innovation may be inferred from the RA Law on Reproductive Health and Rights. Specifically, Article 4(1) of this law provides: *In compliance with the Constitution and laws of the Republic of Armenia, International Treaties of the Republic of Armenia, everyone shall have the following sexual and reproductive rights of vital need ... benefit from new reproductive technologies (including secure and effective methods of regulation of fertility and treatment of infertility).* Article 11 of the same law provides: *The following ancillary reproductive technologies are allowed to use in the Republic of Armenia:*
  - *Artificial insemination with the husband's or donor's sperm;*
  - *Artificial (out-of body/tube) insemination with the husband's or donor's sperm and implanting of the fetus;*
  - *Implanting of donor fetus in surrogate mother's uterus*

A right to innovation is more directly expressed in terms of RA legislation on reproductive health, but the concept may be implied generally to all health services.

## c) Supporting Regulations/Bylaws/Orders

- ▶ Exercise of this right in the Republic of Armenia and in other countries is conditioned by financial capacity. Every year, the Republic of Armenia acquires upgraded medical equipment with budgetary funding and distributes it to health care facilities. In order to address this problem, Annex 5 to the Government of Armenia Decree No. 318-N, dated March 4, 2004, approved the procedure for centralized acquisition and distribution of medical equipment and utilities within the framework of state-guaranteed free medical care and services. In addition, the state is implementing medical equipment provision and upgrading programs with budgetary and donor funding and is supporting the development of medical science. Nevertheless, this procedure does not directly stipulate the patient's right of access to innovative and most recent medical achievements. Cardiac operations should be particularly distinguished as an expensive and rarely accessible type of medical care in Armenia. By 2007, cardiac surgery was being performed in Armenia, but it was not accessible to socially vulnerable populations.

▶ In 2008, an amendment was made to Government Decree No. 318-N with Government Decree No. 880-N, dated July 19, 2007. According to the amending decree, persons registered in the Family Vulnerability Assessment System that have scores of 36 or above are entitled to receive medical care and services in relation to cardiac operations at the expense of the state. For this purpose, it is necessary to apply—in the procedure established by Government Decree No. 880-N—to the respective medical facility performing cardiac surgery. According to the established procedure, selection of persons subject to free-of-charge cardiac surgery is performed by the commission established at the licensed medical facility performing the cardiac operation. The chairman of the commission is the head of the medical facility. The selection of persons is performed within a one-week period following the submission of necessary documents. In order to undergo free-of-charge cardiac surgery, the patient has to submit the following documents to the medical facility:

1. Application addressed to the chairman of the commission
2. Respective document proving social vulnerability (certificate of having a score of 36 or above in the Family Vulnerability Assessment System, as of the previous month)
3. Medical conclusion on the need for cardiac surgery
4. Copy of passport

In the procedure defined by the decree, there are certain guarantees for organizing cardiac surgery of socially vulnerable persons in emergency cases. Specifically, if the applicant was urgently hospitalized but did not apply to the commission, he or she may submit to the commission the documents indicated in Clause 3 of the procedure after the hospitalization and before or after the surgery.

The submitted documents are examined by the commission, and, based on them, the commission concludes whether to satisfy or to decline the person's application for free-of-charge cardiac surgery.

The procedure clearly stipulates the cases in which an application for free-of-charge cardiac surgery free of charge may be declined:

1. The submitted documents are not in conformity with the requirements of this procedure.
2. Funds anticipated for the basic benefit package have been used.

If the funds for the given year have been spent, the person may be registered to receive free care and services in the following year.

#### **d) Relevant Provisions of Provider Code of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). The WMA International Code of Medical Ethics states that physicians owe their patients complete loyalty and all the scientific resources available to them.

## e) Practical Examples

### 1. Example(s) of Compliance

Citizen S. applied to Nork-Marash medical center experiencing heart pains. After examination, the physicians told him that urgent surgery was necessary. The citizen was told that the surgery cost AMD 4,000,000. The citizen explained that he was socially vulnerable with a vulnerability score of 36 and that he could not pay for the services. He was told that surgery would not be possible at that time because the state was not covering the expenses. The center took the patient's contact information, however, saying that, if possible, he would be invited for the surgery. After the amendment of RA Government Decree No. 318-N by Government Decree No. 880-N—which provided that persons with a vulnerability score of 36 or above may undergo cardiac surgery without any charge within the framework of state-guaranteed target programs—the citizen was invited for surgery and was operated on free of charge. (Reported by the Nork Marash Medical Center)

### 2. Example(s) of Violation

With regard to the example of compliance above, despite the fact that the vulnerability score of Citizen S. was as low as 36, he was refused for cardiac surgery covered by the state until the new, amending government decree was made on July 19, 2007. (Hypothetical case)

### 3. Actual Case(s)

In 2008, Citizen S.-yan, age 45, learned from the media that a set of formerly unavailable surgical treatment services, utilizing modern eye devices and other instruments, would be available at the Center of Eye Diseases of Yerevan and that those services would be provided by invited international experts in the field. She applied to the clinic, and her name was put on the waiting list of potential patients. Five days later, Citizen S. received a call from the eye clinic, was invited for medical examination, and, two days later, received state-of-the-art surgical treatment. Thus, Citizen S.-yan was able to realize her right to innovative treatment. (Reported by S.-yan)

## f) Practice Notes for Lawyers

- Lawyers need to assess whether the system in place for rationing expensive and/or innovative treatment is fair and reasonable with respect to the individual case.

## g) 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 Chapter 2 and Chapter 3.

## Right to Avoid Unnecessary Suffering and Pain

### a) Right 11 as Stated in the ECPR

*Each individual has the right to avoid as much suffering and pain as possible, in each phase of his/her illness.*

### b) Right as Stated in Country Constitution/Legislation

- ▶ Although the RA Constitution and legislation do not directly address the issue of pain and suffering in the medical care context, Article 7 of the RA Constitution provides:

*No one shall be subjected to torture as well as inhuman or degrading treatment or punishment. Arrested, detained or incarcerated persons shall be entitled to human treatment and respect to dignity. No one shall be subjected to scientific, medical experiments without his/her consent.*

- ▶ Further, Article 119 of the RA Criminal Code criminalizes torture. The article defines torture as willfully causing strong pain or bodily or mental suffering to a person. Thus, the RA Criminal Code provides for liability for willfully causing pain to a person, including during treatment. (See also Right to Safety and Right to Observance of Quality Standards for relevant provisions).

### c) Supporting Regulations/Bylaws/Orders

This right is indirectly stipulated in state-guaranteed health care programs because the programs are allocating budgetary funding every year for the acquisition of pain medications.

- ▶ Specifically, in the 1999 State Health Target Program approved by the Government of Armenia Decree No. 85, dated August 24, 1999, it was indicated that the state guarantees chemotherapeutic and pain medications for patients of the republican anti-tumor dispensaries and the oncological departments of regional anti-tumor dispensaries from the centralized funds in compliance with the procedure established by the RA Ministry of Health. The government decrees anticipate acquisition of pain medications for servicemen.

Article 26 of the Government of Armenia Decree No. 1273-N, dated October 2, 2002, "on Approving the procedure and rules on provision of ova by reproductive donors, as well as persons not being reproductive donors, preservation of provided ova and fetus" stipulates anesthetization guarantees for these types of medical aid.

- ▶ Specific guarantees for avoiding pain are stipulated by Government of Armenia Decree No. 1771-N, dated November 13, 2003. Specifically, the decree provides for persons who have malignant tumors to be provided with anti-tumor drugs, pain medications, and narcotics by ambulatory, dispensary, and inpatient facilities covered by state funds.

Thus, the right of avoiding suffering and pain is not stipulated by the law in Armenia, but secondary legislation provides for the right to access to pain medications for some groups of patients (persons with malignant tumors, servicemen).

#### **d) Relevant Provisions of Provider Code of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). Principle 10(b) of the WMA Declaration on the Rights of the Patient provides for the patient's right to relief of suffering according to the current state of knowledge.

Principle 10(c) of the same declaration states that the patient is entitled to humane terminal care and is also entitled to all available assistance in making the process of dying as dignified and comfortable as possible.

In addition, the WMA Medical Ethics Manual (page 59) states that palliative care can be appropriate for patients of all ages, whether a child with cancer or a senior nearing the end of life. One aspect of palliative care that needs greater attention for all patients is pain control. All physicians who care for dying patients should ensure that they have adequate skills in this domain, and, where available, also have access to skilled consultative help from palliative care specialists. Above all, physicians should not abandon dying patients, but should instead continue to provide compassionate care, even when a medical cure is no longer possible.

#### **e) Practical Examples**

##### **1. Example(s) of Compliance**

A person with cancer applied to the National Center of Oncology and, after getting the necessary medications, underwent the required treatment. After surgery, the person was discharged from the hospital and received outpatient treatment at home. Because the person needed pain medication, he applied to the precinct polyclinic, with the certificate provided by the National Center of Oncology. Based on the conclusion of the medical commission, the polyclinic provided him with narcotics free of charge. (Reported by the RA Ministry of Health)

##### **2. Example(s) of Violation**

Citizen L. was pregnant and applied for maternity care services, requesting pain relief for the delivery. The maternity care facility told her that it was not possible to receive an epidural anesthetization within the framework of the basic benefit package. Accordingly, the facility requested payment of AMD 25,000 for anesthetization. Because of the patient's inability to pay, she delivered her child without general anesthesia. (Hypothetical case)

##### **3. Actual Case(s)**

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

## f) Practice Notes for Lawyers

- Lawyers dealing with the protection of patients' rights should be aware that, even though there is no direct indication in the RA legislation as to the patients' right to avoid unnecessary suffering and pain, every physician is obliged to do everything possible to avoid the potential for pain and suffering during treatment of the patient. During their training, every physician learns about providing treatment as painlessly as possible. In addition, the physician may bear disciplinary and pecuniary liability for causing pain and suffering to the patient through negligence or as a result of poor quality of services.
- In order to assess whether reasonable thresholds of pain were breached, lawyers need to be able to sensitively obtain detailed information from a patient as to the amount of pain and suffering the patient has endured and the acts and/or omissions of medical staff. Expert opinions on the appropriate treatment should be obtained.

## g) 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 12 as Stated in the ECPR

*Each individual has the right to diagnostic or therapeutic programmes tailored as much as possible to his or her personal needs.*

### b) Right as Stated in Country Constitution/Legislation

Although there are no constitutional or legislative provisions reflecting this right specifically, lawyers should consider whether the discussion above regarding Right to Access to Information is called into question in their specific cases.

### c) Supporting Regulations/Bylaws/Orders

No specific regulations apply in this context.

## d) Relevant Provisions of Provider Code of Ethics

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Right to Preventive Measures, part d, above). Principle 1(c) of the WMA Declaration on the Rights of the Patient states that the patient shall always be treated in accordance with his or her best interests. The treatment applied shall be in accordance with generally approved medical principles.

## e) Practical Examples

### 1. Example(s) of Compliance

Doctors consult with patients regarding the side effects of medications to ensure that the side effect does not inhibit the patient's work or regular activities. (Hypothetical case)

### 2. Example(s) of Violation

Prescribing a medicine with a side effect that frustrates the patient in his or her regular activities violates the patient's right to personalized treatment if there exists an alternative medication that provides the same or better result and produces no side effects or produces a side effect that is not significant to the patient in daily activities. (Hypothetical case)

### 3. Actual Case(s)

Citizen S.-yan applied to a doctor and complained about pains in his back. The doctor prescribed medications without thoroughly examining the patient. As a result of the wrongful treatment, three days later the patient's condition deteriorated, and he returned to the doctor and complained about stomach pain. The doctor responded that he had prescribed the standard treatment for the patient's problem. In this case, the patient's right to personalized treatment was violated, because, as a result of defective examination, the doctor failed to diagnose the patient's stomach problem, leading to further complications during the prescribed treatment. A complaint was made to the RA Ministry of Health, and the patient was advised to submit his complaint to the court of first instance. (Reported by the RA Ministry of Health)

## f) Practice Notes for Lawyers

- Lawyers should consider that a violation of a patient's right to information and/or right to free choice may often raise a question as to whether the patient's right to personalized treatment has also been violated because this right is related to a patient's right to make choices based on adequate information about health care options.
- Lawyers may need to obtain expert medical opinion as to whether the treatment was appropriate for the patient's needs or not.
- Lawyers must note that the phrase in the European Charter of Patients' Rights "as much as possible" is a limitation, meaning that medical professionals have a margin of error in regard to liability for such a violation, depending on normal standards.

## **g) 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 13 as Stated in the ECPR**

*Each individual has the right to complain whenever he or she has suffered harm and the right to receive a response or other feedback.*

### **b) Right as Stated in Country Constitution/Legislation**

#### **▶ RA Constitution**

This right is reflected in Article 18 of the Constitution, which states:

*Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.*

*Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by law.*

*Everyone shall be entitled to have the support of the Human Rights Defender for the protection of his/her rights and freedoms on the grounds and in conformity with the procedure prescribed by law.*

*Everyone shall, in conformity with the international treaties of the Republic of Armenia, be entitled to apply to the international institutions protecting human rights and freedoms with a request to protect his/her rights and freedoms.*

In addition, Article 27.1 of the RA Constitution guarantees everyone's right to submit letters and recommendations to the authorized public and local self-government bodies for the protection of private and public interests and the right to receive appropriate answers within a reasonable time.

In conformity with the RA Constitution, on November 24, 1999, the RA National Assembly adopted the RA Law on the Procedure of Discussing Citizens' Proposals, Applications and Complaints, which regulates the discussion by state, public, and other entities of proposals, applications, and complaints of citizens and legal persons and of foreign citizens and stateless persons residing in the territory of the Republic of Armenia, in a procedure and within time limits set out by the law, and also regulates the recording of cases of violation of rights and lawful interests of citizens and legal persons and of relations originating from the elimination and prevention of these violations. Since the entry into force of the RA Law

on Fundamentals of Administrative Action and Administrative Proceedings on December 31, 2004, the RA Law on the Procedure of Discussing Citizens' Proposals, Applications and Complaints has been effective only with regard to citizens' proposals.

Whenever a patient considers that his or her rights that are guaranteed by the Constitution or by laws have been violated, that patient will have the following remedies at his or her disposal:

- Seek the support of the RA Human Rights Defender if the alleged violation was committed by a state or local self-government body or its official, in accordance with the RA Law on the Human Rights Defender.
- If the alleged violation was committed by an administrative body, lodge an administrative appeal, that is, an appeal with the body or official superior to the alleged violator, in accordance with the RA Law on Fundamentals of Administrative Action and Administrative Proceedings. If the appeal is not satisfied, the applicant can further proceed by bringing an action before the RA Administrative Court in accordance with the RA Administrative Procedure Code.
- If the complaint is against a private entity, bring a lawsuit before the court of first instance, in accordance with the RA Civil Procedure Code.
- If the alleged action or inaction contains elements of crime as defined by the RA Criminal Code, file a complaint with the police of the Republic of Armenia, in accordance with the RA Criminal Procedure Code.

### **c) Supporting Regulations/Bylaws/Orders**

No specific regulations apply in this context.

### **d) Relevant Provisions of Provider Code of Ethics**

No specific code of ethics provisions apply in this context.

### **e) Practical Examples**

#### **1. Example(s) of Compliance**

Citizen A. appealed to the Ministry of Health on violation of his rights by the Ijevan Medical Center under the Tavush governor. Guided by the provision of the RA Law on the Fundamentals of Administrative Action and Administrative Proceedings, the Ministry of Health forwarded the complaint to the respective administrative entity—the Tavush governor—while also notifying the applicant of the action. As a result of an investigation, the doctor was called for disciplinary liability and Citizen A.'s rights were restored. (Reported by the RA Ministry of Health)

## 2. Example(s) of Violation

Analyzing facts in the complaint against the actions of Doctor A. from a medical facility under the subordination of the Kotayk Region, the staff of that facility concluded that a patient's rights can be recovered only through court and are not subject to address by any administrative entity. As a result, they did not notify the applicant about the discussion and left the complaint without response. (Reported by the RA Ministry of Health)

## 3. Actual Case(s)

On September 9, 2004, Mr. O., a lawyer from Yerevan, submitted a written application to the RA Human Rights Defender concerning the defender's failure to hold somebody to account and obtain appropriate compensation for the wrongful treatment and surgery performed on the lawyer's son's right knee joint, which was injured while the boy was playing in the yard.

Following the initial treatment, Mr. O. requested clarification from the physician as to his son's resulting disability and was told: "If you are not happy, take him to another physician." In 2001, Mr. O. submitted a written appeal to the prosecutor's office in the Yerevan Kentron and Nork-Marash communities. Two forensic examinations commissioned by the prosecutor demonstrated that the boy's disability was the fault of the physician. The doctor accepted his liability, but the prosecutor's office declined to initiate a criminal case against him for inflicting grave bodily injury due to negligence on the ground that an act of amnesty had been adopted. After some time, the Yerevan prosecutor repealed the decision not to prosecute, and materials were sent for reexamination. Subsequently, as a result of a new forensic examination made by the commission of specialists of the RA Ministry of Health, there was no finding of liability. As a result, the prosecutor, on July 3, 2007, declined to initiate a criminal case in accordance with Article 35.1(2) of the RA Criminal Procedure Code.

On September 6, 2002, the Chamber of Criminal and Military Affairs of the RA Cassation Court ruled that the prosecutor's decision was groundless and sent the case back to the prosecutor for reexamination. This time, a criminal case was instituted, and a new forensic expert was assigned. According to the fifth conclusion of the Republican Forensic Center of the RA Ministry of Health, it was proved that, given the fact that no appropriate physiotherapeutic treatment was conducted prior to surgery, the physician's diagnosis was incorrect. In addition, the physician provided no effective medical assistance during the post-surgery period, as the surgery had already caused the joint to become immovable.

By the resolution dated December 9, 2002, however, the Prosecutor's Office of the Erebuni and Nubarashen regions discontinued the proceedings on the basis that the actions of the physician lacked the elements of an intended crime, according to Article 35.1(2) of the RA Criminal Procedure Code, because his actions were considered to be malpractice.

Consequently, Mr. O. decided to launch a civil suit. By the resolution of March 19, 2003, the court of the Kentron and Nork-Marash communities upheld the suit and ordered a payment of US\$5,000 from the funds of the Children's Clinic 1, as compensation for the harm suffered by Mr. O.'s son, together with US\$100 paid to the state budget.

## f) Practice Notes for Lawyers

- Before considering legal action, which can be time-consuming and costly for a client, the lawyer needs to know what administrative complaint procedures exist in each scenario and whether these procedures have already been exhausted.

## Right to Compensation

### a) Right 14 as Stated in the ECPR

*Each individual has the right to receive sufficient compensation within a reasonably short time whenever he or she has suffered physical or moral harm and psychological harm caused by a health service treatment.*

### b) Right as Stated in Country Constitution/Legislation

#### ▶ RA Constitution

Article 18 of the RA Constitution states:

*Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.*

*Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by law.*

#### ▶ RA Medical Care Law

Article 6 of the Medical Care Law states:

*Everyone shall have the right to receive compensation for the harm caused to his/her health during the organization and realization of medical care and services, in accordance with the RA legislation.*

- ▶ In Armenia, compensation for damage caused is sought by bringing an action before a court in accordance with the RA Civil Procedure Code. Whenever a criminal case is instituted in connection with the damage caused, however, there is no need to bring a separate action for compensation before the court. The civil claim for compensation is filed, examined, and resolved together with the criminal case, in accordance with the RA Criminal Procedure Code.

#### ▶ RA Civil Code

For persons eligible to receive compensation, the manner of calculation of the amount of compensation is defined by Articles 1077–1087 of the RA Civil Code.

The harm-causing party bears responsibility for the following: 1) the harm caused to a person's health; 2) harm that causes the death of a family's breadwinner.

In the case of causing disability or other injury to the health of a citizen, the lost wages (or income) that he or she would have received and the supplementary expenses borne as a result of the injury to health, including expenses for medical treatment, supplementary nourishments, medicines, prosthetics, care, sanitarium-resort treatment, special means of transport, preparation for another job, etc., shall be subject to compensation, if it is established that the victim needs these means of assistance and care and does not have the right to receive them free of charge (Article 1078[1] of the Civil Code).

The total sum of wages lost is paid to the victim every month, regardless of whether he or she continues to work in the previous position, has moved to another workplace, etc.

In the case of harm caused to the health of a minor, compensation is made in accordance with the rules of Article 1080 of the Civil Code. According to these rules, the person liable for the harm caused to the health of a minor who has not attained the age of 14 years and does not receive any wages (or income) shall compensate for the actual expenses connected with the injury to health.

When the minor attains the age of 14 years—and in the case of harm caused to the health of a minor of 14 to 18 years of age who does not have wages (or income)—the person liable for the harm caused shall, in addition to compensating for expenses connected with the causing of injury to health, compensate the victim for the harm connected with the loss or reduction of his ability to work by taking fivefold the minimum monthly statutory salary as a reference amount.

If, at the time of injury to his health, the minor had earnings, then the harm shall be compensated based on the amount of those earnings, if the amount is not less than fivefold the minimum monthly statutory salary.

After the start of employment, a minor to whose health the harm was caused, shall have the right to demand an increase in the amount of compensation on the basis of the new wages.

In the case of the death of the victim, the party bearing civil responsibility for it shall pay compensation to persons who have lost their means of survival as a result. The list of such persons is provided under Article 1081 of the Civil Code. In the case of the death of the family breadwinner, the following persons shall have the right to compensation for harm:

- persons not capable of work, who were dependent upon the decedent for support or had, on the day of his death, the right to receive support from him
- child of the decedent, born after his death
- a parent, spouse, or other family member, who, regardless of the ability to work, does not work and engages in the care of the decedent's children, grandchildren, brothers, or sisters who were dependent upon the decedent for support and have not attained 14 years of age or who, although they have attained this age, based on the conclusion of medical bodies, need outside care due to condition of health
- persons who were dependent upon the decedent for support and have become incapable of work within the course of five years after the victim's death

According to the same article, a parent, spouse, or other family member who was not working and was engaged in the care of the decedent's children, grandchildren, brothers, or sisters and who became unable to work during the time period of conducting care reserves the right to compensation for harm after their care of these persons ends.

The amount that is subject to compensation may be changed upon the request of the harmed party and also upon the request of the party liable for the payment of the compensation. The party causing harm to the health of a person may request reduction of the amount of compensation if the working ability of the harmed party has increased as compared to the party's ability at the moment of assigning the compensation. The harmed party may request an increase in the amount of harm compensation if the financial status of the compensating party has improved and the compensation amount had been reduced in accordance with Article 1076(3) of the Civil Code.

With a change in the harmed party's working ability, the amount of the harm compensation may also be changed through a court procedure, at the request of the harm-causing party.

Because it is an innovation in the Civil Code, attention should be paid to Article 1084, which sets forth that the sums of compensation paid for harm caused to the life or health of the victim shall be subject to indexation by the procedure established by a statute in case of an increase in the cost of living.

Special rules are set out for the harm caused to a person's health and life in cases in which the harm was caused by a legal entity that is being liquidated or restructured.

In the event of the reorganization of a legal entity that has been recognized by the established procedure as liable for the harm caused to life or health, the duty of making the respective payments shall be borne by the entity's legal successor, and claims for compensation for harm shall be made against it. In the event of the liquidation of a legal entity recognized by the established procedure as liable for the harm caused to the life or health, the respective payments must be capitalized for their payment to the victim according to the rules established by a statute or other legal acts (Article 1096 of the Civil Code).

In the event of a legal entity's liquidation where there is no legal successor, the harm is compensated by the state through the Social Security Department of the Ministry of Labor and Social Affairs (Clause 16 of the rules).

- ▶ Article 13 of the RA Law on Prevention of Disease caused by HIV states that if persons have acquired HIV infection while providing or receiving medical care, they have a right to compensation as stipulated by the RA legislation.

### **c) Supporting Regulations/Bylaws/Orders**

No specific regulations apply in this context.

## **d) Relevant Provisions of Provider Code of Ethics**

No specific code of ethics provisions apply in this context.

## **e) Practical Examples**

### **1. Example(s) of Compliance**

In 2006, Citizen L.-yan from Aragatsotn Marz had a fracture of the right radius and underwent surgery at the regional hospital. Four months after discharge from the hospital, he found that his right arm's muscular strength and amplitude of motion were significantly reduced. L.-yan shared his concern with a traumatologist from Yerevan, who referred the patient for radio diagnostics. The X-ray image showed that there was a small piece of bone within the zone of the former fracture that was disturbing the motion of the right arm. The patient was advised that a new surgery would be needed to restore the normal functioning of the right arm. L.-yan applied to the regional hospital and requested compensation in order to pay for the proposed additional surgery. It was agreed that the surgeon of the regional hospital who performed the first operation would cover all costs related to the second operation. (Hypothetical case)

### **2. Example(s) of Violation**

As this area of law is still developing, no actual cases are available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

### **3. Actual Case(s)**

On March 19, 2003, the court of the Kentron and Nork-Marash communities decided to satisfy the claim for compensation of the harm caused by Yerevan Clinical Hospital 1 (hereinafter referred to as the hospital) lodged by N. A., the legal representative of T. O. A decision was made to order a payment of US\$5,000 from the funds of Children's Clinic 1 to be paid to the plaintiff as compensation for the damage and a payment of US\$100, paid in AMD, from the defendant organization as a state duty to be paid to the state budget.

The claiming party brought an action before the court stating that her son T. O., who was born on October 10, 1993, received a knee injury in May 1997. They went to the hospital in March 2000 to arrange for the treatment of the child. The child underwent treatment and surgery in the Department of Children's Orthopedy.

For the period of June 12, 2001, to June 1, 2003, T. O. was assigned a child disability pension.

According to statement 6 of October 8, 2001, and conclusion of August 12, 2001, provided by the Nork Center of Traumatology, Orthopedy and Rehabilitation, T. O. was hospitalized for inpatient treatment of his right knee with the diagnosis of fibrous ankylosis. After the surgery on August 1, 2001, he was discharged on August 21, 2001, and referred to the Rehabilitation Center of Red

Cross for specialized rehabilitation care. The child's condition deteriorated, however. Forensic examination proved that the hospital surgeon had performed the wrong operation. As a result of the surgeon's treatment and incorrect operation, material damage of US\$15,900 was suffered since 1997. They were asking for the indicated amount to be ordered to be paid by the hospital.

The plaintiff then appealed the decision before the appeals court. Based on the above-mentioned facts and guided by the RA Civil Procedure Code, the RA Court of Appeals decided to satisfy the appeal and ordered payment of US\$15,900 in AMD to T. O.'s legal representative, N. A., as compensation for the harm caused to T. O. (Reported by the RA Ministry of Health)

### **f) Practice Notes for Lawyers**

- Calculate the size of damage based on losses incurred (pecuniary and nonpecuniary) and in light of previous awards.



## **7.1 PROVIDERS' RIGHTS**

**Right to Work in Decent Conditions**

**Right to Freedom of Association**

**Right to Due Process**

**Right to Undertake Professional Activities**

## **7.2 PROVIDERS' RESPONSIBILITIES**

**Duty to Provide Emergency Medical Treatment**

**Duty to Provide Quality Medical Care**

**Duty to Inform**

**Duty to Keep Patient Information Confidential**

**Duty to Keep Records**

**Duty to Treat Patients with Care and Respect**

# 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.

This right is closely related to the Patient's Right to Safety.

### b) Right as Stated in Country Constitution/Legislation

Article 32 of the RA Constitution guarantees everyone the right to safe and hygienic working conditions. This right is further elaborated by these more detailed legislative provisions:

- According to Article 43 of the RA Law on Licensing, the provision of health care and services by legal entities and individual entrepreneurs is a licensable activity. As a result, in order to function, any medical facility must be licensed and its activities must comply with the conditions and requirements of this license. Pursuant to Article 11(1) of the same law, such requirements include decent working conditions, access to and use of necessary equipment, and observance of hygiene and sanitary-epidemic rules, etc. The licensing authority delivers to the licensees the list of legal requirements with the license.
- According to Article 19 of the RA Law on Ensuring Sanitary-Epidemic Safety for the Population of the Republic of Armenia, adopted in 1992, buildings and premises, including places of work, must not endanger health—in other words, they must meet the appropriate sanitary rules and norms. In addition, the levels of contaminants and other harmful elements present in the air at the workplace must not breach the sanitary rules (Article 17). Article 22 also provides for preliminary and regular medical examination of those categories of workers defined by the RA Government (see below for the relevant decree).
- Chapter 23 of the RA Labor Code (Articles 242–262) entitled “Safety and Health of Workers” covers, but is not limited to, the responsibility of the employer to make provision for healthy and safe working conditions for employees and also for the provision of all necessary equipment, furniture, and tools. Employers are also obliged to ensure that all workers under the age of 18 and those who are exposed to risks connected with their professional activities are subject to a medical examination upon commencement of their employment and thereafter pursuant to the timetable established by the employer. Although the RA Labor Code does not contain specific provisions with regard to health professionals, the relevant decree of the RA Government prescribes the list of those health professionals who are required to undertake a medical examination upon commencement of employment and regularly thereafter (see below for the relevant decree).
- Government of Armenia Decree No. 347, dated March 27, 2003, “On approving regulation of the preliminary mandatory health state (while getting a job) and regular medical examination; the spheres of activity, where the persons employed are subject to mandatory health state examination; the list of medical examination volume and frequency; the personal sanitary (medical) handbook; the list of persons’ names subject to medical examination; and the protocol on not temporarily permitting a person to a job.”

- ▶ Article 12 of the RA Law on Prevention of Disease caused by HIV states that: *Health organizations are obliged to inform persons undergoing HIV diagnosis, persons infected with HIV, as well as medical personnel, of their responsibilities regarding all necessary safety means and conditions stipulated by the RA Government regulations.*

### **c) Supporting Regulations/Bylaws/Orders**

- ▶ RA Government Decree No. 318-N, dated March 4, 2004, approved the procedure for the centralized acquisition and distribution of medical equipment and utilities within the framework of state-guaranteed free medical care and services. This decree also creates equal conditions for work and provision of medical care and services.

In addition, workplace safety issues are regulated by a number of sanitary rules and hygiene regulations, such as:

- RA Ministry of Health Order No. 132 “On Approving Noise in Workplace, Residential and Public Buildings and in Residential Construction Premises,” dated March 6, 2002 [Sanitary Norms N2-III-11.3]
- RA Minister of Health Order No. 983-N “On Approving Dental Policlinics, Cabinets and Dental Technician Laboratories,” dated October 26, 2005 [Sanitary Norms N2-III-2.2.5]
- RA Minister of Health Order No. 756-N “On Approving Hygiene Classification of Activities According to Harmful and Dangerous Factors of the Working Environment, Indicators of Hardness and Strain of the Working Process,” dated August 15, 2005 [Sanitary Norms N2-III-2.2.5]
- RA Minister of Health Order No. 718-N “On Approving Hygiene Requirements for Computers and Organization of Work and Work Conditions of Those Using Computers.” dated June 23, 2006 [Sanitary Rules and Norms N2.III-4.10]
- RA Minister of Health Order No. 21-N “On Approving Sanitary-Epidemic Rules and Norms on Epidemic Control of Tuberculosis,” dated October 20, 2008 [Sanitary Norms N3.1.1-010-08]
- RA Ministry of Health Order No. 959 “On Approving the Manner and Conditions of Using Sources of Ionizing Radiation,” dated December 28, 2001
- RA Minister of Health Order No. 614-N “On Approving Hygiene Norms of Infra-Sound in the Workplace,” dated June 2, 2006 [Sanitary Norms N2.2.4-010-06]
- RA Government Decree “On Approving Technical Regulation of Individual Protection Measures”
- RA Government Decree "On Approving the Procedure on Conducting Preliminary (Upon Admission to Employment) and Regular Medical Examination of Health Condition of Certain Categories of Population Exposed to Harmful and Dangerous Factors of Working Environment and Process, and the Lists of Factors, Nature of the Works Performed, Frequency of Examination, and of Medical Contraindications"

## d) Codes of Ethics

No specific code of ethics provisions apply in this context.

## e) Practical Examples

### 1. Example(s) of Compliance

In general, according to the regulations, hospitals are responsible for ensuring the safe operation and maintenance of oxygen-supply systems. For this reason, a technical staff is hired and monitors oxygen-tube systems and connecting devices for the normal flow of oxygen in the system. (Actual but unreported case)

### 2. Example(s) of Violation

Employees of the Yerevan Avan Community Polyclinic have been working without heating in winter for more than 15 years. They are unable to properly examine patients because it is not possible to remove patients' clothing at such low temperatures. Each year, the management promises to remedy the situation, but it remains unchanged. The doctors were advised to file a complaint with the Ministry of Health because not only are their rights being violated but so are the rights of their patients. (Reported by the general practitioners of Yerevan Avan Community Polyclinic)

### 3. Actual Case(s)

Doctor P-yan complained to the Ministry of Health that his workplace did not meet the required sanitary standards as laid down in Article 11(1) of the RA Law on Licensing and in the RA Minister of Health Order "On Approving Hygiene Classification of Activities According to Harmful and Dangerous Factors of the Working Environment, Indicators of Hardness and Strain of the Working Process" of the Sanitary Rules and Norms, insofar as his office was in the basement and did not have a window or ventilation and also as there was no heat in winter—facts confirmed by the inspection process. The management of the facility was fined, and P-yan was provided with an office that met the required standards. (Reported by the RA Ministry of Health)

## f) Practice Notes for Lawyers

In order to assess compliance, lawyers need to have recourse to relevant health and safety regulations and to information as to how these regulations have been interpreted by monitoring bodies.

## g) Cross-referencing Relevant International and Regional Rights

Provisions on the Right to Work in Decent Conditions include:

- Article 7 ICESCR (see Right to Fair Pay and Working Conditions in Chapter 2)
- Relevant ILO standards, although three main conventions (155, 161, and 187) have not been ratified by Armenia

- Articles 2(1) to (6) and 3(1) of the ESC

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 Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 28 of the RA Constitution guarantees everyone's right to freedom of association with others, including the right to form and to join trade unions.
- ▶ Article 32 of the RA Constitution guarantees employees' right to strike for the protection of their economic, social, and employment interests in accordance with the procedure and limitations prescribed by law.
- ▶ Health care and service providers may join professional associations under the procedure set forth by Article 18 of the RA Law on Medical Care and Services to the Population. These associations participate in the development of state health target and insurance programs, licensing of medical activities, protection of health care workers' rights, and to the implementation of other objectives set forth in their respective charters. The procedure for the formation (including registration), functioning, and dissolution of such associations and their rights and responsibilities in general and with regard to public authorities are prescribed by the RA Law on Non-Governmental Organizations.

Health care and service providers may join their respective professional associations (for example, in dentistry, cardiology, and nursing), allowing them to participate more effectively in the development of state health care programs. These associations also enable members to benefit in their respective areas of specialization, such as by organizing and attending national and international conferences and international study exchange programs.

- ▶ Most health care and service providers also have a constitutional right to strike. The manner of initiation, conduct, strike cessation, rights limitations, guarantees for participants, and other issues concerning the right to strike are regulated by Articles 73–82 of the RA Labor Code. It should be noted that, according to Article 75 of the Labor Code, emergency medical services personnel are prohibited from striking.

### c) Supporting Regulations/Bylaws/Orders

No specific regulations apply in this context.

### d) Codes of Ethics

No specific code of ethics provisions apply in this context.

### e) Practical Examples

#### 1. Example(s) of Compliance

In the Republic of Armenia, thousands of physicians are members of different associations and NGOs without any restrictions (the Armenian Medical Association, Association of Armenian Psychiatrists and Narclogists, Association of Armenian Urologists, Armenian Association of Cardiologists, etc.). (Actual but unreported case)

#### 2. Example(s) of Violation

Personnel at a Yerevan Medical Center opposed the Ministry's of Health decision to appoint a new chief physician and decided to go on strike. The new appointee remained in office, however, and subsequently fired all the employees that had participated in the strike. These employees challenged their dismissal in the courts but were unsuccessful. (Actual but unreported case)

#### 3. Actual Case(s)

Citizen K.-yan is a physician by profession and works for NewMed Medical Center. K.-yan wants to join the Free Doctors Association, which promotes the protection of the professional reputation and dignity of physicians. In order to join, K.-yan. needs a certificate from the NewMed Medical Center. The director of the center refuses to provide him with the certificate, arguing that K.-yan's wish to join is not justified and will only result in harm. K.-yan never challenged this refusal because he was afraid of losing his job; there was only an oral complaint to the Ministry of Health. (Actual but unreported case)

### f) Practice Notes for Lawyers

- It is important tht lawyers refer to both relevant ILO standards and interpretation in this area and to those of the United Nations and Council of Europe.
- The constitutional and legal right of health care and service providers to form and join associations and use them accordingly, as set out above, should not be subject to any unreasonable restrictions, for example, the requirement to produce a certificate from one's place of work as set out in the case of Citizen K.-yan, above.
- Compulsion to join an association can result in a violation of the right to freedom of association. For this reason, each time a person is de jure or de facto forced to join an institution, a determination must be made whether this institution is in fact an association or not (see the ECtHR interpretation below).

- Under Article 11 (Freedom of Association) of the European Convention on Human Rights, as interpreted by the ECtHR, the concept of association has an autonomous meaning independent of national law. The ECtHR has ruled in a number of cases that only so-called public law associations fall outside the scope of Article 11. These are institutions that are founded not by individuals but by the legislature and remain integrated with the structure of the state, exercise public control over a given profession, are invested with administrative, legislative, and disciplinary powers, and, in fact, function as a state authority. If a person is “forced” to join an institution meeting these criteria, this compulsion will not amount to a violation of his or her right to freedom of association. In contrast, institutions formed under private law and enjoying full autonomy in determining their own aims, organization, and procedure do fall within the scope of Article 11.
- As to the right to strike, the ECtHR noted in the case of *Schmidt and Dahlström v. Sweden*: *The Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. Article 11(1) nevertheless leaves each State a free choice of the means to be used towards this end. The granting of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances. According to this interpretation, as long as trade unions enjoy another effective medium to strive for their organizational interests, they have no guaranteed right to strike under Article 11 of the Convention. Trade unions should be heard and be permitted to take action to protect the occupational interests of their members, however.*<sup>1</sup>
- This protection can include the right to strike, which may only be limited under certain circumstances.<sup>2</sup>

## **g) 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 ICESCR
- Article 11 of the ECHR
- Articles 5 and 6 of the ESC
- ILO Convention 87 (ratified on January 2, 2006)
- ILO Convention 98 (ratified on November 12, 2003)

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1. *National Union of Belgian Police v. Belgium*. (1 EHRR 578).

2. *Wilson and Ors v. UK*. (35 EHRR 20). Violation of Article 11 found, 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.

Please find a discussion of international and regional standards relevant to the Right to Freedom of Association in Chapter 2 and Chapter 3.

## Right to Due Process

**a) Health care and service providers are potentially subject to a range of civil and administrative proceedings—disciplinary measures, medical negligence suits, administrative measures such as warnings, reprimands, suspension of activities, etc.—and are entitled to enjoyment of due process and a fair hearing.**

### **b) Right as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 19 of the RA Constitution guarantees everyone's right to restore his or her revealed rights and to have the grounds of the charge against him or her heard in a fair public hearing under the equal protection of the law and fulfilling all the demands of justice by an independent and impartial court within a reasonable time.
- ▶ Article 14 of the RA Constitution states that human dignity shall be respected and protected by the state as an inviolable foundation of human rights and freedoms.
- ▶ For medical professionals, this right is further ensured by Article 18 of the RA Law on Medical Care and Services to the Population, which states that, in the Republic of Armenia, health care and service providers have the right to uphold their professional honor and dignity. (It should be noted here that defamation issues in Armenia are regulated by Article 19 of the RA Civil Code. Also, defamation is a criminal offence under Article 135 of the RA Criminal Code). This right includes the right to court protection.

Article 18 of the RA Constitution provides for the following legal remedies to restore one's violated rights:

*Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.*

*Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by law.*

*Everyone shall be entitled to have the support of the Human Rights Defender for the protection of his/her rights and freedoms on the grounds of, and in conformity with, the procedure prescribed by law.*

*Everyone shall, in conformity with the international treaties of the Republic of Armenia, be entitled to apply to the international institutions protecting human rights and freedoms with a request to protect his/her rights and freedoms.*

Due-process guarantees in civil law actions are stipulated in the RA Civil Procedure Code. Due-process guarantees in criminal law actions are provided for in the RA Criminal Procedure Code, and due-process guarantees in administrative law actions are found in the RA Law on Fundamentals of Administrative Action and Administrative Proceedings and in the RA Administrative Procedure Code. The procedure for obtaining the support of the RA Human Rights Defender in the protection of one's rights and/or freedoms is prescribed by the RA Law on the Human Rights Defender.

### **c) Supporting Regulations/Bylaws/Orders**

No specific regulations apply in this context.

### **d) Codes of Ethics**

No specific code of ethics provisions apply in this context.

### **e) Practical Examples**

#### **1. Example(s) of Compliance**

A health care and service provider's right to practice was suspended for three months by the RA Ministry of Health on the ground of an alleged violation of the license requirements. The provider is able to challenge the suspension decision before the RA Administrative Court, an impartial, independent tribunal established by law, which, in addition, affords the applicant a public hearing within a reasonable time. (Hypothetical case)

#### **2. Example(s) of Violation**

In the above example, the court upholds the Ministry of Health's decision in an in-camera hearing of the applicant's case, without providing any reasoning for its decision not to hold a public hearing. Although the physician may challenge the court's decision before the RA Court of Cassation, the violation of the physician's right to a public hearing cannot be remedied because the Court of Cassation lacks the authority to examine the merits of the case (see the ECtHR judgment in the case of *Le Compte, Van Leuven and De Meyere v. Belgium*, June 23, 1981).

#### **3. Actual Case(s)**

When, in the past, hospitals have faced insufficient operating budgets, hospital administrators have unofficially and informally directed medical personal to take, by turns, one month of unpaid leave. Although such leave is ostensibly voluntary, in actuality it amounts to a unilateral change in terms of employment without an opportunity of redress. (Actual but unreported case)

### **f) Practice Notes for Lawyers**

- Lawyers need to identify the part of the proceedings that did not meet fair trial standards pursuant to RA and ECHR jurisprudence and also determine whether or not the

proceedings themselves are protected. Apart from those cases involving criminal charges, Article 6 of the ECHR also applies to cases that determine a person's civil rights and obligations. A determination in this respect is a dispute resolution that has a decisive effect for the particular civil right or obligation. As interpreted by the ECtHR, under Article 6, "civil rights and obligations" can include licensing and/or disciplinary proceedings and also the rights to practice a profession and to enjoy a good reputation.

- Article 6(1) of the ECHR secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal that meets the requirements of independence and impartiality established by law and affording a public hearing subject to certain prescribed exceptions. A determination by an administrative body that breaches Article 6, however, may still comply where there is recourse with a legal mechanism to remedy the breach (see the ECtHR judgment in *Le Compte v. Belgium*).

## g) 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 Undertake Professional Activities

**a) Right to undertake professional activities is critical to health professionals' ability to practice their profession.**

**b) Right as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 32 of the RA Constitution guarantees everyone's right to choose his or her occupation.
- ▶ Article 18 of the RA Law on Medical Care and Services to the Population, adopted by the National Assembly on March 4, 1996. states:

*The providers of medical care and services in the Republic of Armenia have the right to provide relevant medical care and services within the framework of selected types, on*

*condition that a license is received by the procedure established by the legislation of Armenia.*

The first of the requirements under Article 18(1) of the law is licensing, that is, obtaining a special authorization provided by the state. According to Article 43 of the RA Law on Licensing, the activity type “medical care and service” is a licensable activity. It should be noted that the law does not divide the concept of “medical care and service” into categories. An act of lower legal effect, however—for example, a government decree—defines such a list. In effect, the availability of licenses for medical care and services does not mean permission to practice all types of care and service; rather, it enables one to practice the specific type of care or service for which permission was provided by the state. Simultaneously, Article 46 of the RA Law on Licensing prohibits practicing a licensable activity without a license. Depending on the level of fault and the amount of resulting damage caused, involvement in licensable activities without a license can result in administrative, civil, or criminal liability (Article 169 of the RA Administrative Offences Code, Article 280 of the RA Criminal Code).

Article 18 of the Medical Care Law also provides that:

*Persons who have received relevant education and specialization in the Republic of Armenia and hold a license to practice certain types of medical activities by the procedure established by the legislation of Armenia may be involved in medical activities.*

This right is closely related to the rationale of the previous right (i.e., that medical care and service providers in the Republic of Armenia have the right to provide relevant medical care and services within the framework of selected types if a license is received in the procedure established by the legislation of Armenia). Article 18 of the Medical Care Law states that persons having graduated from educational institutions meeting the requirements of the legislation regulating the education sector in Armenia and having the respective specialization may practice medical activities, subject to holding an appropriate license. According to Article 43 of the RA Law on Licensing, the exercise of the referenced right assumes that the health professional having the necessary education may practice medical activities only within the framework of activities performed by an appropriate legal entity or by an individual entrepreneur having a license for the provision of medical care and services (or may establish a legal entity or become an individual entrepreneur himself or herself).

- ▶ **Law on Medical Care and Services to the Population:** The RA Law on Medical Care and Services to the Population states that persons who have received medical education in other countries may carry out medical activities by the procedure established by the Government of Armenia and in accordance with international treaties ratified/accepted/signed by Armenia:

*Persons who have received medical education in other countries are allowed to carry out medical activities in the Republic of Armenia, by the procedure established by the Government of Armenia and in accordance with relevant international treaties ratified by Armenia.*

Armenia has concluded agreements with a number of states on mutual recognition of higher medical and secondary vocational education certificates. According to these agreements, certificates held by persons who have received medical education in Armenia or other countries are equivalent to those received in Armenia or other countries with which an agreement was signed (for example, the agreement concluded between the Republic of Armenia and the Russian Federation in 2001 and the agreement concluded with Ukraine and Belarus in 1992).

Certain rights of health professionals provided for by the RA legislation are closely connected to their right to undertake professional activities. For example, Article 18 of the RA Law on Medical Care and Services to the Population provides for the health professionals' right to insure their professional activities in accordance with the RA Law on Insurance and Insurance Activities.

In addition, Article 17 (Guarantees for Psychiatrists, Psycho-therapists and Other Specialists of Psychiatric Care Organizations) of the RA Law on Psychiatric Care stipulates that both psychiatrists providing psychiatric care and services and other specialists may, in accordance with the RA Law on Insurance, be required to be covered by state insurance for cases causing harm to their life and health during the performance of their professional duties in the procedure set forth by law.

Also, Article 12 (Independence of Psychiatrists during the Psychiatric Care) of the same law provides that: *During the provision of psychiatric care psychiatrists shall be independent in the decisions made by them and shall be guided by their sense of medical duty and this Law.*

In addition, some specific legislation provides for additional social security measures for health professionals and serves as an additional guarantee for their right to undertake professional activities. For example, Article 12 (Social Protection of Persons Subject to the Danger of HIV Infection at Work) of the RA Law on the Prevention of Infection by the Human Immunodeficiency Virus provides:

*The staff of enterprises, companies and organizations providing diagnosis and treatment of HIV infected persons, as well as staff whose work is related with materials containing HIV is provided with:*

- a) *Salary premium;*
- b) *Shortened working day;*
- c) *Additional remuneration;*
- d) *Additional vacation.*

The conditions and procedure of providing the above-mentioned privileges is set forth by the Government of Armenia. Administrators of medical facilities must ensure necessary terms and conditions in the procedure established by the authorized state entity.

## c) Supporting Regulations/Bylaws/Orders

- ▶ RA Government Decree No, 276-N, dated March 27, 2008, lists the types of medical care and service practices in the Republic of Armenia. Government of Armenia Decrees No. 1936-N, dated December 5, 2002, and No. 1662-N, dated October 17, 2002, defines mandatory terms and requirements for the licensing of medical facilities. In accordance with these decrees, a physician, in order to practice medical activities, has to renew his or her license every five years by undertaking appropriate refresher training under the framework of continuous education. If the practitioner does not do so, he or she may be deprived of the right to practice.

## d) Codes of Ethics

No specific code of ethics provisions apply in this context.

## e) Practical Examples

### 1. Example(s) of Compliance

Citizen X.-yan applied to a dental center for employment. Despite having a vacancy, the director refused to hire X.-yan because he had graduated from a university in the Russian Federation. X.-yan submitted a written application to the RA Ministry of Health challenging the decision and received a written response that Armenia has a ratified agreement with the Russian Federation, which permits recognition of RF educational documents in Armenia. Based on the above, X.-yan was hired. (Reported by the RA Ministry of Health)

### 2. Example(s) of Violation

Citizen T. M. graduated from a private university that had state accreditation and completed his residency at the National Institute of Health. T. M. later applied for an advertised job with a diagnostic center. The director declined to hire him solely on the grounds that he had not graduated from a state university. No complaint was ever made or action taken. (Reported by the RA Ministry of Health)

### 3. Actual Case(s)

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

## f) Practice Notes for Lawyers

- Practicing lawyers should be aware of the different educational and/or licensing requirements that exist before an individual can practice as a health care and service provider, i.e., they should know which countries have mutual recognition agreements and whether the five-year retraining requirement has been met.

- It should also be noted, in line with international law, that the right to work does not mean that the state must provide the claimant with a job; rather it means that the state should not do anything unreasonable or arbitrary or act in a discriminatory way to prevent the claimant from earning a living or practicing his or her profession.

### **g) Cross-referencing Relevant International and Regional Rights**

- Article 6 of the ICESCR
- General Comment 18 of the CESCR, para. 4
- Article 1 of the European Social Charter
- Agreement concluded between the Republic of Armenia and Russian Federation in 2001.
- Agreement concluded between the Republic of Armenia and Ukraine and Belarus in 1992.

## **7.2 Providers' Responsibilities**

The responsibilities of health care personnel (including both medical and ancillary staff) shall be governed by rules of behavior that are either moral or legal in character or on occasion both, as in the responsibility to treat patients with care and respect as defined under Article 19 (g) of the RA Law on Medical Care and Services to the Population.

Nonlegal moral duties that are widely accepted as amounting to appropriate ethical behavior include, for example, nondisclosure by the practitioner of personal information after the patient's death, the practitioner's honesty with patients and colleagues, and demonstration of sympathy and respect toward patients during their treatment. By their very nature as moral responsibilities, nonperformance does not result in legal liability.

### **Duty to Provide Emergency Medical Treatment**

**a) Health care and service providers are obliged to provide emergency medical treatment and/or primary health care to everyone, irrespective of the person's ability to pay.**

This obligation is closely related to the Patient's Right to Access.

## **b) Responsibility as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 38 of the RA Constitution guarantees everyone's right to benefit from medical care and services under the conditions prescribed by law and also guarantees everyone's right to benefit from free basic medical aid and services.
- ▶ The relevant obligation of health care and service providers is set out under Article 19 of the RA Law on Medical Care and Services to the Population.

In cases where there is a threat to a person's life and/or health, health care practitioners must provide emergency first-aid medical assistance without expecting any material reward or other form of remuneration (monetary or gift-in-kind) regardless of:

- whether they are performing their official duties;
  - their whereabouts (in other words, practitioner does not have to be at his or her workplace);
  - whether in fact they have the necessary medication and/or medical instruments, etc., with them;
  - their area of specialization.
- ▶ Article 129 of the RA Criminal Code only provides for liability for failure of health care and service providers to render first aid to a patient in the absence of a justifiable reason for not doing so, such as: force majeure, extreme necessity (as when the physician must provide assistance to another patient who is at more serious risk), presence of certain disease in the provider, lack of necessary instruments or medications, etc. (See Ghazinyan, Gabuzyan et al, *Criminal Law of the Republic of Armenia*, Special Part [Yerevan State University, 2007]).

Article 129 also states the following:

1. *Failure without good reason to provide assistance to the patient by the person obliged to help him/her, if this causes grave or medium-gravity harm to the patient through the latter's negligence, shall be punishable with a fine of 50 to 100 times the minimum salary, or detention for one to two months.*
2. *The same act, if it results in the patient's death through negligence, shall be punishable with imprisonment for up to 3 years, with the provider also being deprived of the right to hold certain posts and practice certain activities for up to 3 years.*

## **c) Supporting Regulations/Bylaws/Orders**

- ▶ RA Government Decree No. 318-N, dated March 4, 2004, approves a list of state-guaranteed free-of-charge medical care and services in accordance with the State Health Target Programs funded annually from the budget of Armenia.

This decree guarantees free-of-charge emergency care and primary (ambulatory-polyclinic) care by the state. In addition, the socially vulnerable and specific (special) groups of the population (see Annex 1 to the decree) are entitled to free medical care and services.

## d) Codes of Ethics

Although the Republic of Armenia does not have an approved code of ethics, the Medical Association of Armenia is a member of the WMA, which adopted its Medical Ethics Manual in 2005.<sup>3</sup> In addition, the WMA has adopted policies on a large number of ethical issues. With the exception of the International Code of Medical Ethics, the most important of these have been given the title of "declaration." Although not necessarily legally binding, these documents establish respected standards for medical professionals to follow.

The WMA Declaration of Geneva encourages health professionals to not “permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene” between their duty and their patients.

In addition, the WMA International Code of Medical Ethics implies that the only reason for ending a physician-patient relationship is if the patient requires another physician with different skills. The code, in particular, states: *A physician shall owe his/her patients complete loyalty and all the scientific resources available to him/her. Whenever an examination or treatment is beyond the physician's capacity, he/she should consult with or refer to another physician who has the necessary ability.*

Moreover, in ending a physician-patient relationship, physicians should be prepared to justify their decisions to themselves, to the patient, and to a third party, if appropriate. If the motive is legitimate, the physician should help the patient find another suitable physician or, if not possible, should give the patient adequate notice of withdrawal of services so that the patient can find alternative care. If the motive is not legitimate (racial prejudice, for example), the physician should take steps to address this issue. See WMA Medical Ethics Manual, pages 39–40.

Finally, the WMA Statement on HIV/AIDS and the Medical Profession states that unfair discrimination against HIV/AIDS patients by physicians must be eliminated completely from the practice of medicine. All persons infected or affected by HIV/AIDS are entitled to adequate prevention, support, treatment, and care, with compassion and respect for human dignity.

A physician may not ethically refuse to treat a patient whose condition is within his or her current realm of competence solely because the patient is HIV-positive. A physician who is not able to provide the care and services required by patients with HIV/AIDS should make an appropriate referral to those physicians or facilities that are equipped to provide such services. Unless or until the referral can be accomplished, however, the physician must care for the patient to the best of his or her ability.

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3. [http://www.wma.net/e/ethicsunit/pdf/manual/ethics\\_manual.pdf](http://www.wma.net/e/ethicsunit/pdf/manual/ethics_manual.pdf) and [http://www.wma.net/e/members/list\\_ab.htm#armenia](http://www.wma.net/e/members/list_ab.htm#armenia).

## e) Practical Examples

### 1. Example(s) of Compliance

Pensioner N. applied to the precinct polyclinic for spinal problems, a case of primary free-of-charge care whereby examination and treatment were guaranteed by the basic benefits package. The polyclinic requested illegal payments for some of the treatment, however. After N. challenged the payments, the court ruled that he should be reimbursed for the whole amount.

Such obvious cases are rare. Unlike cases in which physical harm is caused to the health of the person, it is often difficult factually to prove a demand for illegal payment. More often, the responsibility to provide free-of-charge medical care is violated by health care providers allegedly taking money secretly from the patient and/or by requesting that the patient purchase and bring with him or her the medications or other materials, etc., necessary for the treatment. In fact, this sort of case is very difficult to prove. (Hypothetical case)

### 2. Example(s) of Violation

Citizen N.-yan applied to the polyclinic for emergency care for a foot injury. The doctor refused to provide assistance as he knew that the patient was HIV-infected, which would lead to complications. The physician did not perform his duty, which is to provide first-aid emergency care regardless of circumstances. No legal action was taken. (Reported by the RA Ministry of Health)

### 3. Actual Case(s)

All of the following examples involve refusal of treatment based on the patients' being HIV-infected, which is clearly not a justified reason:

1. An oncological facility refused to treat a patient based on the argument that he was HIV-infected, resulting in the patient's premature death.
2. A rheumatology facility refused treatment to a patient on the grounds that he was HIV-infected. Currently, thanks to the AIDS Prevention Center, he is in Armenicum<sup>4</sup> and is receiving the required treatment.
3. A pregnant woman applied to her local maternity hospital at Gavar requesting a Caesarean section. She was refused, based on the argument that she was HIV-infected. The medical treatment was subsequently performed in Yerevan thanks to the AIDS Prevention Center.

No legal actions were taken in any of the three cases. (Data provided by AIDS Prevention Center)

## f) Practice Notes for Lawyers

- When providing advice to the patient in relation to the above responsibilities of health care providers and the related rights of the patient, it is important for lawyers to remember the following: in cases threatening a person's life and/or health, health care and service providers are obliged to provide emergency medical care to everybody, regardless of the

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4. Armenicum is an AIDS treatment facility in Yerevan, Armenia.

availability of guarantees of remuneration for the assistance or of other circumstances. Nonprovision of emergency care by the physician will result in liability as provided for by law, unless there are justified reasons to the contrary, as stipulated above. It is important, however, to distinguish between legal and nonlegal duties, as outlined above, in terms of liability, because there may still exist a moral duty to act, even if an exception to a legal imperative applies.

## **Duty to Provide Quality Medical Care**

### **a) Each health care provider is obliged to ensure that the quantitative and qualitative features of provided medical care and services are consistent with the established criteria.**

This obligation is closely related to the following Patient's Rights: Right to Timely Treatment, Right to the Observance of Quality Standards, Right to Safety, Right to Innovation, Right to Avoid Unnecessary Suffering and Pain, and Right to Personalized Treatment.

### **b) Responsibility as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 38 of the RA Constitution guarantees everyone's right to benefit from medical aid and service under the conditions prescribed by law.

The above obligation of health professionals is further elaborated under Article 19 of the RA Law on Medical Care and Services to the Population. Every individual is entitled to have access to medical treatment, including diagnostic treatment in accordance with international standards, regardless of economic and financial problems. Health care providers are obliged to support biomedicine examinations, paying sufficient attention also to infrequently occurring cases.

In practice, this obligation means that, during the provision of medical assistance, the health care provider is obliged to ensure that qualitative and quantitative standards as defined by the state and approved by medical science are adhered to. The provider is not allowed to reduce or add to these quantitative standards or change qualitative aspects of treatment that are deemed to be mandatory. For instance, the practitioner does not have the right to decrease the minimum frequency of a specific treatment at his or her own discretion if it is predefined by the treatment standards. Likewise, if the treatment requires a mandatory combination of several treatment methods and approaches, he or she is not entitled to remove one or more of them at his or her own discretion.

### **c) Supporting Regulations/Bylaws/Orders**

Currently, the normative legal framework does not set out medical standards or norms, however, standards are due to be approved in compliance with a timetable laid down by government decree. In addition, sanitary rules and hygiene norms that cover both patients and physicians have been approved.

### **d) Codes of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provides guidance to practitioners (see Duty to Provide Emergency Medical Treatment, above).

The WMA International Code of Medical Ethics states that physicians owe their patients complete loyalty and all the scientific resources available to them. Whenever an examination or treatment is beyond the physician's capacity, he or she should consult with or refer to another physician who has the necessary ability and, thus exercise, among other things, respect for the patient's time.

Principle 1 of the WMA Declaration on the Rights of the Patient states that the patient shall always be treated in accordance with his or her best interests. The treatment applied shall be in accordance with generally approved medical principles. Quality assurance should always be a part of health care. Physicians, in particular, should accept responsibility for being guardians of the quality of medical services. In addition, the patient has the right to continuity of health care. The physician has an obligation to cooperate in the coordination of medically indicated care with other health care providers who are treating the patient. The physician may not discontinue treatment of a patient as long as further treatment is medically indicated without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care.

In addition, the WMA International Code of Medical Ethics states that physicians shall always bear in mind the obligation to respect human life and act in the patient's best interest when providing medical care.

Furthermore, Principle 10(b) of the WMA Declaration on the Rights of the Patient provides for the patients' right to relief of their suffering according to the current state of knowledge.

Principle 10(c) of the same declaration states that the patient is entitled to humane terminal care and to be provided with all available assistance in making dying as dignified and comfortable as possible. In addition, the WMA Medical Ethics Manual (page 59) states that palliative care can be appropriate for patients of all ages, whether a child with cancer or a senior nearing the end of life. One aspect of palliative care that needs greater attention for all patients is pain control. All physicians who care for dying patients should ensure that they have adequate skills in this domain, and, where available, also have access to skilled consultative help from palliative care specialists. Above all, physicians should not abandon dying patients but should instead continue to provide compassionate care even when a medical cure is no longer possible.

Lastly, Principle 1(c) of the WMA Declaration on the Rights of the Patient states that the patient shall always be treated in accordance with his or her best interests. The treatment applied shall be in accordance with generally approved medical principles.

## e) Practical Examples

### 1. Example(s) of Compliance

Consider Case 3 in Actual Case(s), below.

### 2. Example(s) of Violation

Citizen H.-yan, a pensioner and second-degree disabled person applies to a doctor with health-related complaints. He is entitled to free-of-charge medical care within the framework of the basic benefits package. While prescribing the treatment, the practitioner was guided not by the consideration of which medication would be more effective, but by which medication was cheaper. As a result, H.-yan's condition deteriorated. (Reported by the RA Ministry of Health)

### 3. Actual Case(s)

Citizen M.-yan appealed to the medical center where she was undergoing treatment and requested reimbursement of the amount she had paid for treatment. According to her complaint, following conclusion of a contract with the medical center for receiving medical services, her skin problem was diagnosed and treated by a dermatologist, including prescription of appropriate pharmaceuticals.

After the third intravenous treatment, however, she alleged that she had received “burn of metacarpus” and was compelled to stop the treatment. Consequently, she requested a complete reimbursement of monies paid, in consideration of the harm that had been caused to her health and the failure to inform her about the treatment and its complications. If her request was not dealt with satisfactorily within 10 days, she had the right to appeal to the court.

In response, the medical center stated that:

- M.-yan was subject to all the laboratory examinations referred to in the contract, the disease was diagnosed, and respective treatment was prescribed;
- during the treatment, the patient's positive progress was noted, and the treatment was discontinued at her request. During the intravenous infusion, the needle came out, causing intracutaneous hemorrhaging followed by inflammation, for which the patient received care free of charge;
- the center returned the monies for the treatment not provided to M.-yan due to discontinuation of the treatment; and
- while concluding the contract, M.-yan was provided with all the necessary information about the center and the physicians, and the license was shown to her. The treatment methods and possible complications were explained to the patient before the treatment commenced, and M.-yan gave her consent. One of the complications of intravenous

infusions is intracutaneous hemorrhaging, causing hematoma, which is therefore an event not fully dependent on the behavior of the health care personnel.

Compliance was argued by the center inasmuch as the patient was refunded monies covering the treatment that was discontinued or not provided as per her decision. No further action was taken. (Reported by the RA Ministry of Health)

### **f) Practice notes for Lawyers**

- Lawyers should note that there is always a need to obtain expert medical opinion (and usually more than one expert's opinion) as to appropriate medical treatment in a particular case.

## **Duty to Inform**

**a) Health care providers are obliged to keep each patient informed as to the type, methods, scope, order, and conditions of provision of the medical care and services provided to him/her and are also obliged to provide each patient or other person paying for the patient's medical care with the necessary information on the quantitative and qualitative features of the medical care and services and the expenses made for that purpose.**

This obligation is closely related to the following Patient's Rights: Right to Information, Right to Consent, and Right to Free Choice.

### **b) Responsibility as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 23 of the RA Constitution guarantees everyone's right to get acquainted with data concerning him or her that is available at the state and local self-government bodies.
- ▶ This responsibility is further elaborated under Article 19 of the RA Law on Medical Care and Services to the Population. The practitioner is obliged (the requirement is not applicable for emergency first aid) to inform the patient in advance about the type(s) of medical care and services (for example, therapeutic, neurological), methods to be used during the treatment, scope of treatment (in other words, forms and approaches of treatment), and the procedure and terms of providing medical care (whether paid or free of charge or the payment conditions, including lump-sum prepaid amount or through installments during the treatment or after the completion of the treatment).
- ▶ In addition, there are specific legislative guarantees that certain types of patients who should be informed of specific health-related information. For example, Article 8 (Use of Pregnancy Prevention Measures) of the RA Law on Reproductive Health and Reproductive Rights of the Person provides:

1. *Every woman shall have the right to a secure maternity and use of effective means to avoid unwanted pregnancy and prevention of pregnancy;*
2. *Health care services shall provide accurate information on the security, effectiveness and safety of available means for the prevention of pregnancy in order to make informed selection of family planning;*
3. *Selection of family planning measures by the health care services shall be based on the reproductive history of spouses, health condition, age, personal specificities and preferences and their use shall be performed only with their full, free and conscious consent;*
4. *Family planning and pregnancy prevention measures shall be used as a measure for avoiding unwanted pregnancy and induced termination.*

Thus, health professionals should be conscious of the need to keep their patients informed.

- ▶ Furthermore, there are some specific legislative standards in relation to consent that require consent to be informed consent. For example, Article 15 (Consent for Treatment) of the RA Law on Psychiatric Care provides:

1. *Treatment of a patient suffering from a mental disorder shall be performed on the basis of his/her or his/her legitimate representative's written application, with the exception of cases provided under para. 3 of this Article;*
2. *The physician shall provide information on the nature of the mental disorder, and the objective, methodology, duration, as well as side effects and expected results of the offered treatment to the person suffering from the mental disorder or his/her legitimate representative. A record is made about this in the medical documents (medical card or description of disease history);*
3. *Treatment of the person suffering from a mental disorder may be performed without his/her or his/her legitimate representative's consent only in cases of application of enforcement measures of a medical nature stipulated by law, and of involuntary hospitalization.*

Article 16 (Refusing Treatment) of the same law contains the following provisions:

1. *A person's legitimate representative or the person suffering from a mental disorder may refuse the suggested medical care or discontinue it, except in the cases stipulated under Article 15.3 of the Law;*
2. *Possible consequences related to the discontinuation of the treatment shall be explained to the person refusing the treatment or his/her legitimate representative;*
3. *The fact that information about the possible consequences related to the refusal of the treatment and discontinuation of the treatment has been provided shall be recorded in medical documents and signed by the person refusing the treatment or his/her legitimate representative.*

Article 19 (Psychiatric Examination) of the same law provides that:

1. *A psychiatric examination is conducted with the purpose of checking a person's mental disorder, as well as evaluation of the need for psychiatric care;*

2. *The physician conducting a psychiatric examination shall introduce himself/herself as a psychiatrist to the person being examined or his/her legitimate representative and inform them about the nature and consequences of the conducted examination;*
3. *A psychiatric examination is conducted at the consent of the legitimate representative after providing full information on the patient's condition and nature of the examination.*

### **c) Supporting Regulations/Bylaws/Orders**

No specific regulations apply in this context.

### **d) Codes of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Duty to Provide Emergency Medical Treatment, above). The WMA Declaration on the Rights of the Patient states: *The patient has the right to the information necessary to make his/her decisions. The patient should understand clearly what is the purpose of any test or treatment, what the results would imply, and what would be the implications of withholding consent.*

The WMA Medical Ethics Manual (pages 42–43) states: *A necessary condition for informed consent is good communication between physician and patient. ... Physicians must provide patients with all the information they need to make their decisions. This involves explaining complex medical diagnoses, prognoses and treatment regimes in simple language, ensuring that patients understand the treatment options, including the advantages and disadvantages of each, answering any questions they may have, and understanding whatever decision the patient has reached and, if possible, the reasons for it. Good communication skills do not come naturally to most people; they must be developed and maintained with conscious effort and periodic review.*

Also, as stated in the WMA Medical Ethics Manual (page 44), evidence of consent can be explicit or implicit (implied). Explicit consent is given orally or in writing. Consent is implicit when the patient, by his or her behavior, indicates a willingness to undergo a certain procedure or treatment. For example, consent for vein puncture is implied by the action of presenting one's arm.<sup>5</sup> For treatments that entail risk or involve more than mild discomfort, it is preferable to obtain explicit rather than implicit consent.

Because of the complexity of the matter or because the patient has complete confidence in the physician's judgment, the patient may tell the physician, "Do what you think is best." Physicians should not be eager to act on such requests but should provide patients with basic information about the treatment options and encourage them to make their own decisions. However, if after such encouragement the patient still wants the physician to decide, the physician should do so according to the best interests of the patient. (WMA Medical Ethics Manual, page 44.)

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5. Vein puncture is the process of obtaining intravenous access for the purpose of intravenous therapy or obtaining a sample of blood (mostly applicable for treatment with intravenous infusion therapy).

As to making decisions for incompetent patients, the WMA Declaration on the Rights of the Patient states the physician's duty in this matter as follows: *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. 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.* The WMA Declaration also offers the following advice: *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 addition, the WMA Declaration states that, in any case, the patient must be involved in the decision making to the fullest extent allowed by his or her capacity. The principal criteria for making treatment decisions for an incompetent patient are his or her preferences, if known.

The preferences may be found in an advance directive or may have been communicated to the designated substitute decision maker, the physician, or other members of the health care team. When an incompetent patient's preferences are not known, treatment decisions should be based on the patient's best interests, taking into account: (a) the patient's diagnosis and prognosis; (b) the patient's known values; (c) information received from those who are significant in the patient's life and who could help in determining his or her best interests; and (d) aspects of the patient's culture and religion that would influence a treatment decision.

Finally, the WMA International Code of Medical Ethics states that a physician should not receive any financial benefits or other incentives solely for referring patients or prescribing specific products.

## e) Practical Examples

### 1. Example(s) of Compliance

Citizen N.-yan appealed to the RA Ministry of Health with a complaint that he was not provided with the necessary medical care when he applied to the district polyclinic. This situation led to complications, and N.-yan became disabled. During the examination of the case, it was discovered that the physician had informed the patient about his disease, the course and methods of the treatment, and the possible complications in the event that the patient declined the treatment. N.-yan signed a document attesting that he was aware of this information. In these circumstances there was no violation of the law. (Hypothetical case)

### 2. Example(s) of Violation

Citizen N.-yan was accepted to a hospital with arterial hypertension and paid AMD 80,000, having been informed by the physician that the payment was for treatment and examination. Subsequently, however, the patient had to buy medication and also pay separate amounts for a number of examinations.

In this case, the physician had failed to inform the patient, in a transparent and timely manner, as to the amounts he was due to pay and to provide him with the price list of services provided by the facility and approved by the director and failed to also inform him that, during the treatment he might have to pay an additional amount for further examinations and medications. (Hypothetical case)

### **3. Actual Case(s)**

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

#### **f) Practice Notes for Lawyers**

- There will be a need for expert opinion(s) as to whether the client was provided with all appropriate health care information in the particular circumstances.

## **Duty to Keep Patient Information Confidential**

**a) Medical care and service providers are obliged to ensure the confidentiality of an individual's request for medical care, of the examination of his or her state of health, and of the information obtained during the diagnostics and treatment, except for cases as stipulated by RA legislation.**

This obligation is closely related to the Patient's Right to Privacy and Confidentiality.

#### **b) Responsibility as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 23 of the RA Constitution guarantees everyone's right to respect for his or her private life.
- ▶ The responsibility is further elaborated under Article 19 of the RA Law on Medical Care and Services to the Population. This provision stipulates that health care and service providers can be held liable for unauthorized disclosure(s) of personal information regarding a patient's health condition. Therefore, a health care provider is required to keep such information confidential, even if the recipient intends to use it for the benefit of the patient.
- ▶ Legislation also provides exceptions to the general rule. Specifically, the RA Laws on Police and on Prosecution enable law-enforcement authorities to request companies and/or organizations to provide them with information as part of their criminal investigations. In such cases, health practitioners are obliged to provide the required information through the head of the medical facility.

- ▶ Similarly, Article 18 (Confidentiality of Information Related to the Use of Auxiliary Technologies) of the RA Law on Reproductive Health and Reproductive Rights of the Person provides that:

1. *Auxiliary reproduction technologies, i.e. artificial insemination or fertilization and surrogate mothers shall constitute a medical secret and shall not be subject to disclosure;*
2. *Information stipulated under paragraph 1 of this Article may be provided only to the court (judge), prosecutor's office, pre-investigation and prosecution authorities in relation to instituted criminal or civil cases, as well as at the request of other authorized entities in cases and procedures provided for by law.*

- ▶ Article 13 (Liability for Disclosing Data of the Donor and Recipient) of the RA Law on Transplanting Human Organs and/or Tissues provides that information related to the donor and recipient constitute a medical secret. Consequently, practitioners and other health care personnel are prohibited from disclosing information about the donor and/or recipient against their will, and the practitioners and health care personnel are liable for any breach.

At the request of investigating authorities, the court, prosecutor's office, and investigation unit are provided with data, information, and documents about the donor and the recipient only in relation to criminal and civil cases under their consideration.

### **c) Supporting Regulations/Bylaws/Orders**

According to new state licensing requirements (approved by the November 2009 Decision of the RA Government), all dental centers shall be equipped by a special locked storage for keeping patients' records.

### **d) Codes of Ethics**

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Duty to Provide Emergency Medical Treatment, above). The WMA Declaration on the Rights of the Patient states that 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.

The WMA Medical Ethics Manual (pages 53–54) states that physicians should be aware of the specific legal requirements at their place of employment regarding the disclosure of patient information. Legal requirements, however, can conflict with the respect for human rights that underlie medical ethics. Therefore, physicians should view with a critical eye any legal requirement to breach confidentiality and assure themselves that the breach is justified before adhering to it. If physicians are persuaded to comply with legal requirements to disclose their patients' medical information, it is desirable that they discuss with those patients the necessity of any disclosure before it occurs and also enlist their cooperation.

In addition to those breaches of confidentiality that are required by law, physicians may have an ethical duty to impart confidential information to others who could be at risk of harm because of the patient's health condition. There are two situations in which this can occur: when a patient tells a psychiatrist that he intends to harm another person and when a physician is convinced that an HIV-positive patient is going to continue to have unprotected sexual intercourse with his spouse or other partners. Conditions for breaching confidentiality, when not required by law, occur when the expected harm is believed to be (1) imminent, serious (and irreversible), and unavoidable, except with unauthorized disclosure, and (2) greater than the harm that is likely to result from disclosure. In determining the relative proportionality of these expected harms, the physician needs to assess and compare the seriousness of the harms and the likelihood of their occurrence. In cases of doubt, it would be wise for the physician to seek expert advice. The physician has to inform the patient about his intent to disclose the relevant information to a third party.

## **e) Practical Examples**

### **1. Example(s) of Compliance**

A couple applied to a medical center for general examination because one of them had received an overseas job offer. The examining doctor asks them to come to the office at different times. The doctor then recommends in the separate meeting with the wife that she should not leave the country due to some health problems. The doctor only discloses the information to the husband in the wife's presence after she has requested him to do so. (Hypothetical case)

### **2. Example(s) of Violation**

Despite a husband's specific request that his physician should not provide information about his health condition to his spouse, the physician does so, thereby breaching the man's right to confidentiality. (Hypothetical case)

### **3. Actual Case(s)**

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

## **f) Practice Notes for Lawyers**

- When providing a consultation on confidentiality issues regarding patients' data, lawyers should feel confident to refer to the RA laws, including the RA Criminal Code, even if no underlying legislative mechanisms could be found. In parallel, health care providers are obliged to take proper actions for keeping a patient's information confidential as stipulated by law.

## Duty to Keep Records

### a) Health care and service providers are obliged to submit statistical and other data in the manner established by RA legislation.

This obligation is closely related to the Patient's Right to Information.

### b) Responsibility as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes

- ▶ This obligation is set out under Article 20 of the RA Law on State Statistics, which states that all institutions, including medical ones, shall submit statistical reports to the RA State Statistical Service. Health providers are also obliged to submit statistical reports to the Ministry of Health.

### c) Supporting Regulations/Bylaws/Orders

- ▶ RA Government Decree No. 1936-N, dated December 4, 2002, states that all polyclinics and medical offices are obliged to register their patients (with medical cards) and also prepare and submit statistical reports to the relevant department of the Ministry of Health.
- ▶ The same obligation is assigned for dental polyclinics and offices (RA Government Decree No. 1662-N, dated October 17, 2002).

### d) Codes of Ethics

No specific code of ethics provisions apply in this context.

### e) Practical Examples

#### 1. Example(s) of Compliance

Citizen A. requested from the Erebuni Medical Center all medical records concerning the surgical operation he underwent in that hospital. An official of the center explained that originals of the patient's medical records must be kept in the center, but authorized copies of his medical records to be made available within the next few days. As promised, Citizen A. received copies of his medical records by the fifth day after his request. (Reported by the RA Ministry of Health)

#### 2. Example(s) of Violation

Citizen X.-yan applied to the Human Rights Defender complaining that his rights had been violated by the dental center in terms of providing unacceptable poor medical service. The defender forwarded the application to the Ministry of Health, who, after investigating, observed that no medical records could be found concerning the case of X.-yan. Thus, nothing could be found concerning the quality of service that X.-yan received. As the lack of records was a clear violation

of licensing requirements, the Ministry of Health temporarily stopped the activity of the dental center for further detailed review. (Reported by the RA Ministry of Health)

### **3. Actual Case(s)**

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

### **f) Practice Notes for Lawyers**

- Lawyers need to be aware that the Ministry of Health maintains extensive statistical data. Although the data is generally not distributed to the public, under the Freedom of Information Law, any citizen of Armenia may request specific information from a record holder, such as the Ministry of Health. Statistical data may be helpful to prove in court the frequency of specific medical diseases or the frequency of recurrence to specific treatment options or facilities. This information may help prove applicable standards of care.

## **Duty to Treat Patients with Care and Respect**

### **a) Health care and service providers are obliged to treat patients with care and respect.**

This obligation is closely related to the following Patient's Rights: Right to Consent, Right to Safety, Right to Avoid Unnecessary Suffering and Pain, Right to Complain, and Right to Compensation.

### **b) Responsibility as Stated in Country Constitution/Legislation, including Licensing and Certification Statutes**

- ▶ Article 14 of the RA Constitution states that human dignity shall be respected and protected by the state as an inviolable foundation of human rights and freedoms.
- ▶ This obligation is further elaborated under Article 19 of the RA Law on Medical Care and Services to the Population adopted by the National Assembly on March 4, 1996.

Arguably, this duty is one of the most important responsibilities of practitioners, requiring them to respect the dignity of the patient and show care, sympathy, and understanding toward them and any behavior they may exhibit as a result of their condition.

The same article also provides that medical care and services providers (including those engaged in illegal medical activities) bear legal responsibility for any harm caused by their actions or omissions and also for unlawful dissemination of information on the state of the health of patients.

### c) Supporting Regulations/Bylaws/Orders

No specific regulations apply in this context.

### d) Codes of Ethics

Although the Republic of Armenia has no approved code of ethics, the ethics documents of the WMA provide guidance to practitioners (see Duty to Provide Emergency Medical Treatment, above). As stated in the WMA Medical Ethics Manual (page 44), evidence of consent can be explicit or implicit (implied). Explicit consent is given orally or in writing. Consent is implicit when the patient indicates a willingness, by his or her behavior, to undergo a certain procedure or treatment. For example, consent for vein puncture is implied by the action of presenting one's arm.<sup>5</sup> For treatments that entail risk or involve more than mild discomfort, it is preferable to obtain explicit rather than implicit consent.

Because of the complexity of the matter or because the patient has complete confidence in the physician's judgment, the patient may tell the physician, "Do what you think is best." Physicians should not be eager to act on such requests but should instead provide patients with basic information about the treatment options and encourage them to make their own decisions. If after such encouragement the patient still wants the physician to decide, however, the physician should do so according to the best interests of the patient. (WMA Medical Ethics Manual, page 44.)

As to making decisions for incompetent patients, the WMA Declaration on the Rights of the Patient states the physician's duty in this matter as follows: *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. 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.* The same declaration also offers the following advice: *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 addition, the WMA Declaration states that in any case, the patient must be involved in the decision making to the fullest extent allowed by his or her capacity. The principal criteria for making treatment decisions for an incompetent patient are his or her preferences, if known.

The preferences may be found in an advance directive or may have been communicated to the designated substitute decision maker, the physician, or other members of the health care team. When an incompetent patient's preferences are not known, treatment decisions should be based on the patient's best interests, taking into account: (a) the patient's diagnosis and prognosis; (b) the patient's known values; (c) information received from those who are significant in the patient's

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5. Vein puncture is the process of obtaining intravenous access for the purpose of intravenous therapy or obtaining a sample of blood (mostly applicable for treatment with intravenous infusion therapy).

life and who could help in determining his or her best interests; and (d) aspects of the patient's culture and religion that would influence a treatment decision.

Of course, the WMA International Code of Medical Ethics also states that physicians shall always bear in mind the obligation to respect human life and act in the patient's best interest when providing medical care.

Additionally, Principle 10(b) of the WMA Declaration on the Rights of the Patient provides for the patients' right to relief of their suffering according to the current state of knowledge.

Principle 10(c) of the same Declaration states that the patient is entitled to humane terminal care and is also entitled to all available assistance in making the process of dying as dignified and comfortable as possible.

In addition, the WMA Medical Ethics Manual (page 59) states that palliative care can be appropriate for patients of all ages, whether a child with cancer or a senior nearing the end of life. One aspect of palliative care that needs greater attention for all patients is pain control. All physicians who care for dying patients should ensure that they have adequate skills in this domain, and, where available, also have access to skilled consultative help from palliative care specialists. Above all, physicians should not abandon dying patients, but should instead continue to provide compassionate care even when a medical cure is no longer possible.

## **e) Practical Examples**

### **1. Example(s) of Compliance**

The Post-Traumatic Rehabilitation Center of the Red Cross is a building with a comfortable lobby, restrooms, wards, buffet, a swimming pool, and other facilities. It also has an experienced and skilled staff. The administration takes all necessary measures to secure the dignity of and respect for patients. Patients often leave their feedback in the center's guest book. If a patient has noted a complaint or dissatisfaction with services or with physicians' or nurses' attitudes, the administration considers the matter closely, analyzes causes, and takes the proper actions to respect patients' rights. (Reported by the Post-Traumatic Rehabilitation Center of the Red Cross)

### **2. Example(s) of Violation**

Citizen M. went to the polyclinic for the treatment of pain in the radius bone of his right hand as a result of difficult physical work. After an X-ray examination, the problem was diagnosed as "fracture of the radius," and a plaster cast was set for one month. After two weeks, M. suffered intense pain in the hand, and his fingers swelled and lost feeling. Despite the patient's request to have the plaster cast changed, the cast was not replaced. After 29 days, when the cast was taken off, the fingers were not moving, and "compression neuropathy" had developed. As a result, M. had to undergo further treatment at hospital for a long period. M. made a claim to the court for compensation for both pecuniary and nonpecuniary damages (in other words, for financial loss and for physical and mental suffering).

During a later X-ray examination, it was diagnosed that M. had not had a fracture and that the original radiologist had been mistaken. The court ruled that the practitioner had also erred in his treatment, as he had not removed the plaster cast after the hand had become swollen. As a result, although M.'s tendons had only been slightly damaged originally, he would need two years to recover from the consequences of the wrong treatment. To date, the functioning of the nerves in his hand has not been completely restored.

The court upheld M.'s claim and ruled that the polyclinic should compensate him for both pecuniary and nonpecuniary loss and for his legal expenses. (Actual but unreported case)

### **3. Actual Case(s)**

As this area of law is still developing, no actual cases were available as an example for this section. Readers may offer examples of actual cases for future editions of this guide by writing to [info@healthrights.am](mailto:info@healthrights.am).

### **f) Practice Notes for Lawyers**

- Lawyers should make a clear distinction between the ethical and legal aspects of this obligation as there are only provisions about legal responsibility in the Republic of Armenia.
- Lawyers should know that the provider's obligation to treat patients with care and respect is closely related to almost all of the patient's rights. For example, by ignoring patient confidentiality, a physician automatically violates the dignity of the patient.



- 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**
- 8.6 Appendix 1: List of Spheres of Activities of Employees' Compulsory Medical Examination of Their Health Situation**
- 8.7 Appendix 2: List of Diseases Posing Danger to the Environment**
- 8.8 Appendix 3: List of Socially Vulnerable and Specific Groups of the Population Entitled to State-Guaranteed Free Medical Care and Services**

# 8

## National Procedures and Appendixes

### 8.1 Mechanisms to Protect/Enforce Rights and Responsibilities in Court

#### **What are the mechanisms in place in the Republic of Armenia (RA) for the protection of patients' rights and the remedy for violation?**

In accordance with RA legislation, the following mechanisms are provided for the protection of human rights (including patients' rights):

1. Self-help enforcement
2. Protection of rights by applying to state entities
3. Protection of rights through the Human Rights Defender (Ombudsperson)
4. Judicial protection of rights
5. Protection of rights through international judicial tribunals

#### **What are the constitutional provisions setting forth the mechanisms for the protection of patients' rights?**

The mechanisms for the protection of patients' rights are set forth in the following provisions of the RA Constitution:

**Article 3:** *The human being, his/her dignity and fundamental human rights and freedoms are of the highest value. The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of international law.*

**Article 18:** *Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies. Everyone shall have the right to protect his/her rights and freedoms by any means not prohibited by the law. Everyone shall be entitled to have the support of the Human Rights' Defender for the protection of his/her rights and freedoms on the grounds and in conformity with the procedures prescribed by law. Everyone shall, in conformity with the international treaties of the Republic of Armenia, be entitled to apply to the international institutions protecting human rights and freedoms with a request to protect his/her rights and freedoms.*

**Article 19:** *Everyone shall have the right to restore his/her violated rights, and to reveal the grounds of the charge against him/her in a fair public hearing under the equal protection of the law and fulfilling all the demands of justice by an independent and impartial court within a reasonable time.*

**Article 27.1:** *Everyone shall have the right to submit letters and recommendations to the authorized public and local self-government bodies for the protection of his/her private and public interests and the right to receive appropriate answers to them in a reasonable time.*

Given the above-mentioned provisions, one can assert that state institutions are among the most important patients' rights protection mechanisms in Armenia. In the referred cases, the patient may, on the basis of the RA Constitution, apply to competent state institutions (for instance, the RA Ministry of Health, the RA Prosecutor's Office, etc.) for the protection of his or her rights and the restoration of his or her violated rights.

### **What are the legal acts setting forth patients' rights protection procedures by state institutions?**

Procedures for the protection of rights by applying to state institutions are regulated by a number of laws, particularly by the RA Constitution, the RA Law on the Fundamentals of Administrative Action and Administrative Procedure, the RA Law on Prosecution, and the RA Law on Police.

## 8.2 Administrative Procedure

### How should the application addressed to state institutions for restoring violated rights or protecting rights be formulated?

Persons whose rights have been violated may, in compliance with Article 27.1 of the RA Constitution, apply to state and local self-governing bodies and officials with a request to protect his or her rights. In this case, the person shall submit an application or proposal to the state or local self-governing body.

Requirements for the application are set forth in Article 31 of the RA Law on Fundamentals of Administrative Action and Administrative Procedure (hereinafter referred to as the Administrative Law). Particularly, it is stipulated that the application submitted to the administrative body should be in writing and contain:

- a. the full name of the applicant (or full name of a legal entity);
- b. the applicant's address (or registered office of a legal entity);
- c. the name of the administrative body to which the application is submitted;
- d. the request stated in the application (subject of the application);
- e. a list of documents attached to the application (if applicable);
- f. the year, month, and date of the application;
- g. the applicant's signature (or signature of the authorized official and stamp of a legal entity).

If the application is submitted through a representative, then a power of attorney, stated in a procedure established by the law, must also be provided.

### What are the consequences of errors and inaccuracies in the application?

In order to effectively address the cases of violations of patient's rights, it is necessary for the application to meet the requirements set forth under Article 31 of the Administrative Law. Nevertheless, the Administrative Law provides specific guarantees for minor violations and/or inaccuracies made in an application. Particularly, Article 32 of the Administrative Law states: *If there are formal errors in the application that can be rectified, the administrative entity shall point them out to the applicant providing him/her an opportunity to rectify them or shall rectify them on its own giving advance notice to the applicant or notifying later. If the list of documents attached to the application is not complete, the administrative body shall instruct the applicant to add them to the list.*

### To which administrative body should the patient's application be submitted?

It is important to submit the application on patients' rights protection or restoration of violated

rights to the competent administrative institution. In this case, it is necessary to indicate all the entities authorized to deal with patients' rights or restoration of violated rights. For this purpose, medical institutions in the territory of Armenia are divided into the following types:

1. Joint stock companies with 100 percent public participation, which are further divided into:
  - Institutions subordinate to Ministry of Health
  - Institutions subordinate to the Marzpetaran
2. Institutions under community subordination
3. Private health care companies (These are not covered by the described procedure, however, their actions may be appealed against to the administrative bodies supervising them.)

Usually, the subordination of each health care facility is indicated at the institution's entrance—for example, the Psychiatric Medical Center of the RA Ministry of Health or the Dilijan Medical Center of the Tavush Marzpetaran. The patient may first apply to the superior authority of the health care facility for the protection of his or her rights, in other words, to the RA Ministry of Health, respective Marzpetaran, or respective community head (for example, mayor).

In addition, given the fact that state policy in the health care sector is implemented by the RA Ministry of Health, the patient is also entitled to apply to the RA Ministry of Health for the protection of his or her violated rights.

Applications for the protection of patient's rights may also be submitted to the RA Prosecutor's Office and RA Police.

### **What are the consequences if a patient submits the application to a noncompetent body?**

If the patient submits his or her application to a noncompetent body, the law still envisages operational mechanisms for human rights protection. Particularly, based on Article 33 of the law, if the application is submitted to a noncompetent administrative body, the administrative body forwards it to the competent entity within a three-day period, notifying the applicant of the action. If one or several of the issues indicated in the application are under the competence of another administrative body, the administrative body forwards that part of the application to the competent administrative body, notifying the applicant. For example, the RA Ministry of Health received an application related to the activities of the Ijevan Medical Center under Tavush Marzpetaran; the Ministry of Health forwarded it to the Tavush Marzpetaran, notifying the patient of its action.

According to paragraph 3 of the same article of the law, if the request stated in the application is neither under the competence of the administrative body that has received it nor under the competence of any other administrative body, the administrative body is to return the application and enclosed documents to the applicant within a three-day period following the receipt of the application, indicating the reason for its return. For example, if the patient's rights may be restored only judicially and are not subject to address by any administrative institution, the application is returned to the applicant within a three-day period.

### **Except for submitting an application to administrative institutions, are there any other ways to have direct recourse to them?**

Another method of applying for the restoration of a patient's rights is through participation in the reception of citizens at the administrative institution. For example, the patient may participate in the reception of citizens at the Ministry of Health or Marzpetaran. In this case, according to Article 31(2) of the law, protocol made during the reception at the administrative body is considered to be the application, within the meaning of this article, if it contains the information referred to under (a), (b), and (d) of paragraph 1, and if the law does not require the application to be submitted in compliance with all the remaining provisions of this article.

### **What are the legal guarantees that the patient's request, as indicated in the application, is addressed in a fair manner by the administrative institution?**

When receiving a person's application, administrative institutions and officials shall guarantee the protection of basic human and civil rights and freedoms in compliance with Article 3 of the RA Constitution. When a patient applies to the competent administrative institution, the referred institution initiates administrative proceedings in accordance with Article 30 of the law and, within a three-day period, notifies the applicant about the initiation of the administrative proceedings, in accordance with Article 35 of the law. The administrative institution may not send notification if the period between the initiation of the administrative proceedings and adoption of the administrative act is less than three days.

### **What is the period within which the state institution is to consider the patient's application?**

The law also provides for the administrative institution's responsibility to promptly consider the application. Particularly, Article 36 provides that the administrative proceedings shall be conducted within the shortest time frames possible. The administrative body shall conduct the administrative proceedings without complicating them by, for example, conducting additional checks or having additional expert examination or scrutiny when there is no need for the clarification of factual circumstances of the case. If, after the initiation of the administrative proceedings, the administrative body has documents necessary for the adoption of the respective administrative act, and the circumstances related to the case are adequately clarified and checked, the administrative entity is obliged to adopt the administrative act within reasonable time frames, following the origination of the referred circumstances, without waiting for the expiry of general or specific time frames.

When applying to administrative institutions for the protection of rights, the patient should be aware that, according to Article 46 of the law, the maximum time frame for the administrative proceedings is 30 days. When the patient submits the application to the administrative body, the issue must be considered within 30 days. The law may set out periods that are shorter or longer than 30 days. The period of administrative proceedings starts from the moment of application

registration by the administrative body; in the case of adoption of administrative acts on the initiative of the administrative body, from the day of taking the initiative. Periods provided by this law are calculated in calendar days. If the period expires on a nonworking day, the period is considered to be over at 18.00 h on the first working day following the expiration day.

The law provides for the extension of the period of administrative proceedings. Particularly, the law provides that the period for administrative proceedings may be extended if:

- a. it is necessary to obtain additional information or documents necessary for the clarification of circumstances essential for the consideration of the case, which, according to Article 43.3 of the law, should be submitted by the applicant, and it is not possible to make the respective decision during the remaining period of the administrative proceedings;
- b. the period required for the provision of expert conclusion is longer than the period provided for the administrative proceedings by the law;
- c. the period required for taking mutual support measures is longer than the period provided for the administrative proceedings by the law;
- d. several administrative bodies are participating in the adoption of the administrative act.

The administrative body conducting the proceedings shall take a decision on extending the period of administrative proceedings, and the participants of the proceedings or their representatives and other persons participating in the proceedings shall be notified about the decision in an established procedure.

The law also stipulates guarantees for the applicant when the administrative institution does not address the patient's application within the defined period. Particularly, the law indicates that if the administrative act is not adopted by the administrative body that is entitled to adopt that act within a period set out by the law, as a result of administrative proceedings initiated on the basis of the application:

- a. the administrative act is deemed adopted, and the applicant may go ahead with exercising the respective right;
- b. if the application is related to the provision of a document set out by the law, related to confirmation or recording of a fact (birth, death, absence of a person, etc.), then the person who has not received the respective act on the basis of application or who has submitted an application for that act shall be released from liability or obligations set forth by the law for not having those documents.

### **What are the obligations of the administrative institution related to addressing the application?**

The administrative institution is obliged to ensure comprehensive, full, and objective consideration of factual circumstances indicated in the application, revealing all facts related to the case, including those beneficial for the participants of the proceedings. The administrative institution has no right to not accept applications and documents related to the proceedings and provided by the participants of the administrative proceedings, consideration of which is under its competence.

As required, the patient may orally explain to the administrative institution the factual circumstances of his or her application. Particularly, based on Article 38 of the law, the state institution is obliged to provide the participants of the proceedings and their representatives with an opportunity to express themselves regarding the factual circumstances considered during the administrative proceedings.

Hearings may be waived if:

- a. as a result of administrative proceedings, a favorable administrative act is going to be adopted that does not interfere with the exercise of others' rights, or if the addressee of the administrative act does not insist on conducting hearings;
- b. application is obviously groundless; or
- c. oral administrative act is adopted.

Hearings are not held if:

- a. there is need to immediately adopt an administrative act because delay may lead to a public threat; or
- b. administrative act of another form is adopted.

### **What are the guarantees stipulated by the law for not declining the patient's application due to document error and unawareness of laws or of other legal acts?**

Articles 39 and 40 stipulate guarantees for application to administrative institutions by the applicant, and particularly by the patient, and for getting protection of his or her rights. Article 40 specifically provides that the administrative institution is obliged to provide clarifications to individuals in relation to their rights and responsibilities connected with the administrative proceedings initiated for the issues raised in the application and is also obliged to support them in the formulation of the application and attached documents—and, if necessary, to prepare the application and documents for them. Thus, if the patient faces difficulties in formulation of the application for the protection or restoration of his or her rights or is not well informed about the documents to be attached to the application, the administrative body to which the patient applies has to support the patient in the formulation of the application and attached documents or prepare them itself. Furthermore, if the person does not have an opportunity to familiarize himself or herself with the legal acts related to the activities of that institution, with his or her rights, and with the implementation mechanisms stipulated therein, the administrative body has to ensure conditions so that the person can familiarize himself or herself with normative legal acts adopted by the body and with laws and other legal acts related to the activities of that body. Specifically, the patient may familiarize himself or herself with health care legal acts on the spot when applying to the competent administrative body.

As an additional guarantee, the law also provides that administrative bodies have no right to decline a person's application due to errors in the documents. Specifically, Article 41 of the law stipulates that the administrative body has to draw the attention of persons submitting those documents to errors, crossings, scratches, and typographical errors discovered in the documents

submitted by the participants of the proceedings so that they may correct them and also has to correct itself any obvious errors and inaccuracies existing in the documents in the presence of the participants. The administrative body does not have the right not to accept the documents indicated in this paragraph merely because the documents contain errors, crossings, scratches, or inaccuracies.

The law sets out that the indicated provisions are not applicable for errors, crossings, scratches, typographical errors, or inaccuracies existing in the documents, the correction of which, according to the law, lies with the bodies having adopted or provided those documents.

If the patient wants to familiarize himself or herself with the materials and documents related to his or her application submitted to the administrative institution, the patient may, in compliance with Article 39 of the law, familiarize himself or herself with the materials of administrative proceedings at the body conducting the administrative proceedings. Based on the law, the opportunity to familiarize oneself with the materials of administrative proceedings shall be provided within a three-day period following the submission of the application. After that period, if the patient wants to familiarize himself or herself with the materials, he or she has to submit the respective application to the administrative institution. Based on the law, participants of the proceedings may make copies, photocopies, and extracts of the materials of administrative proceedings.

Article 42 of the law provides one more guarantee for patients' rights. The administrative body does not have the right to ask the person applying to the administrative institution for protection of his or her rights to submit either documents or copies of documents that have been verified by a notary public or otherwise, as the submission of such documents or copies is not stipulated by the law.

The possibility of involving an expert, as provided by Article 45 of the law, is of critical importance in terms of patients' rights. Specifically, the article sets out that, if there is need to involve an expert for the examination of factual circumstances, the administrative body applies to the head or corresponding person of the respective organization, notifying the participants of the proceedings about the action. Persons having knowledge in the respective field may be appointed as experts. As a result of his or her examinations, the expert submits a conclusion. Participants of the proceedings may be present during the activities performed by the expert if their presence does not hinder the examination. At the request of the administrative body or participants of the proceedings, the expert shall provide additional clarifications on the expert conclusion. As required, the administrative body may decide to apply for examination of an individual, area, object, or item. Participants of the proceedings may, upon the administrative entity's decision, be present at the examination. The law, however, does not provide for the possibility of the applicant to provide his or her own expert witness.

The patient applying to an administrative institution for the protection of his or her rights may expect that the administrative body will initiate administrative proceedings and eventually adopt some administrative act. Article 54 of the law defines an administrative act as a decision, instruction, order, or other individual legal act that is adopted by the administrative body for the

regulation of a certain case in the area of public law and that is targeted at defining, modifying, eliminating, or recognizing the rights and responsibilities of persons. Only a written administrative act may be adopted as a result of administrative proceedings initiated on the basis of application. Thus, any patient having applied to an administrative institution for the protection of his or her rights may expect to get a written decision on the issues indicated in his or her application.

In cases provided by the law, an oral administrative act may also be adopted. The law provides, however, that, at the oral or written request of the addressee, the oral administrative act is subject to further written formulation, both in cases stipulated by the law and in cases in which the addressee of the act has justified interests. In the event that the oral act is subject to written formulation, requirements set out in the law for an administrative act shall be met.

For example, a person who has applied to the RA Ministry of Health or to the respective Marzpetaran to make an exception and provide him or her with treatment that is within the framework of the basic benefit package may expect to get a relevant order satisfying or declining his or her application.

### **In what form should the response to the patient's application be provided?**

The law provides specific requirements for the administrative act adopted as a result of administrative proceedings initiated on the basis of applicant's (also patient's) application. It should be stated that the administrative act may be appealed by the patient if it does not meet the requirements defined by the law. Article 55 sets out the requirements for the written administrative act. Specifically, for a written administrative act, the following requirements are defined:

- a. The contents of the administrative act shall meet the requirements set out by the law for its adoption and make reference to all essential factual and legal conditions serving as a basis for the administrative body to adopt the respective decision.
- b. The administrative act shall be drawn up on a paper of defined form and sample.

In fact, the administrative act shall also contain information regarding the expenses made in relation to the adoption of the act and their bearer. In the case of adopting an act on compensating the expenses, the amount subject to compensation and the procedure and terms of compensation shall be indicated.

The administrative act may have inserts, annexes, and other additional documents that expire not later than the expiry date of the administrative act. Inserts, annexes, and other additional documents are not independent administrative acts; they are integrated parts of the administrative act and are effective to the extent that the administrative act itself is effective.

The administrative act shall contain:

- a. the full name of the administrative body conducting the proceedings;
- b. the applicant's full name (or full name of a legal entity);
- c. the full title of the act and the year, month, date, and number of the adopted act;
- d. a description of the issues settled by the act (descriptive part);

- e. a justification for the adoption of the act (reasoning part);
- f. a statement of the adopted decision (resolutive part);
- g. the expiry date of the act (if the act is adopted for a specific period);
- i. the appeal period and the body, including court, where the act may be appealed;
- h. the title, full name, and signature of the official of the administrative body adopting the act;
- j. the official stamp of the administrative body adopting the act.

Administrative acts regulating similar issues may share a common sample (form).

Wording of the administrative act shall be clear and understandable. Contents of the administrative act should be formulated in such a way that it is clear to the applicant what his or her assigned rights are, which right is limited, what he or she is deprived of, and what responsibility is assigned to him or her.

In terms of protection of patients' rights by administrative institutions, the substantiation of acts adopted by those bodies is of critical importance. Specifically, Article 57 of the law sets out that written administrative acts and administrative acts approved in a written form shall contain substantiation that indicates all essential factual and legal grounds for the respective act. From the substantiation of an administrative act adopted as a result of exercise of an administrative body's discretionary powers, all considerations serving as the basis for the administrative body to adopt the given solution should become clear.

Substantiation is not required if:

- a. the administrative body satisfies an application, and third-party rights are not affected by the administrative act;
- b. the addressee of the act or the person whose rights are affected by the administrative act already knows about the position of the administrative body on factual or legal circumstances or if the body's position is obviously clear from the text of the act; or
- c. the administrative body issues similar administrative acts in large numbers or issues the administrative acts with the use of technical means and there is no need for substantiation in each specific case.

### **In what form should the response to the patient's application be delivered to the patient?**

The patient or his or her representative, after applying to the administrative institution for the protection of rights, should expect that the state entity will notify him or her about the favorable or unfavorable decision made regarding the application. As regulated by Article 59 of the law, the administrative body notifies the participants of the proceedings about the adoption of administrative act by way of delivery or publication, as provided by the same article. The written administrative act should be provided to the participants of the proceedings within a three-day period following its adoption. It may be sent by registered mail, with notification upon receipt; delivered personally to the addressee; or delivered through other methods provided by the law.

As a rule, a written administrative act shall be delivered to the participants of the proceedings by registered mail, requiring the receiver to sign upon receipt of the document. Other forms of delivery are used when there is justified reason not to deliver personally or upon signature, including the addressee's request for another form of delivery. The administrative body is also obliged to deliver to the addressee all documents considered to be integral parts of the administrative act. Nondelivery of the indicated documents simultaneously with the administrative act or their delayed delivery may not affect the effectiveness of the administrative act and serve as a basis for questioning the lawfulness of the act.

At the addressee's request, the administrative body adopting the administrative act may also provide the addressee with a copy of a foreign-language translation of the written legal act, which should be approved with the official stamp of the respective administrative body. Only the text of the administrative act adopted in the language of administrative proceedings has legal effect. Its translation in a foreign language cannot serve as a basis for interpretation or clarification of the meaning or contents of the act; and, in case of disputes or complaint, the text of the act adopted in Armenian is taken as the basis.

The administrative act is published in the bulletin of the administrative body or other official bulletin or through other means of mass media. A written administrative act is subject to mandatory publication if the administrative body is not in possession of information about persons directly affected by the act and also in other cases, as provided by the law. The written administrative act may also be published at the initiative of the administrative body if the body finds publication of the act more expedient for state and public interests and also for more effective protection of patients' rights.

An oral administrative act is publicized orally through communication to its addressee(s). An oral administrative act may be publicized in a foreign language understandable to its addressee.

### **What is the procedure for a patient's appeal of an administrative act?**

If the patient who has applied to an administrative institution for the protection of his or her rights finds that the administrative act adopted in relation to his or her application is unlawful, he or she may appeal the act to the superior administrative body in a procedure set out by Article 67 of the law.

The appeals procedure is further explained in Article 70. Specifically, the article stipulates that an administrative act may, at the applicant's choice, be appealed through administrative or judicial procedures. Through administrative procedure, an appeal may be lodged with:

- a. the administrative body that has adopted the act; or
- b. the administrative body superior to the administrative entity that has adopted the act.

The act may be appealed within a specific period of time. The administrative appeal may be submitted:

- a. within six months following the day when the administrative act became effective;
- b. within one month following the taking of an action by the administrative body;

- c. within a three-month period following the inaction by the administrative body; or
- d. where the appeals period is not indicated in a written administrative act, within one year following the day when the administrative act became effective.

If the referred deadlines are missed, the administrative act is no longer able to be appealed. The deadline may be renewed if it was missed due to a reasonable excuse. A reasonable excuse for missing the deadline for appeal may include reasons not attributable to the participant in the proceedings. For example, if the patient was unable to appeal the act adopted by the Marzpet for health reasons, the missing of the deadline may be considered reasonable.

### **How should the appeal be drawn up?**

The act adopted by an administrative institution in connection with the protection of patients' rights should be appealed in a certain form. Specifically, Article 72 of the law provides requirements for the appeals. The appeal must contain:

- a. the name of the administrative body to which the appeal is submitted;
- b. the full name and address of the person filing the appeal (or the full name and registered office of a legal entity and the full name and title of the person filing the appeal on behalf of the entity);
- c. the subject of appeal;
- d. the request of the person filing the appeal;
- e. a list of documents attached to the appeal;
- f. the year, month, and day of preparation of the appeal;
- g. the signature of the person filing the appeal (or the signature of the person filing the appeal on behalf of a legal entity and the stamp of the entity).

### **What are the procedures for the consideration of an appeal submitted by the patient against the decision made by an administrative institution?**

Administrative proceedings on the basis of appeal are initiated on the day of the administrative body's registration of the appeal. When accepting the appeal, the administrative body must check the compliance of the appeal with the requirements of Article 70 of the law and also check whether the appeal was delivered within the time frames stipulated by the law. The superior administrative body has to immediately request the files (materials) on the administrative proceedings from the subordinate administrative body. The subordinate administrative body has to provide the superior administrative body with the administrative files (materials) within the five-day period following the receipt of the request. When considering the administrative appeal on the administrative act, the administrative body that adopted the appealed act is entitled to:

- a. completely or partially satisfy the appeal; in other words, declare the administrative act as invalid or void or adopt a new administrative act; or
- b. decline the appeal, upholding the administrative act.

When considering the appeal against the actions of the administrative body, the administrative entity whose actions have been appealed is entitled to:

- a. completely or partially satisfy the appeal; in other words, declare the appealed action completely or partially unlawful and terminate the activity concerned if, at the moment of accepting the appeal, the activity was in progress; or
- b. decline the appeal, considering its activity as lawful.

When considering the appeal against the inaction of the administrative body, the administrative body whose inaction was appealed is entitled to:

- a. completely or partially satisfy the appeal and completely or partially perform the claimed activity; or
- b. decline the appeal, considering the inaction as lawful.

In the cases indicated above, if the relevant appeal, in compliance with this law, is considered by the superior administrative body of the administrative body that adopted the administrative act, the superior administrative body—should it find that the appeal is subject to be completely or partially satisfied—may adopt one of the decisions taken in connection with the indicated parts or completely or partially terminate the written administrative act and instruct the subordinate administrative body that adopted the administrative act to adopt a new administrative act, stop its illegal action, or perform the claimed action.

### **Under what circumstances may the patient apply to the RA Prosecutor's Office or the RA Police for the protection of his or her violated rights?**

The patient may apply to the RA prosecution entities or to the RA Police for the protection of his or her violated rights if, during the violation of those rights, a criminally punishable action occurred. In accordance with Article 11 of the RA Law on Police, the police shall be obliged, in a manner defined by the RA Government, to accept, record, and register applications and reports pertaining to crimes and other offenses and incidents and to set the relevant procedure in motion.

In accordance with Article 42 of the RA Law on Prosecution, among the main responsibilities of the prosecutor are the consideration and processing of recommendations, applications, and complaints in established procedure and time frames.

Because the RA Law on Prosecution does not provide special requirements for the applications submitted to the prosecutor's office, application may be submitted to the prosecutor's office and police in a procedure set out by the RA Law on Fundamentals of Administrative Action and Administrative Procedure.

## 8.3 Civil Procedure

As already indicated in section 5 of this guide, the selection of effective legal remedies—including specific mechanisms and procedures for exercising the right to appeal against actions and decisions of health care and service providers, guaranteed by Article 18 of the RA Constitution—is conditional to the nature of relations (civil and criminal liability) originating from the possible illegal restrictions or violations of a person's rights and freedoms.<sup>1</sup>

### **What are the grounds for instituting a civil case for the protection of patients' rights?**

The court only initiates a civil case based on a lawsuit or application (Article 3, RA Civil Procedure Code).

The interested person is entitled to apply to court, in accordance with the procedure established by the Civil Procedure Code, for the protection of his or her rights, freedoms, and lawful interests, as stipulated and provided for in the RA Constitution, laws, and other legal acts or agreements.

In cases provided by the Civil Procedure Code and other laws, persons entitled to protect the rights, freedoms, and lawful interests of other persons can apply to the court for the purpose of such protection.

### **Which courts have jurisdiction over civil actions for the protection of patient's rights?**

All civil actions are subject to the jurisdiction of the first instance courts of general jurisdiction.

As a rule, the lawsuit is filed with the court of the defendant's residence (whereabouts).

Article 83 of the RA Civil Procedure Code envisages jurisdiction by the plaintiff's choice. Specifically, the action against defendants who are residing in different Marzes may, at the plaintiff's choice, be brought before the court of residence of one of the defendants.

An action against a defendant whose whereabouts is unknown can be brought at the place where his or her property is located or at the court of his or her last residence. An action concerning damage to the health or the death of the breadwinner for a family can be brought in the court at the plaintiff's residence or at the place where damage was inflicted.

Actions against a legal entity deriving from the activities of its representations or branches can be brought in the court at the place of the registered office of the appropriate representation or branch.

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1. The possible civil and legal relations arising in this area are described in Chapter 5 of this guide in the section "Right to Compensation."

## What are the legislative requirements for the complaint?

Article 87 of the RA Civil Procedure Code defines the form and contents of the statement of claim. Specifically, the statement of claim is submitted in writing.

The statement of claim must indicate:

1. the name of the court to which the statement of claim is submitted;
2. the full names of persons participating in the case (or full name of legal entity), their place of residence (registered office of legal entity), including the plaintiff's passport data and social security card number, if available (taxpayer number and number of state registration or state registration certificate of legal entity);
3. the amount of the claim, if the claim lends itself to evaluation;
4. the circumstances on which the claims are based;
5. the evidence supporting the claims;
6. a calculation of the disputed amount or amount subject to levy;
7. the plaintiff's claims and, when bringing an action against more than one defendant, the claims of the plaintiff concerning each of them; and
8. a list of the documents attached to the statement of claim.

Other data can also be indicated in the statement of claim, if they are necessary for the right solution of the dispute and to support the motions of the plaintiff.

The statement of claim is signed by the plaintiff or a representative who is authorized by the plaintiff for this purpose.

The issue of accepting the statement of claim is solved solely by the judge, who must conduct the proceedings of examination of the complaint submitted with due observance of the requirements provided in this code.

In compliance with the procedure provided by Article 144(2) of the Civil Procedure Code, in case of not dismissing or not returning the statement of claim within a three-day period following its receipt, the judge makes a decision to accept the statement of claim, in which decision the time and place of the hearing are indicated.

## What are the rights and responsibilities of a patient or of any other person who brings an action for the protection of his or her interests?

Generally, persons participating in the case are entitled to familiarize themselves with the materials of the case, make notes, obtain copies of the materials, make challenges, present evidence and participate in their examination, ask questions, make motions, give explanations to the court, present their arguments for all questions emerging during the hearing of the case, object to the motions and arguments made by other persons participating in the case, lodge appeals against judicial acts, and exercise the other rights that they are entitled to, in accordance with the RA Civil Procedure Code.

Persons participating in the case have procedural duties stipulated by law. They must use their procedural rights and observe their procedural duties in good faith. Persons participating in the case are subject to criminal liability for providing false explanation or false testimony, in a procedure established by RA legislation.

### **What is the procedure for judicial formulation of a reconciliation agreement between the parties?**

The parties can end the case at any moment during the proceedings by compiling a reconciliation agreement in written form. Prior to the court's approval of the reconciliation agreement, the court explains the procedural consequences to the parties. The court does not approve the reconciliation agreement if the agreement contradicts the law and other legal acts or breaches other persons' rights and lawful interests.

### **What are the time frames for conducting actions of the proceedings?**

The court shall consider the case and make a decision within a reasonable period. As a rule, court examination shall be concluded in one judicial session. If the RA Civil Procedure Code and other laws envisage special time frames for proceedings, the court shall conduct the court proceedings within those time frames.

### **What is the general procedure for appealing judicial acts on civil cases?**

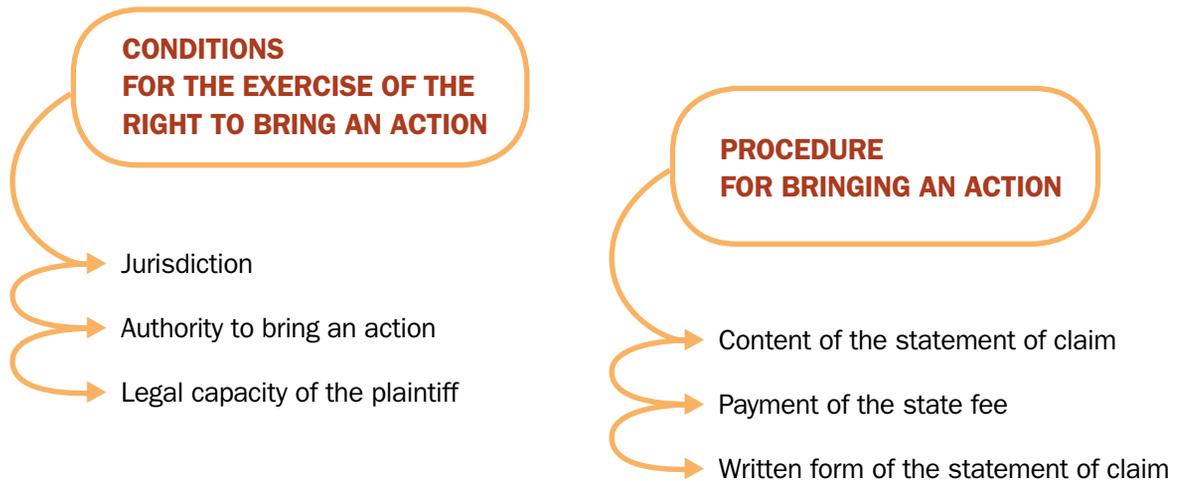
Judicial acts of the first instance court of general jurisdiction that is deciding the case on the merits can be appealed to an appeals court; the judicial acts that do not decide the case on the merits (interim judicial acts), such as, for example, decisions relating to the application of provisional and protective measures, can be appealed to an appeals court only in cases and instances provided by Civil Procedure Code or other laws.

Judicial acts of the first instance court of general jurisdiction that is deciding the case on the merits become legally effective within one month following their publication, except for cases such as those in which the claim on forfeiture of an amount or the monetary equivalent of the claimed object does not exceed 50 times the minimum salary. In these cases, the judicial acts that are deciding the case on the merits become effective upon their publication. In exceptional cases, judicial acts of the first instance court of general jurisdiction that is deciding the case on the merits can become legally effective immediately with adoption if declared so by the court, in case failure to do so will inevitably cause grave consequences for the party. Such acts, however, are also appealed in terms and procedures defined by the Civil Procedure Code that are applicable for the acts of the same court that have not become legally effective.

The acts of the Appeals Court that is deciding the case on the merits become legally effective one month after the publication and may be appealed to the RA Cassation Court by persons and in a procedure set out by the law.

## Civil Procedure Flowcharts

### Procedure for Bringing an Action



### Statement of Claim

- ▶ Statement of claim is a procedural document which is filed with the court for the purpose of initiating a lawsuit and which incorporates both substantive and procedural aspects of the claim.
- ▶ The statement of claim is submitted in a written form and is signed by the plaintiff or by his representative.

## Content and Structure of the Statement of Claim

Requirements are defined by Articles 87 and 88 of the RA Civil Procedure Code



### Name of the court

#### Plaintiff citizen's

- name, place of residence
- passport data, social card number

#### Plaintiff legal person's

- name, registered office
- taxpayer registration number and state registration number or state registration certificate number

#### Defendant's

- name
- place of residence (registered office)

### Amount of claim (if the claim is assessable)

### Brief statement of the subject matter of the claim



**Cause of action**



Circumstances supporting the claims

**Evidence establishing the cause of action**



Information on witnesses, written and material evidence



**Calculation of the amount to be levied or in dispute**

**Legal qualification of the case (if appropriate)**



Legal acts regulating the relevant relationships based on which the court should settle the dispute, as well as relevant decisions of the RA Cassation Court and the ECtHR



**Claims of the plaintiff**

**In case of bringing an action against several defendants**

- claims presented to each of them

**Plaintiff's motions**

**List of the supporting documents and material evidence**

**Where the statement of claim is signed by the head of the legal person:**

- his/her name, position
- signature and seal

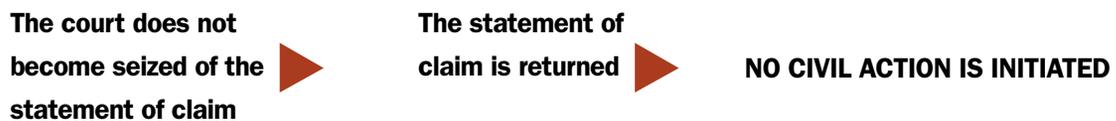
**Where the statement of claim is signed by the citizen or his/her representative:**

- name of the plaintiff
- name and signature of the representative

## Documents Attached to the Statement of Claim

- ▶ Document certifying the payment of the state fee or the motion to defer the payment of the state fee
- ▶ Written and material evidence (supporting the claims)
- ▶ Authorization of the representative (where he has signed the statement of claim)
- ▶ Draft contract (where an action to oblige to enter into a contract is brought)

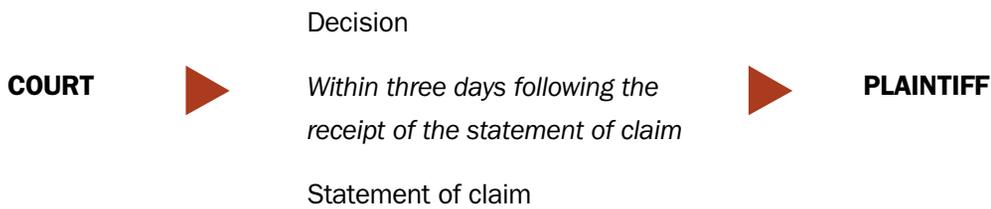
## Consequences of Not Complying with the Procedure for Bringing and Action



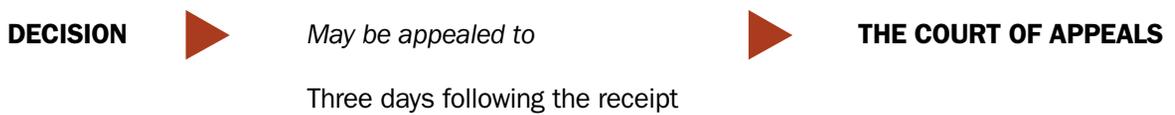
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THE EXHAUSTIVE LIST OF THE *GROUND*S FOR RETURNING THE STATEMENT OF CLAIM IS PROVIDED FOR BY ARTICLE 92 OF THE RA CIVIL PROCEDURE CODE

## Returning the Statement of Claim



Where deficiencies are remedied and the statement of the claim is again filed with the court within a three day period, it is considered accepted as from the date of the initial filing (Article 92 (2) and (3) of the Civil Procedure Code).



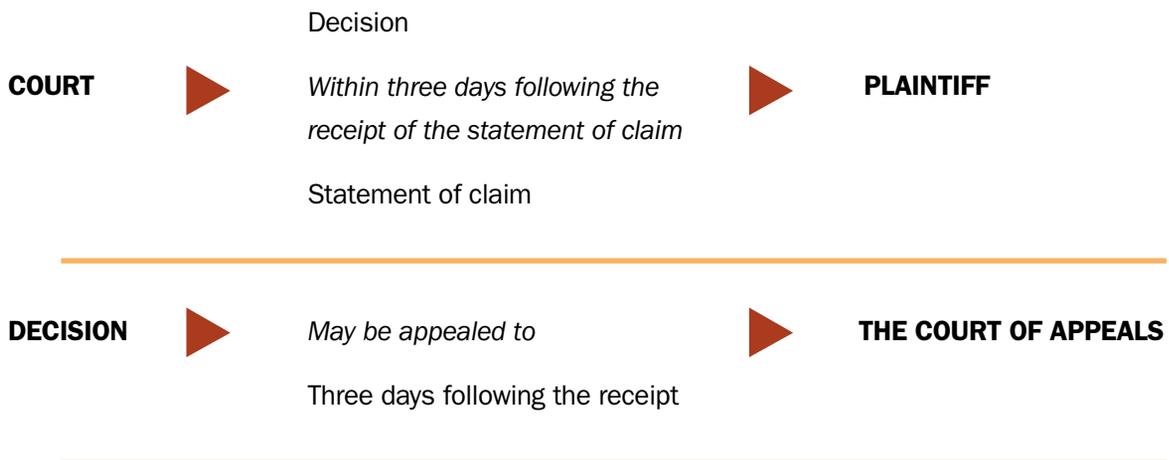
If the decision is reversed, the statement of claim is considered accepted by the court as from the date of the initial filing (Article 92 (4) and (5) of the Civil Procedure Code).

## Refusal to Accept the Statement of Claim



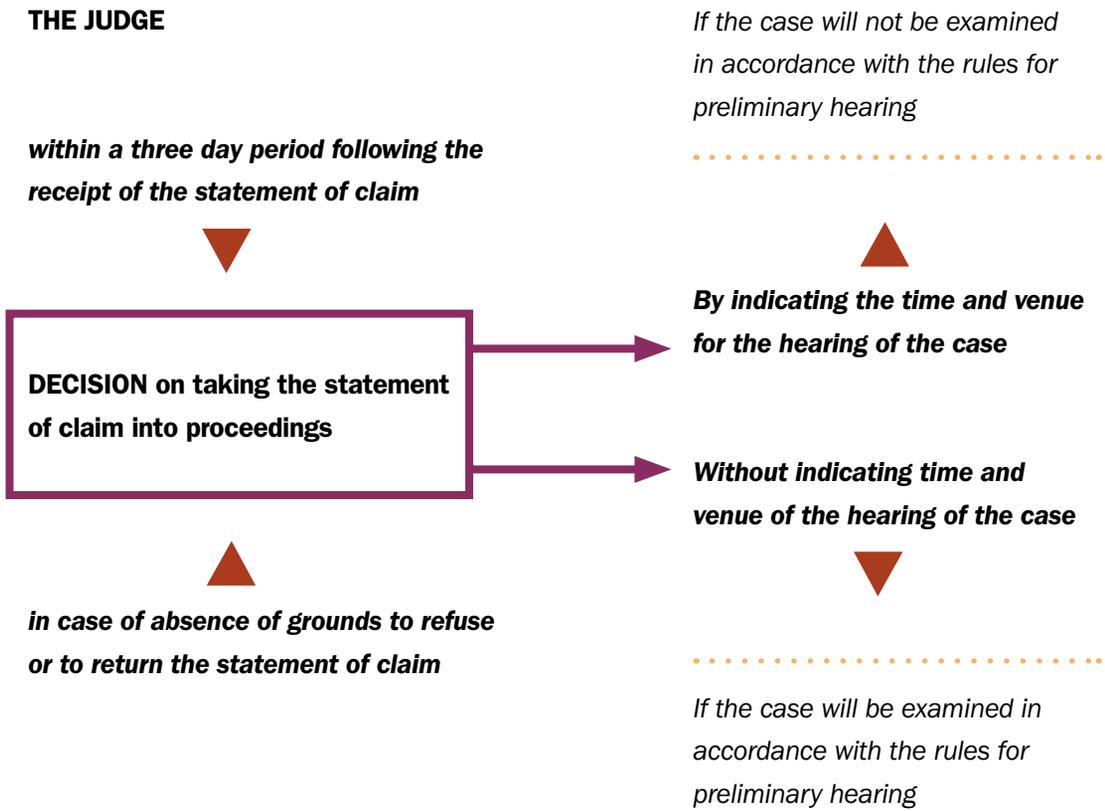
THE EXHAUSTIVE LIST OF THE *GROUND*S FOR RETURNING THE STATEMENT OF CLAIM IS PROVIDED FOR IN ARTICLE 91 OF THE RA CIVIL PROCEDURE CODE

## Refusal to Accept the Statement of Claim



If the decision is reversed, the statement of claim is considered accepted by the court as from the date of the initial filing (*Article 91 (4) and (5) of the Civil Procedure Code*).

## Accepting the Statement of Claim



## 8.4 Criminal Procedure

### **What are the entities and what is the procedure for notifying such entities of violations of patients' rights that constitute crimes?**

In such cases, recourse should be made, in accordance with the RA Criminal Procedure Code, to the authorities and/or officials that are responsible for initiating a criminal case. The prosecutor, the investigator, or the body of inquiry (depending on which of those entities receives the report on an alleged crime) must institute criminal prosecution, within their authority, according to Article 175 of the Criminal Procedure Code, provided that there are reasons and grounds provided in the code for the initiation of criminal prosecution.

The reasons and grounds for initiation of criminal prosecution are:

- The report of crime to the body of inquiry, investigator, prosecutor by natural persons and legal entities
- Mass-media reports about crimes
- Discovery of information about crime, material traces of crime, and consequences of crime by the body of inquiry, the investigator, the prosecutor, the court, and the judge in the exercise of their powers

An individual's report of crime can be written or oral. The oral statement made about a crime during an investigative action or court trial is registered in the record of the investigative action or the court session, respectively. In other cases, separate records are drawn up. The record must indicate the surname and the first name of the applicant, his or her date of birth, his or her home and work address, the applicant's relation to the crime, the source of information, and data about the identification documents submitted by the applicant. If the applicant has not submitted identification documents, other measures must be taken to verify the identity of the person. If the applicant is 16 years old or younger, he or she is warned about the responsibility for fraudulent representation, which is confirmed by his signature.

The record is signed by the applicant and by the recipient official. A letter, a report, or other anonymous message about a crime, unsigned or with a false signature or written on behalf of a fictitious person, cannot be a reason for initiation of criminal prosecution.

A statement by a legal entity must be in the form of an official letter; confirmed telegram, telephone, or radio message; e-mail message; or other accepted form of communication. Documents confirming the crime may be attached to the message.

### **What is the legislative procedure and the time frame for the consideration of reports on crimes?**

Reports on crimes shall be considered and decided upon immediately or, if there is need to check the legality and sufficiency of grounds for initiating a case, within 10 days following the receipt of report. Additional documents and examination of the crime scene may be required during the

indicated period and, given sufficient grounds for suspecting individuals of committing the crime, these individuals may be apprehended and searched, samples taken for examination, and expert examination conducted.

Upon receipt of information about a crime, one of the following decisions is made:

- Initiate a criminal case
- Decline the initiation of a criminal case
- Forward the report to the body with jurisdiction over the crime

### **What are the procedures and time limits for appealing the decision declining the initiation of a criminal case?**

The copy of the decision declining the initiation of a criminal case shall, without delay, be sent to the person or legal entity that reported the crime. The decision may be appealed in accordance with the RA Criminal Procedure Code within seven days of the receipt of the copy of the decision.

The court shall either reverse or uphold the appealed decision declining the initiation of a criminal case. A reversal of the appealed decision shall oblige the prosecutor to initiate an action.

The superior prosecutor shall, within seven days of its receipt, either uphold the lawfulness of declining initiation of a criminal case or reverse the appealed decision, initiate a criminal case, and forward it to the investigator for the purpose of conducting pretrial investigation. The decision of the criminal prosecution authority on closing the proceedings, terminating the criminal prosecution, or not conducting criminal prosecution may, within a six-month period following the adoption of such decision, be reversed only once and only by the prosecutor general.

### **In an initiated case, what status may the patient who has suffered from the crime acquire and how?**

The body of inquiry, the investigator, and the prosecutor decide to institute a criminal case. The decision shall indicate the reasons and grounds for initiating a criminal case, the article of the law that served as a basis for initiation of a criminal case, and the course of the case after its initiation.

If the person who has suffered from the case is known at the moment of initiation of a criminal case, that person is declared a victim by the body conducting the proceedings; where a civil lawsuit is submitted together with the report on crime, the person is also declared a civil plaintiff by the same decision.

The RA criminal procedure legislation stipulates the concept of "successor of the victim." A close relative of a crime victim, who expresses a wish to exercise, during the proceedings of the criminal case, the rights and obligations of the deceased victim or the victim who has lost the ability to consciously express his or her will, can be recognized as the successor of the victim.

The decision to declare a successor of the victim is made by the body of inquiry, the investigator, and the prosecutor or the court at the request of that relative who wishes to be the successor of the victim. The selection of the successor of the victim from among several close relatives, who each submitted a relevant request, is conducted by the prosecutor or by the court.

The person recognized as a successor of the victim is entitled to terminate his or her powers at any time during the proceedings of the criminal case. The successor of the victim participates in the proceedings of the criminal case in place of the victim and enjoys the rights and bears the obligations of the victim, with the exception of the right to give evidence and other rights and obligations inseparable from those of the victim. The successor of the victim is not entitled to reconcile with the suspect or the accused and recall the appeal instituted by the victim.

### **What are the rights and responsibilities of the victim during the criminal proceedings?**

In compliance with Article 58 of the RA Criminal Procedure Code, a person is recognized as a victim if a moral, physical, or proprietary damage was inflicted directly on that person by an action that is not punishable under the RA Criminal Code. A person is also recognized as a victim if a deed, not punishable under the criminal code, was not finished due to circumstances out of the offender's control but would have caused the victim moral or physical damage if finished.

The decision on recognizing a victim is made by the body of inquiry, the investigator, the prosecutor, or the court.

#### **In the manner prescribed by the RA Criminal Procedure Code, the victim has the right:**

- to know the essence of the charge;
- to give evidence;
- to present materials for inclusion into the criminal case and examination;
- to declare challenges;
- to file motions;
- to object against the actions of the bodies of criminal prosecution and to demand inclusion of his or her objections in the record of the investigatory or other procedural action;
- to get acquainted with the records of the investigatory and other procedural actions, in which he or she participated, and to submit remarks on the correctness and completeness of the entries in the record; to demand, during the participation in investigatory or other procedural actions, the inclusion in the record of the mentioned action or court session any notes on the circumstances, which, in his or her opinion, have to be mentioned; to get acquainted with the record of the court session and to bring remarks on it;
- to get acquainted with all materials of the case, from the moment of accomplishment of the preliminary investigation, make copies of the materials, and record in writing any data from the case, in any volume;
- to participate in the sessions of the court of first instance and appeals court and make a statement before the court delivers its judgment;

- to receive upon his or her request, free of charge, copies of the decisions on the abatement of criminal proceedings, the copy of the indictment or final act on inclusion of an accused person into the case, and the copy of verdict or other final decision of the court;
- to appeal the actions and decisions of the body of inquiry, the investigator, prosecutor, and the court, including the appeal of the verdict and other final court decision;
- to reconcile with the suspect and the accused in cases prescribed by this code;
- to object to the appeals of other participants of the trial regarding the verdict or other final court decision;
- to receive the compensation stipulated by law for the damage caused by unlawful actions;
- to recover the expenses incurred during the criminal proceedings;
- to recover the property seized by the body conducting criminal proceedings, as material evidence or on other bases, and the originals of the documents belonging to him or her; and
- to have a representative and to terminate the powers of the representative.

**In the manner prescribed by the RA Criminal Procedure Code, the victim is obliged:**

- to arrive upon the call of the body that is conducting criminal proceedings;
- to give evidence upon the demand of the body that is conducting criminal proceedings;
- to present the items, documents, and samples in his or her possession for comparative study upon the demand of the body that is conducting criminal proceedings;
- to be subjected to examination upon demand of the body that is conducting criminal proceedings on the crime allegedly committed with respect to him or her;
- to be subjected, upon the demand of the body conducting criminal proceedings, to medical examination in order to check the ability to perceive and to reproduce correctly the circumstances subject to discovery in criminal case, if strong arguments are available to suspect the lack of such abilities;
- to obey the legitimate instructions of the prosecutor, the investigator, the body of inquiry, and the person presiding;
- to observe the order at the court session.

The victim also has other rights and bears other obligations, as prescribed by the RA Criminal Procedure Code.

The victim personally exercises the rights belonging to him or her and also executes the obligations imposed on him or her or, if corresponding to the nature of respective rights and obligations, exercises the rights and executes the obligations through a representative. The rights of the juvenile or legally incapable victim are exercised in the victim's stead by his or her legally authorized representative, in the manner prescribed by the RA Criminal Procedure Code.

## What are the rights and responsibilities of a civil plaintiff during criminal proceedings?

According to Article 60 of the RA Criminal Procedure Code, a person or legal entity filing a claim during the proceedings of the criminal case, with respect to which sufficient bases are available to assume that a material damage, subject to compensation in the manner of criminal proceedings, was caused to the person or entity upon a deed that is not punishable under the RA Criminal Code, is recognized as a civil plaintiff. The decision on recognizing a civil plaintiff is made by the body of inquiry, the investigator, the prosecutor, or the court. A civil plaintiff enjoys rights and bears obligations identical to those of the victim.

## Who is entitled to lodge an ordinary appeal in criminal cases?

The defendant, the defendant's counsel and legally authorized representative, the prosecuting attorney, the superior prosecutor, the victim, and the successor of the victim are entitled to lodge an ordinary appeal against judicial acts of first instance courts. The acquitted, the convicted, and their counsels and legally authorized representatives are also entitled to lodge an ordinary appeal against the decisions referred to in Article 3761(2) of the RA Criminal Procedure Code (see below). A civil plaintiff, a civil defendant, and their representatives are entitled to appeal the judicial act with regard to the civil claim. Persons whose interests are affected by the judicial act and who are not parties to the proceedings are also entitled to lodge an ordinary appeal with regard to the civil claim. The defendant, the defendant's counsel and legally authorized representatives, and the applicant are entitled to lodge an ordinary appeal against the judicial acts referred to in Article 3761(3) to (6).

## Which judicial acts of the first instance court are subject to appeal?

According to Article 3761 of the RA Criminal Procedure Code, the following are subject to ordinary appeal:

- Judicial acts of first instance courts that decide the case on the merits and have not become effective
- Judicial acts of first instance courts that decide the case on the merits and have become effective, in such exclusive cases in which fundamental violations of substantive or procedural law occurred during the preceding trial of the case, which resulted in a judicial act distorting the very nature of justice
- Judicial acts of first instance courts that decide the case on the merits and have become effective, on the basis of newly revealed or new circumstances
- Decisions of first instance courts on suspending the proceedings of the case
- Decisions of first instance courts on imposing, altering, or revoking detention as a measure of restraint, and, in cases provided for by the RA Criminal Procedure Code, decisions on searches and seizures, placing persons in a medical institution, and interfering with the

right to confidentiality of correspondence, telephone conversations, mail, telegraph, and other communications

- Decisions of first instance courts rendered with regard to complaints against the decisions and actions (inactions) of officers of inquiry bodies, investigators, prosecutors, and bodies carrying out operative-intelligence activities
- Decisions on extradition
- Decisions rendered with regard to issues referred to in Chapter 49 of the RA Criminal Procedure Code (Enforcement of Judicial Decisions)
- Other judicial acts in cases provided for by the RA Criminal Procedure Code (Article 376.1)

### **What is the procedure for lodging an ordinary appeal?**

The ordinary appeal is lodged with the appeals court, and its copy is submitted to the court that has delivered the judicial act, for the purpose of fulfilling the requirements of Articles 382 and 383(2) of the RA Criminal Procedure Code (notifying the appeal to the parties to the proceedings).

### **What are the time limits for lodging an ordinary appeal?**

An ordinary appeal is lodged:

- in the case of the judicial acts of first instance courts deciding the case on the merits, within a one-month period after their publication;
- in the case of the judicial act as provided for by Article 3761(2) of the RA Criminal Procedure Code, within a six-month period after it became effective;
- in the case provided for by Article 3761(2.1) of the RA Criminal Procedure Code, within the periods defined by Articles 426.3 and 426.4 of the RA Criminal Procedure Code;
- in the case of decisions of first instance courts on detention, extending the period of detention, or placing persons in medical institutions, within a five-day period following their publication; in the case of other decisions not deciding the case on the merits, within a 10-day period following their publication.

Appeals that have missed the deadlines are dismissed, and the court makes decisions to that effect.

When there is a good reason for missing the deadline for appeal, persons entitled to lodge an appeal may file a motion with the court that has rendered the judicial act in order to renew the missed deadline. The motion on renewal of the missed deadline is examined in a court hearing by the court that has rendered the judgment or decision, and that court has the right to summon the person filing the motion for the purpose of giving explanations. The decision on rejecting the motion to renew the missed deadline may, within a 15-day period, be appealed to appeals court, which is entitled to renew the deadline and to examine the case, subject to the requirements referred to in Articles 382 and 383(2) of the RA Criminal Procedure Code.

## **What are the effects of the appeal?**

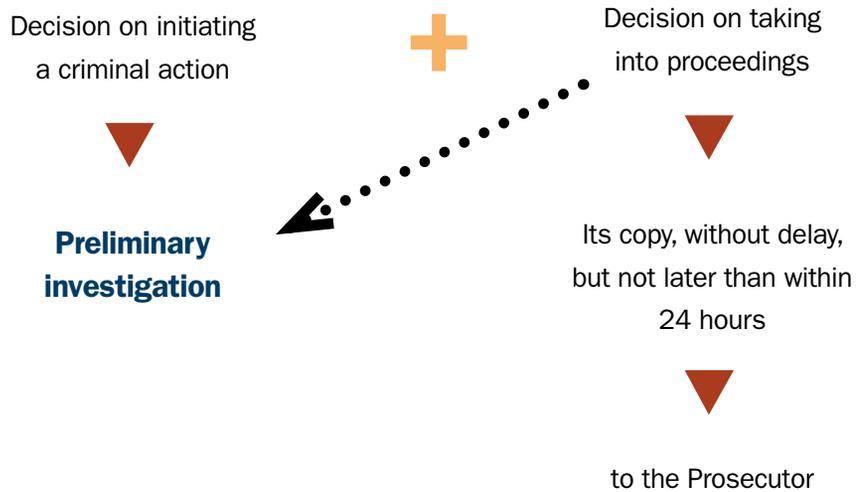
An appeal against a judicial act that has not become effective has a suspensive effect. Following the expiration of the time limit for the appeal, the court that has rendered the judicial act submits to the appeals court the files of the case, together with the responses received with regard to appeals, and notifies the parties to that effect. The appealing party and the person for the protection of whose interests the appeal was lodged may withdraw the appeal prior to commencement of the hearing in the appeals court. The defense counsel is not entitled to withdraw the appeal lodged by him or her without the consent of the defendant. The appeal lodged by the prosecutor may be withdrawn by a superior prosecutor.

In the event that the time limit for the appeal has expired and no other ordinary appeal has been lodged against the judicial act concerned, the court makes a decision on closing the appellate proceedings in case the appeal is withdrawn.

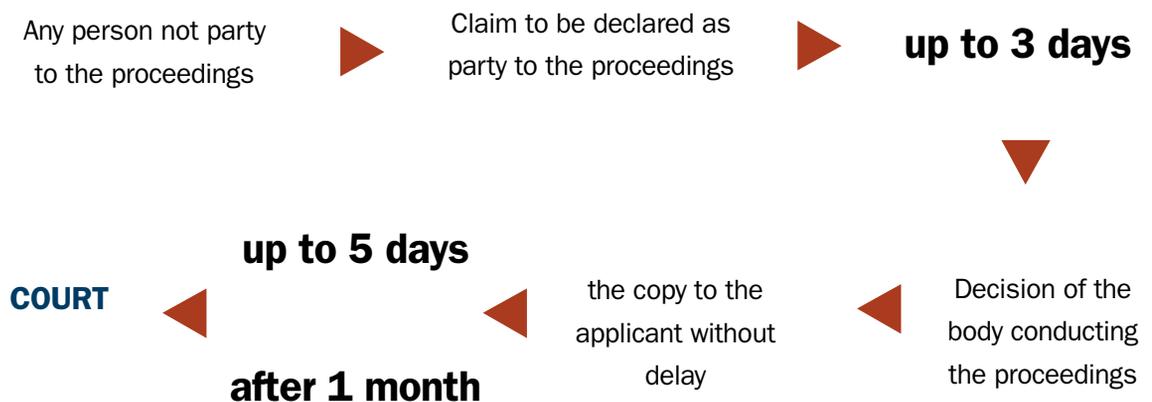
The judicial acts of the appeals court become effective one month following their publication and may be appealed to the RA Court of Cassation in accordance with the procedure and by persons defined by law.

## Criminal Procedure Flowcharts

### Commencement of the Pretrial Investigation



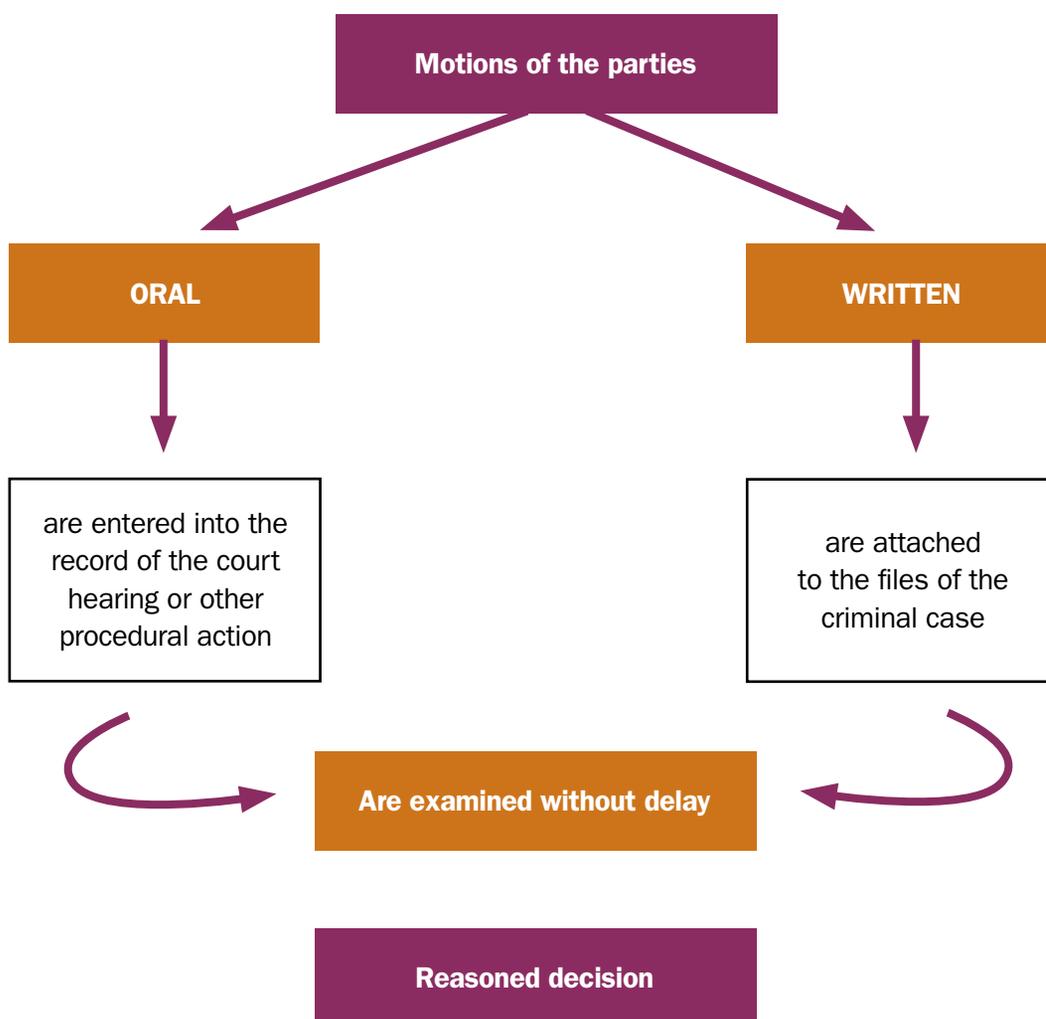
### The Right to Claim to Be Declared as a Party to the Proceedings



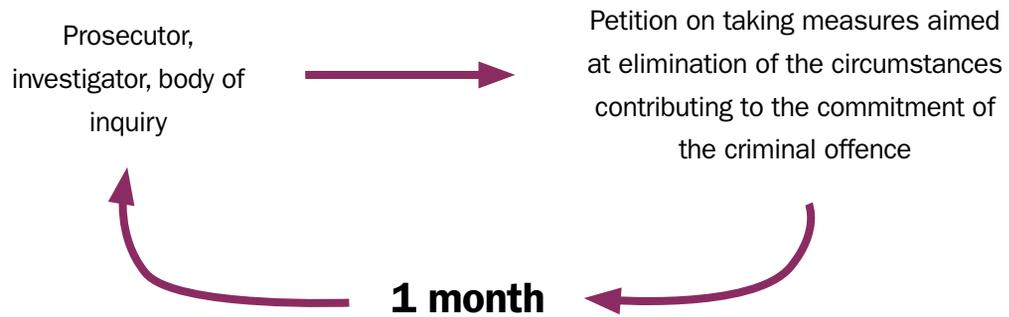
## Clarification of the Rights and Responsibilities of the Parties to the Proceedings, Ensuring the Conditions for Their Implementation



## Mandatory Nature of Taking Motions and Claims into Examination



## The Duty to Reveal and Eliminate Circumstances Contributing to the Commitment of the Criminal Offence



## Freedom to Appeal Against the Actions and Decisions of the Body Conducting the Proceedings

- ▶ Prosecutor – court – higher court
- ▶ Written / oral
- ▶ Time limit to take into examination—without delay (3 days)
- ▶ Response
  - by a decision
  - reasoned
  - with notice to the appellant
- ▶ Right to withdraw the appeal
  - the appeal filed by the defense counsel—upon the defendant's consent

## 8.5 Alternative Mechanisms to Protect/Enforce Rights and Responsibilities

### Office of the Ombudsperson

#### Who can apply to the RA Human Rights Defender?

The following may appeal to the RA Human Rights Defender:<sup>2</sup>

- Any individual, including persons in places of confinement, whose rights have been violated
- Representatives (with the written consent of the person whose rights have been violated)
- Family members and heirs of deceased persons
- Legal persons
- Officials acting only in their personal capacity, for the protection of their violated rights and fundamental freedoms

The RA Human Rights Defender is entitled to commence an examination of a matter on its own motion, especially in those cases in which there exists information on mass violations of human rights and fundamental freedoms or in which the matter has an exclusive public significance or is connected with the necessity of protecting the interests of persons who are not in a position to have recourse, on their own, to legal remedies available for their protection.<sup>3</sup>

#### Who may be the subjects of complaint to the RA Human Rights Defender?

A complaint may be filed against the heads or staff of any state body.<sup>4</sup> The RA Human Rights Defender is not entitled to examine complaints against the actions of private entities and their officials. In the case of matters related to health care, state hospitals or clinics are not considered to be state bodies, so complaints against state hospitals, clinics, or their heads and staff may not be addressed by the RA Human Rights Defender. All public institutions are under the jurisdiction or responsibility of a central or regional state body, however. Therefore, it is necessary to apply, in the first place, to the respective state body that supervises the activities of the health care facility. If there is no response from the state body or if the response is not satisfactory, the complaint may be forwarded to the RA Human Rights Defender. The subject of the complaint should be the fact that the state body has not made a valid decision in relation to the person's rights.

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2. RA Law on Human Rights Defender, Article 8.

3. Ibid., Article 11(4).

4. Ibid., Article 7.

## What are the possible complaints related to the health care sector?

Complaints related to the health care sector and subject to examination by the RA Human Rights Defender are as follows:

- The state institution did not respond to the applicant or responded by providing insufficient solution to a fundamental violation of human rights.
- The applicant's fair trial rights are being violated during a court proceeding (although the Human Rights Defender is not entitled to intervene in a court proceeding, he or she may submit recommendations to the court with regard to proper enforcement of the applicant's procedural rights).

In both cases, the complaint should comprise two parts. The first part should relate to inaccuracies in the operation of the state body or the court. The second part should qualify the fundamental harm that is subject to complaint as a violation of one or more human rights as provided by international law or national law. A sound complaint should qualify the harm as a violation of both international and national legal provisions. Lawyers should study relevant sections of this guide to find out, in the case of the harm concerned, what international and national legal norms are violated. In addition to the complaint, lawyers should also submit other documents supporting the complaint.

## What will the RA Human Rights Defender do?

Upon receiving a written or oral complaint, the RA Human Rights Defender shall make a decision on:

- accepting the complaint for examination;
- introducing to the applicant the possibilities of protecting his or her rights and freedoms;
- forwarding, upon the applicant's consent, the complaint to a state or local self-government body or their officials with jurisdiction to settle the complaint on merits;
- not considering the complaint.<sup>5</sup>

An applicant whose complaint relates to the health care sector should, in the first place, contest the actions of the relevant state body and, in accordance with the relevant bulleted point above, should be reasonable in giving consent. Upon the consent of the applicant and acceptance of the complaint, however, the RA Human Rights Defender has to oversee the process of settlement of the matter.<sup>6</sup>

After accepting a complaint for examination, the RA Human Rights Defender may personally study the case, requesting and receiving information and evidence from relevant bodies.<sup>7</sup> Afterward, the findings of the examination of the complaint shall, within a 10-day period following the end of the examination, be delivered to the state or local self-government body or its official against

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5. Ibid., Article 11.

6. Ibid., Article 10.3.

7. Ibid., Article 11(5) and (6), Article 12.

whose actions (inactions) the complaint was filed. The latter is obliged to forward its position and clarifications to the RA Human Rights Defender not more than 15 days after the receipt of the findings of the examination. The time limit may, however, be extended by the Human Rights Defender.

Based on the findings of the examination of a complaint, the Human Rights Defender shall adopt one of the following decisions:

- Propose to the state or local self-government body or its official, whose decisions or actions (inactions) have been qualified by the Rights Defender as violating human rights and freedoms, to eliminate the committed violations, indicating the possible measures necessary and subject to implementation for the restoration of human rights and fundamental freedoms
- Reject the complaint, if the examination of the complaint revealed no violation of human rights and fundamental freedoms by the state or local self-government body or its official
- Terminate the examination of the complaint, based on the grounds provided for by law, when the examination of the complaint revealed grounds for not examining or terminating the examination of the complaint
- Bring an action before the court, upon invalidating in full or partially the normative legal acts of the state and local self-government bodies or their officials that violate human rights and fundamental freedoms and contradict the law and other legal acts, if the state or local self-government bodies or their officials, who committed the violation, do not invalidate in full or partially their corresponding legal act within the prescribed period
- Recommend that the authorized state bodies impose disciplinary or administrative penalties or file criminal charges against the official whose decisions or actions (inactions) violated human rights and fundamental freedoms and/or violated the requirements of this law.

In practice, it is useful to apply to the RA Human Rights Defender to focus the attention of authorities on problems requiring a settlement.

## 8.6 Appendix 1

### List of Spheres of Activities of Employees' Compulsory Medical Examination of Their Health Situation

**Annex N2 of the RA Government Decision No. 347-N, dated March 27, 2006**

**List of those spheres of activities where the people involved are subject to compulsory medical examination of their health situation and of the frequency and scope of medical examination**

#	Sphere of activity
1.	Employees of food production/processing, cattle breeding, food warehouses and bases; those who have direct connection with food during food production, preservation, and distribution; those who have direct interaction with food during its transportation in all types of vehicles
2.	People working in public food enterprises
3.	People working in food trade organizations
4.	Students of colleges, public schools, and universities who are engaged in educational-practical activities in such enterprises, the employees of which have to undergo compulsory health checkups (examinations)
5.	Medical employees working in maternity hospitals (its departments); children's hospitals; dental and gynecological departments of hospitals and polyclinics; surgical medical preventive establishments; children's polyclinics; departments of hospitals of infectious diseases; reanimation, hemodialysis, laboratory, and centralized disinfection facilities; blood service organizations; and intervention departments.
6.	Employees of pharmaceutical companies and pharmacies who are engaged in the production and packaging of medications
7.	Employees of pharmacies and pharmaceutical stalls who sell and/or dispense medicine
8.	Producers of cosmetic items, items of hygiene, and newborn-care products
9.	Employees of educational institutions (HEIs, public schools, colleges, gymnasiums, sport schools, etc.) who are engaged in educational processes
10.	Employees dealing with the production and sale of children's games and toys
11.	Employees of summer camps and other children's health facilities who are engaged in the sphere of services
12.	Employees of children's preschool establishments (nursery, kindergarten), orphanages, boarding facilities, and temporary charitable housing who directly provide services for children and those under treatment and those who are resting
13.	Employees of health resorts, rest homes, sports and health facilities, and elderly-care nursing homes who directly provide services to those under treatment and those who are resting
14.	Employees of communal services organizations (bathhouses, saunas, laundry and dry-cleaning facilities) who are engaged in technological processes or service provision
15.	Employees of communal services organizations (hairdressers and barbers, pedicure and manicure specialists, cosmetologists)
16.	Employees of hotels and dormitories
17.	Swimming trainers, instructors, masseuses, and those servicing swimming pools
18.	Stewards of planes and trains
19.	Drivers of long-distance passenger vehicles
20.	Employees of plumbing facilities who directly deal with purifying and disinfecting drinking water

## 8.7 Appendix 2

### List of Diseases Posing Danger to the Environment

**Decision of the Government of the Republic of Armenia  
December 27, 2001, Decision No. 1286  
about approving the list of diseases posing danger to the environment**

According to provision 11 of the Law on Providing Medical Assistance and Services to Population, the Government of the Republic of Armenia decides:

1. to approve the list of diseases posing danger to the environment (see list below);
2. to disregard RA Government Decision 234, made on August 1, 1996, on endorsing the list of diseases posing danger to the environment;
3. to enter the decision into force as of December 27, 2001.

- |                              |  |
|------------------------------|--|
| 1. HIV/AIDS                  | 18. Rabies                                       |
| 2. Plague                    | 19. Syphilis                                     |
| 3. Cholera                   | 20. Complicated Form of Gonococcal Infections    |
| 4. Anthrax                   | 21. Leptospirosis                                |
| 5. Tularemia                 | 22. General Intestinal Infections                |
| 6. Dyphteria                 | 23. Salmonelosis                                 |
| 7. Scrub Typhus              | 24. Epidemic Parotitis                           |
| 8. Epidemic Typhus           | 25. Measles                                      |
| 9. Paratyphus                | 26. Rubella                                      |
| 10. Malaria                  | 27. Whooping Cough                               |
| 11. Tetanus                  | 28. Chicken Pox                                  |
| 12. Acute Polio              | 29. Viral Mononucleosis                          |
| 13. Meningitis               | 30. Scarlet Fever, Angina Caused by Streptococci |
| 14. Disentaria               | 31. Influenza                                    |
| 15. Viral Hepatitis          |  |
| 16. Tuberculosis (all types) |  |
| 17. Brucelosis               |  |

## 8.8 Appendix 3

### List of Socially Vulnerable and Specific Groups of the Population Entitled to State-Guaranteed Free Medical Care and Services

#### Annex N1 of the RA Government Decision No. 318-N, dated March 4, 2004

- Persons covered by the Poverty (Family) Benefit System, whose vulnerability score is 36.00 or above (particularly, disabled persons of the first and second groups, disabled children, parentless children, unemployed pensioners living alone, and pensioners above the age of 75)
- Disabled of the first group (the groups are defined based on medical status, social functioning, and levels of disease)
- Disabled of the second group
- Disabled of the third group
- Disabled children (under the age of 18)
- Military veterans and equivalent persons
- Single parent of children (under the age of 18)
- Children left without parental care (under the age of 18) and persons whose status is equivalent to the status of children left without parental care (18 to 23 years old)
- Children from families with many children (four or more under the age of 18)
- Family members of deceased servicemen and of those who died performing service duties to the RA
- Participants of Chernobyl-disaster removal activities
- Convicts
- Persons undergoing additional medical examination upon referral by a sociomedical-expert state-authorized entity
- Children under the age of seven from families that include disabled persons
- Persons of preconscription and conscription age (inpatient medical care and also, for persons of conscription age, inpatient expert examination)
- Servicemen and their family members
- Detainees, arrestees, and convicted persons
- Persons in the care of orphanages and elderly-care homes
- Children (under the age of 18) under dispensary care (all services related to the diseases are provided by the dispensary, including prescription of medicines, referral to hospitals, etc.)
- Persons under the age of 8 and over the age of 65 (specialized dental care)



# Glossary of Terms

## Related to Human Rights in Patient Care

### A

#### **Acceptability**

One of four criteria set out by the 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, and sensitive to gender and life-cycle requirements, and must also be 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: nondiscrimination, 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 nonsignatory state of the opportunity to become a party to a treaty and to be legally bound by it, achieved by depositing an "instrument of accession." Accession has the same legal effect as ratification, but unlike ratification, it is a one-step process.

#### ***Actio Popularis* (public action)**

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 that expresses the will of the states and the international organizations that are participating in the negotiation of that treaty, for example, 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 to 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**

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)**

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 provided on an outpatient basis, including diagnosis, observation, treatment, and rehabilitation.

**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, and programs must be available in sufficient quantity—including 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 that are necessary for a person to live.

## C

**Concluding Observations**

Recommendations by a treaty's enforcement mechanism on the actions that a state should take in ensuring compliance with the treaty's obligations. Concluding observations generally follow both submission of a state's country report and a constructive dialogue with state representatives.

**Country Report**

State's report to the enforcement mechanism of a particular treaty on the progress that it has made in implementing it.

**Convention**

Term used interchangeably with "treaty," but can also have the specific meaning of a treaty binding a broad number of nations. Conventions are normally open for participation to the international community as a whole or a large number of states. Usually, instruments negotiated under the auspices of an international organization are entitled conventions, as are instruments adopted by an organ of an international organization.

**Customary International Law**

One of the sources of international law, consisting of rules of law derived from the consistent conduct of states, acting with the belief that the law requires them to act that way. It follows that customary international law can be discerned by states' widespread repetition of similar international acts over time (state practice). These 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 that is so fundamental that no state may opt out by way of treaty or otherwise. Examples might include prohibitions against slavery, against genocide, and against 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)**

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)**

Situation or condition that is based on a matter of law, such as those detailed in ratified treaties.

**Declaration**

An interpretive 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**

Quality of being worthy, honored, or esteemed. Human rights are based on inherent human dignity and aim to protect and promote it.

**Discrimination**

Practical distinction between persons on the basis of race, sex, religion, political opinions, national or social origin, minority status, or personal antipathy.

**Domestication**

Process by which an international treaty is incorporated into domestic legislation.

**Dual Loyalty**

Role conflict between professional duties to a patient and to 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**

Moment in time in which a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine its entry into force, which may occur, for example, on 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**

Condition required before submission of a complaint on behalf of a victim to any regional or international tribunal—in other words, 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: for example, remedies may be unavailable, ineffective (as in 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 comments/recommendations are not legally binding, they are widely regarded as authoritative and have significant legal weight.

## H

### **Health**

State of complete physical, mental, and social well-being, rather than merely the absence of disease or infirmity (World Health Organization).

### **Health Care**

1. 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 definitions are also sometimes given for “patient care.” The World Health Organization states that “health care” 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 (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, World Health Organization, 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, World Health Organization, 1994).

## Health Care Providers

Physicians, nurses, dentists, or other health professionals (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994).

## Health Care System

The organized provision of health care services.

## Human Rights

Entitlements, freedoms, and privileges that adhere to all human beings, regardless of jurisdiction or other factors such as ethnicity, nationality, religion, or sex.

Human rights are universal legal guarantees that protect individuals and groups from interference with fundamental freedoms and human dignity. As defined in *The United Nations System and Human Rights: Guidelines and Information for the Resident Coordinator System* (United Nations, Administrative Committee on Coordination, 2000), some of the most important characteristics of human rights are that they:

- are guaranteed by international standards;
- are legally protected;
- focus on the dignity of human beings;
- oblige states and state actors;
- cannot be waived or taken away;
- are interdependent and interrelated;
- are universal.

## Human Rights Indicators

Criteria used to measure compliance with international human rights standards.

## Human Rights in Patient Care

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. The concept is complementary to bioethics but also provides a set of universally accepted norms and procedures for making conclusions about abuses within health care settings and for providing remedies. It uses standards contained in the international human rights framework, which are often mirrored in regional treaties and national constitutions. Human rights in patient care 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

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. Indirect discrimination generally occurs when a rule or condition that applies to everyone is met by a considerably smaller proportion of people from a particular group, the rule is to their disadvantage, and the rule cannot be justified on other grounds.

**Individual Rights in Patient Care**

Rights that, when made operational, can be made enforceable on behalf of an individual patient. Individual rights in patient care are more readily expressed in absolute terms than are social rights in health care (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994). See also "Social Rights in Health Care" and "Patients' Rights."

**Informed Consent**

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 in order for consent to be considered informed consent.

**Informed Consent in the Health Care Context**

Process by which a patient participates in health care choices. The patient must be provided with adequate and understandable information on matters such as the treatment's purpose, alternative treatments, risks, and side effects.

**Inpatient**

A patient whose care requires a stay in a hospital or hospice facility for at least one night.

**International Human Rights Law**

Codification of the legal provisions governing human rights in various international and regional human rights instruments.

**International Law**

Set of rules and legal instruments that are 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* (compelling law)**

Peremptory principle of international law (for example, prohibition on torture) from which no derogation by treaty is permitted.

## M

### **Maximum Available Resources**

Key provision in Article 2 of the International Covenant on Economic, Social and Cultural Rights, which obliges governments to devote the maximum amount of available government resources to realizing economic, social, and cultural rights.

### **Medical Intervention**

Any examination, treatment, or other act that has 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, World Health Organization, 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 with their attempt to act.

### **Neglected Diseases**

Diseases affecting almost exclusively poor and powerless people in rural parts of low-income countries that generally receive less attention and fewer resources.

## O

### **Outpatient**

Patient receiving treatment without any overnight stays at a health care institution.

## P

### **Party**

State or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty through an act of ratification, acceptance, approval, or accession, etc., and where that treaty has entered into force for that particular state or entity. The state or entity 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, World Health Organization, 1994).
2. A person in contact with the health system, seeking attention for a health condition (European Observatory on Health Systems and Policies).

**Patient Autonomy**

The right of patients to make decisions about their medical care. Although providers can educate and inform patients, they cannot make decisions for those patients.

**Patient Care**

The services rendered by members of the health professions or by nonprofessionals under the supervision of health professionals 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, patients, and patients' families. Decisions about medical treatments must respect patients' desires, 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 in which each side assumes certain obligations. Patients' 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. Set of rights calling for the accountability of the government and the health care provider in the provision of quality health services. Patients' rights are associated with a movement that has emerged as the result of increasing concern about human rights abuses in health care settings, particularly in countries in which patients assume a greater share of health care costs and, therefore, demand respect for their rights as "consumers" of health care services.
2. Set of rights, responsibilities, and duties under which individuals seek and receive health care services (European Observatory on Health Systems and Policies).
3. That which physicians and the state owe to a patient simply due to his or her status as a human being.

**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 act for an individual's benefit.

## Primary Health Care

1. General health services that are available in a community, located near the places where people live and work.
2. First level of contact that individuals and families have with the health system.

## Progressive Realization

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 that there are no regressive developments.

## Protocol

Section in a treaty that clarifies terms, adds additional text as amendments, or establishes new obligations (such as quantitative targets for nations to achieve, for example).

## Public Health

Collective actions of a society to ensure conditions in which people can be healthy (Institute of Medicine).

## Public International Law

Body of laws that establish the framework and the criteria for identifying states as the principal actors in the international legal system. Public international law deals with the acquisition of territory, state immunity, and the legal responsibility of states in their conduct with each other. It is 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—including 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

Formal acceptance of the rights and obligations of a treaty. If a treaty has entered into force, the treaty thereafter becomes legally binding to parties that have ratified the treaty. Ratification requires two steps: (1) 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 (2) for multilateral treaties, the deposit of the instrument with the depositary; for bilateral treaties, the exchange of the instruments between parties.

**Reservation**

Statement by which a state 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. Because the 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 that are 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 a reasonable provision of health care for the whole population. These rights also relate to equal access to health care for all those living in a country or other geopolitical area and also to the elimination of unjustified discriminatory barriers, whether financial, geographical, cultural, social, or psychological. Social rights in health care are enjoyed collectively (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994). See also "Individual Rights in Patient Care."

**Self-Executing Treaty**

Treaty that does not require implementing legislation for its provisions to have effect in domestic law.

**Shadow Report**

Independent NGO's submission to a treaty-enforcement mechanism in order to help the NGO assess a state's compliance with that treaty.

**Signatory**

Party that has signed an agreement. A signatory to a treaty is not yet legally bound by the treaty; instead, a signatory agrees to an obligation not to defeat the object and purpose of the signed treaty. See also "Ratification."

**Special Rapporteurs**

Individuals appointed by the Human Rights Council to investigate human rights violations and then present an annual report with recommendations for action. There are both country-specific and thematic special rapporteurs, including one investigating violations of 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 and also the care given at the approach of death (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994).

**Tertiary Health Care**

Specialized health services that are available in hospitals.

**Transformation Theory**

Theory maintaining that international law only becomes part of domestic law after domestication and after the incorporation of treaty provisions into domestic legislation.

**Treaty**

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 to study a particular human rights issue. Working groups write to government officials concerning urgent cases and also help prevent future violations by developing clarifying criteria as to what constitutes a human rights violation.



***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 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 forums 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](http://www.health-rights.org).**



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