

Human Rights in Patient Care

A PRACTITIONER GUIDE

SERBIA



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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 Former Special Rapporteur on the Right to Health, August 2008- July 2014

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

Organizations supporting this project include various Open Society Foundations (OSF) entities (Fund for an Open Society Serbia, Open Society Public Health Program, and Human Rights Initiative), as well as Faculty of Medicine of the University of Belgrade, Institute of Comparative Law, NGO SUPRAM - Association of Lawyers for Medical and Health Law in Serbia, and NGO Law Scanner. We are grateful to the Dean of the Faculty of Medicine, Nebojša M. Lalić, for his ongoing support and encouragement of the working group. Much appreciation is owed to the individuals from these organizations who were most directly involved: Mihajlo Čolak (Fund for an Open Society Serbia); Tamar Ezer and Jonathan Cohen (Open Society Public Health Program) who, in addition to general oversight and editing responsibilities, along with Judith Overall, authored the introduction and contributed to the international and regional chapters; and Sebastian Kohn (OSF) for review and comments.

Special thanks to Ana Ayala, Oscar Cabrera, and Brian Honerman (O'Neill Institute for National and Global Health Law, Georgetown University), who authored the revised international and regional chapters. Additional contributors to these chapters include Tanya Baytor, Marguerite de Causans, Michelle Robert, Luis Enrique Rosas, Ami Shah, Zachary Turk, and Lucy Xi with research support; Eric Friedman, Aliza Glasner, and Susan Kim with review; Susie Talbot (ESCR-Net) for review and comment; and Iain Byrne, who developed the initial version of these chapters (and authored the international glossary with Judith Overall).

Thanks also to Dragana Maletić (MSc, lawyer, Clinical Center of Serbia), Vladimir Čolović (PhD, lawyer, research and scientific counselor, professor of legal sciences) and Ulrich Laaser (MD, PhD, professor of public health, University of Bielefeld, Germany) for reviewing the national chapters and providing suggestions for improvement.

For production support, we wish to thank Paul Silva, former OSF Communications Officer; Jeanne Criscola for design; Nataša Ognjanović and Ivana Katić for translation; and Vladimir Radević for technical editing and design.

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

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

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EXCERPTS FROM REVIEWS OF THE SERBIAN EDITION

MSc Dragana Maletić, Lawyer:

Authors of this guide handed over to the lawyers dealing with health care, users of health care services, experts in the field of health and health care and to all readers who are interested in that field, a text about a very significant topic, but not enough processed: human rights in patient care.

Today, even if we know a lot about rights of citizens and patients as users of health care services, and rights of health care professionals, there are still a lot of patients, lawyers and health care professionals who are under-informed and unprepared for a complex system such as the health care system, with legal and ethical norms overlapping. Although the progressive abandonment of the paternalistic concept of a doctor-patient relationship and the recognition of the active role of the patient in the decision-making process concerning his health status, reached a higher standard of protection of patients' rights, the right to health for all is still not established and we can say that the number of patients, primarily members of marginalized groups, is still limited or completely denied the opportunity to receive necessary health care. Modern medical practice, in addition to all the previous problems that included insufficient resources for health, meets a very dangerous phenomenon of today - the dehumanization of society, together with medicine, not taking into consideration general human needs, including the need for treatment and care. In order to get closer to societies of higher medical standards, with a developed network of social organization at all levels, characterized by disciplined respect for the rights that belong both to health care professionals and to citizens and patients as users of health care services, a guide such as this one is more than necessary.

The guide is written in good, clear, communicative, yet academic style and gives us substantial and meaningful information for the application of principles of protection of the rights of health care professionals, and rights of patients of the health care system in Serbia, which is reason enough for the best recommendation for readers. The guide treats all aspects of the rights and responsibilities of the participants in the health care process scientifically, systematically, in great detail and comprehensively: the international and regional legal and ethical framework for human rights in patient care, national specificities, rights and responsibilities of health care professionals, rights and responsibilities of patients, legal instruments available to health care professionals and patients if the need to protect their rights arises, with special emphasis on the procedural rights which belong to them as participants in the criminal, civil, administrative, misdemeanor or disciplinary proceedings.

One of the best ways to get this guide closer to all the readers in Serbia, to a greater extent, are practice examples of the of courts in Serbia, practice of government agencies, especially the Agency for Peaceful Settlement of Labor Disputes, which was decided upon in proceedings initiated due to violation of the rights of health care professionals and patients' rights, including litigation for damages incurred due to medical error. This fulfills one more goal of this guide: to introduce the reader, step by step, with the issue of human rights in the area of patient care and to show the different paths of protection when these rights are violated and different outcomes in resolving disputes that are available in the international and national legal framework. Authors of this interesting guide give us a scheme that illustrates the sequence of procedural actions undertaken in different cases of protection of rights, which should facilitate the path to patients, health care professionals, judges, protectors of citizens' rights, lawyers, members of the ethics committees and disciplinary committees. To make this guide useful for not only those who deal with the protection of patients' or health care professionals' rights, the international glossary with numerous concepts is attached to this guide, which define: human rights indicators, informed consent in the context of health care, dual loyalty, social rights in health care, patient autonomy, binding rights, neglected diseases and many other concepts.

The content of this publication reflects the authors' intent, consistently enforced, to introduce the reader gradually and thoroughly with issues of national and international legal framework for rights on health care protection and thus further ensure the quality of the health care, indirectly. This is a guide that will

interest both health care professionals, patients, judges, protectors of citizens, lawyers, and members of other professional groups involved in the protection of human rights. The recommendation for readers is to pay particular attention to this guide, especially because the special significance of the topic „Human Rights in Patient Care“ deserves a detailed introduction and implementation.

Prof. Dr. Ulrich Laaser, Physician:

The Serbian version of the Human Rights in Patient Care Practitioner Guide – a tool for lawyers dealing with issues related to health care – is a long desired and urgently necessary compendium of national regulations and case studies. This is relevant especially for Serbia, still struggling to improve its health care system.

The guide comprises 8 chapters where the first ones relate to the international state of the art being the same for all national guides. Therefore I concentrate here on the country-specific chapters 5-8. Chapter 5 clarifies the legal status of international and regional treaties ratified, signed or adopted by the Republic of Serbia. Chapter 6 deals with patient rights and responsibilities. Chapter 7 focuses on provider rights and responsibilities. Chapter 8 covers the national mechanisms for enforcement of both patient and provider rights and responsibilities.

The debate in Serbia has been greatly influenced by developments at the European level. Consequently, chapter 5 starts with an overview of all relevant documents signed by Serbia including 3 which are still waiting for adoption. All must comply with the Constitution of the Republic of Serbia (2006); different from the Anglo-American legal system, the ruling of cases does not constitute a precedent. The structure of the legal and the Bismarckian health system of Serbia including the Health Insurance Fund is described in a summarizing overview supported by 2 corresponding tables.

The basic rights of patients for prevention and access to care are described in chapter 6, most comprehensively in the Health Care Law based on the European Charter and the Serbian Constitution, amended by a number of additional laws and annually updated by-laws targeting specific issues as well as 3 professional codes of ethics for physicians, dentists, and nurses. This overview is followed by sections with examples of compliance and potential violation. Of special interest to me is the major effort of Serbia to prevent violence and neglect of children which of course is comprehensive and therefore lists under compliance as well as violation. The same applies to the major efforts of the Serbian government to improve the health situation of the relatively large Roma population. A final case study presents an event which happened in the school environment. A table summarizes the relevant strategies developed in Serbia to protect the patients' rights. The same scheme is followed as regards the patient's right to information, consent, free choice, etc. including also 3 rights not included in the ECPR: access to medical record, 2nd professional opinion, and right to be released. A final short section deals with responsibilities on the patients' side, as there are the responsibility to personal health, to inform on one's health status, and to act in compliance with the health institution, the providers, and other users of health services.

The rights and responsibilities of providers and stakeholders in the health services of Serbia are covered in chapter 7. The rights of patients and providers are interdependent. The Law on Health Care in Article 165 defines health care workers i.e. those executing health services as: „persons who have completed medical, dental or pharmaceutical college, as well as persons who have completed another school of the health profession, a profession that is performing health care activities in health care facilities or private practice, under the conditions stipulated by this Law“.

Several laws and regulations defining providers' rights deal with 3 main issues: decent working conditions, the right to form associations, and the right to due process, underpinned by actual cases and examples. Each section follows again the same structure and covers first the national legislation and supporting regulations, followed by providers' codes of ethics, practical examples, notes for lawyers, and international regulations. The next section deals in the same way with the procedures open for providers to protect their rights. As above, Serbia has established rights going beyond the frame of the ECPR, similar to workers/employees in other fields - except for some issues referring to the performance of care - the most important being the right to strike and the right to benefitted length of service. Specific for the health care professions are the rights to provide independently health care services, limitations, independent professional opinion, etc.

The next section describes the responsibilities of health care providers, such as to provide health care and more specifically to examine the patient, to act in emergencies, to act without discrimination, etc., and last but not least the obligation to continued education and re-licensing.

The final chapter 8 deals with the Mechanisms to Protect/Enforce Rights and Responsibilities in Court and the respective administrative procedures. This chapter is of course essential to transfer the legislation and the established regulations into reality. An administrative procedure is initiated by the competent authority at the request of a party or ex officio. After the initiation of an administrative procedure, the authority will convene an oral public hearing if it decides it is useful to clarify matters. The public hearing is, however, an obligatory part in the procedure when there are two or more parties, or it is required to complete the investigation, to hear witnesses or experts. After presentation of evidence, conducted for the purpose of establishing the facts, means of proof can be used, such as: documents, witness statements, findings and opinions of expert witnesses, statements of parties and investigation. After a decision an appeal procedure can be initiated. Although even this first step sounds bureaucratically overloaded, the availability of an office for patients' rights protection (at least in Belgrade) and the function of a patient counselor provide the essential support for patients complaining. The chapter further instructs lawyers in a very substantial way how to make use of the appeal procedure, the co-called administrative dispute, the misdemeanor code, and the civil and criminal procedure. The professional chambers can become involved in mediation procedures and through their internal court of honor.

In summary I find this guide of substantial help for lawyers and even in various parts for patients and health care providers. The highly standardized structure and the richness of legal and practical information about the legal environment in Serbia make an invaluable help for all concerned. I hope that this guidance can be made available to a larger group of patient and professional organizations, as well as to the relevant ministries and last but not least to lawyers.



1.1. INTRODUCTION

1.2. OVERVIEW OF THE GUIDE

1.3. 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 Foundations (OSF) Public Health Program, OSF Human Rights and Governance Grants Program, OSI's Russia Project, and the Soros Foundations of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Serbia 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 within 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 both 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 law governing human rights in patient care. They examine relevant “hard” and “soft” law 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; and nondiscrimination and equality for patients; decent work conditions; freedom of association; and due process for providers. Chapter 4 then 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 the Republic of Serbia, explains the country’s use of precedent, and includes a brief description of the legal and health system. 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 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 thus 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: <http://www.health-rights.org/>. This international home page links to country websites, which include additional resources gathered by the country working groups that

prepared each guide. The Serbian country website is www.healthrights.rs. 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 the Republic of Serbia. 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 the Republic of Serbia, 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. Abbreviations

AC	Advisory Committee
CAT	Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment
CCPR	Human Rights Committee
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
COE	Council of Europe
CRC	Committee on the Rights of the Child
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
ICMW	International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families
ICN	International Council of Nurses
ICRPD	International Convention on the Rights of Persons with Disabilities
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 with ratified international and regional documents

DOCUMENTS	Date of Accession	Date of Signature	Date of Ratification	Entry into Force	Applicable In-country Legislation	Reservation Entered
INTERNATIONAL						
International Covenant on Civil and Political Rights (ICCPR)		08.08.1967	02.06.1971 Succession: 12.03.2001			
Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP)			06.09.2001			
International Covenant on Economic, Social and Cultural Rights (ICES CR)		08.08.1967	02.06.1971 Succession: 12.03.2001			
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)		17.07.1980	16.02.1982 Succession: 12.03.2001			
Convention for the Elimination of All Forms of Racial Discrimination (CERD)		15.04.1966	02.10.1967 Succession: 12.03.2001			
Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)		18.04.1989	10.09.1991 Succession: 12.03.2001			
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT -OP)		25.09.2003	26.09.2006			
Convention on the Rights of the Child (CRC)		26.01.1990	03.01.1991 Succession: 12.03.2001			
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)		11.11.2004				
Convention on the Rights of Persons with Disabilities (DRC)		17.12.2007	31.07.2009			
EUROPEAN (REGIONAL)						
Convention on Human Rights and Biomedicine 1997		09.02.2005	10.02.2011	01.06.2011		
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		09.02.2005				
Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research		09.02.2005				
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)		03.04.2003	03.03.2004	03.03.2004		
European Social Charter 1961						
European Social Charter 1996		22.03.2005	14.09.2009	01.11.2009		
Framework Convention for the Protection of National Minorities 1995			11.05.2001	01.09.2001		
EU Charter of Fundamental Rights		03.04.2003	03.03.2004	03.03.2004		

2.1. INTRODUCTION

2.2. KEY SOURCES

2.3. PATIENTS' RIGHTS

Right to liberty and security of the person

Right to privacy

Right of access 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
or punishment

Right to participation in public policy

Right to equality and freedom from discrimination

Right to an effective remedy

2.3. PROVIDERS' RIGHTS

Right to work in decent conditions

Right to freedom of association and assembly

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 sections. The first section describes key international sources governing human rights in patient care. The second examines patients' rights and includes subsections that discuss the standards and relevant interpretations connected to a particular right (e.g., right to privacy) within three particularly common health-related contexts: mental health, infectious diseases, and sexual and reproductive rights. These subsections provide examples of potential violations based on UN treaty-monitoring body observations and case law. It is worth underscoring here that these three contexts are used as examples and that human rights violations (and therefore, the application of human rights standards) can occur beyond this limited set of patient care-related contexts. The third section focuses on the rights of health care providers. This last section includes subsections that discuss the standards and relevant interpretations connected to a particular right from UN treaty-monitoring bodies, as well as relevant case law.

The standards addressed in each of these sections include binding treaties, such as the International Covenant on Civil and Political Rights, and non-binding instruments developed by the UN and other entities, such as the World Medical Association's Declaration of Lisbon on the Rights of the Patient.¹

2.2. Key Sources

This section provides an overview of relevant legal instruments, including UN treaties and mechanisms available for monitoring state compliance with each. It also provides examples of non-legally binding instruments issued by the UN and other bodies. It is worth noting that, in this section, the Universal Declaration of Human Rights² is treated separately from other instruments due to its unique and ambiguous—yet important—legal nature.

Universal Declaration of Human Rights

While not a treaty, the Universal Declaration of Human Rights (UDHR)³ has been highly influential. It was adopted by the UN General Assembly in 1948 and has served as the foundation for modern human rights law. Many of its provisions have been effectively reproduced in human rights treaties and domestic law, and some argue⁴ that it has achieved the status of customary international law—meaning that its provisions are established state practice and accepted by states as obligations, making them universal standards and legally binding on states.⁵

Unlike the UN treaties discussed below, the UDHR itself is not enforceable through any specific body that monitors state compliance.

UN Treaties and Treaty-Monitoring Bodies

There are currently eight core international human rights treaties that contain guarantees related to the protection of human rights in patient care. Many of these treaties have additional optional protocols that are referenced in this guide but are not explored in detail. While these treaties are only binding on those states that have ratified them, their standards have strong moral and political force even for non-ratifying countries. Each of these treaties has a committee in charge of monitoring state compliance with the treaty. These are referred to as “treaty-monitoring bodies” or “treaty bodies.”

UN treaty-monitoring bodies monitor state compliance with their respective treaties using a combination of three types of mechanisms. First, they issue documents that interpret the content of the

1 World Medical Association [WMA]. Declaration on the Rights of the Patient. September/October 1981.

2 United Nations General Assembly. United Nations General Assembly Resolution 217A (III): Universal Declaration of Human Rights (UDHR). UN Doc. A/810 at 71. December 12, 1948.

3 United Nations General Assembly. United Nations General Assembly Resolution 217A (III): Universal Declaration of Human Rights (UDHR). UN Doc. A/810 at 71. December 12, 1948.

4 See Louis Henkin, *The Age of Rights*. New York: Columbia Press, 1990. p. 19; Christina M. Cerna. Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts.” 16 *Hum. Rts. Q.* 740. 1994. p. 745.

5 Hurst Hannum. “The Status of the Universal Declaration of Human Rights in National and International Law.” 25 *Ga. J. Int'l & Comp. L.* 287. 1995-1996. p. 319.

treaties. While not legally binding, these interpretative documents guide states on how to interpret and implement the content of the rights contained in the relevant treaty. These interpretative documents are known as “General Comments,” with the exception of those issued by the Committee on the Elimination of Discrimination against Women and the Committee on the Elimination of Racial Discrimination, which are referred to as “General Recommendations.” Second, treaty-monitoring bodies evaluate state compliance with the relevant treaty based on reports that member states are required to submit on a regular basis. As part of this process, they issue what are known as “Concluding Observations.” Finally, eight⁶ of the ten core treaty-monitoring bodies currently receive and consider individual communications. Through these communications, individuals and groups of individuals can bring allegations of human rights violations by states that have ratified the instrument (e.g., optional protocols to treaties) creating the individual complaint mechanism. Following the examination of the communication, treaty-monitoring bodies issue recommendations to the state being challenged. These recommendations are non-legally binding, but may be influential.

Treaty-monitoring bodies also offer different avenues for civil society participation. Each of the bodies’ specific functions, contact information, and ways through which civil society can participate are discussed in Chapter 4.

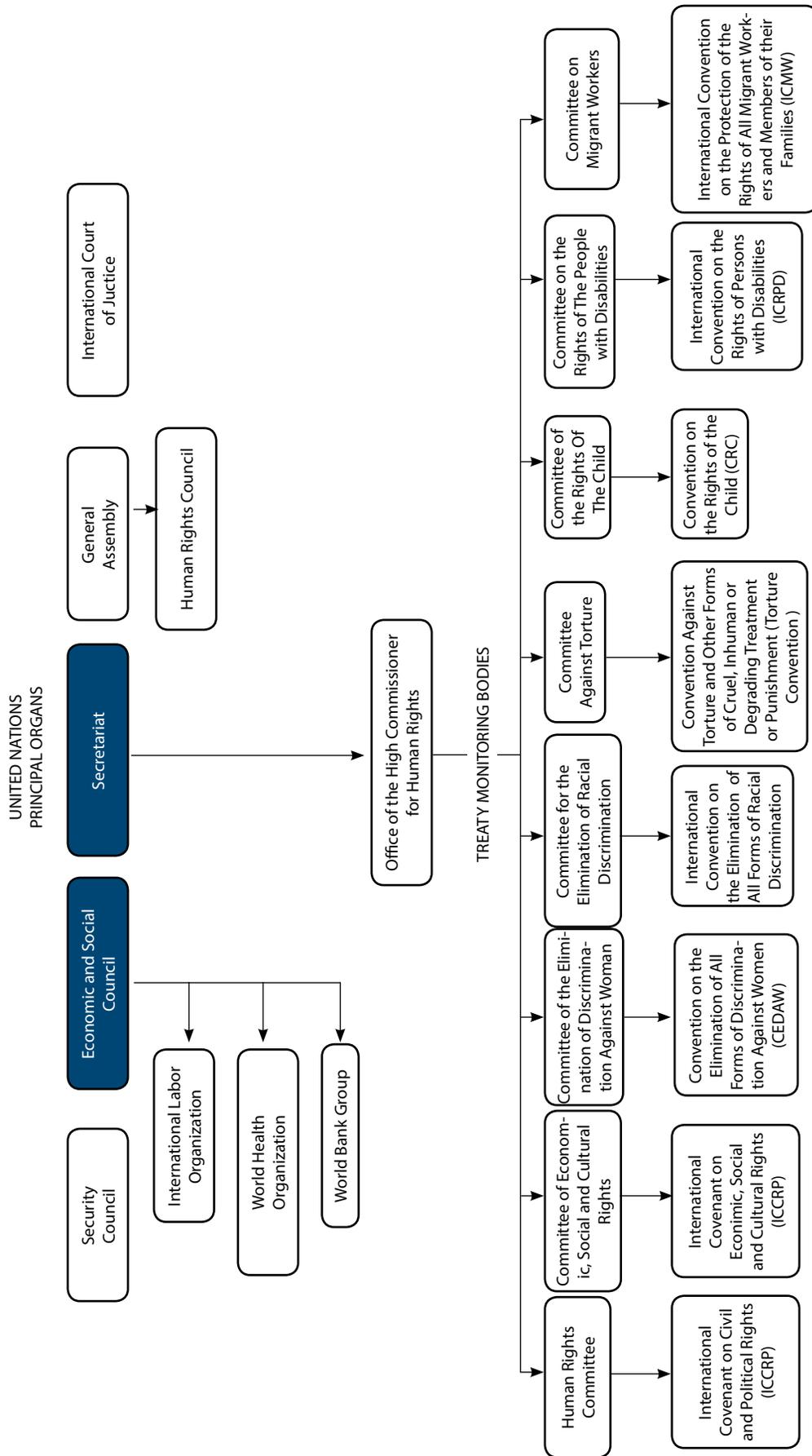
For the user’s quick reference, below are the abbreviations for treaties and UN treaty-monitoring bodies that will be used throughout this chapter:

TREATIES

- ▶ ICCPR - International Covenant on Civil and Political Rights
- ▶ ICESCR - International Covenant on Economic, Social, and Cultural Rights
- ▶ CAT/Torture Convention - Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment
- ▶ CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women
- ▶ ICERD – International Convention on the Elimination of All Forms of Racial Discrimination
- ▶ CRC - Convention on the Rights of the Child
- ▶ ICRPD – International Convention on the Rights of Persons with Disabilities
- ▶ ICMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

⁶ Human Rights Committee [CCPR], Committee on the Elimination of Racial Discrimination [CERD], Committee Against Torture [CAT Committee], Committee on Elimination of Discrimination against Women [CEDAW Committee], Committee on the Rights of the Child [CRC Committee], Committee on the Rights of Persons with Disabilities [CRPD], Committee on Enforced Disappearances [CED], and Committee on Economic, Social and Cultural Rights [CESCR].

UNITED NATIONS SYSTEM AND PATIENT CARE: RELEVANT CORE TREATIES AND TREATY-MONITORING BODIES



TREATY-MONITORING BODIES

- ▶ CCPR - Human Rights Committee
- ▶ CESCR - Committee on Economic, Social and Cultural Rights
- ▶ CAT Committee - Committee Against Torture
- ▶ CEDAW Committee- Committee on Elimination of Discrimination against Women
- ▶ CERD - Committee on the Elimination of Racial Discrimination
- ▶ CRC Committee - Committee on the Rights of the Child
- ▶ CRPD - Committee on the Rights of Persons with Disabilities
- ▶ CMW - Committee on Migrant Workers

RELEVANT UN CORE TREATIES AND TREATY-MONITORING BODIES AND THEIR STATE REPORTING AND INDIVIDUAL COMMUNICATIONS SYSTEMS

TREATY	MONITORING BODY	STATE REPORTING	INDIVIDUAL COMMUNICATIONS
International Covenant on Civil and Political Rights (ICCPR) ⁷	Human Rights Committee (CCPR)	Every 4 years	For states having ratified the First Optional Protocol under the ICCPR
International Covenant on Economic, Social, and Cultural Rights (ICESCR) ⁸	Committee on Economic, Social, and Cultural Rights (CESCR)	Every 5 years	For states having ratified the Optional Protocol
Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT/Torture Convention) ⁹	Committee Against Torture (CAT Committee)	Every 4 years	For states declaring recognition of the competence of the CAT Committee under Article 21 of the CAT
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ¹⁰	Committee on the Elimination of Discrimination Against Women (CEDAW Committee)	As needed, but at least every 4 years	For states having ratified the Optional Protocol
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ¹¹	Committee on the Elimination of Racial Discrimination (CERD)	Every 2 years	For states declaring recognition of the competence of the CERD Committee under Article 14 of the CERD
Convention on the Rights of the Child (CRC) ¹²	Committee on the Rights of the Child (CRC Committee)	Every 5 years	For states having ratified the Optional Protocol

International Convention on the Rights of Persons with Disabilities (ICRPD) ¹³	Committee on the Rights of Persons with Disabilities (CRPD)	Every 4 years	For states having ratified the Optional Protocol
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) ¹⁴	Committee on Migrant Workers (CMW)	Every 5 years	Article 77 of the CMW will create this mechanism once 10 states have made the necessary declarations.

In addition to state reporting and individual communications, other monitoring mechanisms have been established:

- ▶ **Inter-State Complaints Procedures.** This allows the treaty body to examine complaints brought by a state alleging human rights violations in another state. To date, this procedure has never been used.
 - Treaty-monitoring bodies with this competence: CCPR, CESCR, CERD, CAT Committee, CRC Committee, CMW, CRPD
- ▶ **Inquiries.** This allows the treaty body to initiate inquiries into systemic or grave human rights violations in a country.
 - Treaty-monitoring bodies with this competence: CESCR, CEDAW Committee, CAT Committee, CRC Committee, CRPD
- ▶ **Early Warning Procedure.** This allows the treaty body to adopt measures to prevent certain situations from escalating into conflicts or matters requiring urgent attention.
 - Treaty-monitoring body with this competence: CERD

These procedures may require additional declarations and ratifications by countries before entering into force and will not be discussed in detail here. For more information on these procedures, see Chapter 4 (International and Regional Procedures).

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- 7 United Nations General Assembly. United Nations General Assembly Resolution 2200A [XXI]: International Covenant on Civil and Political Rights (ICCPR). UN Doc. A/6316. December 16, 1966.
 - 8 United Nations General Assembly. United Nations General Assembly Resolution 2200A[XXI]: International Covenant on Economic, Social and Cultural Rights (ICESCR). UN Doc. A/6316. December 16, 1966.
 - 9 United Nations General Assembly. United Nations General Assembly Resolution 39/46: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). UN Doc. A/39/51. December 10, 1984.
 - 10 United Nations General Assembly. United Nations General Assembly Resolution 34/180: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). UN Doc. A/34/46. December 18, 1979.
 - 11 United Nations General Assembly. United Nations General Assembly Resolution 2106 [XX]: International Convention for the Elimination of all Forms of Racial Discrimination (ICERD). UN Doc. A/6014. December 21, 1965.
 - 12 United Nations General Assembly. United Nations General Assembly Resolution 44/25: Convention on the Rights of the Child (CRC). UN Doc. A/44/49. November 20, 1989.
 - 13 United Nations General Assembly. United Nations General Assembly Resolution 61/106: International Convention on the Rights of Persons with Disabilities (ICRPD). UN Doc. A/61/49. December 13, 2006.
 - 14 United Nations General Assembly. United Nations General Assembly Resolution 45/158: International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. UN Doc. A/45/49. December 18, 1990.

Non-legally Binding Instruments

There are a number of other instruments that, even though do not have the legally binding force of treaties, have received international consensus and assist in interpreting the content of patients' rights. In fact, some of these have been adopted by civil society groups, such as professional associations and non-governmental organizations. Below are a few examples.

UNITED NATIONS

▶ **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁵**

These principles provide guidance on the treatment and rights of all persons who are under any form of detention or imprisonment, including the right to not be subjected to medical or scientific experimentation that is detrimental to his/her the individual's health, even with her/his consent.

▶ **Declaration of Alma-Ata¹⁶**

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.

▶ **Declaration on the Elimination of Violence against Women¹⁷**

This declaration affirms states' commitment to preventing violence against women and protecting their rights, including their rights to life, to liberty and security of person, to be free from all forms of discrimination, to the highest standard attainable of physical and mental health and freedom from torture, or other cruel, inhuman or degrading treatment or punishment.

▶ **Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights¹⁸**

Developed by a group of international law experts, these principles delineate the scope and nature of obligations of states that have ratified the ICESCR. They have been issued as an official UN document and recognized in the work of the CESCR in interpreting state obligations under the Covenant.

▶ **Maastricht Guidelines on Violations of Economic, Social and Cultural Rights¹⁹**

Developed by international law experts, these guidelines seek to outline the meaning and scope of economic, social and cultural rights violations. They consider that a state's failure to provide primary care may constitute a violation, and they call on international bodies to adopt new

15 United Nations General Assembly. United Nations General Assembly Resolution 43/173: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. UN Doc. A/RES/43/173. December 9, 1998.

16 International Conference on Primary Health Care. Declaration of Alma-Ata. September 6, 1978.

17 United Nations General Assembly. United Nations General Assembly Resolution 48/104: Declaration on the Elimination of Violence against Women. UN Doc. A/48/49. December 20, 1993.

18 United Nations Commission on Human Rights. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN Doc. E/CN.4/1987/17. January 8, 1987.

19 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. January 22-26, 1997.

standards on a number of rights, including the right to health. They have been issued as an official UN document.

▶ **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 Punishment²⁰**

These principles outline the duties of health care providers to prisoners and detainees, including protecting their mental and physical health in the same way that they would protect the health of a person who is not a prisoner or detained. They must also refrain from inciting or attempting to commit torture or other cruel, inhuman or degrading treatment or punishment.

▶ **Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care²¹**

These principles define the rights of persons with mental disabilities within the context of health care. They address issues of informed consent, confidentiality, standard of care, and treatment. They also address the rights of those in mental disability institutions.

▶ **Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights²²**

These principles have played an important role in evaluating measures that restrict human rights guaranteed under the ICCPR. They require that any measure that the government takes that would restrict the human rights under the ICCPR is: 1) provided by and in accordance with the law, (2) in the interest of a legitimate objective, (3) strictly necessary in a democratic society to achieve the objective, (4) the least restrictive and intrusive means available, and (5) not arbitrary, unreasonable, or discriminatory.

▶ **Standard Minimum Rules for the Treatment of Prisoners²³**

This instrument outlines a model system of penal institutions in terms of what is generally accepted as good principle and practice in the treatment of prisoners and the management of institutions.

▶ **(UN General Assembly's) Social, Humanitarian Cultural Committee (Third Committee) Draft Resolutions**

The Third Committee is tasked with advancing the General Assembly's social, humanitarian, and human rights agenda through a variety of ways, including the discussion and drafting of resolutions to be considered during the General Assembly's plenary meeting.

20 United Nations General Assembly. UN General Assembly Resolution 37/194: 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. UN Doc. A/37/51. December 18, 1982.

21 United Nations General Assembly. UN General Assembly Resolution 46/119: Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care. December 17, 1991.

22 United Nations Commission on Human Rights. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. UN Doc. E/CN.4/1985/4. September 28, 1984.

23 United Nations. Economic and Social Council Resolution 663 C (XXIV): Standard Minimum Rules for the Treatment of Prisoners. August 30, 1955.

▶ **UN Human Rights Council Resolutions**

As the General Assembly's subsidiary organ responsible for the protection and promotion of all human rights, the Human Rights Council issues recommendations to UN member states in the form of resolutions.

CIVIL SOCIETY

▶ **Declaration of Lisbon on the Rights of the Patients (WMA)²⁴**

This declaration outlines patients' rights that physicians should recognize and uphold, addressing issues such as the rights to confidentiality, information, and informed consent.

▶ **Declaration on Patient-Centred Healthcare (International Alliance of Patients' Organizations (IAPO))²⁵**

This declaration promotes the involvement of patients in their care through self-management, adherence to treatment, and behavioral changes to make the system more cost-effective and improve health outcomes for patients.

▶ **Jakarta Declaration on Leading Health Promotion into the 21st Century²⁶**

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.

▶ **Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights²⁷**

These principles focus on states' extraterritorial obligations to ensure the enjoyment of economic, social and cultural rights, including the right to health.

▶ **Position Statement: Nurses and Human Rights 1998, International Council of Nurses (ICN)²⁸**

The ICN adopted this document recognizing health care as the right of all individuals—including the right to choose or decline care, which encompasses 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 both patients' and providers' rights and outlines nurses' obligations to protect the patients' rights.

2.3. Patients' Rights

This section explores international protection of ten critical patients' rights:

- ▶ Liberty and security of person;
- ▶ Privacy;

24 WMA. Declaration on the Rights of the Patient. September/October 1981.

25 International Alliance of Patients' Organizations [IAPO]. Declaration on Patient-Centred Healthcare. February 2006.

26 WHO. Jakarta Declaration on Leading Health Promotion into the 21st Century. July 21–25, 1997.

27 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. September 28, 2011.

28 International Council of Nurses. Position Statement: Nurses and Human Rights. 1998.

- ▶ Access to information;
- ▶ Bodily integrity;
- ▶ Life;
- ▶ Highest attainable standard of mental and physical health;
- ▶ Freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- ▶ Participation in public policy;
- ▶ Equality and freedom from discrimination; and
- ▶ Effective remedy.

As emphasized by the CCPR, although Article 9 enshrines “the right to liberty and security of person,” the right to liberty is separate from the right to security of person. For this reason, this chapter addresses them separately.²⁹

Treaty-monitoring bodies’ interpretative documents have played an important role in the area of patients’ rights. The CESCR, specifically, has provided the most significant international legal commentary on the rights of patients. Its interpretation of the right to the highest attainable standard of health (Article 12 of the ICESCR) in General Comment 14³⁰ has been particularly influential, despite it not being legally binding. In addition, the CESCR has frequently criticized governments’ failure to devote adequate resources to health care and services for patients.

Other UN treaty-monitoring bodies have also provided significant comments on patients’ rights. The CCPR has frequently cited Articles 9 (right to liberty and security of the person) and 10 (right of a person deprived of liberty to be treated with humanity and dignity) 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 (right to privacy) of the ICCPR and has used Article 6 (right to life) of the ICCPR to safeguard medical treatment during pretrial detention. In addition, as detailed below, treaty-monitoring bodies concerned with monitoring racial and sex discrimination have examined equal access to health care.

Additionally, other international standards, such as the Standard Minimum Rules for the Treatment of Prisoners, can provide significant reference points regarding patients’ rights. Although these standards cannot be directly enforced against states, patients and their advocates can use them to pressure governments and influence judicial and other government interpretation of treaty provisions.

29 CCPR. Draft CCPR General Comment No. 35 on Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8.

30 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000.

It is worth noting that, as of this writing, the CESCR's individual communications mechanism had just been established. The former lack of a complaint mechanism for the CESCR hampered the treaty body's ability to examine specific violations of the ICESCR beyond the systemic failures identified in country reports. The introduction of this mechanism should provide the CESCR with an opportunity to mirror the work of its sister body, the CCPR, in developing significant case law on human rights in patient care.

Right to liberty and security of person

While guaranteed under the same article as the right to liberty under the ICCPR, the right to security of person is a right in and of itself and is not limited to individuals formally deprived of liberty.³¹ The right to liberty protects individuals from arbitrary or unjustified physical confinement. The deprivation of liberty must be necessary and proportionate—it must be intended to either protect the individual from harming her/himself or to prevent harm to others, it must take into account less restrictive alternatives, and it must be in line with adequate procedural and substantive legal safeguards.³² As it relates to patients' rights, the right to liberty protects the individual from arbitrary or unjustified physical confinement on the basis of mental or physical health, such as involuntary hospitalization. The detention of an individual based on health grounds, such as quarantine and isolation, must be done in accordance with established law and must safeguard the individual's rights of due process under the law.³³

The right to security of person safeguards the individual's freedom from bodily injury, including protection from fatal injuries and non-intentional injury.³⁴ Under this right, a government must take the necessary measures to protect the individual from threats to her/his bodily integrity, regardless of whether these threats come from the government or private actors.³⁵ Related rights enshrined in international human rights law include the right to freedom from torture, or other cruel, inhuman or degrading treatment; the right to privacy; and the right to the highest attainable standard of health. When it comes to violations of the physical integrity of the person, treaty bodies have opted to address them under other related rights, particularly the right to freedom from torture, cruel, inhuman, or degrading treatment. Therefore, there is little analysis emanating from treaty bodies on these issues under the right to security of person. For this reason, this section contains concluding observations and case law that focus primarily on the right to liberty.

31 CCPR. Draft General Comment No. 35: Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8; CCPR. Communication No. 195/1985: Delgado Páez v. Colombia. UN Doc. CCPR/C/39/D/195/1985. July 12, 1990. paras. 5.4-5.5; CCPR. Communication No. 711/1996: Dias v. Angola. UN Doc. CCPR/C/68/D/711/1996. April 18, 2000. para. 8.3.

32 CCPR. Communication No. 1061/2002: Fijalkowska v. Poland. UN Doc. CCPR/C/84/1061/2002. July 26, 2005; CCPR. Communication No. 1629/2007: Fardon v. Australia. UN Doc. CCPR/C/98/D/1629/2007. March 18, 2010. para. 7.3; CCPR. Concluding Observations: Russian Federation. UN Doc. CCPR/C/RUS/CO/6. November 24, 2009. para. 19.

33 CCPR. Concluding Observations: Bulgaria. UN Doc. CCPR/C/BGR/CO/3. July 25, 2011. para. 17.

34 CCPR. Draft General Comment No. 35: Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8.

35 CCPR. Draft General Comment No. 35: Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8; CCPR. Communication No. 1560/2007: Marcellana and Gumanoy v. Philippines. UN Doc. CCPR/C/94/D/1560/2007. November 17, 2008. para. 7.7; CCPR. Concluding Observations: Uganda. UN Doc. CCPR/CO/80/UGA. May 4, 2004. para. 12.

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 3:** Everyone has the right to life, liberty and security of person.
- ▶ **ICCPR, Art. 9(1):** 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.
- ▶ **ICESCR, Art. 12:** 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.
- ▶ **CERD, Art. 5(b):** States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of... (b) the right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.
- ▶ **CRC**
 - Art. 25:** 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.
 - Art. 39:** 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.
- ▶ **ICRPD, Art. 14:**
 - (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) State 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.
- Art. 17:** Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

▶ **ICMW**

Art. 16:

- (1) Migrant workers and members of their families shall have the right to liberty and security of person.
- (4) Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.
- (8) Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

Art. 17:

- (1) Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.
- (7) Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

▶ **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment³⁶**

Principle 4: Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 11:

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 13: Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

³⁶ Council for International Organizations of Medical Sciences [CIOMS] in collaboration with the WHO. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 2002.

Principle 25: A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 32:

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

▶ **International Ethical Guidelines for Biomedical Research Involving Human Subjects:³⁷ Respect for persons incorporates at least two fundamental ethical considerations, namely:**

- (a) respect for autonomy, which requires that those who are capable of deliberation about their personal choices should be treated with respect for their capacity for self-determination; and
- (b) protection of persons with impaired or diminished autonomy, which requires that those who are dependent or vulnerable be afforded security against harm or abuse.

▶ **Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care³⁸**

Principle 9:

- (1) Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.
- (2) The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.
- (3) Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the 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, adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.
- (4) The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

37 CIOMS. International Ethical Guidelines for Biomedical Research Involving Human Subjects. 2002.

38 United Nations General Assembly. United Nations General Assembly Resolution 46/119: Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. UN Doc. A/RES/46/119. December 17, 1991.

▶ **WMA Declaration of Lisbon on the Rights of the Patients**³⁹

Principle 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.

Principle 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.

Right to liberty and security of person in the context of Mental Health

Under the right to liberty, a person is protected from arbitrary or unjustifiable detention that is solely based on mental health without judicial review.⁴⁰ Governments should ensure that the patient's views are respected in the process and that the interests of the patient are represented and defended.⁴¹ Any patient involuntarily admitted or detained in a mental health facility also has due process rights, including the right to be informed of the grounds for her/his detention, to be detained for as short a period as is reasonably necessary, and to challenge her/his detention with a judicial body and to have counsel appointed to assist in any such challenge.⁴² The continuity of detention should be re-evaluated on a regular basis to ensure its necessity.⁴³

Under this right, governments have the obligation to refrain from using coercive force or restraint of mental health patients. While relevant to this context, this right has been overshadowed by other related rights (mainly the right to freedom from torture, cruel, inhuman and degrading treatment) in addressing use of coercive force in the mental health context. Refer to sections on the "right to bodily integrity" and the "right to freedom from torture and other cruel, inhuman or degrading treatment or punishment" below.

39 WMA. Declaration on the Rights of the Patient. September/October 1981.

40 See CCPR. Draft CCPR General Comment No. 35 on Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8; CCPR. Concluding Observations: Belgium. UN Doc. CCPR/CO/81/BEL. August 12, 2004. para. 17.

41 CCPR. Concluding Observations: Czech Republic. UN Doc. CCPR/C/CZE/CO/2. August 9, 2007. para. 14; CCPR. Concluding Observations: Bulgaria. UN Doc. CCPR/C/BGR/CO/3. July 25, 2011. para. 17; see also CRC Committee. General Comment No. 9: The rights of children with disabilities. UN Doc. CRC/C/GC/9. February 2, 2007. para. 48.

42 See United Nations General Assembly. United Nations General Assembly Resolution 46/119: Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. UN Doc. A/RES/46/119. December 17, 1991.

43 CCPR. Communication No. 754/1997: A v. New Zealand. UN Doc. CCPR/C/66/D/754/1997. August 3, 1999. para. 7.2; CCPR. Concluding Observations: Canada. UN Doc. CCPR/C/CAN/CO/5. April 20, 2006. para. 17.

Concluding Observations on Estonia Relating to Mental Health and the Right to Liberty

[T]he Committee is concerned at some aspects of the administrative procedure related to the detention of a person for mental health reasons, in particular the patient's right to request termination of detention, and, in the light of the significant number of detention measures that had been terminated after 14 days, the legitimate character of some of these detentions. The Committee considers that a period of 14 days of detention for mental health reasons without any review by a court is incompatible with article 9 of the [ICCPR].

The State party should ensure that measures depriving an individual of his or her liberty, including for mental health reasons, comply with article 9 of the Covenant. The Committee recalls the obligation of the State party under article 9, paragraph 4, to enable a person detained for mental health reasons to initiate proceedings in order to review the lawfulness of his/her detention. The State party is invited to furnish additional information on this issue and on the steps taken to bring the relevant legislation into conformity with the Covenant.⁴⁴

Cases Relating to Mental Health and the Right to Liberty

- ***A v. New Zealand (CCPR)(1999)***. While affirming that treatment in a psychiatric institution against the will of a patient falls within protections of Article 9 (of the ICCPR), the Committee found no violation where the patient was detained for several years in accordance with New Zealand's Mental Health Act as the detention was based upon the evaluation of three psychiatrists and was regularly reviewed by both a panel of psychiatrists and courts.⁴⁵
- ***Fijalkovska v. Poland (CCPR)(2002)***. The Committee found no violation where the patient was detained in accordance with Poland's Mental Health Act. However, the Committee did find violations as a result of the complainant not having been provided with adequate counsel to challenge her involuntary admission and for having failed to advise the complainant of her right to challenge her involuntary admission until after she was released.⁴⁶

Right to liberty and Security of Person in the context of Infectious Diseases

The fear of the spread of infectious diseases has led governments to subject individuals suspected of being infected to forced detention, such as quarantine or forced isolation, including when the individual refuses treatment.⁴⁷ The CCPR has called on governments to ensure that such restrictive measures against individuals with infectious diseases respect the individuals' rights, including guarantees of judicial review.⁴⁸

As explained above, little analysis exists on the right to security of person mainly due to the fact that treaty monitoring bodies have opted to address issues of physical integrity through other related

44 CCPR. Concluding Observations: Estonia. UN Doc. CCPR/CO/77/EST. April 15, 2003. para 10.

45 CCPR. Communication No. 754/1997: A v. New Zealand. UN Doc. CCPR/C/66/D/754/1997. August 3, 1999.

46 CCPR. Communication No. 1061/2002: Fijalkowska v. Poland. UN Doc. CCPR/C/84/1061/2002. July 26, 2005.

47 OHCHR. International Guidelines on HIV/AIDS and Human Rights. July 2006. para. 105.

48 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009.

rights. Nevertheless, this right is relevant to cases where the government has applied coercive measures against an individual with infectious diseases, such as forced treatment. Refer to sections on the “right to bodily integrity” and the “right to freedom from torture and other cruel, inhuman or degrading treatment or punishment” below.

Concluding Observations on Moldova Relating to Infectious Diseases and the Right to Liberty

[T]he Committee notes with concern that, under a regulation promulgated in August 2009, persons with tuberculosis may be subjected to forcible detention in circumstances where he or she is deemed to have “avoided treatment”. In particular, the regulation is unclear as to what constitutes the avoidance of treatment and fails to provide, inter alia, for patient confidentiality or for the possibility for the judicial review of a decision to forcibly detain a patient. (arts. 2, 9 and 26).

The State party should urgently review this measure to bring it into line with the [ICCPR], ensuring that any coercive measures arising from public health concerns are duly balanced against respect for patients’ rights, guaranteeing judicial review and patient confidentiality and otherwise ensuring that persons with tuberculosis are treated humanely.⁴⁹

Right to liberty and security of person in the context of Sexual and Reproductive Health

The right to liberty protects individuals from interference intended to limit or promote their fertility and hinder their sexual autonomy—either by the state or private individuals. In addition to protecting the life and health of the individual, the right to liberty recognizes the individual’s reproductive choice as well as her/his decision on how to conduct her/his sexual life.⁵⁰ It requires that the government ensure that individuals have access to legal representation in court proceedings and that women in prison are provided with health care after the termination of a pregnancy.⁵¹

As in other contexts, the right to security of person has rarely been used to address issues of sexual and reproductive health. Oftentimes, treaty monitoring bodies have analyzed such issues under the related rights to liberty, privacy, and freedom from torture, cruel, inhuman and degrading treatment. However, the right to security of person has been deemed relevant in cases where the state or private individuals threaten an individual’s sexual and/or reproductive health, such as when women are subjected to forced sterilization.

Concluding Observations on Moldova Relating to Sexual and Reproductive Health and the Right to Liberty

The Committee is concerned that, despite the National Strategy for Health (2005-2015), the use of abortion as a contraceptive measure is widespread. It notes, in this respect, that the law on compulsory medical insurance, which provides for the inclusion of contraceptives in the Basic Benefits Package, has not been implemented. Furthermore, the Committee is concerned that, al-

49 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009.

50 See Rebecca Cook. International Human Rights and Women’s Reproductive Health. *Studies in Family Planning*, Vol. 24, No. 2. March - April, 1993. p. 79.

51 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009. para. 17; see also Inter-American Commission on Human Rights [CIDH]. Paulina Del Carmen Ramirez Jacinto v. Mexico. Case 161-02. Report No. 21/07. March 9, 2007; Inter-Am. C.H.R. OEA/Ser.L/V/II.130 Doc. 22, rev. 1. December 29, 2007.

though abortion is not prohibited by law, there have been instances where women have been prosecuted for murder or infanticide after having had an abortion and that no after-abortion healthcare is provided to them in prison. (arts. 3, 9 and 10)

The State party should:

- (a) Take steps to eliminate the use of abortion as a method of contraception by, inter alia, ensuring the provision of affordable contraception and introducing reproductive and sexual health education in school curricula and for the broader public;*
- (b) Consistently apply the law so that women who undergo abortions are not prosecuted for murder or infanticide;*
- (c) Release any women currently serving sentences on such charges; and*
- (d) Provide appropriate health care in prison facilities to women who have undergone abortions.⁵²*

Right to Privacy

The right to privacy protects the individual from unlawful and arbitrary interference with her/his privacy—meaning that any interference must be based on law and be proportionate to the end sought.⁵³ In the context of patient care, the right can be applied to prevent undue disclosure of information on a patient’s health status, medical condition, diagnosis, prognosis, and treatment and other personal information. The gathering, holding, and sharing of personal information by a private or public actor must be regulated by law.⁵⁴

Moreover, interference by the government—such as administrative hurdles imposed by the judicial system—with matters that should be resolved between the physician and the patient has been considered a violation of the patient’s right to privacy.⁵⁵ UN treaty-monitoring bodies have underscored that accessibility to information should not impair the right to have personal health data treated with confidentiality.⁵⁶

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 12:** No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- ▶ **ICCPR, Art. 17(1):** 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.
- ▶ **CRC, Art. 16(1):** 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.

52 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009. para. 17.

53 CCPR. CCPR General Comment No. 16: Article 17 (Right to Privacy). The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation. April 8, 1988. paras. 3-4; CCPR. Communication No. 1482/2006: M. G. v. Germany. UN Doc. CCPR/C/93/D/1482/2006. September 2, 2008. para. 10.2.

54 See CCPR. CCPR General Comment No. 16: Article 17 (Right to Privacy). The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation. April 8, 1988. para. 10.

55 CCPR. Communication No. 1482/2006: L.M.R v. Argentina. UN Doc. CCPR/C/101/D/1608/2007. March 29, 2011. para 9.3.

56 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12.

▶ **CRPD, Art. 22:**

- (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) State Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

▶ **ICMW, Art. 14:** No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, , correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

▶ **Beijing Declaration and Platform for Action**⁵⁷

106. By Governments, in collaboration with non- governmental organizations and employers' and workers' organizations and with the support of international institutions: . . . (f) Redesign health information, services and training for health workers so that they are gender-sensitive and reflect the user's perspectives with regard to interpersonal and communications skills and the user's right to privacy and confidentiality. These services, information and training should adopt a holistic approach. . .

▶ **Declaration of Lisbon on the Rights of the Patients (WMA)**⁵⁸

Principle 8. 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.

Principle 10. Right to dignity

The patient's dignity and right to privacy shall be respected at all times in medical care and teaching, as shall his/her culture and values.

57 Fourth World Conference on Women. Beijing Declaration and Platform for Action. September 1995.

58 WMA. Declaration on the Rights of the Patient. September/October 1981.

Right to Privacy in the Context of Mental Health

In patient care, medical treatment or examination of a patient's mental and physical state could constitute a violation of the patient's right to privacy when it is not performed out of "therapeutic necessity."⁵⁹ Additionally, the government must ensure that any reasons given for the disclosure of medical information on the patient's mental health is balanced with careful consideration of the patients' interests in keeping their information confidential and private.⁶⁰

Concluding Observations on the Republic of Korea Relating to Mental Health and the Right to Privacy

The Committee welcomes the State party's efforts to improve children's mental health by, inter alia, establishing 32 centres for mental health services nationwide. However, the Committee remains concerned that the overall state of child mental health in the State party has deteriorated and that the rate of depression and suicide among children has increased, especially among girls. The Committee also notes the implementation of a diagnostic tool for facilitating the early detection and prevention of suicide, but is nevertheless concerned that the diagnostic tool could negatively impact the child's right to privacy.

The Committee recommends that the State party undertake measures for the development of a child mental health-care policy based on a thorough study of the root causes of depression and suicide among children, and invest in the development of a comprehensive system of services, including mental health promotion and prevention activities, out-patient and in-patient mental health services, with a view to ensuring the effective prevention of suicidal behaviour, especially among girls ... [I]n applying its diagnostic tool for the detection and prevention of suicide, the Committee recommends that the State party establish adequate safeguards for ensuring that the diagnostic tool is applied in a manner that fully respects the right of the child to privacy and to be adequately consulted.⁶¹

Right to Privacy in the Context of Infectious diseases

The right to privacy requires that the government ensure that information regarding individuals' health status, such as HIV status, be kept confidential. The disclosure of this information should be done with the informed consent of the patient. States should clearly define and establish guiding principles and recommendations for handling such information, as well as laws on privacy and confidentiality. They should also raise awareness of those accessing this type of data.⁶² Laws that interfere with this right in the interest of public health must be "in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances."⁶³

59 CCPR. Communication No. 1482/2006: M. G. v. Germany. UN Doc. CCPR/C/93/D/1482/2006. September 2, 2008. para. 10.1.

60 CRPD. Concluding Observations: Hungary. UN Doc. CRPD/C/HUN/CO/1. October 22, 2012. paras. 48-49.

61 CRC Committee. Concluding Observations: Republic of Korea. UN Doc. CRC/C/KOR/CO/3-4. October 6, 2011. paras. 55-56.

62 WHO European Region. Scaling up HIV testing and counselling in the WHO European Region as an essential component of efforts to achieve universal access to HIV prevention, treatment, care and support. Policy Framework. WHO/EURO 2010. p. 10.

63 See CCPR. CCPR General Comment No. 16: Article 17 (Right to Privacy). The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation. April 8, 1988. para. 4; CCPR. Communication No. 488/1992: Toonen v. Australia. UN Doc. CCPR/C/50/D/488/1992. March 31, 1994. paras. 8.5-8.6.

Concluding Observations on Moldova Relating to Infectious Diseases and the Right to Privacy

The Committee is concerned that persons infected with HIV/AIDS face discrimination and stigmatization in the State party, including in the fields of education, employment, housing and health care, and that foreigners are arbitrarily subjected to HIV/AIDS tests as part of the immigration rules framework. In particular, the Committee is concerned that patient confidentiality is not always respected by health-care professionals. It is also concerned that legislation prohibits the adoption of children with HIV/AIDS, thereby depriving them of a family environment. (arts. 2, 17 and 26)

The State party should take measures to address the stigmatization of HIV/AIDS sufferers through, inter alia, awareness-raising campaigns on HIV/AIDS, and should amend its legislation and regulatory framework in order to remove the prohibition on the adoption of children with HIV/AIDS, as well as any other discriminatory laws or rules pertaining to HIV/AIDS.⁶⁴

Case Relating to Infectious Diseases and the Right to Privacy

- **Toonen v. Australia (CCPR)(1994).** The Committee found that the laws criminalizing consensual sex between adult males “cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV” and, therefore, failed the “reasonableness test,” as the laws arbitrarily interfered with the individual’s right to privacy.⁶⁵

Right to Privacy in the Context of Sexual and Reproductive Health

The need to protect the confidentiality of medical information is particularly vital in relation to sexual and reproductive health. 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;⁶⁶ (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 administration of antipregnancy drugs;⁶⁷ 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.⁶⁸

Concluding Observations on Australia Relating to Sexual and Reproductive Health and the Right to Privacy

The Committee notes as positive that the Office of the Australian Information Commissioner has issued guidelines on the application of the Australian Privacy Act on handling the personal information of children. However, the Committee is concerned that

64 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009. para. 12.

65 CCPR. Communication No. 488/1992: Toonen v. Australia. UN Doc. CCPR/C/50/D/488/1992. March 31, 1994. paras. 8.5-8.6.

66 CCPR. Concluding Observations: Chile. UN Doc. CCPR/C/79/Add.104. March 30, 1999; CCPR. Concluding Observations: Venezuela. UN Doc. CCPR/CO/71/VEN. April 26, 2001.

67 CCPR. Concluding Observation: Mexico. UN Doc. CCPR/C/79/Add.109. July 27, 1999. Requirement for women to have access to appropriate remedies where their equality and privacy rights had been violated.

68 CRC Committee. Concluding Observations: Djibouti. UN Doc. CRC/C/15/Add.131. June 28, 2000.

the State party does not have comprehensive legislation protecting the right to privacy of children. Furthermore, while noting that the Office of the Australian Information Commissioner is empowered to hear complaints about breaches of privacy rights under the Privacy Act 1998 (Cth), it is concerned that there are no child-specific and child-friendly mechanisms and that those available are limited to complaints made against government agencies and officers and large private organizations... Furthermore, the Committee is concerned that children receiving health services, particularly sexual and reproductive health services, are not ensured their right to privacy.

The Committee recommends that the State party consider enacting comprehensive national legislation enshrining the right to privacy. It also urges the State party to establish child-specific and child-friendly mechanisms for children complaining against breaches of their privacy and to increase the protection of children involved in penal proceedings...⁶⁹

Cases Relating to Sexual and Reproductive Health and the Right to Privacy

- **Karen Noelia Llantoy Huamán v. Peru (CCPR)(2003).** The Committee found that the doctor's refusal to terminate the pregnancy as requested by the patient, and forcing her to carry the pregnancy to term despite the existence of laws permitting the service, was not justified and constituted a violation of the patient's right to privacy.⁷⁰
- **L.N.P. v. Argentina (CCPR)(2011).** The Committee found the "constant inquiries" by the social worker, medical personnel, and the court "into the author's sexual life and morality" to constitute a violation of her right to privacy as these inquiries were not relevant to her rape. The Committee recalled that interference occurs when the woman's sexual life is considered to define her rights and protections.⁷¹

Right of Access to Information

The right of access to information guarantees the individual access to personal information concerning her/him, as well as medical information on her/his condition, except when this information could be harmful to her/his life or health. The government should take the necessary measures to guarantee the patient access to information about her health conditions,⁷² but also ensure that access to this information does not infringe on the patient's right to keep her/his information confidential.⁷³ Accordingly, a government's refusal to provide the patient with access to her/his medical records has been treated as a violation of the individual's right of access to information.⁷⁴ However, a patient also has the right not to be informed, unless the disclosure of this information to the patient is needed to protect another person's life.⁷⁵

69 CRC. Concluding Observations: Australia. UN Doc. CRC/C/AUS/CO/4. August 28, 2012. para. 41-42.

70 CCPR. Communication No. 1153/2003: Karen Noelia Llantoy Huamán v. Peru. UN Doc. CCPR/C/85/D/1153/2003. October 24, 2005.

71 CCPR. Communication No. 1610/2007: L.N.P. v. Argentina. UN Doc. CCPR/C/102/D/1610/2007. August 16, 2011. para. 13.7.

72 See UN Special Rapporteur on Freedom of Expression. Report "The Right to Freedom of Opinion and Expression." UN Doc. E/CN.4/2005/64. December 17, 2004. para. 42.

73 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b)(iv).

74 CCPR. Communication No. 726/1996: Zheludkov v. Ukraine. UN Doc. CCPR/C/76/D/726/1996. Views adopted October 29, 2002. Individual opinion by Ms. Cecilia Medina Quiroga (concurring).

75 WMA. Declaration on the Rights of the Patient. September/October 1981. principle 7(d).

Additionally, access to information has been interpreted as an essential part of the accessibility component of the right to health.⁷⁶

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 19:** Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
- ▶ **ICCPR, Art. 19(2):** 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.
- ▶ **CRC, Art. 17:** 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.
- ▶ **ICRPD, Art. 21:** 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.
- ▶ **ICMW**
 - Art. 13(2):** Migrant workers and members of their families 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 their choice.
 - Art. 33:**
 - (1) Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning: (a) Their rights arising out of the present Convention;...
 - (2) Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.
- ▶ **IAPO Declaration on Patient-Centred Healthcare,⁷⁷ Principle 5:** 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

⁷⁶ CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b)(iv).

⁷⁷ IAPO. Declaration on Patient-Centred Healthcare. February 2006.

appropriate format according to health literacy principles considering the individual's condition, language, age, understanding, abilities, and culture.

► **WMA Declaration of Lisbon on the Rights of the Patients**⁷⁸

Principle 7. Right to information:

- (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 9. Right to Health Education:

- (a) Every person has the right to health education that will assist him/her in making informed choices about personal health and about the available health services. The education should include information about healthy lifestyles and about methods of prevention and early detection of illnesses. The personal responsibility of everybody for his/her own health should be stressed. Physicians have an obligation to participate actively in educational efforts.

Right of access to Information in the Context of Mental Health

Mental health patients are often denied access to information about their mental health condition, including diagnosis and treatment, because of a perceived incapacity to adequately make or participate in decisions concerning their own treatment and care.⁷⁹ Treaty bodies and special procedures have recognized the importance of the right of access to information in the context of mental health and have emphasized that information on the patient's mental health condition be made accessible to the patient and, in the case of children, be made accessible to the parents.⁸⁰

78 WMA. Declaration on the Rights of the Patient. September/October 1981.

79 UN Special Rapporteur on the Right to Health. Report on "Mental Disability and the Right to Health." UN Doc. E/CN.4/2005/51. February 11, 2005. para. 46(b).

80 UN Special Rapporteur on the Right to Health, Report on "Mental Disability and the Right to Health." UN Doc. E/CN.4/2005/51. February 11, 2005. para. 46(b).

Concluding Observations on Estonia Relating to Mental Health and the Right to Access to Information

[T]he Committee is concerned by information that persons with psychosocial disabilities or their legal guardians are not [sic] often denied the right to be sufficiently informed about criminal proceedings and charges against them, the right to a fair hearing and the right to adequate and effective legal assistance (arts. 2, 10, 11, 12, 13 and 16).

The State party should:

- (a) Ensure effective supervision and independent monitoring by judicial organs of any involuntary hospitalization in psychiatric institutions of persons with mental and psychosocial disabilities; and ensure that every patient, whether voluntarily or involuntarily hospitalized, is fully informed about the treatment to be prescribed and given the opportunity to refuse treatment or any other medical intervention ;...*
- (c) Ensure the right of persons with mental and psychosocial disabilities or their legal guardians to be sufficiently informed about criminal proceedings and charges against them, the right to a fair hearing and the right to adequate and effective legal assistance for their defence.⁸¹*

Right of Access to Information in the Context of Infectious diseases

Governments should take measures to control the spread of infectious diseases through the dissemination of information, including through public information campaigns.⁸² Access to information enables individuals to make informed decisions regarding their health conditions. For example, when an individual needs to decide on whether to take an HIV test, she/he should be provided with information on the voluntary nature of the test; her/his right to decline it; the fact that if the test is declined, it would not affect her/his access to services; the benefits and risks of HIV testing; and available social support.⁸³

Concluding Observations Libya Relating to Infectious Diseases and the Right to Access to Information

The Committee notes the establishment of the National Committee for AIDS Prevention in 1987 and other measures to address the problem of HIV/AIDS, but is concerned at the relatively high number of children afflicted by HIV/AIDS in Benghazi. The Committee is also concerned at insufficient information available in relation to adolescent health, particularly in relation to mental health issues.

The Committee recommends that the State party: ... (c) Ensure that adolescents have access to and are provided with education on adolescent health issues, in particular regarding mental health, in a sensitive manner.⁸⁴

81 CAT Committee. Concluding Observations: Estonia. UN Doc. CAT/C/EST/CO/5. June 17, 2013. para. 20.

82 CESCR. Concluding Observations: Lithuania. UN Doc. E/C.12/1/Add.96. June 7, 2004; CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women: Twenty-eighth session, Twenty-ninth session. UN Doc. A/58/38 (SUPP). 2003. para. 260.

83 WHO European Region. Scaling up HIV testing and counselling in the WHO European Region as an essential component of efforts to achieve universal access to HIV prevention, treatment, care and support. Policy Framework. p. 7.

84 CRC Committee. Concluding Observations: Libya (Arab Jamahiriya). UN Doc. CRC/C/15/Add.209. July 4, 2003. paras. 37-38.

Case Relating to Infectious Diseases and the Right of Access to Information

- **Tornel et al. v. Spain (CCPR)(2006).** The Committee found that the prison's failure to inform the detained individual's family of his severely deteriorating condition related to his HIV-positive status constituted an arbitrary interference with the family and violated Article 17(1) of the ICCPR.⁸⁵

Right of Access to Information in the Context of Sexual and Reproductive Health

The provision of appropriate and timely information with respect to sexual and reproductive health is particularly crucial as access to this information enables individuals to make informed decisions on the number, spacing, and timing of their children. What is more, the right of access to information includes access to confidential and child-sensitive counseling services⁸⁶ and for adolescents, access to information without parental consent based on the adolescent's maturity level.⁸⁷ Accordingly, UN treaty-monitoring bodies have urged governments to improve access in light of increasing teenage abortions and sexually transmitted diseases,⁸⁸ including HIV/AIDS,⁸⁹ with this right to access also extending to children.⁹⁰

Concluding Observations on Panama Relating to Sexual and Reproductive Health and the Right to Access to Information

The Committee is concerned at the State party's insufficient recognition and protection of women's sexual health and reproductive rights, in particular with regard to the delay in the debate over draft law No. 442 on sexual and reproductive health. It regrets the lack of access to information on health-care services provided to adolescent girls, particularly in rural areas, as well as the high number of early pregnancies. Furthermore, the Committee is concerned at the lack of a holistic and life-cycle approach to the health of women in the State party.

The Committee urges the State party to take the necessary steps to overcome the stalemate surrounding draft law No. 442 and to promulgate it as soon as possible. The Committee also urges the State party to improve family planning and reproductive health programmes and policies designed to give women and adolescent girls, in particular in rural areas, effective access to information on health-care services, including reproductive health-care services and contraception, in accordance with the Committee's

85 CCPR. Communication No. 1473/2006: Tornel v. Spain. UN Doc. CCPR/C/95/D/1473/2006. March 20, 2009. para. 7.4.

86 CRC Committee. Concluding Observations: Oman, 2006. UN Doc. CRC/C/OMN/CO/2. September 29, 2006. para. 50(c); CRC Committee. Concluding Observations: Russian Federation. UN Doc. CRC/C/RUS/CO/3. November 23, 2005. para. 56.

87 CEDAW Committee. CEDAW General Recommendation No.24: Article 12 of the Convention (Women and Health). UN Doc. A/54/38/Rev. 1, chap. I. 1999. para. 14; CRC Committee. Concluding Observations: Austria. UN Doc. CRC/C/15/Add.98. May 7, 1999. para. 15; CRC Committee. Concluding Observations: Bangladesh. UN Doc. CRC/C/15/Add.221. October 27, 2003. para. 60; CRC Committee. Concluding Observation of the Committee on the Rights of the Child: Barbados. UN Doc. CRC/C/15/Add.103. August 24, 1999. para. 25.

88 CESCR. Concluding Observations: Lithuania. UN Doc. E/C.12/1/Add.96. June 7, 2004; CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women: Twenty-eighth session, Twenty-ninth session. UN Doc. A/58/38 (SUPP). 2003; see also CESCR. Concluding Observations: People's Republic of China (including Hong Kong and Macao). UN Doc. E/C.12/1/Add.107. May 13, 2005.

89 CESCR. Concluding Observations: Chile. UN Doc. E/C.12/Add.105. November 26, 2004; see also CESCR. Concluding Observations: Cameroon. UN Doc. E/C.12/1/Add.40. December 8, 1999; see also CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women: Twenty-eighth session, Twenty-ninth session. UN Doc. A/58/38 (SUPP). 2003.

90 CRC Committee. Concluding Observations: Mozambique. UN Doc. CRC/C/15/Add.172. April 3, 2002; see also CRC Committee. Concluding Observations: Indonesia. UN Doc. CRC/C/15/Add.223. February 26, 2004.

general recommendation No. 24 on women and health and the Beijing Declaration and Platform for Action. The Committee also recommends that the State party step up its efforts to incorporate age-appropriate sex education in school curricula and organize information campaigns aimed at preventing teenage pregnancies. It further recommends that the State party undertake a holistic and life-cycle approach to women's health that includes an intercultural focus.⁹¹

Case Relating to Sexual and Reproductive Health and the Right to Access to Information

- **A.S. v. Hungary (CEDAW Committee)(2006).** The Committee found the sterilization of a Roma woman without her informed consent violated her right of access to information and her right to decide freely on the number of children under the CEDAW. The Committee recalled that “informed decision-making about safe and reliable contraceptive measures depends upon a woman having ‘information about contraceptive measures and their use, and guaranteed access to sex education and family planning services.’”⁹²

Right to Bodily Integrity

The right to bodily integrity protects the individual from bodily injury.⁹³ In the patient care context, this right becomes relevant in cases of involuntary medical treatment and experimentation, among others.⁹⁴ It is not specifically recognized under the ICCPR or the ICESCR, but it has been interpreted to be part of related rights, including the right to freedom from torture, cruel, inhuman, and degrading treatment (ICCPR, Art. 7); the right to security of person (ICCPR, Art. 9); the right to privacy (ICCPR, Art. 17); and the right to the highest attainable standard of health (ICESCR, Art. 12). Under this right, a government must take the necessary measures to protect the individual from threats to her/his bodily integrity, regardless of whether these threats come from the government or private actors.⁹⁵ Please refer to the sections discussing the related rights.

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 3:** Everyone has the right to life, liberty and security of person.
- ▶ **ICCPR, Art. 9(1):** 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.
- ▶ **ICESCR, Art. 12:** 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.

91 CEDAW Committee. Concluding Observations: Panama. UN Doc. CEDAW/C/PAN/CO/7. February 5, 2010. para 40-41.

92 CEDAW Committee. Communication No. 4/2004: A.S. v. Hungary. UN Doc. CEDAW/C/36/D/4/2004. July 14, 2006. para. 11.2 (recalling CEDAW Committee's General Comment 21 on equality in marriage and family relations).

93 CCPR. Draft General Comment No. 35: Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8.

94 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 8.

95 CCPR. Draft General Comment No. 35: Article 9: Liberty and security of person. UN Doc. CCPR/C/107/R.3. January 28, 2013. para. 8; CCPR. Communication No. 1560/2007: Marcellana and Gumanoy v. Philippines. UN Doc. CCPR/C/94/D/1560/2007. November 17, 2008. para. 7.7; CCPR. Concluding Observations: Uganda. UN Doc. CCPR/CO/80/UGA. May 4, 2004. para. 12.

- ▶ **CERD, Art. 5(b):** States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of... (b) the right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

- ▶ **CRC**

Art. 12(1): 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.

Art. 25: 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. 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.

Art. 39: 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.

- ▶ **ICRPD**

Art. 14:

- (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;...

Art. 17: Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

- ▶ **ICMW, Art. 16:**

- (1) Migrant workers and members of their families shall have the right to liberty and security of person.
- (3) Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

- ▶ **International Ethical Guidelines for Biomedical Research Involving Human Subjects:**⁹⁶ Respect for persons incorporates at least two fundamental ethical considerations, namely:

- (a) respect for autonomy, which requires that those who are capable of deliberation about their personal choices should be treated with respect for their capacity for self-determination; and

96 CIOMS. International Ethical Guidelines for Biomedical Research Involving Human Subjects. 2002.

- (b) protection of persons with impaired or diminished autonomy, which requires that those who are dependent or vulnerable be afforded security against harm or abuse.

▶ **Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care**⁹⁷

Principle 9:

- (1) Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.
- (2) The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.
- (3) Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the 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, adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.
- (4) The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

▶ **WMA Declaration of Lisbon on the Rights of the Patients**⁹⁸

Principle 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.

Principle 3. Right to self-determination

- (b) The patient has the right to self-determination, to make free decisions regarding himself/herself. The physician will inform the patient of the consequences of his/her decisions.
- (c) 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 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.
- (d) The patient has the right to refuse to participate in research or the teaching of medicine.

97 United Nations General Assembly. United Nations General Assembly Resolution 46/119: Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. UN Doc. A/RES/46/119. December 17, 1991.

98 WMA. Declaration on the Rights of the Patient. September/October 1981.

Principle 4. The unconscious patient

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

Principle 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.

Principle 6. Procedures against the patient's will

- (d) 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.

Right to Bodily Integrity in the Context of Mental Health

The right to bodily integrity protects mental health patients from the use of coercive force or restraint. If force or restraint is used, it must be made following a "thorough and professional medical assessment" that calls for this type of intervention.⁹⁹ Moreover, the government has the obligation to establish a monitoring and reporting system of mental health-care institutions.¹⁰⁰ It requires the monitoring of psychiatric and other institutions to ensure that no person is placed in the institution on the basis of her/his mental disability without her/his free and informed consent.¹⁰¹

99 CCPR. Concluding Observations: Norway. UN Doc. CCPR/C/NOR/CO/6. November 18, 2011. para. 10.

100 CCPR. Concluding Observations: Norway. UN Doc. CCPR/C/NOR/CO/6. November 18, 2011. para. 10; CCPR. Concluding Observations: Bulgaria. UN Doc. CCPR/C/BGR/CO/3. July 25, 2011. para. 17.

101 CRPD. Monitoring the Convention on the Rights of Persons with Disabilities Guidance for human Rights Monitors. UN Doc. HR/P/PT/17. April 2010.

As explained above, threats to the bodily integrity of such individuals can be addressed through other related rights, such as the right to security of persons and the right to freedom from torture, cruel, inhuman and degrading treatment. As in the case of the right to security of person, the state is required to monitor of psychiatric and other institutions to ensure that no person is placed in the institution on the basis of her/his mental disability without her/his free and informed consent.¹⁰² If force or restraint is used, it must be made following a “thorough and professional medical assessment” that calls for this type of intervention.¹⁰³ Moreover, the government has the obligation to establish a monitoring and reporting system of mental health-care institutions.¹⁰⁴

Concluding Observations on Croatia Relating to Mental Health and the Right to Bodily Integrity

While noting the State party's statement concerning its commitment to abolish the use of enclosed restraint beds (cages/net beds) as a means to restrain mental health patients, including children, in institutions, the Committee is concerned about the current use of such beds. The Committee recalls that this practice constitutes inhuman and degrading treatment. (arts. 7, 9, 10 of the Covenant.)

The State party should take immediate measures to abolish the use of enclosed restraint beds in psychiatric and related institutions. The State party should also establish an inspection system, taking into account the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.¹⁰⁵

Right to Bodily Integrity in the Context OF Infectious Diseases

The right to bodily integrity becomes particularly relevant in instances where individuals with infectious diseases are subjected to coercive measures, such as quarantine and forced treatment. In this context, states must ensure that the interests for the protection of the public's health are balanced with the individual's right to bodily integrity and that the individual is treated humanely.¹⁰⁶ For example, governments must consider “potential outcomes of HIV testing – including stigma, discrimination, violence and other abuse – in policy and practice.” Moreover, they “must do all they can to prevent such human rights violations, both for the protection of the individual and the effectiveness of the national response to HIV.”¹⁰⁷

Concluding Observations on Moldova Relating to Infectious Diseases and the Right to Bodily Integrity

[T]he Committee notes with concern that, under a regulation promulgated in August 2009, persons with tuberculosis may be subjected to forcible detention in circumstances where he or she is deemed to have “avoided treatment”. In particular, the regula-

102 CRPD. Monitoring the Convention on the Rights of Persons with Disabilities Guidance for human Rights Monitors. UN Doc. HR/P/PT/17. April 2010.

103 CCPR. Concluding Observations: Norway. UN Doc. CCPR/C/NOR/CO/6. November 18, 2011. para. 10.

104 CCPR. Concluding Observations: Norway. UN Doc. CCPR/C/NOR/CO/6. November 18, 2011. para. 10; CCPR. Concluding Observations: Bulgaria. UN Doc. CCPR/C/BGR/CO/3. July 25, 2011. para. 17.

105 CCPR. Concluding Observations: Croatia. UN Doc. CCPR/C/HRV/CO/2. November 4, 2009. para. 12.

106 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009. para. 13.

107 WHO European Region. Scaling up HIV testing and counselling in the WHO European Region as an essential component of efforts to achieve universal access to HIV prevention, treatment, care and support. Policy Framework. WHO/EURO 2010. p. 10.

tion is unclear as to what constitutes the avoidance of treatment and fails to provide, inter alia, for patient confidentiality or for the possibility for the judicial review of a decision to forcibly detain a patient. (arts. 2, 9 and 26).

The State party should urgently review this measure to bring it into line with the [ICCPR], ensuring that any coercive measures arising from public health concerns are duly balanced against respect for patients' rights, guaranteeing judicial review and patient confidentiality and otherwise ensuring that persons with tuberculosis are treated humanely.¹⁰⁸

Right to Bodily Integrity in the Context OF Sexual and Reproductive Health

The right to security of person safeguards the person's right to control her/his health and body. Physical acts on the individual's body done without her/his consent (such as forced sterilization) have been deemed "acts of violence."¹⁰⁹ 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.¹¹⁰ In the case of forced sterilization, governments should take the necessary measures to prevent such acts, such as holding health care providers criminally liable for conducting sterilizations without the individual's free, full, and informed consent.¹¹¹

Concluding Observations on the Czech Republic Relating to Sexual and Reproductive Health and the Right to Bodily Integrity

The Committee notes with concern that women, a high proportion of which being Roma women, have been subjected to coerced sterilization. It welcomes the inquiries undertaken by the Public Defender of Rights on this matter, but remains concerned that to date, the State party has not taken sufficient and prompt action to establish responsibilities and provide reparation to the victims...

The State party should take strong action, without further delay, to acknowledge the harm done to the victims...and recognize the particular situation of Roma women in this regard. It should take all necessary steps to facilitate victims' access to justice and reparation, including through the establishment of criminal responsibilities and the creation of a fund to assist victims in bringing their claims. The Committee urges the State party to establish clear and compulsory criteria for the informed consent of women prior to sterilization and ensure that criteria and procedures to be followed are well known to practitioners and the public.¹¹²

Case Relating to Sexual and Reproductive Health and the Right to Security of Person

- **Szijjarto v. Hungary (CEDAW Committee)(2006).** The Committee found that the sterilization of a Roma woman without her informed consent amounted to a violation of Article 12 of CEDAW (among others) and underscored that "acceptable services" are those performed with the woman's full and informed consent and

108 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. November 4, 2009.

109 UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health [UN Special Rapporteur on the Right to Health]. UN Doc. E/CN.4/2005/51. February 11, 2005. para. 38; Human Rights Watch [HRW]. Sterilization of Women and Girls with Disabilities: A Briefing Paper. November 10, 2011.

110 CEDAW Committee. Concluding Observations: Burkina Faso. UN Doc. A/55/38 (Supp). August 17, 2000. para. 261.

111 CAT Committee. Concluding Observations: Slovakia. UN Doc. CAT/C/SVK/CO/2. December 31, 2009. para. 10.

112 CERD. Concluding Observations: Czech Republic. UN Doc. CERD/C/CZE/CO/7. April 11, 2007. para 14.

reiterated the obligation of States Parties to prevent forms of coercion, such as non-consensual sterilization.¹¹³

Right to Life

The right to life protects the individual from the imposition of the death sentence when the process on which the judgment is based does not meet the requirements under international human rights law (ICCPR, Art. 14).¹¹⁴ In addition, the right to life involves substantive obligations on the part of the state to (1) refrain from the use of actual or potentially lethal force by state officials unless absolutely necessary, and (2) protect the life of individuals at risk of harm by non-state actors. It also includes a procedural obligation on the part of the state to conduct effective investigations into deaths (other than those arising from natural causes).

The right to life is not to be interpreted narrowly and “requires that States adopt positive measures... to increase life expectancy.”¹¹⁵ For example, as it relates to patient care, the right to life requires that the government always fulfill its duty to regulate and monitor private health care institutions in order to protect this right.¹¹⁶

Under the right to life, the government must provide a minimum level of health services and essential medication that ensures a patient’s good health. If health care services are inadequate and lead to the patient’s death, then, depending on the circumstances, the government may be held responsible for the mismanagement of health care resources and the death of the patient.¹¹⁷

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 3: Everyone has the right to life, liberty and security of person.**
- ▶ **ICCPR, Art. 6(1):** 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.
- CRC, Art. 6:**
 - (1) States Parties recognize that every child has the inherent right to life.
 - (4) States Parties shall ensure to the maximum extent possible the survival and development of the child.
- ▶ **ICRPD, Art. 10:** 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.

113 CEDAW Committee. Communication No. 4/2004: Szijjarto v. Hungary. UN Doc. A/61/38. August 14, 2006. section 11.3.

114 CCPR. Communication No. 1520/2006: Mwamba v. Zambia. UN Doc. CCPR/C/98/D/1520/2006. April 30, 2010. para 6.8.

115 CCPR. CCPR General Comment 6: The right to life (Art. 6). April 30, 1982. paras. 1, 5.

116 CEDAW Committee. Communication No. 17/2008: Teixeira v. Brazil. UN Doc. CEDAW/C/49/D/17/2008. September 27, 2011. para 7.4.

117 CCPR. Communication 763/1997: Lantsova v. the Russian Federation. UN Doc. CCPR/C/74/D/763/1997. March 26, 2002. para 9.2; see CCPR. Communication No. 1556/2007: Novaković v. Serbia. UN Doc. CCPR/C/100/D/1556/2007. November 2, 2010.

► **ICMW**

Art. 9: The right to life of migrant workers and members of their families shall be protected by law.

Art. 28: 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.

Right to Life in the Context of Mental Health

In the context of mental health, the right to life acquires even greater importance. The government has a special duty to protect patients with mental disabilities —taking the appropriate health care measures for the protection of patients' lives.¹¹⁸ This right requires the government to ensure the right of life of persons deprived of their liberty even in the absence of a request for protection.¹¹⁹

Concluding Observations on Australia Relating to Mental Health and the Right to Life

The Committee is concerned that the State party's level of funding for mental health continues to be substantially below that of other developed countries, with children and young persons seeking mental health services often facing limited access to and substantial delays in receiving such services. In this context, the Committee shares the concerns stated in the health study published by the Australian Institute of Health and Welfare in 2010 indicating that poor mental health is the leading health issue for children and young people and the largest contributor to the burden of disease in children aged 0-14 years (23 per cent) and young people aged 15-24 years (50 per cent). Furthermore, the Committee is concerned about the high rate of suicidal deaths among young people throughout the State party, particularly among the Aboriginal community. The Committee notes as positive that the State party's territory of Western Australia has carried out research investigating the effectiveness of drugs currently used to treat Attention Deficit Hyperactivity Disorder (ADHD) and Attention Deficit Disorder (ADD). However, the Committee remains concerned that current diagnosis procedures may not be adequately addressing the underlying mental health issues linked to it resulting in significant increases and/or erroneous prescription of psycho-stimulants to children diagnosed with ADHD and ADD which is of serious concern.

Emphasising the importance of access to child and youth-friendly mental health support and services, the Committee recommends that the State party:

- (a) Follow-up on the Australian Institute of Health and Welfare health study with measures designed to address the direct and underlying causes of the high rates of mental health problems in children and young people, focusing [sic] especially on suicides and other disorders linked to, inter alia, substance abuse, violence and inadequate quality of care in alternative care settings;*
- (b) Allocate specific resources for improving the availability and quality of early intervention services, training and development of teachers, counsellors, health professionals and others working with children, as well as support to parents;*
- (c) Develop specialized health services and targeted strategies for children at particular risk of mental health problems, and their families, and ensure accessibility for all those requiring such services with due consideration to their age, sex, socio-economic background, geographical and ethnic origin, etc;*

118 ECtHR. *Dodov v. Bulgaria* (59548/00). April 17, 2008.

119 CCPR. Communication No. 763/1997: *Lantsova v. The Russian Federation*. UN Doc. CCPR/C/74/D/763/1997. March 26, 2002. para 9.2.

(d) *In planning and implementing the above, consult with children and youth for the development of these measures while undertaking awareness-raising on mental health, with a view to ensuring better family and community support as well as to reducing the associated stigma;*

(e) *Carefully monitor the prescription of psycho-stimulants to children and take initiatives to provide children diagnosed with ADHD and ADD, as well as their parents and teachers, with access to a wider range of psychological, educational and social measures and treatments; and, consider undertaking the collection and analysis of data disaggregated according to the type of substance- and age with a view to monitoring the possible abuse of psycho-stimulant drugs by children.*¹²⁰

SECTION 2.3

Right to Life in the Context of Infectious diseases

According to the CCPR, under the right to life, governments should “take all possible measures to ... increase life expectancy, especially in adopting measures to eliminate ... epidemics.”¹²¹ Perceived as the most basic human right, the right to life has been useful in advocating prevention and access to medicines and treatment. The right to life has played a critical role in governments’ response to infectious diseases like HIV/AIDS, and continues to be used by litigants and advocates alike to pressure governments to adopt measures that are necessary for protecting the lives of persons living with HIV/AIDS.¹²²

Concluding Observations on Uganda Relating to Infectious Diseases and the Right to Life

While the Committee takes note of the measures taken by the State party to deal with the widespread problem of HIV/AIDS, it remains concerned about the effectiveness of these measures and the extent to which they guarantee access to medical services, including antiretroviral treatment, to persons infected with HIV ([ICCPR,] art. 6).

*The State party is urged to adopt comprehensive measures to allow a greater number of persons suffering from HIV/AIDS to obtain adequate antiretroviral treatment.*¹²³

Right to Life in the Context of Sexual and Reproductive Health

In the context of sexual and reproductive health, the right to life has been used to call for measures that safeguard the lives of individuals, particularly women resorting to unsafe abortions—one of the major causes of maternal mortality in the world. Governments have been called to adopt comprehensive abortion laws, especially in cases of rape and incest and for therapeutic reasons.¹²⁴ For example, a state should take measures to help women avoid unsafe abortions,¹²⁵ such as decriminalizing abortion, ensuring access to reproductive health services,¹²⁶ making contraceptives widely available, and establishing health care facilities in rural areas.¹²⁷

120 CRC Committee. Concluding Observations: Australia. UN Doc. CRC/C/AUS/CO/4. August 28, 2012. paras. 64-65.

121 CCPR. CCPR General Comment 6: The right to life (Art. 6). April 30, 1982. para. 5.

122 See Open Society Foundations, Ford Foundation, and UNDP. Factsheet: Human Rights & the Three Diseases. October 5, 2011.

123 CCPR. Concluding Observations: Uganda. UN Doc. CCPR/CO/80/UGA. May 4, 2004. CCPR. para. 14.

124 United Nations. Report of the Human Rights Committee. UN Doc. A/67/40 (Vol. I). 2012. p. 46-47, para 15.

125 United Nations. Report of the Human Rights Committee. UN Doc. A/65/40 (Vol. I). 2009. p. 51, para 10.

126 United Nations. Report of the Human Rights Committee. UN Doc. A/65/40 (Vol. I). 2009. p. 94-95, para 13.

127 United Nations. Report of the Human Rights Committee. UN Doc. A/66/40 (Vol. I). 2011. p. 28-29, para 12.

Concluding Observations on Cameroon Relating to Sexual and Reproductive Health and the Right to Life

While noting the efforts by the State party, jointly with international partners, to improve access to reproductive health services, the Committee remains concerned about high maternal mortality and about abortion laws which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned about the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape. ([CCPR,] art. 6)

The State party should step up its efforts to reduce maternal mortality, including by ensuring that women have access to reproductive health services. In this regard, the State party should amend its legislation to effectively help women avoid unwanted pregnancies and protect them from having to resort to illegal abortions that could endanger their lives.¹²⁸

Case Relating to Sexual and Reproductive Health and the Right to Life

- ***da Silva Pimentel Teixeira v. Brazil (CEDAW Committee)(2011)***. The Committee found that the government's failure to ensure appropriate pregnancy-related medical treatment and to provide timely emergency obstetric care to the patient (both of which were found to have led to her death) constituted a violation of the right to life.¹²⁹

Right to the Highest Attainable Standard of Health

The right to the highest attainable standard of health (hereinafter “right to health”) is the right of everyone to enjoy the highest attainable standard of both mental and physical health. The right to health requires that facilities, goods, and services be available, accessible, acceptable, and of quality. In other words, under this right, states have the obligation to make available health care facilities, goods and services in sufficient quantity and accessible to everyone physically, economically and without discrimination.¹³⁰ Health facilities, goods and services must be respectful of medical ethics, culturally acceptable, scientifically and medically appropriate and of good quality.¹³¹ The right to health extends not only to appropriate and accessible health care but also to the underlying determinants of health, such as access to safe and potable drinking water, and adequate supply of safe food, nutrition and housing.¹³²

The ICESCR allows States Parties to “progressively realize” the right to health, recognizing the limitations that a state’s resources may have on the state’s ability to achieve the full realization of the right to health. However, it also establishes immediate obligations under which States Parties are to take “deliberate, concrete and targeted” steps towards the right’s full realization—these include ensuring

128 CCPR. Concluding Observations: Cameroon. UN Doc. CCPR/C/CMR/CO/4. August 4, 2010. para. 13.

129 CEDAW Committee. Communication No. 17/2008: Maria de Lourdes da Silva Pimentel Teixeira v. Brazil. UN Doc. CEDAW/C/49/D/17/2008. September 27, 2011. para. 7.2.

130 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12; See CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia. UN Doc. CEDAW/C/SAU/CO/2. April 8, 2008. paras. 33-34; CESCR. Concluding observation of the Committee on Economic, Social and Cultural Rights: Algeria. UN Doc. E/C.12/DZA/CO/4. June 7, 2010. para 20.

131 See CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12.

132 See CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 4.

that the right is “exercised without discrimination of any kind (art. 2.2).”¹³³ The CESCR has been clear in that the “progressive realization” of the right does not strip away the “meaningful content” of States Parties’ obligations. Instead, it means that States Parties have “a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of [the right to health].”¹³⁴ Moreover, States Parties are not allowed to take retrogressive measures, and if such measures are taken, the State Party must prove that these measures were taken “after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party’s maximum available resources.”¹³⁵

Violations of the right to health can result from both a deliberate act and a failure to act by the government.¹³⁶ In fact, states have been frequently condemned by the CESCR for failing to devote adequate resources to health care and services because of the obviously detrimental impact of that failure on patients.¹³⁷

Additionally, the right to health is inclusive and covers freedoms in addition to entitlements.¹³⁸ Such freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from non-consensual medical treatment and experimentation.¹³⁹

RELEVANT PROVISIONS

► UDHR, Art. 25:

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

133 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 30.

134 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 31.

135 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 32.

136 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. paras. 46-52.

137 CESCR. Concluding Observations: Uruguay. UN Doc. E/C.12/1/Add.18. December 22, 1997. 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 CESCR. Concluding Observations: Republic of the Congo. UN Doc. E/C.12/1/Add.45. May 23, 2000. 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; CESCR. Concluding Observations: Mongolia. UN Doc. E/C.12/1/Add.47. September 1, 2000. 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.

138 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 8; UN Special Rapporteur on the Right to Health. Report on “Mental and the Right to Health.” UN Doc. E/CN.4/2005/51. February 11, 2005. para. 38.

139 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 8.

ICESCR, Art. 12:

- (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.

▶ **CRC**

Art. 3(3): 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.

Art. 24:

- (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.

▶ **CEDAW, Art. 12:**

- (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

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

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programs as provided to other persons, including in the area of sexual and reproductive health and population-based public health programs;

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

► ICMW

Art. 28: 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.

Art. 43(1)(e): Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:...[a]ccess to social and health services, provided that the requirements for participation in the respective schemes are met...

Art. 45(1)(c): 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: [a]ccess to social and health services, provided that requirements for participation in the respective schemes are met...

Art. 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 Health in the Context of Mental health

The ICESCR, along with other relevant international legal instruments,¹⁴⁰ have established that the right to health is not limited to physical health, but that it also includes the right to the highest attain-

140 Such instruments are not limited to human rights instruments (see e.g., WHO Constitution).

able standard of mental health.¹⁴¹ For example, the CRC and the ICRPD have enshrined both aspects of the right and explicitly prohibit discrimination on grounds of disability. States, even those with very limited resources, are expected to adopt measures that protect this right for mental health patients, such as: the recognition, care and treatment of mental disabilities in training curricula of all health personnel; promot[ing] public campaigns against stigma and discrimination of persons with mental disabilities; support[ing] the formation of civil society groups that are representative of mental health-care users and their families; formulat[ing] modern policies and programmes on mental disabilities; downsiz[ing] psychiatric hospitals and, as far as possible, extend community care; in relation to persons with mental disabilities, actively seek[ing] assistance and cooperation from donors and international organizations; and so on.¹⁴²

Concluding Observations on Australia Relating to Mental Health and the Right to the Highest Attainable Standard of Health

The Committee notes with concern the insufficient support for persons with mental health problems, as well as the difficult access to mental health services, in particular for indigenous peoples, prisoners and asylum-seekers in detention. (arts. 2, para. 2; and 12)

The Committee recommends that the State party take effective measures to ensure the equal enjoyment of the right to the highest attainable standard of mental health, including by (a) allocating adequate resources for mental health services and other support measures for persons with mental-health problems in line with the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care; (b) implementing the recommendations of the Australian Medical Association's 2008 report on indigenous health; (c) reducing the high rate of incarceration of people with mental diseases; (d) ensuring that all prisoners receive an adequate and appropriate mental health treatment when needed.¹⁴³

Right to Health in the Context of Infectious diseases

Under the right to health, persons suffering from infectious diseases have the right to access affordable treatment, such as antiretroviral therapy and appropriate health care services and counseling.¹⁴⁴ In the context of infectious diseases, states also have the obligation to prepare, prevent and respond to the threat of emerging infectious diseases. For example, states are required to implement effective public health surveillance and reporting systems.¹⁴⁵ Governments are also prohibited from discriminating against individuals based on their health status, such as HIV/AIDS and tuberculosis.¹⁴⁶

141 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000; UN Special Rapporteur on the Right to Health. UN Doc. E/CN.4/2005/51. February 11, 2005. para. 32.

142 UN Special Rapporteur on the Right to Health. Report on "Mental Disability and the Right to Health." UN Doc. E/CN.4/2005/51. February 11, 2005. para. 35.

143 CESCR. Concluding Observations: Australia. UN Doc. E/C.12/AUS/CO/4. June 12, 2009. para. 30.

144 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b).

145 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 16.

146 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 18.

Concluding Observations on Mauritania Relating to Infectious Diseases and the Right to the Highest Attainable Standard of Health

The Committee is concerned that the access to anti-retroviral-treatment (ARV) and prevention of parent to child transmission (PPTCT) services are inadequate; that testing and counselling services are insufficient; and that there is an overall lack of funds for prevention measures.

The Committee recommends, with reference to its general comment No. 3 (2003) on HIV/AIDS and the rights of the child and to the International Guidelines on HIV/AIDS and Human Rights, that the State party:

- (a) *Ensure the full and effective implementation of a comprehensive policy to prevent HIV/AIDS with adequate targeting of areas and groups that are the most vulnerable;*
- (b) *Strengthen its efforts to combat HIV/AIDS, including through awareness-raising campaigns.*¹⁴⁷

Right to Health in the Context of Sexual and Reproductive Health

UN treaty-monitoring bodies have linked maternal mortality to a “lack of comprehensive reproductive health services, restrictive abortion laws, unsafe or illegal abortion, adolescent childbearing, child and forced marriage, and inadequate access to contraceptives.”¹⁴⁸ Moreover, the UN Human Rights Council has declared maternal mortality a human rights violation and has called on states to take the necessary measures to prevent it.¹⁴⁹ For example, in addition to facilitating access to contracep-

¹⁴⁷ CRC Committee. Concluding Observations: Mauritania. UN Doc. CRC/C/MRT/CO/2/Corr.1. July 21, 2009. paras. 57-58.

¹⁴⁸ Center for Reproductive Rights. ICPD and Human Rights: 20 years of advancing reproductive rights through UN treaty bodies and legal reform. June 2013. p. 2, citing as examples: CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Malawi. UN Doc. CEDAW/C/MWI/CO/5. February 3, 2006. para. 31; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Mexico. UN Doc. CEDAW/C/MEX/CO/6. August 25, 2006. para. 32; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Morocco UN Doc. CEDAW/C/MAR/CO/4. April 8, 2008. para. 30; CCPR. Concluding Observations: Chile. UN Doc. CCPR/C/CHL/CO/5. May 18, 2007. para. 8; CCPR. Concluding Observations: Madagascar. UN Doc. CCPR/C/MDG/CO/3. May 11, 2007. para. 14; CCPR. Concluding Observations: Panama. UN Doc. CCPR/C/PAN/CO/3. April 17, 2008. para. 9; CRC Committee. Concluding Observations: Democratic People's Republic of Korea. UN Doc. CRC/C/15/Add.239. July 1, 2004. para. 50; CRC Committee. Concluding Observations: Guatemala. UN Doc. CRC/C/15/Add.154. July 9, 2001. para. 40; CRC Committee. Concluding Observations: Haiti. UN Doc. CRC/C/15/Add.202. March 18, 2003. para. 46; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Eritrea. UN Doc. CEDAW/C/ERI/CO/3. February 3, 2006. para. 22; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Mozambique. UN Doc. CEDAW/C/MOZ/CO/2. June 11, 2007. para. 36; CRC Committee. Concluding Observations: Sudan. UN Doc. CRC/C/15/Add.10. October 18, 1993. para. 10; CRC Committee. Concluding Observations: Chile. UN Doc. CRC/C/15/Add.173. April 3, 2002. para. 41.

¹⁴⁹ Center for Reproductive Rights. ICPD and Human Rights: 20 years of advancing reproductive rights through UN treaty bodies and legal reform. June 2013. p. 2, citing as examples: CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Malawi. UN Doc. CEDAW/C/MWI/CO/5. February 3, 2006; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Mexico. UN Doc. CEDAW/C/MEX/CO/6. August 25, 2006. para. 32; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Morocco. UN Doc. CEDAW/C/MAR/CO/4. April 8, 2008. para. 30; CCPR. Concluding Observations: Chile. UN Doc. CCPR/C/CHL/CO/5. May 18, 2007; CCPR. Concluding Observations: Madagascar. UN Doc. CCPR/C/MDG/CO/3. May 11, 2007. para. 14; CCPR. Concluding Observations: Panama. UN Doc. CCPR/C/PAN/CO/3. April 17, 2008. para. 9; CRC Committee. Concluding Observations: Democratic People's Republic of Korea. UN Doc. CRC/C/15/Add.239. July 1, 2004. para. 50; CRC Committee. Concluding Observations: Guatemala. UN Doc. CRC/C/15/Add.154. July 9, 2001. para. 40; CRC Committee. Concluding Observations: Haiti. UN Doc. CRC/C/15/Add.202. March 18, 2003. para. 46; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Eritrea. UN Doc. CEDAW/C/ERI/CO/3. February 3, 2006. para. 22; CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Mozambique. UN Doc. CEDAW/C/MOZ/CO/2. June 11, 2007. para. 36; CRC Committee. Concluding Observations: Sudan. UN Doc. CRC/C/15/Add.10. October 18, 1993. para. 10; CRC Committee. Concluding Observations: Chile. UN Doc. CRC/C/15/Add.173. April 3, 2002. para. 41.

tives and family planning,¹⁵⁰ governments are to ensure the establishment of “education and training programmes to encourage health providers to change their attitudes and behaviour in relation to adolescent women seeking reproductive health services and respond to specific health needs related to sexual violence.” Likewise, governments should develop “guidelines or protocols to ensure [reproductive] health services are available and accessible in public facilities.”¹⁵¹

Concluding Observations on Benin Relating to Sexual and Reproductive Health and the Right to the Highest Attainable Standard of Health

While noting the efforts made by the State party to improve reproductive health care to women, the Committee remains concerned about the lack of access to adequate health care for women and girls, particularly in rural areas. It is concerned about the causes of morbidity and mortality in women, particularly the number of deaths due to illegal abortions, and about inadequate family planning services and the low rates of contraceptive use. The Committee expresses its concern that women require the permission of their husbands to obtain contraceptives and family planning services.

The Committee recommends that the State party take measures, in accordance with general recommendation 24 on women and health, to improve and increase women’s access to health care and health-related services and information, particularly in rural areas. It calls on the State party to improve the availability of sexual and reproductive health services, including family planning, with the aim also of preventing clandestine abortions, and to make available, without requiring the permission of the husband, contraceptive services to women and girls. It further recommends that sex education be widely promoted and targeted at girls and boys, with special attention to the prevention of early pregnancies and sexually transmitted diseases.¹⁵²

Case Relating to Sexual and Reproductive Health and the Right to the Highest Attainable Standard of Health

- **da Silva Pimentel Teixeira v. Brazil (CEDAW Committee)(2011).** The Committee found that the government’s failure to ensure that the activities of private institutions providing medical services are appropriate and in line with health policies and practices attributed to the death of the patient and constituted a violation of the right to health.¹⁵³
- **L.C. v. Peru (CEDAW Committee)(2009).** The Committee found a violation of Article 12 of CEDAW where the state refused to terminate the woman’s pregnancy that put her life and health at risk. The Committee recalled that states had the obligation of taking “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 plan-

150 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. paras. 14, 23, 34; CEDAW Committee. General Recommendation No. 21: Equality in marriage and family relations. UN Doc. A/49/38. 1994. para. 22; United Nations General Assembly. Interim report of the UN Special Rapporteur on the Right to Health. UN Doc. A/66/254. August 3, 2011. para. 65 (main focus: criminalization of sexual and reproductive health); CRC Committee. Concluding Observations: Australia. UN Doc. CRC/C/15/Add.268. October 20, 2005. para. 46(e); CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: China. UN Doc. CEDAW/C/CHN/CO/6. August 25, 2006. para. 32.

151 CEDAW Committee. Communication No. 22/2009: L.C. v. Peru. UN Doc. CEDAW/C/50/D/22/2009. November 4, 2011. para. 9.2(b).

152 CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women. UN Doc. A/60/38(SUPP). 2005. para. 157.

153 CEDAW Committee. Communication No. 17/2008: Maria de Lourdes da Silva Pimentel Teixeira v. Brazil. UN Doc. CEDAW/C/49/D/17/2008. September 27, 2011. para. 7.5.

ning.”The Committee also emphasized that a state cannot refuse to provide “certain reproductive health services for women”—a state’s duty to “ensure, on a basis of equality between men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women’s rights to health care.”¹⁵⁴

Right to Freedom from Torture and other cruel, Inhuman or Degrading Treatment or Punishment

The right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (TCIDT) obligates the State to prevent and protect people from, and punish acts of, cruel, inhuman or degrading treatment and torture. In fact, as a *jus cogens* norm, this right is one of the few absolute non-derogable human rights under international law—meaning that the right is “untouchable” even in exceptional circumstances, such as war or threat of war.¹⁵⁵ Most human rights prohibitions against torture cover abuses ranging from torture to cruel and inhuman treatment to degrading treatment. The CCPR has hesitated to sharply distinguish different types of abuse, but has indicated that distinctions are based on the nature, purpose and severity of the treatment.¹⁵⁶ Moreover, while the CAT defines torture under Article 1, none of the international human rights treaties define cruel, inhuman and degrading treatment. However, Manfred Nowak, former UN Special Rapporteur on TCIDT, has made the distinction. According to Nowak, the difference does not stem from the degree of “intensity of the suffering being inflicted” or the “severity of the treatment,” but rather in “the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim.”¹⁵⁷ Torture consists of four essential elements: an act inflicting severe pain or suffering, whether physical or mental; the element of intent; the specific purpose; and the involvement of a State official, at least by acquiescence.¹⁵⁸ In contrast, CIDT is “the infliction of severe pain or suffering without purpose or intention and outside a situation where a person is under the de facto control of another.”¹⁵⁹ Juan Mendez, the current UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on Torture), has defined CIDT as “acts falling short of [the torture] definition.”¹⁶⁰

154 CEDAW Committee. Communication No. 22/2009: L.C. v. Peru. UN Doc. CEDAW/C/50/D/22/2009. November 4, 2011. para. 8.11.

155 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. UN Doc. A/HRC/13/39/Add.5. February 5, 2010. paras. 42, 186.

156 CCPR. General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment. October 3, 1992. para. 4.

157 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. UN Doc. A/HRC/13/39/Add.5. February 5, 2010. paras. 187-188.

158 CAT, Art. 1. See also UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. UN Doc. A/HRC/13/39/Add.5. February 5, 2010. para. 30.

159 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention. UN Doc. A/HRC/13/39/Add.5. February 5, 2010. para. 188.

160 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013.

International human rights law explicitly protects patients against torture in health-care settings and requires the State to prevent, investigate, prosecute and punish violations by non-State actors.¹⁶¹ 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;¹⁶² and where medical personnel participate in acts of torture, they should be held accountable and punished.¹⁶³

In his February 2013 report, the Special Rapporteur underscores the applicability of TCIDT in health-care settings, including the State's obligation to not only prevent torture inflicted by public officials, but also by doctors, health-care professionals and social workers at public or private hospitals, detention centers, and any other institutions where health care is provided.¹⁶⁴ The Special Rapporteur clarifies that "[m]edical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is State involvement and specific intent, it is torture."¹⁶⁵ He explains that involuntary medical treatment, including forced sterilization, involuntary detention and compulsory treatment of people who use drugs, denial of pain treatment and available health services, and solitary confinement or prolonged detention of persons with mental disabilities, among others, constitute violations of the right to freedom from TCIDT. In addition to discussing the special situation of marginalized groups with respect to TCIDT in health-care settings, the Special Rapporteur highlights the obligations of states to prevent, prosecute, and redress violations of the right. Specifically, he recalls that redress shall not require that the abuse in health care settings fit the definition of torture.¹⁶⁶

With respect to detainees, denial to medical treatment and/or access to it when the individual is under custody can be considered cruel, inhuman or degrading treatment or punishment under international law.¹⁶⁷ In relation to Article 10(1), the CCPR has found a violation where a prisoner on death row was denied medical treatment¹⁶⁸ and where severe overcrowding in a pretrial detention center resulted in inhumane and unhealthy conditions, eventually leading to the detainee's death.¹⁶⁹ Other examples of

161 CEDAW Committee. Communication No. 17/2008: Maria de Lourdes da Silva Pimentel Teixeira v. Brazil. UN Doc. CEDAW/C/49/D/17/2008. September 27, 2011. para. 7.5. UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013. para. 24.

162 CCPR. Communication No. 684/1996: Sahadath v. Trinidad and Tobago. UN Doc. CCPR/A/57/40 (Vol. II); CCPR/C/684/1996. April 2, 2002.

163 CAT Committee. Report of the Committee against Torture. UN Doc. A/48/44. 1993.

164 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013. para. 24. See also CAT Committee. General Comment No.2: Implementation of Article 2 by States Parties. UN Doc. CAT/C/GC/2. January 24, 2008. para. 15.

165 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013. para. 39.

166 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013. para. 84.

167 United Nations Human Rights Council. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/10/44. January 14, 2009. para. 71.

168 CCPR. Communication No. 527/1993: Lewis v. Jamaica. UN Doc. CCPR/C/57/D/527/1993. July 18, 1996. Appointments to treat skin condition not kept over period of 2½ years; see also CCPR. Communication No. 232/1987: Pinto v. Trinidad and Tobago. UN Doc. CCPR/A/45/40 (Vol. II SUPP). July 20, 1990. The CCPR 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; CCPR. Communication No. 571/1994: Henry and Douglas v. Jamaica. UN Doc. CCPR/A/51/40 (Vol. II SUPP); CCPR/C/57/D/571/1994. July 25, 1996. Keeping Henry in a cold cell after he was diagnosed for cancer breached Articles 7 and 10(1); CCPR. Communication No. 613/1995: Leehong v. Jamaica. UN Doc. CCPR/A/54/40 (Vol. II); CCPR/C/66/D/613/1995. July 13, 1999. Prisoner on death row only allowed to see a doctor once, despite sustained beatings by warders and request for medical attention.

169 CCPR. Communication No. 763/1997: Lantsova v. Russian Federation. UN Doc. CCPR/C/74/D/763/1997. March 26, 2002.

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 required¹⁷⁰ 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).¹⁷¹

In addition, denying access to pain relief, if it causes severe pain and suffering, constitutes cruel, inhuman or degrading treatment or punishment.¹⁷² Denying a detainee direct access to her/his medical records, particularly where this may have consequences for her/his treatment, can likewise constitute a breach of Article 10(1).¹⁷³ 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.¹⁷⁴ Some of the worst abuses include: failure to provide new detainees with access to a medical professional and with sanitary living conditions;¹⁷⁵ failure to segregate those with contagious diseases such as tuberculosis;¹⁷⁶ completely unacceptable quarantine procedures;¹⁷⁷ insufficient provision of food, leading in some instances to conditions approaching starvation;¹⁷⁸ and mental suffering that could amount to mental torture.¹⁷⁹

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 5:** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- ▶ **ICCPR**
 - Art. 7:** 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.

170 CCPR. Communication No. R.14/63: Setelich/Sendic v. Uruguay. UN Doc. CCPR/A/37/40. October 28, 1981.

171 CCPR. Communication No. 798/1998: Howell v. Jamaica. UN Doc. CCPR/A/59/40 (Vol. II); C/79/D/798/1998). October 21, 2003.

172 United Nations Human Rights Council. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/10/44. January 14, 2009. paras. 71-72.

173 CCPR. Communication No. 726/1996: Zheludkov v. Ukraine. UN Doc. CCPR/A/58/40 (Vol. II); CCPR/C/76/D/726/1996. 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.

174 United Nations Human Rights Council. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Jordan. UN Doc. A/HRC/33/Add.3. January 5, 2007; United Nations Commission on Human Rights. Report of the UN Special Rapporteur on the question of torture: Mission to Uzbekistan. UN Doc. E/CN.4/2003/68/Add.2. February 3, 2003.

175 United Nations Commission on Human Rights. Report of the UN Special Rapporteur: Russian Federation. UN Doc. E/CN.4/1995/34/Add.1. November 16, 1994.

176 United Nations Commission on Human Rights. Report of the UN Special Rapporteur: Azerbaijan. UN Doc. E/CN.4/2001/66/Add.1. November 14, 2000.

177 United Nations Commission on Human Rights. Report of the UN Special Rapporteur: Azerbaijan. UN Doc. E/CN.4/2001/66/Add.1. November 14, 2000; United Nations Human Rights Council. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/10/44/Add.3. February 12, 2009.

178 United Nations Commission on Human Rights. Report of the UN Special Rapporteur: Kenya. UN Doc. E/CN.4/2000/9/Add.4. March 9, 2000.

179 UN Commission on Human Rights. Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: China. UN Doc. E/CN.4/2006/6/Add.6. March 10, 2006. para. 64.

Art. 10(1): All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

▶ **CAT**

Art. 1:

- (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.

Art. 2:

- (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.

Art. 4:

- (1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
- (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Art. 10:

- (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.

Art. 13: 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.

Art. 14:

- (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains re-dress 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 dependents 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.

Art. 16:

- (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.

▶ **CRC**

Art. 37: States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Art. 39: 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.

▶ **ICRPD, Art. 15:**

- (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.

▶ **ICMW**

Art. 10: No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Art. 17(1): Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

▶ **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**¹⁸⁰

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.

▶ **Code of Conduct for Law Enforcement Officials**¹⁸¹

Art. 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.

Art. 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.

▶ **Standard Minimum Rules for the Treatment of Prisoners**¹⁸²

Rule 22:

- (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
- (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
- (3) The services of a qualified dental officer shall be available to every prisoner.

Rule 23:

- (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
- (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

180 United Nations General Assembly. United Nations General Assembly Resolution 43/173: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. UN Doc. A/RES/43/173. December 9, 1998.

181 United Nations General Assembly. United Nations General Assembly Resolution 34/169, annex: Code of Conduct for Law Enforcement Officials. UN Doc. A/34/46. February 5, 1980.

182 United Nations. Economic and Social Council Resolution 663 C (XXIV): Standard Minimum Rules for the Treatment of Prisoners. August 30, 1955.

Rule 24: The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

Rule 25:

- (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
- (2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

Rule 26:

- (1) The medical officer shall regularly inspect and advise the director upon:
 - (a) The quantity, quality, preparation and service of food;
 - (b) The hygiene and cleanliness of the institution and the prisoners;
 - (c) The sanitation, heating, lighting and ventilation of the institution;
 - (d) The suitability and cleanliness of the prisoners' clothing and bedding;
 - (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.
- (2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

Freedom from Torture and other cruel, inhuman or degrading treatment or punishment in the Context of Mental Health

The right to freedom from torture and cruel, inhuman and degrading treatment guarantees persons with disabilities the full exercise of their legal capacities and to exercise any procedural safeguard that is at their disposition.¹⁸³ In fact, the CCPR 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.”¹⁸⁴ The

¹⁸³ United Nations. Report of the Human Rights Committee. UN Doc. A/65/40 (Vol. I). 2009. p. 40-41, para. 19.

¹⁸⁴ CCPR. CCPR General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10) (Annex VI, B). UN Doc. A/47/40 [SUPP]. March 13, 1993. para. 2.

CCPR has repeatedly reaffirmed 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.¹⁸⁵ Often in conjunction with Article 7, it has gone on to find breaches of this obligation on numerous occasions.¹⁸⁶ Specifically, in relation to persons suffering from mental health disabilities in detention facilities (both in prisons and mental health institutions), the CCPR has required improvements in hygienic conditions and the provision of regular exercise and adequate treatment.¹⁸⁷ Similarly, solitary confinement or deprivation of food is considered torture, and therefore illegal.¹⁸⁸

Additionally, the CAT Committee has identified overcrowding, inadequate living conditions and lengthy confinement in psychiatric hospitals as “tantamount to inhuman or degrading treatment.”¹⁸⁹ 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,¹⁹⁰ in addition to lack of medical attention.¹⁹¹

Concluding Observations Relating on China to Mental Health and the Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

For those involuntarily committed persons with actual or perceived intellectual and psychosocial impairments, the Committee is concerned that the “correctional therapy” offered at psychiatric institutions represents inhuman and degrading treatment. Further, the Committee is concerned that not all medical experimentation without free and informed consent is prohibited by Chinese law.

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- 185 CCPR. Communication No. 256/1987: Kelly v. Jamaica. UN Doc. CCPR/C/41/D/253/1987. 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 CCPR. Communication No. 255/1987: Linton v. Jamaica. UN Doc. CCPR/C/46/D/255/1987. October 22, 1992. Denial of adequate medical treatment for injuries sustained during aborted escape attempt breached Articles 7 and 10(1); CCPR. Communication No. 334/1988: Bailey v. Jamaica. UN Doc. CCPR/C/47/D/334/1988. December 5, 1993; CCPR. Communication No. 321/1988: Thomas v. Jamaica. UN Doc. CCPR/C/49/D/321/1988. October 19, 1993; CCPR. Communication No. 414/1990: Mika Miha v. Equatorial Guinea. UN Doc. CCPR/C/51/D/414/1990. July 8, 1994; CCPR. Communication No. 653/1995: Colin Johnson v. Jamaica. UN Doc. CCPR/C/64/D/653/1995. October 20, 1998; CCPR. Communication No. 326/1988: Kalenga v. Zambia. UN Doc. CCPR/C/48/D/326/1988. July 27, 1993.
- 186 CCPR. Communication No. 732/1997: Whyte v. Jamaica. UN Doc. CCPR/C/63/D/732/1997. July 27, 1998. Failure to treat asthma attacks and injuries sustained through beatings; see also CCPR. Communication No. 564/1993: Leslie v. Jamaica. UN Doc. CCPR/C/63/D/564/1993. July 31, 1998. Lack of adequate medical treatment for beatings and stabbing on basis that Leslie was due to be executed imminently; CCPR. Communication No. 610/1995: Henry v. Jamaica. UN Doc. CCPR/C/64/D/610/1995. October 20, 1995. Lack of medical treatment despite a recommendation from a doctor that prisoner be operated on; CCPR. Communication No. 647/1995: Pennant v. Jamaica. UN Doc. CCPR/C/64/D/647/1995. October 20, 1998; CCPR. Communication No. 719/1996: Levy v. Jamaica. UN Doc. CCPR/C/64/D/719/1996. November 3, 1998; CCPR. Communication No. 730/1996: Marshall v. Jamaica. UN Doc. CCPR/C/64/D/730/1996. November 3, 1998; CCPR. Communication No. 720/1996: Morgan and Williams v. Jamaica. UN Doc. CCPR/C/64/D/720/1996. November 3, 1998; CCPR. Communication No. 663/1995: Morrison v. Jamaica. UN Doc. CCPR/C/64/D/663/1995. November 3, 1998; CCPR. Communication No. 775/1997: Brown v. Jamaica. UN Doc. CCPR/C/65/D/775/1997. March 23, 1999; CCPR. Communication No. 590/1994: Bennett v. Jamaica. UN Doc. CCPR/C/65/D/590/1994. March 25, 1999; CCPR. Communication No. 668/1995: Smith and Stewart v. Jamaica. UN Doc. CCPR/C/65/D/668/1995. April 8, 1999; CCPR. Communication No. 962/2001: Mulezi v. Democratic Republic of the Congo. UN Doc. CCPR/C/81/D/962/2001. July 6, 2004; CCPR. Communication No. 964/2001: Saidov v. Tajikistan. UN Doc. CCPR/C/81/D/964/2001. July 8, 2004.
- 187 CCPR. Concluding Observations: Bosnia and Herzegovina. UN Doc. CCPR/C/BIH/CO/1. November 22, 2006.
- 188 United Nations. Report of the Human Rights Committee. UN Doc. A/65/40 (Vol. I). 2009. p. 90, para 21.
- 189 CAT Committee. Concluding and recommendation of the Committee against Torture: Russian Federation. UN Doc. CAT/C/RUS/CO/4. February 6, 2007.
- 190 CAT Committee. Concluding and recommendation of the Committee against Torture: Cameroon. UN Doc. CAT/C/CR/31/6. February 5, 2004.
- 191 CAT Committee. Concluding and recommendation of the Committee against Torture: Nepal. UN Doc. CAT/C/NPL/CO/2. April 13, 2007; see also CAT. Summary record of the first part of the 418th meeting: Paraguay. UN Doc. CAT/C/SR.418. January 11, 2001; see also CAT Committee. Summary record of the first part of the 471th meeting: Greece, Brazil. UN Doc. CAT/C/SR.471. May 21, 2001.

*The Committee urges the State party to cease its policy of subjecting persons with actual or perceived impairments to such therapies and abstain from involuntarily committing them to institutions. Further it urges the State party to abolish laws which allow for medical experimentation on persons with disabilities without their free and informed consent.*¹⁹²

Case Relating to Mental Health and the Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- **Williams v. Jamaica (CCPR)(1997).** The Committee found that the government's failure to adequately treat the applicant, an inmate with a mental health condition that was exacerbated by being on death row, amounted to a breach of Articles 7 and 10(1) of the ICCPR.¹⁹³

Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Context of Infectious diseases

Under the right to freedom from torture and other cruel, inhuman or degrading treatment, the intentional transmission of an infectious disease, such as HIV/AIDS, is prohibited.¹⁹⁴ Likewise, this right requires that governments protect persons living with infectious diseases from torture and other cruel, inhuman or degrading treatment. For example, denying persons living with HIV "access to HIV-related information, education and means of prevention, voluntary testing, counselling, confidentiality and HIV-related health care and access to and voluntary participation in treatment trials could constitute cruel, inhuman or degrading treatment."¹⁹⁵ Likewise, forced sterilization of women living with HIV could amount to cruel, inhuman or degrading treatment.¹⁹⁶

Additionally, failing to segregate inmates with infectious diseases (such as tuberculosis) in prisons has been considered a violation of this right.¹⁹⁷ At the same time, persons suffering from infectious diseases may be more vulnerable to ill treatment.¹⁹⁸ They are likely to be denied access to information, prevention, testing, treatment and support.¹⁹⁹

192 CRPD. Concluding Observations: China. UN Doc. CRPD/C/CHN/CO/1. October 15, 2012. para 27-28.

193 CCPR. Communication No. 609/1995: Williams v. Jamaica. UN Doc. CCPR/C/61/D/609/1995. November 4, 1997.

194 United Nations Commission on Human Rights. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. E/CN.4/2004/56. December 23, 2003. paras. 52-53.

195 United Nations Commission on Human Rights. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. E/CN.4/2004/56. December 23, 2003. para. 54 (citing *HIV/AIDS and Human Rights: International Guidelines*, United Nations publication, Sales No. E.98.XIV.1, United Nations, New York and Geneva, 1998, para. 130); see also paras. 56-57 on access to medical care and treatment.

196 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013. paras. 48, 71; see UN Special Rapporteur on the Right to Health. Report. UN Doc. A/64/272. August 10, 2009. para. 55.

197 See United Nations Commission on Human Rights. Report of the UN Special Rapporteur: Azerbaijan. UN Doc. E/CN.4/2001/66/Add.1. November 14, 2000; United Nations Human Rights Council. Reports of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/10/44/Add.3. February 12, 2009.

198 United Nations Commission on Human Rights. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. E/CN.4/2004/56. December 23, 2003. para. 61.

199 United Nations Commission on Human Rights. Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. E/CN.4/2004/56. December 23, 2003. para. 61.

Concluding Observations on China Relating to Infectious Diseases and the Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

While the Committee notes that the Special Rapporteur on the question of torture has found the availability of medical care in the detention facilities he visited to be generally satisfactory (E/CN.4/2006/6/Add.6, para. 77), it also notes with concern new information provided about inter alia the lack of treatment for drug users and people living with HIV/AIDS and regrets the lack of statistical data on the health of detainees (art. 11).

The State party should take effective measures to keep under systematic review all places of detention, including existing and available health services. Furthermore, the State party should take prompt measures to ensure that all instances of deaths in custody are independently investigated and that those responsible for such deaths resulting from torture, ill-treatment or wilful negligence are prosecuted. The Committee would appreciate a report on the outcome of such investigations, where completed, and about what penalties and remedies were provided.²⁰⁰

Case Relating to Infectious Diseases and the Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- **McCallum v. South Africa (CCPR)(2010).** The Committee found the government in violation of Article 7 where a prisoner is forced to strip in front of multiple other inmates, is severely beaten (dislocating his jaw and front teeth), is sexually degraded (including anal penetration by a police baton), is exposed to bodily fluids (including urine and fecal matter) and is denied HIV testing, medical treatment, and communication with legal counsel and family after the assault. Despite letters to a number of government officials, the author was unable to obtain HIV testing and, while police promised an investigation of the incident, no official action was taken.²⁰¹

Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Context of Sexual and Reproductive Health

Under the right to freedom from torture and other cruel, inhuman or degrading treatment, a state's failure to provide access to abortion services where the pregnancy would pose a risk on the woman's life or health, results from rape or incest, or where the fetus exhibits severe abnormalities, constitutes a violation of this right.²⁰² Likewise, forced castration or sterilization has been treated as a breach of this right.²⁰³ Harmful traditional practices, such as female genital mutilation, have been considered

200 CAT Committee. Concluding Observations: China. UN Doc. CAT/C/CHN/CO/4. December 12, 2008. para. 12

201 CCPR. Communication No. 1818/2008: McCallum v. South Africa. UN Doc. CCPR/C/100/D/1818/2008. November 2, 2010. paras. 6.2-6.4.

202 CCPR. Communication No. 1153/2003: K.L. v. Peru. UN Doc. CCPR/C/85/D/1153/2003. November 22, 2005. para. 7; CCPR. Communication No: 1608/2007: L.M.R v. Argentina. UN Doc. CCPR/C/101/D/1608/2007. April 28, 2011. para. 9.2; CRC Committee. Concluding Observations: Chad. UN Doc. CRC/C/15/Add.107. August 24, 1999. para. 30; CRC Committee. Concluding Observations: Chile. UN Doc. CRC/C/CHL/CO/3. April 23, 2007. para. 56; CRC Committee. Concluding Observations: Costa Rica. UN Doc. CRC/C/CR/CO/4. June 17, 2011. para. 64(c); CCPR. Concluding Observations: Guatemala. UN Doc. CCPR/C/GTM/CO/3. April 19, 2012. para. 20; ESCRC. Concluding Observations: Dominican Republic. UN Doc. E/C.12/DOM/CO/3. November 26, 2010. para. 29; ESCRC. Concluding Observations: Chile. UN Doc. E/C.12/1/Add.105. November 26, 2004. para. 53.

203 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report on health-care settings. UN Doc. A/HRC/22/53. February 1, 2013. paras. 46, 48; United Nations. Report of the Human Rights Committee. UN Doc. A/65/40 (Vol. I). 2009. p. 20, para. 20.

cruel, inhuman and degrading treatment, and states are required to implement measures that prevent such practices.²⁰⁴

Concluding Observations on Chad Relating to Sexual and Reproductive Health and the Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Committee expresses its serious concern at the high prevalence of sexual and gender-based violence, including FGM, rape and domestic violence in the State party. It is deeply concerned that violence against women is accompanied by a culture of silence and impunity that has impeded the investigation, prosecution and punishment of sexual and gender-based violence perpetrators, regardless of their ethnic group, for acts committed during conflict and post-conflict times. In this context, it also notes with concern that the vast majority of cases of domestic and sexual violence remain under-reported due to cultural taboos and the victims' fear of being stigmatized by their communities. It is further concerned that at least 45% of women in Chad have been subjected to FGM and it deeply regrets the lack of implementation of the Law on Reproductive Health (2002), which prohibits FGM, early marriages, domestic and sexual violence. Likewise, the Committee regrets the lack of information on the impact of the measures and programmes in place to reduce incidences of all forms of violence against women and girls. The Committee is also concerned about the availability of social support services, including shelters, for the victims.²⁰⁵

Case Relating to Sexual and Reproductive Health and the Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- **L.M.R v. Argentina (CCPR)(2011).** The Committee found an Article 7 violation where a young mentally impaired woman became pregnant after being raped. Despite judicial authorization for an abortion, no hospital was willing to undertake the procedure – due in part to pressure from religious groups, to which Argentinian authorities failed to respond. The woman was forced to resort to an illegal abortion at a later stage in her pregnancy, resulting in psychological harm, including post-traumatic stress disorder.²⁰⁶

Right to Participation in Public Policy

The right to participation in public policy has been treated as an underlying determinant of health,²⁰⁷ and in the context of health services, it is the right and opportunity of every person to participate in political processes and policy decisions affecting their health and wellbeing at the community, national and international levels.²⁰⁸ This opportunity must be meaningful, supported and provided to all citizens without discrimination. The right extends to participation in decisions about the planning and implementation of health care services, appropriate treatments, and public health strategies.

204 United Nations. Report of the Human Rights Committee. UN Doc. A/67/40 (Vol. I). 2012. p. 62, para. 9.

205 CEDAW Committee. Concluding Observations: Chad. UN Doc. CEDAW/C/TCD/CO/1-4. October 21, 2011. para. 22.

206 CCPR. Communication No. 1608/2007: L.M.R v. Argentina. UN Doc. CCPR/C/101/D/1608/2007. April 28, 2011. para. 9.2.

207 Halabi, Sam. Health and Human Rights Journal. Volume 11, No 1. p. 51

208 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 11.

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.”²⁰⁹ 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.”²¹⁰

RELEVANT PROVISIONS

▶ UDHR, Art. 21:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

▶ ICCPR, Art. 25(a):

Every citizen shall have the right and the opportunity, without ... distinctions ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives..

▶ ICESCR, Art. 12:

- (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: ...
 - (i) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (ii) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

▶ CEDAW

Art. 7(b): 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.

Art. 14(2)(a): The right of rural women to participate in development planning.

▶ ICRPD, Art. 29:

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- (1) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives,

209 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 43(f).

210 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 54.

including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

- (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
- (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
- (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; ...

▶ **Declaration of Alma-Ata,**²¹¹ **Art. IV:** The people have the right and the duty to participate individually and collectively in the planning and implementation of their health care.

▶ **IAPO Declaration on Patient-Centred Healthcare**²¹²

Principle 2. 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. Patient involvement in health policy: Patients and patients' organizations deserve to share the responsibility of health care policy-making through meaningful and supported engagement in all levels and at all points of decision-making, to ensure that they are designed with the patient at the center. This should not be restricted to health care policy but include, for example, social policy that will ultimately impact on patients' lives.

Right to Participation in public policy in the Context of Mental Health

The right to participation in public policy entitles individuals with intellectual disabilities or mental health problems to participate in public life on an equal basis with others, directly or through a chosen representative.²¹³ In fact, the participation of persons with mental disabilities "in decision-making processes that affect their health and development, as well as in every aspect of service delivery, is an integral part of the right to health."²¹⁴ States are to ensure that persons with mental disabilities are

211 International Conference on Primary Health Care. Declaration of Alma-Ata. September 6, 1978.

212 International Alliance of Patients' Organizations [IAPO]. Declaration on Patient-Centred Healthcare. February 2006. See also IAPO's Policy Statement on Patient Involvement.

213 FRA. The right to political participation of persons with mental health problems and persons with intellectual disabilities. October 2010.

214 UN Special Rapporteur on the Right to Health. Report on Mental Disability and the Right to Health. UN Doc. E/CN.4/2005/51. February 11, 2005. para. 59; see WHO. Montreal Declaration of Intellectual Disabilities. 2004.

involved “at all stages of the development, implementation and monitoring of legislation, policies, programmes and services relating to mental health and social support, as well as broader policies and programmes, including poverty reduction strategies, that affect them.”²¹⁵ Care and support providers, as well as family, should also be involved in the process.²¹⁶

However, while physical disabilities do not justify restrictions on this right, “mental incapacity may be a ground for denying a person the right to vote or to hold office.”²¹⁷ As of this writing, the CRPD has not issued its interpretation of Article 29 of the ICRPD outlining the article’s scope of protection of this right.

Concluding Observations on China Relating to Mental Health and the Right to Participation in Public Policy

The Committee is concerned about the disqualification from voting of all persons who are found to be incapable, by reason of their mental, intellectual or psychosocial disabilities of managing and administering their property and affairs under section 31(1) of the Legislative Council Ordinance and section 30 of the District Councils Ordinance (arts. 2, 25 and 26).

*Hong Kong, China, should revise its legislation to ensure that it does not discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable and objective relation to their ability to vote, taking account of article 25, of the Covenant and article 29 of the Convention on the Rights of Persons with Disabilities.*²¹⁸

In this instance, the human rights in patient care connection is the right to influence public policy on health care issues, including issues relating to mental, intellectual, or psychosocial disabilities.

Right to Participation in public policy in the Context of Infectious diseases

Persons living with infectious diseases, such as HIV/AIDS have the right to meaningful participation in designing and implementing policies that may impact them.²¹⁹ States have been called to engage civil society, including patient groups, in the “formulation and implementation of public policies.”²²⁰ As individuals who are most affected by public policies aimed at protecting the public’s health from infectious diseases, their engagement is crucial to creating comprehensive and successful public policy that not only protects the health of the larger community, but also respects the human rights of these individuals.

215 UN Special Rapporteur on the Right to Health. Report on Mental Disability and the Right to Health. UN Doc. E/CN.4/2005/51. February 11, 2005. para. 60.

216 UN Special Rapporteur on the Right to Health. Report on Mental Disability and the Right to Health. UN Doc. E/CN.4/2005/51. February 11, 2005. para. 60.

217 CCPR. General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25). UN Doc. CCPR/C/21/Rev.1/Add.7. July 12, 1996. para. 10.

218 CCPR. Concluding Observations on the third periodic report of Hong Kong, China. UN Doc. CCPR/C/CHN-HKG/CO/3. April 29, 2013. para. 24.

219 See Declaration of the Paris AIDS Summit. December 1, 1994; UNAIDS. UNAIDS Policy Brief: The Greater Involvement of People Living with HIV (GIPA). March 2007. p. 1.

220 See Declaration of the Paris AIDS Summit. December 1, 1994.

Concluding Observations on Suriname Relating to Infectious Diseases and the Right to Participation in Public Policy

The Committee is concerned about the situation of rural women... who are disadvantaged by poor infrastructure, limited markets, obstacles in availability and accessibility of agricultural land and agricultural credit, low literacy rates, ignorance of existing regulations, lack of services and environmental pollution. It notes with concern the serious absence of specific policies in all these areas, including on family planning and preventing the spread of sexually transmitted diseases, including HIV. The Committee is also concerned that women's work in rural areas is not considered productive labour and that they are hardly represented at all in local government bodies...

*The Committee urges the State party to give full attention to the needs of rural women... to ensure that they benefit from policies and programmes in all areas, in particular access to health, education, social services and decision-making...*²²¹

Right to Participation in public policy in the Context of Sexual and Reproductive Health

The right to participation in public policy is essential to protecting the sexual and reproductive health of women. The participation of the populations most affected by policies related to sexual and reproductive health helps to ensure that their needs, such as those related to family planning and access to contraceptives, are met. In addition to granting them a sense of ownership, the involvement of affected individuals can make the policies and implementation efforts more culturally appropriate and thereby increase access to individuals.²²²

Concluding Observations on Morocco Relating to Sexual and Reproductive Health and the Right to Participation in Public Policy

The Committee is particularly concerned about the situation of rural women, their lack of participation in decision-making processes and their difficulty in accessing health care, public services, education, justice, clean water and electricity, which impairs seriously the enjoyment of their social, economic and cultural rights. The Committee is also concerned about the lack of data on the de facto situation of rural women.

*The Committee recommends that the State party take temporary special measures, in accordance with article 4, paragraph 1, of the Convention, to ensure that rural women enjoy their political, social, economic and cultural rights without any discrimination, especially with regard to access to education and health care facilities. It also recommends that they are fully integrated in the formulation and implementation of all sectoral policies and programmes.*²²³

Right to Equality and Freedom from Discrimination

The right to equality and freedom from discrimination is crucial to the enjoyment of the right to health. Health care services and treatment must be accessible and provided without discrimination (in intent or effect) based on health status, race, ethnicity, age, sex, sexuality, sexual orientation, gender

221 CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women. UN Doc. A/57/38(SUPP). 2002. paras. 65-66.

222 CRF and UNFPA. Briefing Paper: The Right to Contraceptive Information and Services for Women and Adolescents. 2011. p. 24.

223 CEDAW Committee. Concluding comments of the Committee on the Elimination of Discrimination against Women: Morocco. UN Doc. CEDAW/C/MAR/CO/4. April 8, 2008. paras. 32-33.

identity, disability, language, religion, national origin, income or social status.²²⁴ 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.”²²⁵ 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.”²²⁶ It is worth highlighting that the protection from racial discrimination has been widely considered an obligation *erga omnes* under international law—meaning that even if a state has not ratified any convention prohibiting racial discrimination, it has a legal obligation to prohibit racial discrimination.²²⁷

Additionally, international discrimination law has distinguished direct discrimination from indirect discrimination, both of which are prohibited. Direct discrimination refers to discriminatory measures that has an intent to discriminate—it is “less favorable or detrimental” to an individual or group of individuals based on a “prohibited characteristic or ground such as race, sex or disability.”²²⁸ Indirect discrimination refers to “a practice, rule, requirement or condition [that] is neutral on its face” but has a negative and disproportionate impact on a group of individuals without justification.²²⁹ This type of discrimination includes stereotyping and acts of stigmatization. Therefore, while direct discrimination is defined by the *purpose* of the measure, indirect discrimination is defined the *effect* of the measure. For a more discussion on the issue, refer to Interights’ “Non-Discrimination in International Law: A Handbook for Practitioners.”²³⁰

Under this right, states have an obligation to prohibit and eliminate discrimination on all grounds and ensure equality to all in relation to access to health care and the underlying determinants of health.²³¹ States should also recognize and provide for differences and specific needs of groups that experience particular health challenges, such as higher mortality rates or vulnerability to specific diseases.²³² The CESCR has 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.”²³³ 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

224 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b)(i), 18; CESCR. CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/GC/20. July 2, 2009. para. 32; CRC Committee. CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child. UN Doc. CRC/GC/2003/4. July 1, 2003. para. 6.

225 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b).

226 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b).

227 Timo Makkonen. *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Thereto in Europe*. Boston: Martinus Nijhoff Publishers, 2012. p. 117.

228 Interights. *Non-Discrimination in International Law: A Handbook for Practitioners*. 2011. 18.

229 Interights. *Non-Discrimination in International Law: A Handbook for Practitioners*. 2011. 18.

230 Interights. *Non-Discrimination in International Law: A Handbook for Practitioners*. 2011.

231 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 18.

232 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 37.

233 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 12(b).

of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.²³⁴ In fact, according to the CESCR, states are to ensure that health facilities, goods and services are available, accessible, acceptable, of good quality and applicable to all sectors of the population, including migrants.²³⁵ Similarly, the CRC Committee has emphasized that all children be afforded “sustained and equal access to comprehensive treatment and care, including necessary HIV-related drugs, goods and services on a basis of non-discrimination.”²³⁶

UN treaty bodies have frequently condemned states for failing to ensure equal access to medical services (often due to a lack of sufficient resources) to marginalized and vulnerable groups. These groups have included indigenous people living in extreme poverty;²³⁷ refugees of a particular nationality;²³⁸ children, older persons, and persons with physical and mental disabilities;²³⁹ and those living in rural areas where the geographical distribution of health services and personnel shows a heavy urban bias.²⁴⁰ With respect to one country alone, the CESCR noted with regret the differential treatment in providing access to health services between one group of refugees and another,²⁴¹ the lack of mental health services in the country,²⁴² and the need to “reinforce reproductive and sexual health programmes, in particular in rural areas.”²⁴³

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 7:** All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
- ▶ **ICCPR, Art. 26:** 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.

234 CERD. CERD General Comment No. 30: Discrimination Against Non Citizens. UN Doc. A/59/18. October 1, 2004. para. 36.

235 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para.12.

236 CRC Committee. CRC General Comment No. 3: HIV/AIDS and the rights of the child. UN Doc. CRC/GC2003/3. March 17, 2003. paras. 21, 28.

237 CERD. Concluding Observations: Bolivia. UN Doc. CERD/C/304/Add.10. September 27, 1996; see also CESCR. Concluding Observations: Mexico. UN Doc. E/C.12/1/Add.41. December 8, 1999. 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.

238 United Nations. Report of the Committee on the Elimination of Racial Discrimination. UN Doc. A/56/18 (SUPP). 2003. Different standards of treatment are applied to Indochinese refugees compared to those from other nationalities.

239 CESCR. Concluding Observations: Finland. UN Doc. E/C.12/1/Add.52. December 1, 2000. 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.

240 CESCR. Concluding Observations: Mali. UN Doc. E/C.12/1994/17. December 21, 1994; see also CESCR. Concluding Observations: Guatemala. UN Doc. E/1997/22. May 17, 1996; CESCR. Concluding Observations: Paraguay. UN Doc. E/1997/22. May 14, 1996. Noting the very small number of medical and paramedical personnel in the country; also CESCR. Concluding Observations: Mongolia. UN Doc. E/2001/22. August 28, 2000. Noting the long-term deterioration in health situation and need to improve access to health care services for the poor and in rural areas.

241 CESCR. Concluding Observations: Nepal, 2001. UN Doc. E/2002/22. June 6, 2002. para. 545.

242 CESCR. Concluding Observations: Nepal, 2001. UN Doc. E/2002/22. June 6, 2002. para. 550.

243 CESCR. Concluding Observations: Nepal, 2001. UN Doc. E/2002/22. June 6, 2002. para. 571.

ICESCR, Article 2(2): 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.

- ▶ **CERD, Art. 5:** 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.

- ▶ **CEDAW**

Art. 12:

- (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Art. 14(2)(b): 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.

- ▶ **CRC, Art. 23:**

- (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.

► **ICRPD**

Art. 1: 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.

Art. 12:

- (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.

Art. 25: 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.

► **ICMW**

Art. 7: States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Art. 28: 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.

Art. 43:

- (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.

Art. 45(1)(c): 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.

- ▶ **Declaration of Lisbon on the Rights of the Patients (WMA),²⁴⁴ Principle 1(a):** Every person is entitled without discrimination to appropriate medical care.
- ▶ **IAPO Declaration on Patient-Centred Healthcare,²⁴⁵ Principle 4:** 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.
- ▶ **WMA Resolution on Medical Care for Refugees:²⁴⁶** Physicians have a duty to provide appropriate medical care regardless of the civil or political status of the patient, and governments should not deny patients the right to receive, nor should they interfere with physicians' obligation to administer, adequate treatment; and Physicians cannot be compelled to participate in any punitive or judicial action involving refugees or IDPs or to administer any non-medically justified diagnostic measure or treatment, such as sedatives to facilitate easy deportation from the country or relocation; and Physicians must be allowed adequate time and sufficient resources to assess the physical and psychological condition of refugees who are seeking asylum.

Right to Equality and Freedom from Discrimination in the Context of Mental Health

The right to equality and freedom from discrimination protects individuals with mental disabilities from various forms of stigma and discrimination. For example, those with mental disabilities often face discrimination in accessing general health care services, or stigmatizing attitudes from service providers, which may dissuade them from seeking care in the first place. The right to equality and freedom from discrimination prohibits stigma from leading to the inappropriate institutionalization of persons with mental disabilities against their will. Under this right, decisions to isolate or segregate persons with mental disabilities, including through unnecessary institutionalization, are inherently discriminatory and contrary to the right of community integration enshrined in international standards. Isolation in itself can also deepen stigma surrounding mental disability.²⁴⁷

²⁴⁴ WMA. Declaration on the Rights of the Patient. September/October 1981.

²⁴⁵ IAPO. Declaration on Patient-Centred Healthcare. February 2006.

²⁴⁶ WMA. Resolution on Medical Care for Refugees. 50th World Medical Assembly. October 1998.

²⁴⁷ UN Special Rapporteur on the Right to Health. Report on Mental Disability and the Right to Health. UN Doc. E/CN.4/2005/51. February 11, 2005. paras. 52-56.

Freedom from discrimination on the basis of disability is at the core of the ICRPD—without it, persons with disabilities are not able to enjoy all of their human rights and fundamental freedoms. Under Article 25, States Parties must “take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.” States Parties must also ensure that health professionals “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.”²⁴⁸

Other international treaties and regional treaties, such as the ICRPD and the CRC, prohibit discrimination on grounds of disability.²⁴⁹ The ICESCR does not explicitly refer to disability as a prohibited ground of discrimination, but interpretative documents adopted by the CESCR have interpreted the ICESCR as prohibiting discrimination on this ground.²⁵⁰ In fact, 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.”²⁵¹ 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.”²⁵² The CESCR has also criticized governments for providing inadequate medical care provided to low-income patients and urged states to subsidize expensive drugs required by chronically ill and mentally ill patients.²⁵³

Concluding Observations on China Relating to Mental Health and Right to Equality and Freedom from Discrimination

The Committee is concerned about the reported persistence of discrimination against persons with physical and mental disabilities, especially in terms of employment, social security, education and health.

The Committee recommends that the State party adopt effective measures to ensure equal opportunities for persons with disabilities, especially in the fields of employment, social security, education and health, to provide for more appropriate living conditions for persons with disabilities and to allocate adequate resources for improving the treatment of, and care for, persons with disabilities. The Committee requests the State party to provide detailed information in its second periodic report on the measures undertaken with regard to persons with physical and mental disabilities.²⁵⁴

248 ICRPD, Article 25(f).

249 Convention on the Rights of the Child, Article 2.

250 UN Special Rapporteur on the Right to Health. Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc. E/CN.4/2005/51. February 11, 2005. para. 31.

251 CESCR. CESCR General Comment No. 5: Persons with disabilities. December 9, 1994. para. 15.

252 CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. UN Doc. E/C.12/2000/4. August 11, 2000. para. 26.

253 CESCR. Concluding Observations: People’s Republic of China (including Hong Kong and Macao). UN Doc. E/C.12/1/Add.107. May 13, 2005; see also CESCR. Concluding Observations: Russian Federation. UN Doc. E/C.12/1/ADD.94. December 12, 2003. Committee criticizes Russia for frequent failure of hospitals and clinics in poor regions to stock essential drugs.

254 CESCR. Concluding Observations: People’s Republic of China (including Hong Kong and Macao). UN Doc. E/C.12/1/Add.107. May 13, 2005. paras. 16, 47.

Right to Equality and Freedom from Discrimination in the Context of Infectious diseases

The right to equality and freedom from discrimination protects a person infected with a communicable disease, such as HIV/AIDS or tuberculosis, from discrimination. Treaty-monitoring 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.²⁵⁵ States have an obligation to protect persons suffering from an infectious disease from discrimination or stigmatization in fields of education, employment, housing and health care. This may be accomplished, for example, through awareness-raising campaigns on HIV/AIDS or by amending legislation or regulatory frameworks that are discriminatory in intent or effect.²⁵⁶

Concluding Observations on Moldova Relating to Infectious Diseases and the Right to Equality and Freedom from Discrimination

The Committee is concerned that persons infected with HIV/AIDS face discrimination and stigmatization in the State party, including in the fields of education, employment, housing and health care, and that foreigners are arbitrarily subjected to HIV/AIDS tests as part of the immigration rules framework. In particular, the Committee is concerned that patient confidentiality is not always respected by health-care professionals. It is also concerned that legislation prohibits the adoption of children with HIV/AIDS, thereby depriving them of a family environment. (arts. 2, 17 and 26)

*The State party should take measures to address the stigmatization of HIV/AIDS sufferers through, inter alia, awareness-raising campaigns on HIV/AIDS, and should amend its legislation and regulatory framework in order to remove the prohibition on the adoption of children with HIV/AIDS, as well as any other discriminatory laws or rules pertaining to HIV/AIDS.*²⁵⁷

Case Relating to Infectious Diseases and the Right to Equality and Freedom from Discrimination

- **Toonen v. Australia (CCPR)(1994).** The Committee found that discriminating on the basis of sexual orientation constitutes “sex” discrimination and that criminalization of consensual sex between adult males was not a reasonable measure to prevent spread of HIV/AIDS.²⁵⁸

255 CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women. UN Doc. A/56/38 (SUPP). 2001; see also CESCR. Concluding Observations: Russian Federation. UN Doc. E/2004/22. November 28, 2003.

256 CCPR. Concluding Observations: Zimbabwe. UN Doc. CCPR/C/79/Add.89. April 6, 1998.

257 CCPR. Concluding Observations: Republic of Moldova. UN Doc. CCPR/C/MDA/CO/2. October 29, 2009.

258 CCPR. Communication No. 488/1992: Toonen v. Australia. UN Doc. CCPR/C/50/D/488/1992. April 4, 1994. para. 8.7.

Right to Equality and Freedom from Discrimination in the Context of Sexual and Reproductive Health

Women and young people continue to suffer from unequal access to health services, a situation that frequently leads to high mortality rates.²⁵⁹ Both groups, particularly women living in rural areas²⁶⁰ and especially vulnerable groups of children (such as girls, indigenous children, and children living in poverty), will often experience multiple types of discrimination, requiring specific targeted measures and sufficient budgetary allocations.²⁶¹ To ensure equality between men and women in accessing health care, the CESCR has stated that the ICESCR 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.²⁶²

Concluding Observations on Estonia Relating to Sexual and Reproductive Health and the Right to Equality and Freedom from Discrimination

The Committee regrets that despite the efforts of the State party, wide racial disparities continue to exist in the field of sexual and reproductive health, particularly with regard to the high maternal and infant mortality rates among women and children belonging to racial, ethnic and national minorities, especially African Americans, the high incidence of unintended pregnancies and greater abortion rates affecting African American women, and the growing disparities in HIV infection rates for minority women (art. 5 (e) (iv)).

The Committee recommends that the State party continue its efforts to address persistent racial disparities in sexual and reproductive health, in particular by:

- (i) Improving access to maternal health care, family planning, pre- and post-natal care and emergency obstetric services, inter alia, through the reduction of eligibility barriers for Medicaid coverage;*
- (ii) Facilitating access to adequate contraceptive and family planning methods; and*
- (iii) Providing adequate sexual education aimed at the prevention of unintended pregnancies and sexually-transmitted infections.²⁶³*

Cases Relating to Sexual and Reproductive Health and the Right to Equality and Freedom from Discrimination

- ***L.N.P. v. Argentina (CCPR)(2011)***. The Committee found discrimination both on the basis of ethnicity and gender under Article 26 where a 15-year-old member

259 CESCR. Concluding Observations: Peru. UN Doc. E/1998/22. May 16, 1997. para. 145; see also CESCR. Concluding Observations: Ukraine. UN Doc. E/2002/22. August 29, 2001. 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.

260 CEDAW Committee. Report of the Committee on the Elimination of Discrimination against Women. UN Doc. A/55/38. 2000.

261 CRC Committee. Concluding Observations: Bolivia. UN Doc. CRC/C/16. March 5, 1993.

262 CESCR. CESCR General Comment 16: The equal right of men and women to enjoyment of all economic, social, and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2005/4. August 11, 2005.

263 CERD. Concluding Observations: United States of America. UN Doc. CERD/C/USA/CO/6. May 8, 2008. para. 33.

of an ethnic minority was sexually assaulted, was kept waiting for many hours before being seen, was roughly examined and was tested to determine whether she was a virgin, although this was irrelevant to investigating the attack. At trial, she was not informed of her right to appear as a plaintiff, no translation was provided, testimony by other members of her ethnic group was discounted as “nonsensical” and as motivated by ethnic animosity, and her three attackers were ultimately acquitted in an opinion that cited the victim’s sexual promiscuity as a key factor.²⁶⁴

- **L.C. v. Peru (CEDAW Committee)(2009).** The Committee found a violation of Article 12 of CEDAW where the state refused to terminate the woman’s pregnancy that put her life and health at risk. The Committee recalled that states had the obligation of taking “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.” The Committee also emphasized that a state cannot refuse to provide “certain reproductive health services for women”—states must “ensure, on a basis of equality between men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women’s rights to health care.”²⁶⁵

Right to an Effective Remedy

The right to an effective remedy requires that remedies for human rights violations be accessible and effective, and they must also adhere to “the special vulnerability of certain categories of person.”²⁶⁶ Accordingly, as explained by the CCPR, this right requires states to establish judicial and administrative mechanisms to ensure that human rights violations are effectively addressed at the domestic level.²⁶⁷ The right also entails at least compensatory relief and preventative measures.²⁶⁸ 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 non-repetition and changes in relevant laws and practices, and actions to bring to justice the perpetrators of human rights violations.”²⁶⁹ Relevant to the context of patient care, the CESCR has made clear that states have the obligation to ensure that effective remedies are available for violations of economic, social and cultural rights.²⁷⁰

264 CCPR. Communication No. 1610/2007: L.N.P. v. Argentina. UN Doc. CCPR/C/102/D/1610/2007. August 16, 2011. para. 13.7.

265 CEDAW Committee. Communication No. 22/2009: L.C. v. Peru. UN Doc. CEDAW/C/50/D/22/2009. November 4, 2011. para. 8.11.

266 CCPR. CCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant. May 26, 2004. para. 15.

267 CCPR. CCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant. May 26, 2004. para. 15.

268 CCPR. CCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant. May 26, 2004. para. 15.

269 CCPR. General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13. May 26, 2004. para. 16.

270 CESCR. Concluding Observations: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. UN Doc. E/C.12/GBR/CO/5. June 12, 2009. para. 13.

The Torture Convention enshrines the right to an effective remedy in its own separate provision (Art. 14). However, the ICCPR has linked the right to an effective remedy to the right to fair trial. Article 14 of the treaty includes both a right to compensation and judicial guarantees, such access to court. It requires that the state ensure determination of the right to a remedy by a competent judicial, administrative, or legislative authority. The state must protect “alleged victims if their claims are sufficiently well-founded to be arguable under the [ICCPR].”²⁷¹

RELEVANT PROVISIONS

▶ ICCPR

Art. 2(3): 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.

Art. 14:

1. 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....
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

▶ **ICESCR, Art. 2(1):** 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...

▶ **CAT, Art. 14(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.

271 CCPR. Communication No. 972/01: George Kazantzis v. Cyprus. UN Doc. CCPR/C/78/D/972/2001. September 13, 2003. para. 6.6.

Right to an Effective Remedy in the Context of Mental Health

In highlighting the difficulties that patients of mental health could face in challenging violations of their rights, including in health care settings, treaty bodies have underscored the states' obligation to ensure that the necessary procedural and substantive safeguards are in place to protect these individuals, including the ability to access courts and full exercise their right to an effective remedy.²⁷²

Concluding Observations on Bulgaria Relating to Mental Health and the Right to an Effective Remedy

The Committee remains concerned that persons with mental disabilities do not have access to adequate procedural and substantive safeguards to protect themselves from disproportionate restrictions in their enjoyment of rights guaranteed under the Covenant. In particular, the Committee is concerned that persons deprived of their legal capacity have no recourse to means to challenge violations of their rights, that there is no independent inspection mechanism of mental health institutions and that the system of guardianship often includes the involvement of officials of the same institution as the confined individual (arts. 2, 9, 10, 25 and 26).

The State party should:

(a) *Review its policy of depriving persons with mental disabilities of their legal capacity and establish the necessity and proportionality of any measure on an individual basis with effective procedural safeguards, ensuring in any event that all persons deprived of their legal capacity have prompt access to an effective judicial review of the decisions;*

(b) *Ensure that persons with mental disabilities or their legal representatives are able to exercise the right to effective remedy against violations of their rights, and consider providing less restrictive alternatives to forcible confinement and treatment of persons with mental disabilities;...*²⁷³

Case Relating to Mental Health and the Right to an Effective Remedy

- **Williams v. Jamaica (CCPR)(1997).** The Committee found that the government's failure to adequately treat the applicant, an inmate with a mental health condition that was exacerbated by being on death row, amounted to a breach of Articles 7 and 10(1) of the ICCPR. The Committee concluded that the individual was "entitled to an effective remedy, including in particular to appropriate medical treatment."²⁷⁴

Right to an Effective Remedy in the Context of Infectious Diseases

The right to an effective remedy has been invoked to protect the individuals with infectious diseases as marginalized populations that are stigmatized based on their health status. Treaty monitoring

272 CCPR. Concluding Observations: Bulgaria. UN Doc. CCPR/C/BGR/CO/3. para. 17; CESCR. Concluding Observations: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. UN Doc. E/C.12/GBR/CO/5. June 12, 2009. para. 35.

273 CCPR. Concluding Observations: Bulgaria. UN Doc. CCPR/C/BGR/CO/3. para. 17.

274 CCPR. Communication No. 609/1995: Williams v. Jamaica. UN Doc. CCPR/C/61/D/609/1995. November 4, 1997.

bodies, namely the CESCR, has expressed concern over the obstacles faced by such individuals in accessing the judicial system and have their claims be effectively addressed.²⁷⁵ The CESCR has also called on states to address deleterious prison conditions leading to high rates of infectious diseases, like tuberculosis, among inmates by providing them with medical treatment and improved detention conditions.²⁷⁶

Concluding Observations on India Relating to Infectious Diseases and the Right to an Effective Remedy

The Committee is deeply concerned that in spite of the Constitutional guarantee of non-discrimination as well as the criminal law provisions punishing acts of discrimination, widespread and often socially-accepted discrimination, harassment and/or violence persist against members of certain disadvantaged and marginalized groups, including women, scheduled castes and scheduled tribes, indigenous peoples, the urban poor, informal sector workers, internally-displaced persons, religious minorities such as the Muslim population, persons with disabilities and persons living with HIV/AIDS. The Committee is also concerned about the obstacles faced by the victims in accessing justice, including the high costs of litigation, the long delays in court proceedings and the non-implementation of court decisions by government authorities...

*The Committee ... urges the State party to step up efforts to remove obstacles faced by victims of discrimination when seeking redress through the courts.*²⁷⁷

Case Relating to Infectious Diseases and the Right to an Effective Remedy

- **Tornel et al. v. Spain (CCPR)(2006).** The Committee concluded that the prison's failure to inform the detained individual's family of his severely-deteriorating condition related to his HIV-positive status constituted an arbitrary interference with the family and violated Article 17(1) of the ICCPR. The Committee found that the state had the obligation to provide the victims with effective remedy, including compensation.²⁷⁸

Right to an Effective Remedy in the Context of Sexual and Reproductive Health

The right to an effective remedy and its corresponding state obligations have been invoked in a number of sexual and reproductive health contexts. Treaty monitoring bodies have established that cases of involuntary sterilization require that states investigate, prosecute, and provide redress to the victims, including compensation.²⁷⁹ Concerned with the inability of involuntary sterilization victims to obtain redress, the CAT Committee has called on states to take the necessary measures to "investigate promptly, impartially and effectively" any instance of an alleged involuntary sterilization of Roma women, to extend the period of time allowed for victims to file complaints, and to hold those involved

275 CESCR. Concluding Observations: India. UN Doc. E/C.12/IND/CO/5. August 8, 2008. para. 13.

276 CESCR. Concluding Observations: Ukraine. UN Doc. E/C.12/UKR/CO/5. January 4, 2008. paras. 49, 52.

277 CESCR. Concluding Observations: India. UN Doc. E/C.12/IND/CO/5. August 8, 2008. para. 13.

278 CCPR. Communication No. 1473/2006: Tornel v. Spain. UN Doc. CCPR/C/95/D/1473/2006. March 20, 2009. para. 7.4.

279 CRC Committee. Concluding Observations: Mozambique. UN Doc. CRC/C/15/Add.172. April 2, 2002. paras. 38-39.

accountable in order to provide effective remedy to the victims.²⁸⁰ Likewise, the CCPR has been clear on the importance of the state obligation to provide redress to victims of sexual violence.²⁸¹

Concluding Observations on Czech Republic Relating to Sexual and Reproductive Health and the Right to an Effective Remedy

The Committee is concerned about the absence of statistical data concerning compensation to victims of torture and ill-treatment, including victims of involuntary sterilization and surgical castration as well as ill-treatment in medical and psychiatric settings, violent attacks against ethnic minorities, trafficking and domestic and sexual violence. It is also concerned about the time limits set for filing complaints (arts. 14 and 16).

The Committee recommends that the State party ensure that victims of torture and ill-treatment are entitled to and provided with redress and adequate compensation, including rehabilitation, in conformity with article 14 of the Convention. It recommends that the State party provide it with statistical data on the number of victims, including victims of involuntary sterilization and surgical castration as well as ill-treatment in medical and psychiatric settings, violent attacks against ethnic minorities, trafficking and domestic and sexual violence, who have received compensation and other forms of assistance. It also recommends the extension of the time limit for filing claims.²⁸²

Case Relating to Sexual and Reproductive Health and the Right to an Effective Remedy

- **da Silva Pimentel Teixeira v. Brazil (CEDAW Committee)(2011).** The Committee found that the government's failure to ensure appropriate pregnancy-related medical treatment and to provide timely emergency obstetric care to the patient (both of which were found to have led to her death) constituted a violation of the right to life. The Committee concluded that the state violated Articles 12 and 2(c) by failing to provide a system that could adequately ensure judicial protection and remedies for the victim.²⁸³

2.4. Providers' Rights

Health care providers play a critical role in addressing the abuses that take place in health care settings. As such, the application of the human rights framework to patient care implies that the interests of both patients and health care providers are to be protected. If providers are unable to fully exercise their rights, they may be deterred or made powerless to effectively prevent abuses of patients.

280 CAT Committee. Concluding Observations: Czech Republic. UN Doc. CAT/C/CZE/CO/4-5. May 14-15, 2012. para. 12.

281 CAT Committee. Concluding Observations: Costa Rica. UN Doc. CAT/C/CRI/CO/2. July 7, 2008. para. 19; CEDAW Committee. Concluding Observations: Tanzania. UN Doc. CEDAW/C/TZA/CO/6. July 16, 2008. para. 120; CRC Committee. Concluding Observations: Lebanon. UN Doc. CRC/C/LBN/CO/3. June 8, 2006. paras. 47-48.

282 CAT Committee. Concluding Observations: Czech Republic. UN Doc. CAT/C/CZE/CO/4-5. May 14-15, 2012. para. 13.

283 CEDAW Committee. Communication No. 17/2008: Maria de Lourdes da Silva Pimentel Teixeira v. Brazil. UN Doc. CEDAW/C/49/D/17/2008. September 27, 2011. para. 7.2.

Numerous international treaties and conventions include rights that are designed to protect workers and ensure safe and healthy work environments. The UN 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; (ii) freedom of association and assembly, 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, including the right to work and the right to fair pay and safe working 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 relevant standards from various UN legal instruments and UN treaty-monitoring bodies' concluding observations and case law to exemplify potential violations.

Finally, it is worth noting that 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.

Right to Work in decent conditions

Article 7 of the ICESCR guarantees the individual's right to the enjoyment of just and favorable conditions of work, in particular the right to safe working conditions. The right to work, a component of the right to work in decent conditions, is enshrined under Article 6 and protects every individual's right to be able to work, allowing her/him to live in dignity.²⁸⁴ Article 8 of the ICESCR enshrines the collective right to work, which includes the right to form trade unions, join the trade union of her/his choice, and "the right of trade unions to function freely" (see section "Trade Unions and the Right to Strike" below).²⁸⁵ The CESCR has underscored that these three articles are interdependent.

Right to Work

The right to work guarantees that, in law and in practice, men and women are given equal access to jobs at all levels and all occupations and that includes vocational training and guidance programs.²⁸⁶

284 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. para. 1

285 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. para. 2.

286 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. para. 23

This right requires the State to ensure that neither itself nor others (such as private companies or other non-state actors) unreasonably or in a discriminatory way prevent a person from earning a living or practicing her/his profession.²⁸⁷ The individual must not be deprived from work unfairly.²⁸⁸ Also, this right protects foreign workers who are employed in a State with valid work permits from being unlawfully deported.²⁸⁹

Importantly, UN treaty-monitoring bodies have clarified that there is no “absolute and unconditional 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.²⁹⁰ 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.²⁹¹ The ICMW emphasizes states’ obligations to foreign-born employees.²⁹² The concern over the migration of medical professionals is driven in part by the poor remuneration that they receive in some countries.

Right to Fair Pay and Safe Working Conditions

The right to “the enjoyment of just and favourable conditions of work,” as enshrined under Article 7(a) of the ICESCR, requires that the government guarantee fair wages and equal pay for work of equal value, among other requirements.²⁹³ Under this right, workers who are not covered by collective bargaining are protected.²⁹⁴ It also applies to all workers with disabilities, whether they work in sheltered facilities or in the open labor market. Workers with disabilities 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.²⁹⁵ Article 3 of the ICESCR provides for the equal right of men and women to the enjoyment of the rights enshrined in the treaty. Therefore, when read with Article 7, this right requires that the State identify and eliminate the underlying causes of pay differentials, such as gender-based job evaluation.²⁹⁶ The State must take measures to eliminate discrimination against non-citizen workers in relation to working conditions and work requirements.²⁹⁷ Workers should not face discrimination in employment on the grounds

287 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. paras. 6, 23, and 25

288 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. para. 4

289 CERD. Communication No. 8/1996: B. M. S. v. Australia. UN Doc. CERD/C/54/D/8/1996. May 10, 1999.

290 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. para. 6.

291 CESCR. CESCR General Comment No. 18: The Right to work. UN Doc. E/C.12/GC/18. February 6, 2006. para. 18.

292 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 7.

293 CESCR. CESCR General Comment 16: The equal right of men and women to enjoyment of all economic, social, and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2005/4. August 11, 2005. para. 24.

294 CESCR. Concluding Observations: Suriname. UN Doc. E/1996/22. December 12, 1996.

295 See ICRPD, specifically arts. 8, 9, 27. See also CESCR. CESCR General Comment No. 5: Persons with disabilities. December 9, 1994. para. 25.

296 CESCR. CESCR General Comment 16: The equal right of men and women to enjoyment of all economic, social, and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2005/4. August 11, 2005. para. 24.

297 CERD. CERD General Comment No. 30: Discrimination Against Non Citizens. October 1, 2004. paras. 33–35.

of political opinion.²⁹⁸ The State must also develop regulations to penalize and remedy sexual harassment in the workplace.²⁹⁹

This right also protects the individual from working conditions that are harmful to the individual's health and wellbeing. It establishes limits on the duration of the working day and sets a minimum level of weekly rest,³⁰⁰ as well as prohibits failure to pay medical staff for extended periods of work.³⁰¹ Medical staff cannot be subjected to low wages and substandard working conditions in hospitals.³⁰² With respect to women, this right establishes special protection against harmful types of work during pregnancy and requires the provision of paid maternity leave.³⁰³ Finally, this right requires that the State 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.³⁰⁴

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 23(1):** Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- ▶ **ICESCR**
 - Art. 6(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.
 - Art. 7:** 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.

298 CESCR. Concluding Observations: Germany. UN Doc. E/C.12/1993/17. January 5, 1994.

299 CEDAW Committee. Report of the Committee: Argentina. UN Doc. A/52/38/Rev.1. 1997. part. II; see also CEDAW Committee. Report of the Committee: Cuba. UN Doc. A/55/38. June 19, 2000. part. II; CEDAW Committee. CEDAW General Recommendation No.24: Article 12 of the Convention (Women and Health). UN Doc. A/54/38/Rev. 1. 1999. part. I.

300 CESCR. Concluding Observations: Suriname. UN Doc. E/1996/22. December 12, 1996.

301 CRC Committee. Concluding Observations: Solomon Islands. UN Doc. CRC/C/132. October 23, 2003.

302 CESCR. Concluding Observations: Georgia. UN Doc. E/2003/22. November 29, 2000.

303 CEDAW Committee. CEDAW General Recommendation No.24: Article 12 of the Convention (Women and Health). UN Doc. A/54/38/Rev. 1. 1999. para. 28.

304 CESCR. CESCR General Comment 16: The equal right of men and women to enjoyment of all economic, social, and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2005/4. August 11, 2005. para. 24.

Art. 12:

- (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 ...
 1. [t]he improvement of all aspects of environmental and industrial hygiene....

- ▶ **ICERD, Art. 5(e)(i):** 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: ...
 - (i) 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...

▶ **ICRPD****Article 8 - Awareness-raising:**

1. States Parties undertake to adopt immediate, effective and appropriate measures:
 - a. To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
 - b. To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
 - c. To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

- a. Initiating and maintaining effective public awareness campaigns designed: ...
 - i. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market...

Article 9 – Accessibility:

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: (a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces...

Article 27 - Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
 - a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
 - b. Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
 - c. Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
 - d. Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
 - e. Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
 - f. Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
 - g. Employ persons with disabilities in the public sector;
 - h. Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
 - i. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
 - j. Promote the acquisition by persons with disabilities of work experience in the open labour market;
 - k. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

- ▶ **ILO Occupational Safety and Health Convention, 1981 (No. 155),³⁰⁵ Art. 4:**
 - (1) Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
 - (2) The aim of the policy shall be to prevent 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.
- ▶ **ILO Occupational Health Services Convention, 1985 (No. 161),³⁰⁶ Art. 3:** Each Member undertakes to develop progressively occupational health services for all workers, including those in the public sector and the members of production co-operatives, in all branches of economic activity and all undertakings. The provision made should be adequate and appropriate to the specific risks of the undertakings. ...
- ▶ **ILO Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187),³⁰⁷ Art. 2(1):** Each Member which ratifies this Convention shall 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.

PROVISIONS RELATED TO NURSING STAFF

- ▶ **ILO Nursing Personnel Convention, 1977 (No. 149)³⁰⁸ Art. 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.

³⁰⁵ International Labor Organization [ILO]. Occupational Safety and Health Convention, 1981 (No. 155). August 11, 1983.

³⁰⁶ ILO. Occupational Health Services Convention, 1985 (No. 161). February 17, 1985.

³⁰⁷ ILO. Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). February 20, 2009.

³⁰⁸ ILO. Nursing Personnel Convention, 1977 (No. 149). July 11, 1979.

Art. 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.

Art. 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.

PROVISIONS RELATED TO WOMEN

▶ ICESCR

Art 10(2): 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.

Art. 7: 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.

▶ CEDAW

Art.11:

- (1) 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;...
 - (f) [t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

- (2) 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 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.

Art. 12:

- (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

PROVISIONS RELATED TO MIGRANT WORKERS

► **CERD, Art. 5(e)(i):** 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.

► **ICMW**

Art. 25:

- (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.

Art. 51: 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.

Art. 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.

Concluding Observations on Suriname Relating to the Right to Work in Decent Conditions

*The Committee recommends that legislation be enacted to protect workers who are not covered by collective bargaining agreements, in order to ensure them a minimum wage, health and maternal benefits, safe working conditions, and other guarantees that meet international standards for conditions of work. In this connection, the Committee recommends that assistance from ILO be sought. Furthermore, the Committee encourages the Government to extend such protection also to immigrant workers.*³⁰⁹

Case Relating to the Right to Work in Decent Conditions

- ***B.M.S. v. Australia (CERD)(1999)***. An Indian doctor failed to pass several exams in order to obtain permanent medical registration in Australia. The Committee did not find the examination and quota system to be discriminatory, given that all overseas-trained doctors were subjected to it, irrespective of their race. The Committee found no violation of Article 5 of the ICERD.³¹⁰

309 CESCR. Concluding Observations: Suriname. UN Doc. E/1996/22. December 12, 1996.

310 CERD. Communication No. 8/1996: B. M. S. v. Australia. UN Doc. CERD/C/54/D/8/1996. May 10, 1999.

Right to Freedom of Association and Assembly

The right to freedom of association and assembly protects the association from the government's unjustifiable refusal to register it.³¹¹ This right works to ensure that the procedural formalities that associations of workers must undergo in order to be formally recognized are not too burdensome.³¹² For example, the CCPR has called on governments to refrain from restricting the right to freedom of association through processes that could deny registration to an individual for purposes of joining or forming an association.³¹³ This right also requires allowing men and women to organize and join workers' associations that address their specific concerns.³¹⁴ As it relates to providers, such as hospital personnel, they are entitled to join organizations for the promotion and defense of workers' interests without previous authorization.³¹⁵

Workers' right 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, and even though the health sector provides an essential service, this fact only precludes its members from work stoppage under certain exceptional circumstances. Additionally, 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.³¹⁶

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, which are also the subject of relevant ILO standards.

RELEVANT PROVISIONS

▶ UDHR, Art. 20:

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

▶ ICCPR

Art. 21: 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

311 International Labour Organization [ILO]. Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. 2005; ILO. Freedom of Association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. 1996; ILO. 332nd Report of the Committee on Freedom of Association. November 2003; ILO. Case No. 2225 (Bosnia and Herzegovina). Complaint date: October 18, 2002.

312 CCPR. Concluding Observations: Belarus. UN Doc. CCPR/C/79/Add.86. November 19, 1997; CCPR. Concluding Observations: Lithuania. UN Doc. CCPR/C/79/Add.87. November 19, 1997.

313 CCPR. Concluding Observations: Lebanon. UN Doc. A/52/40 (Vol. II). September 21, 1997.

314 CESCR. CESCR General Comment 16: The equal right of men and women to enjoyment of all economic, social, and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2005/4. August 11, 2005. para. 25.

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

316 United Nations General Assembly. General Assembly Resolution 53/144: Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. UN Doc. A/RES/53/144. March 8, 1999.

order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Art. 22:

- (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.

► **ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),³¹⁷ Art. 2:** Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations of their own choosing without previous authorisation.

► **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) 1998³¹⁸**

Art. 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.

Art. 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 nongovernmental organizations, associations or groups;
- (c) To communicate with non-governmental or intergovernmental organizations.

PROVISIONS RELATED TO WOMEN

► **CEDAW**

Art. 7(c): 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.

317 ILO. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). July 4, 1950.

318 United Nations General Assembly. General Assembly Resolution 53/144: Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. UN Doc. A/RES/53/144. March 8, 1999.

Art. 3: 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.

PROVISIONS RELATED TO RACE

- ▶ **CERD, Art. 5(d)(ix):** 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.

Concluding Observations on Belarus Relating to the Right to Freedom of Association and Assembly

With respect to article 22 of the Covenant, the Committee is also concerned about the difficulties arising from the registration procedures to which non-governmental organizations and trade unions are subjected. The Committee also expresses concern about reports of cases of intimidation and harassment of human rights activists by the authorities, including their arrest and the closure of the offices of certain non-governmental organizations. In this regard:

The Committee, reiterating that the free functioning of non-governmental organizations is essential for protection of human rights and dissemination of information in regard to human rights among the people, recommends that laws, regulations and administrative practices relating to their registration and activities be reviewed without delay in order that their establishment and free operation may be facilitated in accordance with article 22 of the Covenant.³¹⁹

Trade Unions and the Right to Strike

The right to freedom of association protects the individual from policies or conditions that would impact her/his ability to form associations and to bargain collectively.³²⁰ It also protects the individual from reprisals for exercising free association rights and unnecessary interference in trade union activities.³²¹ Accordingly, under international human rights law, the existence of multiple trade unions should be lawfully guaranteed,³²² and the absence of enabling legislation on trade unions must be condemned.³²³ The CESCR has condemned the refusal of some employers to recognize or negotiate

319 CCPR. Concluding Observations: Belarus. UN Doc. CCPR/C/79/Add.86. November 19, 1997. para. 19.

320 CCPR. Concluding Observations: Lebanon. UN Doc. A/52/40 (Vol. I). September 21, 1997; CCPR. Concluding Observations: Chile. UN Doc. A/54/40 (Vol. I). October 21, 1999.

321 CCPR. Concluding Observations: Costa Rica. UN Doc. A/54/40 (Vol. I). October 21, 1999. "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 CCPR. Concluding Observations: Dominican Republic. UN Doc. A/56/40 (Vol. I). October 26, 2001; CCPR. Concluding Observations: Argentina. UN Doc. A/50/40 (Vol. I). October 3, 1995; CCPR. Concluding Observations: Guatemala. UN Doc. A/51/40 (Vol. I). April 3, 1996; CCPR. Concluding Observations: Nigeria. UN Doc. A/51/40 (Vol. I). April 3, 1996; CCPR. Concluding Observations: Bolivia. UN Doc. A/51/40 (Vol. I). April 9, 1997; CCPR. Concluding Observations: Venezuela. UN Doc. A/56/40 (Vol. I). April 2, 2001; CESCR. Concluding Observations: Jamaica. UN Doc. E/1990/23. January 22-24, 1990.

322 CCPR. Concluding Observations: Brazil. UN Doc. A/51/40 (Vol. I). April 13, 1997. CCPR. Concluding Observations: Rwanda. UN Doc. E/1989/22. February 13-14, 1989.

323 CCPR. Concluding Observations: Georgia. UN Doc. A/52/40 (Vol. I). September 21, 1997.

with new “alternative” unions and some employers’ adverse actions against them, including dismissal of union activists.³²⁴ Trade union protection includes ensuring that foreign workers are not barred from holding official positions and that unions are not dissolved by the executive.³²⁵

Consultation and co-operation are no substitute for the “right to strike.”³²⁶ Individuals are guaranteed participation in discussions concerning the determination of minimum wages.³²⁷ With respect to health care workers, this right guarantees those employed in public hospitals the right to enjoy the right to collective bargaining.³²⁸ Moreover, while the “right to strike” is not explicitly mentioned under Article 22 of the ICCPR, the right to freedom of association establishes that 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” may violate this right.³²⁹ Nevertheless, given this “absolute ban,” complex and serious implications for the health and lives of patients can arise if medical personnel were to exercise this right.

RELEVANT PROVISIONS

- ▶ **UDHR, Art. 23(4):** Everyone has the right to form and to join trade unions for the protection of his interests.
- ▶ **ICCPR, Art. 22:**
 - (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.
- ▶ **ICESCR, Art. 8:**
 - (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,

324 ESCR. Concluding Observations: Russian Federation. UN Doc. E/1998/22. June 20, 1998.

325 CCPR. Concluding Observations: Senegal. UN Doc. CCPR/C/79/Add.82. November 19, 1997.

326 CESCR. Concluding Observations: Luxembourg, 1990. UN Doc. 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.

327 CESCR. Concluding Observations: Uruguay. UN Doc. E/1995/22. January 1, 1995.

328 ILO. 306th Report of the Committee on the Freedom of Association. 2009; ILO. Case No. 1882 (Denmark). Complaint date: May 10, 1996; see ILO. Right to Organise and Collective Bargaining Convention (No. 98). July 1, 1949.

329 CCPR. Concluding Observations: Germany. UN Doc. A/52/40 (Vol. I). September 21, 1997.

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.
 - (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.

► **ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)**³³⁰

Art. 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.

Art. 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.

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

Art. 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.

330 ILO. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). July 4, 1950.

► **ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98)**³³¹

Art. 1:

- (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.

Art. 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.

Art. 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.

Concluding Observations on Lebanon Relating to Trade Unions and the Right to Strike

*The Committee has noted that while legislation governing the incorporation and status of associations is on its face compatible with article 22 of the Covenant, de facto State party practice has restricted the right to freedom of association through a process of prior licensing and control. The delegation itself conceded that the practice of denying that registration took place is unlawful. The Committee also regrets that civil servants continue to be denied the right to form associations and to bargain collectively, in violation of article 22 of the Covenant.*³³²

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. As in previous sections, this section highlights material that interprets standards related to health sector personnel. 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.

This section also details those standards that protect the privacy rights of health care providers—in and outside the workplace—and their honor and reputation. 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 significant, 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 for fear of facing adverse consequences.

³³¹ ILO. Right to Organise and Collective Bargaining Convention, 1949 (No. 98). July 1, 1949.

³³² CCPR. Concluding Observations: Lebanon. UN Doc. A/52/40 (Vol. I). September 21, 1997.

Right to a Fair Hearing

The right to a fair hearing in a civil suit encompasses: 1) equality before the courts³³³ (this distinction is narrower than the right of equality before the law as the latter applies to all organs involved in the administration of justice and not just to judicial power)³³⁴ and 2) access to courts³³⁵ (access includes the provision of legal aid).³³⁶ This right requires that states provide for particular causes of action “in certain circumstances” and for competent courts to determine those causes of action.³³⁷ The meaning of “suit at law” under Article 14(1) of the ICCPR 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.

Elements of a fair hearing in a civil suit include equality of arms (both parties have equal procedural access to the court),³³⁸ respect for the principle of adversarial proceedings, preventing the passing of a judgment that makes the interested party worse off (*ex officio reformatio in pejus*), and an expeditious procedure.³³⁹ Violations of the right to a fair hearing include: refusing to allow the complainant to attend the proceedings and to have the opportunity to brief legal representatives properly,³⁴⁰ failing to inform the litigant of her/his appeal date until after it has taken place,³⁴¹ refusal of an administrative tribunal to admit crucial evidence³⁴² and failure to permit one litigant to submit comments on the other side’s submissions.³⁴³

RELEVANT PROVISIONS

▶ ICCPR

Art. 14(1): 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.

333 CCPR. General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007. paras. 3, 7.

334 CCPR. General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007. para. 65.

335 CCPR. General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007. paras. 8, 9, and 12.

336 CCPR. Communication No. 468/1991: Bahamonde v. Equatorial Guinea. UN Doc. CCPR/C/49/D/468/1991. November 10, 1993; CCPR. Communication No. 202/86: Avellanar v. Peru. UN Doc. CCPR/C/34/D/202/1986. October 31, 1989; CCPR. General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007. para. 10.

337 CCPR. Communication No. 547/1993: Mahuika v New Zealand. UN Doc. CCPR/C/70/D/547/1993. November 15, 2000.

338 CCPR. General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007. para. 13; see CCPR. Communication No. 757/1997: Pezoldova v. The Czech Republic. UN Doc. CCPR/C/75/D/757/1997. October 25, 2002. Concurring individual opinion of Prafullachandra Natwarlal Bhagwati “[a]s 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...”

339 CCPR. Communication No. 207/1986: Morael v. France. UN Doc. CCPR/C/36/D/207/1986. July 28, 1989; see also CCPR. Communication No. 514/1992: Fei v. Colombia. UN Doc. CCPR/C/53/D/514/1992. April 26, 1995; CCPR. General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007. para. 27.

340 CCPR. Communication No. 289/1988: Wolf v. Panama. UN Doc. CCPR/C/44/D/289/1988. March 26, 1992.

341 CCPR. Communication No. 532/1993: Thomas v. Jamaica. UN Doc. CCPR/C/61/D/532/1993. December 4, 1997.

342 CCPR. Communication No. 846/1999: Jansen-Gielen v. The Netherlands. UN Doc. CCPR/C/71/D/846/1999. May 14, 2001. Proceedings to determine psychiatric ability to perform job.

343 CCPR. Communication No. 779/1997: Aarela and Anor v. Finland. UN Doc. CCPR/C/73/D/779/1997. February 4, 1997.

Art. 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

- ▶ **CERD, Art. 5(a):** In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to equal treatment before the tribunals and all other organs administering justice.
- ▶ **CEDAW, Art. 15(1):** States Parties shall accord to women equality with men before the law.

Concluding Observations on Austria Relating to the Right to a Fair Hearing

The Committee notes that the State party's new Law on Equal Treatment improves the avenues of redress. However, the Committee is concerned that due to the complexity of the complaints mechanisms and of the legal framework, it may be difficult for the victims of racial discrimination to have access to the relevant procedure (art. 6). The Committee recommends that the State party take steps to simplify the procedures in such cases, to extend the national provisions on the regulation of the burden of proof in civil matters in accordance with the Convention, to ensure that the complaints against racial discrimination are processed free of charge, and to offer legal assistance to persons who need it.³⁴⁴

Case Relating to the Right to a Fair Hearing

- **Nenova v. Libya (CCPR)(2012).** A team of doctors was arrested for allegedly injecting almost 400 children with HIV at the hospital. They were held in a police station incommunicado, allegedly drugged and tortured, and tried after one year of detention. The Committee considered these acts on the part of the government to constitute a violation of both Article 7 (freedom from torture) and Article 14 (right to a fair process).³⁴⁵

Right to an Effective Remedy

The right to an effective remedy requires that remedies for human rights violations be accessible, affordable, timely and effective. Relevant to the context of patient care, the CESCR has made clear that states have the obligation to ensure that effective remedies are available for violations of economic, social and cultural rights.³⁴⁶ 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 non-repetition and changes in relevant laws and practices, and actions to bring to justice the perpetrators of human rights violations."³⁴⁷

344 CERD. Concluding Observations: Austria. UN Doc. CERD/C/AUT/CO/17. August 21, 2008.

345 CCPR. Communication No. 1755/2008: Nenova v. Libya. UN Doc. CCPR/C/104/D/1755/2008/Rev.1. July 10, 2012.

346 CESCR. Concluding Observations: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. UN Doc. E/C.12/GBR/CO/5. June 12, 2009. para. 13.

347 CCPR. General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13. May 26, 2004. para. 16.

The Torture Convention enshrines the right to an effective remedy in its own separate provision (Art. 14). However, the ICCPR has linked the right to an effective remedy to the right to fair trial. Article 14 of the treaty includes both a right to compensation and judicial guarantees, such access to court. It requires that the state ensure determination of the right to a remedy by a competent judicial, administrative, or legislative authority. The state must protect “alleged victims if their claims are sufficiently well-founded to be arguable under the [ICCPR].”³⁴⁸

RELEVANT PROVISIONS

▶ ICCPR

Art. 2(3): 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.

Art. 14:

- (2) 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....
- (6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

▶ **ICESCR, Art. 2(1):** 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...

▶ **CAT, Art. 14(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.

348 CCPR. Communication No. 972/01: George Kazantzis v. Cyprus. UN Doc. CCPR/C/78/D/972/2001. September 13, 2003. para. 6.6.

Concluding Observations on Afghanistan Relating to the Right to an Effective Remedy

The Committee expresses grave concern that limited action has been taken by the State party to combat widespread sexual abuse and exploitation of children, and that perpetrators of such abuse enjoy impunity. The Committee also expresses deep concern that while there is a systematic failure on the part of the authorities to prosecute perpetrators of sexual abuse, child victims are very often considered and treated as offenders, and charged with offences such as debauchery, homosexuality, running away from home or zina...

The Committee calls on the State party to:

- (a) Urgently develop awareness-raising programmes and campaigns, with the involvement of children, to curb sociocultural norms that lead to sexual abuse of children, condone abusers and stigmatize child victims;*
- (b) Revise legislation in order to adequately protect all girls and boys from all forms of sexual abuse and violence, and ensure that the crime of rape is clearly defined;*
- (c) Ensure that child victims of any form of sexual abuse or exploitation are considered and treated as victims and no longer charged and detained as offenders;*
- (d) Strengthen Family Response Units and establish, as a matter of urgency, effective and child-friendly procedures and mechanisms to receive, monitor and investigate complaints;*
- (e) Ensure that perpetrators of sexual abuse and exploitation of children are brought to justice and punished with sanctions proportionate to their crimes; and*
- (f) Develop a national strategy to respond to the housing, health, legal and psychosocial needs of child victims of sexual exploitation and violence.³⁴⁹*

Right to Protection of Privacy and Reputation

Under the right to protection of privacy and reputation, the integrity and confidentiality of correspondence should be guaranteed by the law and in practice. This right protects the individual from the interceptions of electronic, telephonic, telegraphic, and other forms of communication; and wire-tapping and recording of conversations. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. Even with regard to interferences that conform to the ICCPR, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.³⁵⁰

The right requires that 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.³⁵¹ The state must provide protection under the law against any unauthorized interferences with correspondence³⁵² and ensure strict and independent (ideally, judicial) regulation of any such

349 CRC. Concluding Observations: Afghanistan. UN Doc. CRC/C/AFG/CO/1. April 8, 2011.

350 CCPR. CCPR General Comment No. 16: Article 17 (Right to Privacy). The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation. April 8, 1988. para. 8.

351 CCPR. CCPR General Comment No. 16: Article 17 (Right to Privacy). The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation. April 8, 1988. para. 10.

352 CCPR. CCPR General Comment No. 16: Article 17 (Right to Privacy). The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation. April 8, 1988. para. 8; CCPR. Concluding Observations: Zimbabwe. UN Doc. CCPR/C/79/Add.89. April 6, 1998.

practices, including wiretapping.³⁵³ An interference with this right can only be justified if it is lawful and not arbitrary—if it complies with an established legal procedure.³⁵⁴

As it relates to providers, professional duties of confidence, such as those undertaken by the medical profession, are an important aspect of the right to privacy, and any legislation that requires a medical professional to disclose her/his patients' information that should otherwise be kept confidential must specify in detail the circumstances when this requirement would take effect.³⁵⁵

RELEVANT PROVISIONS

- ▶ **ICCPR, Art. 2(3):** 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.
- ▶ **ICESCR, Art. 2(1):** 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...

Right to Freedom of Expression and Information

The right to freedom of expression includes the freedom to impart information and establishes that any restrictions on the right that do not accord with acceptable limitations, such as public order or public health, could result in a breach.³⁵⁶ 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.³⁵⁷ While it is not clear what public health-based restrictions would be permitted, it has been suggested that prohibiting misleading information on health-threatening activities could be justified.³⁵⁸

353 CCPR. Concluding Observations: Poland. UN Doc. CCPR/C/79/Add.110. July 29, 1999; see also CCPR. Concluding Observations: Lesotho. UN Doc. CCPR/C/79/Add.106. April 8, 1999.

354 CCPR. Communication No. 450/1991: I.P. v. Finland. UN Doc. CCPR/C/48/D/450/1991. July 26, 1993; Joseph, Schultz, and Castan. *The ICCPR-Cases, Materials and Commentary*. 2004. p. 494.

355 CCPR. Concluding Observations: Portugal. UN Doc. CCPR/CO/78/PRT. July 5, 2003.

356 CCPR. Communication No. 780/1997: Laptsevich v. Belarus. UN Doc. CCPR/C/68/D/780/1997. April 13, 2000.

357 Joseph, Schultz, and Castan. *The ICCPR-Cases, Materials and Commentary*. 2004. p. 541.

358 Joseph, Schultz, and Castan. *The ICCPR-Cases, Materials and Commentary*. 2004. p.525.

RELEVANT PROVISIONS

- ▶ **ICCPR, Art. 19(2):** 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.
- ▶ **CERD, Art. 5(d)(viii):** 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),³⁵⁹ Art. 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.

³⁵⁹ United Nations General Assembly. General Assembly Resolution 53/144: Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. UN Doc. A/RES/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 of access 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 participation in public policy

Right to nondiscrimination and equality

Right to equality and freedom from discrimination

Right to an effective remedy

3.4. PROVIDERS' RIGHTS

Right to work in decent conditions

Right to freedom of association and assembly

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, which include those established and interpreted by the European Union (EU), the Council of Europe (COE), 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 sections. The first section describes key sources within the region governing human rights in patient care. The second section examines patients' rights and includes subsections that discuss the standards and relevant interpretations connected to a particular right within three particularly common health-related contexts: mental health, infectious diseases, and sexual and reproductive rights. These subsections provide examples of potential violations based on case law. It is worth underscoring here that these three contexts are merely used as examples and that human rights violations (and therefore, the application of human rights standards) can occur beyond this limited set of patient care-related contexts. The third section focuses on the rights of health care providers and discusses the standards and relevant interpretations of each particular provider right that stem from relevant case law.

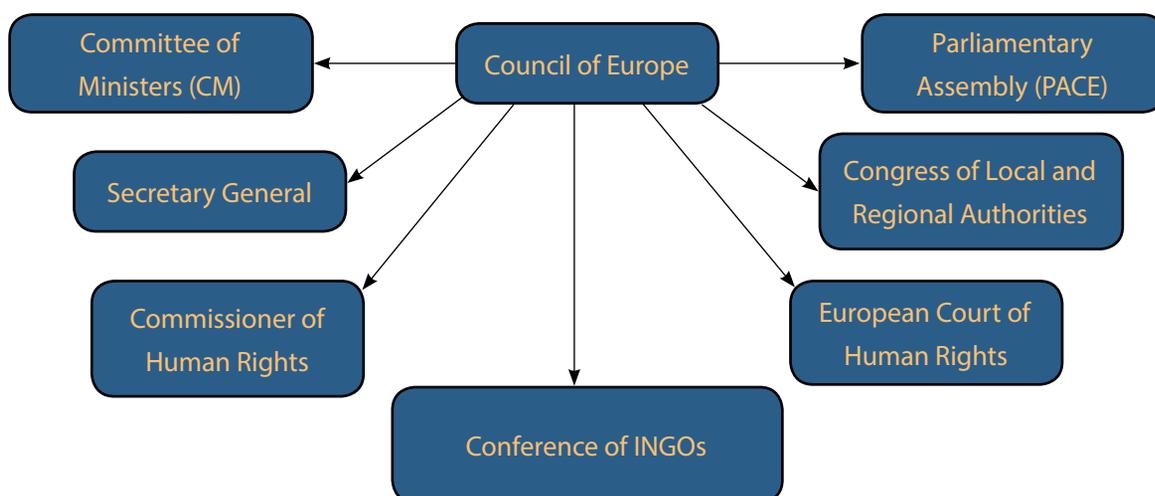
3.2. Key Sources

The standards included in this chapter include those from binding treaties, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (otherwise known as the “European Convention on Human Rights”)(ECHR) and the original and revised European Social Charter (ESC), as well as those included in non-binding instruments. The treaties referenced below have come from either the European Union (EU) or the COE. Some non-binding instruments have also been developed by these organizations, but there are others that have emanated from other actors, including civil society groups.

The EU is an economic and political partnership of 28 European member states, created following World War II for the purposes of fostering economic cooperation among its members. Despite its economic nature, the EU considers human rights and equality to be core values and has developed instruments that are relevant to patient care and human rights. EU law has the same level of legal authority as national law for all its member states and must be transposed into national law. As seen below, some EU directives address matters that are relevant to patient care. A “directive” is a type of EU legislative act that sets out goals for member states to achieve, and member states are free to determine how they will devise their laws and implement these goals.

The COE is a non-EU body that focuses on protection of human rights, democracy, and the rule of law in the European region and is located in Strasbourg, France. It consists of seven bodies, known as “institutions,” that help the COE carry out its functions. All those states that have ratified the ECHR are members of the COE, and as of this writing, there are 47 of them.¹ Importantly, the COE must not be confused with the European Council (an EU non-legislative body made up of EU leaders that meets regularly to define EU political direction and priorities) or the Council of the European Union (informally known as the “EU Council,” a legislative body of the EU).

STRUCTURE OF THE COUNCIL OF EUROPE



¹ Council of Europe [COE]. “The Council of Europe in Brief.” Accessed October 29, 2013.

Legally binding instruments

EUROPEAN UNION

▶ **Charter of Fundamental Rights of the European Union²**

This treaty incorporates into EU law a wide range of civil, political, economic, and social rights belonging to all European citizens and residents. It was signed in Nice, France, on November 7, 2000, and became legally binding on December 12, 2007. It is binding on all EU institutions and on EU governments whenever they apply EU law. The charter also acts as an important reference point on human rights obligations for countries outside of the EU, especially those in the process of accession. Refer to Chapter 4 (International and Regional Procedures) for descriptions of procedures available at the European regional level, including detailed information on monitoring and adjudicatory bodies (e.g., the European Court of Human Rights) and the complaint procedure established by the European Convention on Human Rights.

▶ **Directive 2011/24/EU on the Application of Patients' Rights in Cross-Border Healthcare³**

This directive was adopted on March 9, 2011, and entered into force on April 4, 2011. It clarifies the rules on access to healthcare in another EU country, including reimbursement for health care services. The directive is binding on all member states and creates legal certainty on patients' rights, including the right to seek health care abroad and to be reimbursed the same amount that patients would have received if they had sought care in their home country. It also outlines member states' responsibility to provide access to health care in their territory and for ensuring that treatment in other member states meets quality and safety standards and takes into account international medical advances and sound medical practices.

▶ **Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services⁴**

This directive was adopted on December 13, 2004, and entered into force on December 21, 2004. It is legally binding on member states and requires them to prohibit discrimination based on sex in the supply of public goods and services.

▶ **Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁵**

This directive was adopted on November 27, 2000, and entered into force on December 2, 2000. It establishes a "guideline framework" for member states to address employment discrimination. It prohibits discrimination based on religion or belief, disability, age, or sexual orientation.

2 Official Journal of the European Communities. Charter of Fundamental Rights of the European Union. OJ C 364/01. December 7, 2000.

3 Official Journal of the European Union. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. OJ L 88/45. April 4, 2011.

4 Official Journal of the European Union. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373 of 21.12.2004. June 25, 2009.

5 Official Journal of the European Union. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303 of 2.12.2000. December 2, 2000.

- ▶ **Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁶**

This directive was adopted on June 29, 2000, and entered into force on July 19, 2000. It requires member states to ensure that discrimination based on race or ethnic origin is prohibited in both public and private sectors. The directive lists access to health care as one of the contexts where this type of discrimination must be prohibited.

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)⁷**

This COE 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 recognizing the importance of ensuring the dignity of the human being.”⁸ It is binding on ratifying states.

- ▶ **European Convention on Human Rights (ECHR)⁹**

The ECHR is the leading regional human rights treaty, and it has been ratified by all COE member states. It is enforced by the ECtHR, which hands down binding decisions that frequently involve monetary compensation for victims. It should be considered with the European Social Charter as forming the key, complementary instruments protecting human rights across Europe.

- ▶ **European Social Charter of 1961 and 1996 (ESC)¹⁰**

A COE treaty, 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 can select which provisions to 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.

- ▶ **Framework Convention for the Protection of National Minorities¹¹**

This COE treaty guarantees equal treatment for all ethnic and other minorities. It requires that states take the necessary measures “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

6 Official Journal of the European Union. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180 of 19.7.2000. July 19, 2000.

7 COE. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention of Human Rights and Biomedicine. ETS No. 164. April 4, 1997.

8 Subsequent additional protocols have been produced on prohibition of cloning (ETS No. 168. December 1, 1998), transplantation of organs and tissues (Treaty ETS No. 186. January 24, 2002), and biomedical research (ETS No. 195. January 25, 2005).

9 COE. European Convention on Human Rights. ETS No. 5. November 4, 1950.

10 COE. European Social Charter. ETS No. 35. November 4, 1950.

11 COE. Framework Convention for the Protection of National Minorities. ETS No. 35. February 1, 1995.

belonging to the majority,” and such measures are not to be considered acts of discrimination. States are to consider “the specific conditions of the persons belonging to national minorities.”¹²

Non-legally binding Instruments

There are a number of instruments that do not have the legally binding force of treaties but have acquired regional consensus and assist in developing the content of patients’ rights. In fact, some of these have been adopted by civil society groups, such as professional associations and non-governmental organizations. Below are a few examples.

► **Declaration on the Promotion of Patients’ Rights in Europe: European Consultation on the Rights of Patients, Amsterdam**¹³

This declaration was issued by the WHO Regional Office for Europe in 1994 and has been influential. It sets the International Bill of Rights,¹⁴ the ECHR, and the ESC as its foundation and focuses on rights to information, consent, confidentiality and privacy, as well as care and treatment. It emphasizes the complementary nature between rights and responsibilities and takes into account the perspectives of health care providers and patients. According to this declaration, 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.” By outlining patients’ rights, this declaration hopes to raise awareness among patients about “their responsibilities when seeking and receiving or providing health care,” and thereby create patient/provider relationships based on “mutual support and respect.”¹⁵

► **The European Charter of Patients’ Rights**¹⁶

Drawn up in 2002 by the Active Citizenship Network, a European network of civic, consumer, and patient organizations, this instrument provides a clear, comprehensive statement of patients’ rights. It states:

*As European citizens, we do not accept that rights can be affirmed in theory, but then denied in practice, because of financial limits. Financial constraints, however justified, cannot legitimize denying or compromising patients’ rights. We do not accept that these rights can be established by law, but then left not respected, asserted in electoral programmes, but then forgotten after the arrival of a new government.*¹⁷

This 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.¹⁸ This instrument identifies 14 concrete patients’ rights that are currently at risk: the right to preven-

12 COE. Framework Convention for the Protection of National Minorities. Article 4(2). ETS No. 35. February 1, 1995.

13 WHO. Declaration on the Promotion of Patients’ Rights in Europe. June 28, 1994.

14 The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

15 WHO. Declaration on the Promotion of Patients’ Rights in Europe. June 28, 1994.

16 Active Citizenship Network (ACN). European Charter of Patients’ Rights. November 2002.

17 ACN. European Charter of Patients’ Rights. November 2002. Preamble.

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

tive 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 this instrument 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.¹⁹ It has also been used as a reference point to monitor and evaluate health care systems across Europe.

▶ **Ljubljana Charter on Reforming Health Care**²⁰

This instrument was developed by WHO to improve health systems in the European region. It 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."²¹ Specifically, it recommends that health care systems be people-centric and calls for patient participation in shaping improvements.

▶ **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.**²²

Issued by the COE's Committee of Ministers, this recommendation contains strong political and moral authority even though it is not legally binding on COE member states. 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.

3.3. Patients' Rights

This section is structured around nine critical patient rights:

- ▶ Liberty and security of person;
- ▶ Privacy;
- ▶ Access to information;
- ▶ Bodily integrity;
- ▶ Life;
- ▶ Highest attainable standard of mental and physical health;
- ▶ Freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- ▶ Participation in public policy;

19 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.

20 World Health Organization [WHO]. Ljubljana Charter on Reforming Health Care. June 19, 1996.

21 WHO. Ljubljana Charter on Reforming Health Care.

22 COE. Recommendation Rec No. R (2000) 5. April 30, 2002.

- ▶ Equality and freedom from discrimination; and
- ▶ Effective remedy.

The ECHR and the ESC constitute the two main complementary instruments covering the range of human rights in the European region, with the ECtHR and the ESCR taking a cross-fertilization approach in terms of developing human rights protection and understanding of the substantive content of rights.

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 many patients' rights issues through other articles in the ECHR (the most common ones being Articles 2, 3, 5, 8, 13 and 14). 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 provides an absolute prohibition on 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 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 considered eight right-to-health cases, concerning issues ranging from detrimental effects on health from environmental pollution to denial of medical assistance to poor illegal immigrants.²³ Therefore, there is great potential for further development of the ECSR's case law 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

23 COE. International Federation of Human Rights Leagues (FIDH) v. Belgium. Collective Complaint No. 75/2011. January 23, 2013; COE. International Federation of Human Rights Leagues (FIDH) v. Greece. Collective Complaint No. 72/2011. January 23, 2013; COE. Defence for Children International (DCI) v. Belgium. Collective Complaint No. 69/2011. October 23, 2012; COE. Médecins du Monde - International v. France. Collective Complaint No. 67/2011. September 11, 2012; COE. Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009; COE. European Roma Rights Centre (ERRC) v. Bulgaria. Collective Complaint No. 46/2007. December 3, 2008; COE. Marangopoulos Foundation for Human Rights (MFHR) v. Greece. Collective Complaint No. 30/2005. December 6, 2006; COE. Confédération Générale du Travail (CGT) v. France. Collective Complaint No. 22/2003. December 8, 2004.

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 referenced 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.²⁴

Right to liberty and security of person

As it relates to patients' rights, the right to liberty of the person protects the individual from arbitrary or unjustified physical confinement on the basis of mental or physical health, such as involuntary hospitalization. The detention of an individual based on health grounds, such as quarantine and isolation, must be done in accordance to established law and must safeguard the individual's rights to due process under the law. The detention is considered "lawful" only if it occurs in a hospital, clinic, or other appropriate authorized setting.²⁵ However, 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 she/he may be detained.²⁶

The ECtHR has established procedural guarantees in relation to the application of Article 5(1)(e), which guarantees this right under the ECHR:

- ▶ Committing an individual 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;²⁷
- ▶ Any commitment must be subject to a speedy periodic legal review that incorporates the essential elements of due process;²⁸ and
- ▶ 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).²⁹

With respect to the right to security of person, it is often enshrined under the same provision as the right to liberty, such as Article 5 of the ECHR. The right to liberty protects the individual from arbitrary or unjustified physical confinement. The right to security of person safeguards the individual's freedom from bodily injury or interference. As shown in this section, the facts present in relevant case law have led the ECtHR to address issues concerning physical or bodily integrity (right to security of person) under Article 5 without making a distinction between the two rights. Moreover, most cases concerning

24 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.

25 ECtHR. *De Donder and de Clippel v. Belgium*. App. No. 8595/06. December 6, 2011.

26 ECtHR. *Ashingdane v. The United Kingdom*. App. No. 8225/78. May 28, 1995.

27 ECtHR. *Winterwerp v. The Netherlands*. App. No. 6301/73. October 24, 1979; see also ECtHR. *H.L. v. The United Kingdom*. App. No. 45508/99. January 1, 2004. (system of detaining "informal patients" in psychiatric institutions did not incorporate sufficient procedural safeguards in order to prevent arbitrary deprivations of liberty).

28 ECtHR. *X v. The United Kingdom*. App. No. 7215/75. July 7, 1977.

29 ECtHR. *Gajcsi v. Hungary*. App. No. 34503/03. October 3, 2006. (patient unlawfully detained for three years in a Hungarian psychiatric hospital, where the commitment procedure was superficial and insufficient to show dangerous conduct).

violations of physical or bodily integrity in health care settings have been analyzed under related rights that include the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR, Art. 3), the right to privacy (ECHR, Art. 8), and the right to the highest attainable standard of health (ESC, Art. 11). For example, the Court has examined cases involving the administration of forced medication (including injections), forced feeding and nonconsensual sterilizations under the right to privacy (ECHR, Art. 8)³⁰ and the right to freedom from torture, cruel, inhuman or degrading treatment (ECHR, Art. 3).³¹ Therefore, there is little analysis emanating from the ECtHR solely on the right to security of person. For this reason, this section contains case law that focuses primarily on the right to liberty.

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 5(1):** 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: ... (e) 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.

Right to Liberty and Security of Person in the context of Mental Health

In order to detain an individual on the basis of mental health, three conditions must be satisfied:

- (1) It must be reliably established through objective medical expertise that the person has a mental disorder;
- (2) The mental disorder must be of a kind to warrant compulsory confinement and the deprivation of liberty must be shown to be necessary in the circumstances;
- (3) The mental disorder must persist throughout the period of detention or confinement; and
- (4) The period of confinement must also be under periodic review.³²

Any detention must be “lawful”—it must be conducted according to a law with adequate substantive and procedural safeguards.³³ Moreover, although the intent of 5(1)(e) is not, in principle, concerned with suitable treatment or conditions of detention, the ECtHR has repeatedly stated that the detention of a person in terms of 5(1)(e) will only be considered lawful if the detention is carried out in a hospital, clinic, or other appropriate institution authorized to detain and treat individuals with the relevant mental disorder.³⁴

Additionally, the ECtHR has recognized the need to protect the physical and mental integrity of mental health patients. It has considered forced treatment of mental health patients to be in violation of Article 5 when it fails to satisfy the arbitrariness safeguards.³⁵ For further discussion on physical integrity violations, refer to the section on the “right to bodily integrity” below for more discussion on the issue.

30 ECtHR. *Storck v. Germany*. App. No. 61603/00. June 16, 2005; see also ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; V.C. v. Slovakia. App. No. 18968/07. November 8, 2011.

31 ECtHR. *Ciorap v. Moldova*. App. No. 12066/02. June 19, 2007; V.C. v. Slovakia. App. No. 18968/07. November 8, 2011; *Gorobet v. Moldova*. App. No. 30951/10. October 11, 2011.

32 ECtHR. *Winterwerp v. Netherlands*. App. No. 6301/73. October 24, 1979; ECtHR. *Stanev v. Bulgaria*. App. No. 23419/07. November 22, 2012.

33 See ECtHR. *Stanev v. Bulgaria* (36760/06). January 17, 2012.

34 ECtHR. *De Donder and De Clippeel v. Belgium*. App. No. 8595/06. June 12, 2011. para. 106.

35 ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; ECtHR. *Shopov v. Bulgaria*. App. No. 11373/04. December 2, 2010; ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

Cases Relating to Mental Health and the Right to Liberty and Security of Person

- ***De Donder and De Clippel v. Belgium (ECtHR)(2012)***. The Court held that the placement of the mental health patient in an ordinary section of the prison rather than a specialized institution or the psychiatric wing of the prison constituted a breach of Article 5 of the ECHR. The Court reiterated that the “detention” of a mental health patient is legally justified under Article 5(1)(e) only if it is done “in a hospital, clinic or other appropriate institution.”³⁶
- ***Herz v. Germany (ECtHR)(2003)***. A person was detained in a psychiatric hospital because a judge ordered the person’s emergency confinement on the basis of a diagnosis given over the telephone by a doctor who had not personally examined this person. The Court held that the judge’s order was in conformity with the Convention because of the urgent nature of the situation.³⁷
- ***H.L. v. United Kingdom (ECtHR)(2005)***. The Court found that the involuntary confinement of an autistic person who had shown signs of agitated behavior lacked procedural safeguards and was therefore arbitrary and in violation of Article 5 of the ECHR.³⁸
- ***Shopov v. Bulgaria (ECtHR)(2010)***. The Court found the government in violation of Article 5(1) where an applicant was forced to undergo psychiatric treatment for more than five years as a result of the public prosecutor and the police overstepping the limits of a domestic court’s judgment ordering treatment in an outpatient clinic and not in a psychiatric hospital.³⁹
- ***Storck v. Germany (ECtHR)(2005)***. The Court found the mental health patient’s confinement in a psychiatric hospital and forced treatment to be in violation of Article 5(1) as the confinement had not been ordered by a court. The Court stressed the responsibility of the State to protect vulnerable populations (such as mental health patients) and concluded that retrospective measures to protect such individuals from the unlawful deprivation of liberty were insufficient.⁴⁰
- ***X. v. Finland (ECtHR)(2012)***. The Court found that the confinement and forced treatment of a pediatrician in a mental health hospital lacked the proper safeguards against arbitrariness and, therefore, constituted a violation of Article 5.⁴¹

36 ECtHR. *De Donder and De Clippel v. Belgium*. App. No. 8595/06. June 12, 2011; see ECtHR. *Aerts v. Belgium*. App. No. 25357/94. July 30, 1998. (psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind).

37 ECtHR. *Herz v. Germany*. App. No. 44672/98. December 3, 2003.

38 ECtHR. *H.L. v. The United Kingdom*. App. No. 45508/99. January 5, 2005.

39 ECtHR. *Shopov v. Bulgaria*. App. No. 11373/04. December 2, 2010.

40 ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

41 ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012.

Right to Liberty and Security of Person in the context of Infectious Diseases

Article 5(1)(e) of the ECHR may permit detention based on the threat posed by the spread of infectious diseases. The ECtHR has allowed detention under this provision in the interests of both the individual and public safety.⁴² According to the ECtHR, the essential criteria for lawfully detaining an individual “for the prevention of the spreading of infectious diseases” are:

- (1) The spread of the infectious disease poses a danger to public health or safety;
- (2) It is the least restrictive way of preventing the spread of the disease to safeguard the public interest; and
- (3) Both the danger of spreading the infectious disease and detention being the least restrictive means of safeguarding the public interest must persist throughout the period of detention.⁴³

Moreover, the right to security of person becomes particularly relevant in instances where individuals with infectious diseases are subjected to coercive measures, such as quarantine and forced treatment. Refer to the section on “right to bodily integrity” for more discussion on violations concerning physical and bodily integrity.

Case Relating to Infectious Diseases and the Right to Liberty and Security of Person

- **Enhorn v. Sweden (ECtHR)(2005).** The Court found a violation of Article 5 of the ECHR where an individual living with HIV was placed involuntarily in a hospital for almost one and a half years after having transmitted the virus to another man as a result of sexual activity. The Court concluded that the compulsory isolation was not the least restrictive means available to prevent him from spreading HIV, and therefore, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant’s right to liberty.⁴⁴

Right to Liberty and Security of Person In the Context of Sexual and Reproductive Health

The right to liberty protects individuals from interference intended to limit or promote their fertility and hinder their sexual autonomy—either by the state or private individuals. In addition to protecting the life and health of the individual, the right to liberty recognizes the individual’s reproductive choice as well as her/his decision on how to conduct her/his sexual life.⁴⁵ For example, women can use this

42 ECtHR. *Enhorn v. Sweden*. App. No. 56529/00. January 25, 2005. para. 43; ECtHR. *Litwa v. Poland*. App. No. 26629/95. April 4, 2000; see ECtHR. *Hutchison Reid v. The United Kingdom*. App. No. 50272/99. February 20, 2003. (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 her/his condition was not susceptible to medical treatment).

43 ECtHR. *Enhorn v. Sweden*. App. No. 56529/00. January 25, 2005. para. 43.

44 ECtHR. *Enhorn v. Sweden*. App. No. 56529/00. January 25, 2005.

45 See Rebecca Cook. International Human Rights and Women’s Reproductive Health. *Studies in Family Planning*, Vol. 24, No. 2 (March-April, 1993). p. 79.

right to challenge legal actions involving deprivation of liberty that are taken against them for terminating their own pregnancy.⁴⁶

With respect to the right to security of person, it safeguards the person's right to control her/his health and body and is pertinent to issues relating to sexual and reproductive health, such as forced sterilization, genital mutilation, and abortion. The European Commission of the EU has committed to ending violence against women and ending female genital mutilation (FGM), recognizing it as a violation of women's human rights and the international Convention on the Rights of the Child (CRC).⁴⁷ The EU Council has stated: "[FGM] constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and *physical* and mental *integrity*" (emphasis added).⁴⁸

However, as in other contexts, ECtHR case law involving these sexual and reproductive health issues have been typically addressed under either the right to privacy (ECHR, Art. 8) or the right to freedom from torture and cruel, inhuman, and degrading treatment (ECHR, Art. 3).

Case Relating to Sexual and Reproductive Health and the Right to Liberty and Security of Person

- ***P. and S. v. Poland (ECtHR)(2013)***. The Court found that the essential purpose of placing a 14-year-old girl, who had become pregnant as a result of rape, in a juvenile shelter was to separate her from her parents and prevent an abortion—not for educational supervision, which would have been in accordance with Article 5(1)(d). Therefore, the applicant's confinement was in violation of Article 5.⁴⁹

Right to Privacy

The right to privacy protects the individual from unlawful and arbitrary interference with her/his privacy. As it relates to patients' rights, the right to privacy has been used to protect the bodily integrity of the individual, the confidentiality of the patient's medical information, and to prevent the government from unlawfully interfering in matters that should be resolved between the patient and her/his physician (e.g., to terminate pregnancy). The ECtHR has held that a person's body concerns the most intimate aspect of one's private life⁵⁰ and has used the right to privacy to protect the individual from medical treatment or examination without her/his informed consent.⁵¹ The ECtHR recognizes that the administration of medication against the will of a patient constitutes an interference with an individual's right to respect for their private life.⁵²

46 ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

47 European Commission. Communication from the Commission to the European Parliament and the Council: Towards the elimination of female genital mutilation. November 25, 2013.

48 EU Council. Council Conclusion on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence. December 6, 2012. para. 1.

49 ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

50 ECtHR. *Y.F. v. Turkey*. App. No. 24209/94. October 22, 2003.

51 ECtHR. *Glass v. The United Kingdom*. App. No. 61827/00. March 9, 2004. (the Court found a violation of the right to privacy in the administration of dimorphine a son against his mother's wishes and a DNR (Do Not Resuscitate) order placed in his records without his mother's knowledge).

52 ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005; ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; see also ECtHR. *Glass v. The United Kingdom*. App. No. 61827/00. March 9, 2004.

With regards to the patient's medical information, 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." Moreover, it is "crucial ... to preserving his or her confidence in the medical profession and in the health services in general."⁵³ Failure to protect the confidentiality of the patient's medical information can deter those in need of medical assistance from revealing personal and intimate information that may be necessary to receive appropriate treatment and even from seeking such assistance, thereby endangering their own health and/or those of others.⁵⁴

Generally, any interference with an individual's right to respect for her/his private life will not constitute a breach if such interference is:

- ▶ In accordance with the law;
- ▶ Pursued a legitimate aim or aims under 8(2) of the ECHR (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); and
- ▶ Is necessary in a democratic society and proportionate to the legitimate aim pursued.⁵⁵

With regard to "necessary in a democratic society" the ECtHR has stated that the interference would be assessed in a case-by-case basis, taking into account the "case as a whole and having regard to the margin of appreciation enjoyed by the State in such matters."⁵⁶

RELEVANT PROVISIONS

▶ **ECHR, Art. 8:**

- (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.

- ▶ **COE Recommendation No. R (2004) 10,⁵⁷ Art. 13(1):** All personal data relating to a person with a 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.

▶ **Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data⁵⁸**

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

53 ECtHR. *M.S. v. Sweden*. App. No. 20837/92. August 27, 1997; ECtHR. *Z v. Finland*. App. No. 22009/93. February 25, 1997.

54 ECtHR. *Z v. Finland*. App. No. 22009/93. February 25, 1997.

55 ECtHR. *L.L. v. France*. App. No. 7508/02. October 10, 2006; ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012.

56 ECtHR. *L.L. v. France*. App. No. 7508/02. October 10, 2006.

57 COE. Recommendation Rec No. R (2004) 10. September 22, 2002.

58 COE. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. January 28, 1981.

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

▶ **Declaration on the Promotion of Patients’ Rights in Europe**⁵⁹

1.4 Everyone has the right to respect for his or her privacy.

4.1 All 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.

4.6 There can be no intrusion into a patient’s private and family life unless and only if, in addition to the patient consenting to it, it can be justified as necessary to the patient’s diagnosis, treatment and care.

4.8 Patients admitted to health care establishments have the right to expect physical facilities which ensure privacy.

▶ **European Charter of Patients’ Rights,**⁶⁰ **Art. 6 (Right to Privacy and Confidentiality):** 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.

▶ **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,**⁶¹ **Art. 10(1):** Everyone has the right to respect for private life in relation to information about his or her health.

59 WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

60 Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

61 COE. 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. April 4, 1997.

Right to Privacy in the context of Mental Health

The ECtHR does not automatically condemn the interference in a mental health patient's private life, but it does condemn any breach of privacy that is not in accordance with the law. The placement of a mental health patient in guardianship must be "in accordance with the law and based on a legitimate aim."⁶² In cases where an individual has been deprived of her/his legal capacity, such an individual is entitled to a periodic review of her/his condition.⁶³ Moreover, with respect to persons in need of psychiatric treatment, the State must secure the right to physical integrity to its citizens in accordance to Article 8 of the ECHR.

In deciding to interfere with the mental health patient's right to privacy, authorities must "strike a fair balance between the interests of a person of unsound mind and the other legitimate interests concerned."⁶⁴ However, when determining someone's mental health status, authorities enjoy a wide margin of appreciation,⁶⁵ which will be evaluated based on "the degree of interference" in the patient's life and the "quality of the decision-making process."⁶⁶ Should the interference with the individual's private life be disproportionate to the legitimate aims of the government,⁶⁷ or should the decision-making process employed by the State be flawed⁶⁸ (including failure by the State to periodically re-access the individual's condition⁶⁹), the Court is likely to find a breach of Article 8.

Cases Relating to Mental Health and the Right to Privacy

- ***Lashin v. Russia (ECtHR)(2013)***. The Court found a violation of the right to privacy where the applicant, a person with schizophrenia, was committed by the domestic courts to a psychiatric hospital against his will and without possibility of review, which prevented him from getting married.⁷⁰
- ***Salontaji-Drobnjak v. Serbia (ECtHR)(2010)***. The applicant was diagnosed with litigious paranoia and was placed under guardianship. The Court found a violation of the right to privacy on account of the serious limitation of the applicant's legal capacity (he was unable to independently take part in legal actions, file for a disability pension, or decide about his own medical treatment) and because the procedure that the domestic courts had applied in depriving the applicant of his legal capacity had been "fundamentally flawed," and further, the domestic courts had failed to appropriately reassess the applicant's legal capacity.⁷¹

62 ECtHR. *A.G. v. Switzerland*. App. No. 28605/95. April 9, 1997.

63 ECtHR. *Lashin v. Russia*. App. No. 33117/02. April 22, 2013; see also ECtHR. *Salontaji-Drobnjak v. Serbia*. App. No. 36500/05. January 13, 2010.

64 ECtHR. *Shtukaturov v. Russia*. App. No. 44009/05. June 27, 2008. para. 87

65 ECtHR. *Shtukaturov v. Russia*. App. No. 44009/05. June 27, 2008.

66 ECtHR. *Shtukaturov v. Russia*. App. No. 44009/05. June 27, 2008.

67 ECtHR. *Shtukaturov v. Russia*. App. No. 44009/05. June 27, 2008.

68 ECtHR. *Salontaji-Drobnjak v. Serbia*. App. No. 36500/05. January 13, 2010.

69 ECtHR. *Lashin v. Russia*. App. No. 33117/02. April 22, 2013; see ECtHR. *Salontaji-Drobnjak v. Serbia*. App. No. 36500/05. January 13, 2010.

70 ECtHR. *Lashin v. Russia*. App. No. 33117/02. April 22, 2013.

71 ECtHR. *Salontaji-Drobnjak v. Serbia*. App. No. 36500/05. January 13, 2010.

- ***Shtukaturv v. Russia (ECtHR)(2008)***. The Court found the domestic court’s decision to hospitalize the applicant based on a medical report that had not sufficiently analyzed the degree of the applicant’s incapacity to constitute a violation of the right to privacy. The Court determined that the interference with the applicant’s private life was disproportionate to the legitimate aim of the State.⁷²

Right to Privacy in the context of Infectious Diseases

The ECtHR considers that the unauthorized disclosure of confidential health data could be detrimental to the individual’s private and family life, as well as his/her social and work life, and could put him/her at risk of being ostracized.⁷³ Disclosure of medical information can be particularly damaging to persons living with HIV or other infectious diseases. Therefore, sufficient safeguards in domestic law are necessary. In cases concerning individuals living with HIV, the ECtHR has also established that States have positive obligations to enforce the right to privacy against others.⁷⁴

Cases Relating to Infectious Diseases and the Right to Privacy

- ***Biriuk v. Lithuania (ECtHR)(2009) and Armoniene v. Lithuania (ECtHR)(2009)***. The Court held that the State’s failure to enforce the applicants’ right to privacy against the newspaper that published the applicants’ HIV status on its front page amounted to a violation of the right to privacy.⁷⁵
- ***Colak and Tsakiridis v. Germany (ECtHR)(2009)***. The Court affirmed the domestic court’s finding that the physician’s failure to disclose the HIV status of a patient to the patient’s sexual partner (the applicant) did not amount to “gross error in treatment”—which was required to find the physician liable for malpractice—and that the physician did not disregard medical standards but overestimated his duty of confidence to the patient. The Court held that there was no breach of the right to privacy.⁷⁶
- ***Mitkus v. Latvia (ECtHR)(2013)***. The Court found the disclosure of the inmate applicant’s HIV status in a prison newspaper to constitute a violation of the right to privacy—it led other inmates to ostracize the applicant.⁷⁷

Right to Privacy In the Context of Sexual and Reproductive Health

The right to privacy has served an important role in the promotion of sexual and reproductive health in ECtHR case law. While the right to privacy is often seen as implicating negative State obligations,

72 ECtHR. *Shtukaturv v. Russia*. App. No. 44009/05. June 27, 2008.

73 ECtHR. *Z v. Finland*. App. No. 22009/93. February 25, 1997.

74 ECtHR. *Biriuk v. Lithuania*. App. No. 23373/03. February 25, 2009. para. 35; ECtHR. *Armoniene v. Lithuania*. App. No. 36919/02. February 25, 2009. para. 36.

75 ECtHR. *Biriuk v. Lithuania*. App. No. 23373/03. February 25, 2009; ECtHR. *Armoniene v. Lithuania*. App. No. 36919/02. February 25, 2009.

76 ECtHR. *Colak and Tsakiridis v. Germany*. App. No. 77144/01 and 35493/05. June 5, 2009.

77 ECtHR. *Mitkus v. Latvia*. App. No. 7259/03. January 2, 2013.

the ECtHR has been clear in emphasizing the positive obligations that arise in enforcing respect for an individual's private and family life—particularly where individuals seek access to information regarding risks to their health (such as genetic testing⁷⁸ and the health of their fetus⁷⁹) or seek access to their medical records.⁸⁰ In fact, States have a positive obligation under Article 8 to ensure that individuals have meaningful access to their own medical records.⁸¹ The ECtHR has held in a State-specific context that organizations may not be restrained from providing information about domestic abortion rights, and abortion related services available internationally.⁸²

Furthermore, the Court has interpreted the right to include the right to personal autonomy and personal development, encompassing matters concerning gender identification, sexual orientation, sexual life, the physical and mental integrity of the person, and decisions on whether to become a parent.⁸³

In the context of abortion, the ECtHR has not interpreted Article 8 as conferring a right to abortion;⁸⁴ however, it has recognized that States that permit abortion are responsible for providing the legal framework to determine entitlements to lawful abortion and procedures to resolve disputes between women seeking abortion services and medical practitioners.⁸⁵ The ECtHR has also addressed the possible 'chilling effects' that domestic criminal law may have regarding an individual's ability to access reproductive health care services,⁸⁶ finding that criminal laws that deter medical providers from providing lawful abortion services, or deter patients from seeking such services for fear of criminal responsibility, may contravene Article 8.

The ECtHR has also held that the choice of whether or not to become a parent is encompassed by Article 8 (for both men and women).⁸⁷ Medical procedures that limit a person's ability to conceive and bear children may be contrary to the right to privacy, including forced sterilization⁸⁸ and serious medical errors that deprive individuals of their reproductive capacity.⁸⁹ The Court found a breach of Article 8 where a detainee was denied access to artificial insemination services, considering that his wife would experience difficulties conceiving after his release due to her age and the time frame her husband was anticipated to remain in detention.⁹⁰

78 ECtHR. *Tysi c v. Poland*. App. No. 5410/03. March 20, 2007.

79 ECtHR. *Costa and Pavan v. Italy*. App. No. 54270/10. August 28, 2012; see ECtHR. *R.R. v. Poland*. App. No. 27617/04. May 26, 2011.

80 ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. April 28, 2009.

81 ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. April 28, 2009.

82 ECtHR. *Open Door and Dublin Well Woman v. Ireland*. App. No. 14234/88; 14235/88. October 29, 1992.

83 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010. para. 212.

84 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010; see ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

85 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010; see *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

86 ECtHR. *Ternovsky v. Hungary*. App. No. 67545/09. December 14, 2010; see ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

87 ECtHR. *Evans v. The United Kingdom*. App. No. 6339/05. April 10, 2007.

88 ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. April 28, 2009; ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012; ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 15966/04. November 13, 2012.

89 ECtHR. *Csoma v. Romania*. App. No. 8759/05. January 15, 2013.

90 ECtHR. *Dickson v. The United Kingdom*. App. No. 44362/04. December 4, 2007.

Cases Relating to Sexual and Reproductive Health and the Right to Privacy

- ***A, B and C v. Ireland (ECtHR)(2010)***. Interpreting Article 8 to include the state's positive obligation of providing the necessary procedures to determine entitlement to lawful abortion, the Court found that Ireland's failure to provide such safeguards constituted a violation of the right to privacy. The Court also noted the uncertainty surrounding the process of establishing whether a woman's pregnancy posed a risk to her life and that the threat of criminal prosecution had "significant chilling" effects both on doctors and the women concerned.⁹¹
- ***Costa and Pavan v. Italy (ECtHR)(2012)***. A couple, who were healthy carriers of cystic fibrosis, wanted to avoid transmitting the disease to their offspring with the help of medically-assisted procreation and genetic screening. The Court found the inconsistency in Italian law that denied the couple access to embryo screening but authorized medically-assisted termination of pregnancy if the fetus showed symptoms of the same disease to constitute a violation of the right to privacy.⁹²
- ***Ternovsky v. Hungary (ECtHR)(2011)***. The Court found the lack of specific and comprehensive legislation on when health professionals would be penalized for assisting in a home birth constituted a violation of the right to privacy, considering that the applicant was not free to choose to give birth at home because of the permanent threat of prosecution deterring health professionals from providing this service.⁹³
- ***Tysic v. Poland (ECtHR)(2007)***. The applicant was refused a therapeutic abortion, after being warned that her already severe myopia could worsen if she carried her pregnancy to term. Following the birth of her child, she had a retinal hemorrhage, which resulted in a disability. The Court found that denying her access to an effective mechanism that would determine her eligibility for a legal abortion was a violation of her right to privacy.⁹⁴
- ***V.C. v. Slovakia (ECtHR)(2012)***. Where a Roma woman was sterilized at a public hospital without her informed consent, the Court found the lack of legal safeguards to protect her reproductive health to constitute a violation of the right to private and family life.⁹⁵

Right of Access to Information

The right of access to information guarantees the individual access to personal information concerning her/him, as well as the medical information on the individual's condition, except when this information could be harmful to the individual's life or health. As in international law, the right of access to information is contained within the right to freedom of expression. With respect to patients, the

91 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

92 ECtHR. *Costa and Pavan v. Italy*. App. No. 54270/10. August 28, 2012.

93 ECtHR. *Ternovsky v. Hungary*. App. No. 67545/09. March 14, 2011.

94 ECtHR. *Tysic v. Poland*. App. No. 5410/03. September 24, 2007.

95 ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012.

right of access to information requires the government to take the necessary measures to guarantee access to information about the patient's health conditions.⁹⁶ The ECtHR has interpreted this right as only prohibiting authorities from restricting a person from receiving information from others and not imposing a positive obligation on the government to provide the information.⁹⁷ However, it is worth noting that the ECtHR has interpreted a positive state obligation to provide information under Article 8 (right to respect for family and private life).⁹⁸

RELEVANT PROVISIONS

▶ ECHR

Art. 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence.

Art. 10(1): 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....

▶ Declaration on the Promotion of Patients' Rights in Europe⁹⁹

2.2 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 the 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.

2.5 Patients have the right not to be informed, at their explicit request.

2.6 Patients have the right to choose who, if any one, should be informed on their behalf.

▶ European Charter of Patients' Rights,¹⁰⁰ Art. 3 (Right to Information):

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.

▶ 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,¹⁰¹ Art. 10:

1. Everyone has the right to respect for private life in relation to information about his or her health.
2. Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.

96 ECtHR. *Herczegfalvy v. Austria*. App. No. 10533/83. September 24, 1992.

97 ECtHR. *Guerra v. Italy*. App. No. 14967/89. February 19, 1998.

98 ECtHR. *Tysic v. Poland*. App. No. 5410/03. March 20, 2007.

99 WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

100 Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

101 COE. 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. April 4, 1997.

3. In exceptional cases, restrictions may be placed by law on the exercise of the rights contained in paragraph 2 in the interests of the patient. Everyone has the right to know any information collected about his or her health.

► **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**¹⁰²

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).

Right of Access to Information in the context of Mental Health

Under this right, health care providers have an obligation to provide mental health patients with accurate information about their medical data and/or the treatment they are receiving. Therefore, continuous treatment lacking regular evaluation would undermine the right of access to information, as the patient would not have access to accurate information on her/his mental health status, making it difficult for her/him to challenge the treatment.¹⁰³ Indeed, the ECtHR has found that the denial of access to information may violate Article 10 of the ECHR, even if the denial of access to information is defended by the government on therapeutic grounds.¹⁰⁴

It is worth noting that the right of access to information is closely linked to the concept of consent, and the ECtHR has held that even if a person is diagnosed with a mental illness, a patient always has the right of access to her/his medical records.¹⁰⁵

Case Relating to Mental Health and the Right of Access to Information

- ***Herczegfalvy v. Austria (ECtHR)(1992)***. The applicant who had been diagnosed with a mental illness was detained in a psychiatric hospital. The hospital limited the applicant's access to "reading matter, radio and television," which the ECtHR concluded was a violation of Article 10 of the ECHR.¹⁰⁶

102 COE. Recommendation Rec No. R (2000) 5. April 30, 2002.

103 ECtHR. *Shopov v. Bulgaria*. App. No. 11373/04. September 2, 2010.

104 ECtHR. *Herczegfalvy v. Austria*. App. No. 10533/83. September 24, 1992.

105 ECtHR. *Lashin v. Russia*. App. No. 33117/02. April 22, 2013.

106 ECtHR. *Herczegfalvy v. Austria*. App. No. 10533/83. September 24, 1992.

Right of Access to Information in the Context of Sexual and Reproductive Health

Under the right of access to information, States have a positive obligation to provide accurate information regarding reproductive health laws and the availability of abortion services.¹⁰⁷ The ECtHR has interpreted Article 8 (right to respect for private and family life) of the ECHR to include the government's obligation to enable access to information regarding risks to pregnant women's health¹⁰⁸ and the health of their unborn fetuses,¹⁰⁹ as well as the obligation to provide minors with access to information regarding abortion services.¹¹⁰ This right includes information that is necessary to determine the legality of a woman's access to therapeutic abortion services.¹¹¹ Additionally, the right of access to information requires consent of the individual, which is important in the area of sexual and reproductive health. For example, the ECtHR has held that sterilization without consent is impermissible and that full and informed consent is mandatory under Article 8.¹¹²

Furthermore, a government's efforts to prevent organizations from distributing information regarding the procurement of abortion services constitute a violation of this right.¹¹³ The Court found that such restrictions infringed both on the organization's right to impart information and on the right of individuals to receive such information, both of which are protected under Article 10.¹¹⁴

Cases Relating to Sexual and Reproductive Health and the Right of Access to Information

- ***K.H. and Others v. Slovakia (ECtHR)(2009)***. Eight women of Roma origin could no longer conceive after being treated at gynecological departments in two different public hospitals and suspected that they had been sterilized during their stay in those hospitals. They complained that they could not obtain photocopies of their medical records. The Court concluded that merely providing access to review the records but not providing the applicants with a photocopy of their medical records constituted a violation of Article 8.¹¹⁵
- ***Open Door and Dublin Well Woman v. Ireland (ECtHR)(1992)***. The applicants were two Irish companies that complained about being prevented, by means of a court injunction, from providing pregnant women with information concerning abortion services available abroad. The Court found that the restriction imposed on the applicant companies had created a risk to the health of women who did not have the resources or education to seek and use alternative means of ob-

107 ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

108 ECtHR. *Tysic v. Poland*. App. No. 5410/03. March 20, 2007.

109 ECtHR. *Costa and Pavan v. Italy*. App. No. 54270/10. August 28, 2012; see ECtHR. *R.R. v. Poland*. App. No. 27617/04. May 26, 2011.

110 ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

111 ECtHR. *Tysic v. Poland*. App. No. 5410/03. March 20, 2007.

112 ECtHR. *V.C. v. Slovakia* (, no. 18968/07).. February 8, 2012.

113 ECtHR. *Open Door and Dublin Well Woman v. Ireland* (, no. 14234/88; 14235/88).. October 29, 1992.

114 ECtHR. *Open Door and Dublin Well Woman v. Ireland* (, no. 14234/88; 14235/88).. October 29, 1992.

115 ECtHR. *K.H. and Others v. Slovakia* (, no. 32881/04). 6. November 6, 2009.

taining information about abortion. In addition, given that such information was available elsewhere, and that women in Ireland could, in principle, travel to Great Britain to have abortions, the restriction had been largely ineffective. The Court found a violation of Article 10.¹¹⁶

- **R.R. v. Poland (ECtHR)(2011).** A mother of two was pregnant with a child thought to be suffering from a severe genetic abnormality and was deliberately denied timely access to the genetic tests to which she was entitled by doctors who were opposed to abortion. The Court found a violation of Article 8 because Polish law did not include any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to make, in the light of their results, an informed decision as to whether or not to seek an abortion.¹¹⁷

Right to Bodily Integrity

The right to bodily integrity safeguards the individual's freedom from bodily injury or interference. Most cases concerning violations of physical or bodily integrity in health care settings have been analyzed under related rights that include the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR, Art. 3), the right to privacy (ECHR, Art. 8), and the right to the highest attainable standard of health (ESC, Art. 11). The Court has examined cases involving the administration of forced medication (including injections), forced feeding and nonconsensual sterilizations under the right to privacy (ECHR, Art. 8)¹¹⁸ and the right to freedom from torture, cruel, inhuman or degrading treatment (ECHR, Art. 3).¹¹⁹

RELEVANT PROVISIONS

▶ ECHR

Art. 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Art. 5(1): 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: ... (e) 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. ...

Art. 8:

- (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 preven-

116 ECtHR. *Open Door and Dublin Well Woman v. Ireland* (, no. 14234/88; 14235/88). 29. October 29, 1992.

117 ECtHR. *R.R. v. Poland* (, no. 27617/04). 28. November 28, 2011.

118 ECtHR. *Storck v. Germany*. App. No. 61603/00. June 16, 2005; ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; *V.C. v. Slovakia*. App. No. 18968/07. November 8, 2011.

119 ECtHR. *Ciorap v. Moldova*. App. No. 12066/02. June 19, 2007; *V.C. v. Slovakia*. App. No. 18968/07. November 8, 2011; *Gorobet v. Moldova*. App. No. 30951/10. October 11, 2011.

tion of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

▶ **Charter of Fundamental Rights of the European Union,**¹²⁰ **Art. 3(1) (Right to the integrity of the person):** Everyone has the right to respect for his or her physical and mental integrity.

▶ **COE Recommendation No. R (2004) 10,**¹²¹ **Art. 18 (Criteria for Involuntary Treatment):** A person may be subject to involuntary treatment only if the following conditions are met:

- (i) the person has a mental disorder;
- (ii) the person's condition represents a significant risk of serious harm to his or her health or to other persons;
- (iii) no less intrusive means of providing appropriate care are available;
- (iv) the opinion of the person concerned has been taken into consideration.

▶ **Declaration on the Promotion of Patients' Rights in Europe**¹²²

- 1.1 Everyone has the right to respect of his or her person as a human being.
- 1.3 Everyone has the right to physical and mental integrity and to the security of his or her person.
- 3.1 The informed consent of the patient is a prerequisite for any medical intervention.
- 3.2 A patient has the right to refuse or to halt a medical intervention....
- 3.5 When the consent of a legal representative is required, patients (whether minor or adult) must nevertheless be involved in the decision-making process to the fullest extent which their capacity allows.
- 3.9 The informed consent of the patient is needed for participation in clinical teaching.
- 3.10 The informed consent of the patient is a prerequisite for participation in scientific research.
- 5.10 Patients have the right to relief of their suffering according to the current state of knowledge.
- 5.11 Patients have the right to humane terminal care and to die in dignity.

▶ **European Charter of Patients' Rights**¹²³

Art. 4 (Right to Consent): Every individual has the right of 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.

Art. 5 (Right to Free Choice): Each individual has the right to freely choose from among different treatment procedures and providers on the basis of adequate information.

Art. 11 (Right to Avoid Unnecessary Suffering and Pain): Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.

120 Official Journal of the European Communities. Charter of Fundamental Rights of the European Union. OJ C 364/01. December 7, 2000.

121 COE. Recommendation Rec No. R (2004) 10. September 22, 2002.

122 WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

123 Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

- ▶ **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,**¹²⁴ **Art. 5:** An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

Right to Bodily integrity in the context of Mental Health

The ECtHR has recognized the need to protect the physical and mental integrity of mental health patients. Issues concerning a mental health patient's right to bodily integrity are often raised and treated in conjunction with right to liberty and security of person and freedom from torture concerns. For example, in *Stork v. Germany*, the Court analyzed forced treatment of the psychiatric patient under the rubric of the right to liberty and security of person, while recognizing the State's obligation to protect the physical integrity of the individual and underscoring the need for psychiatric institutions to regularly assess the justification of treatment administered to their patients.¹²⁵

Cases Relating to Mental Health and the Right to Bodily Integrity

- ***M.S. v. United Kingdom (ECtHR)(2012)*.** This case involved the detention of a man suffering from mental illness held in police custody for more than three days. The Court found a violation of Article 3, holding that, although there had been no intentional neglect on the part of the police, the applicant's prolonged detention without appropriate psychiatric treatment had diminished his human dignity.¹²⁶
- ***Shopov v. Bulgaria (ECtHR)(2010)*.** The Court found the government in violation of Article 5(1) where an applicant was forced to undergo psychiatric treatment for more than five years as a result of the public prosecutor and the police overstepping the limits of a domestic court's judgment ordering treatment in an outpatient clinic and not in a psychiatric hospital.¹²⁷
- ***Storck v. Germany (ECtHR)(2005)*.** The Court found the mental health patient's confinement in a psychiatric hospital and forced treatment to be in violation of Article 5(1) as the confinement had not been ordered by a court. The Court stressed the responsibility of the State to protect vulnerable populations (such as mental health patients) and concluded that retrospective measures to protect such individuals from the unlawful deprivation of liberty were insufficient.¹²⁸
- ***X. v. Finland (ECtHR)(2012)*.** The Court found that the confinement and forced treatment of a pediatrician in a mental health hospital lacked the proper safeguards against arbitrariness and, therefore, constituted a violation of Article 5.¹²⁹

124 COE. 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. April 4, 1997.

125 ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

126 ECtHR. *M.S. v. The United Kingdom*. App. No. 24527/08. August 3, 2012.

127 ECtHR. *Shopov v. Bulgaria*. App. No. 11373/04. December 2, 2010.

128 ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

129 ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012.

Right to Bodily Integrity in the context of Infectious Diseases

The right to bodily integrity becomes particularly relevant in instances where individuals with infectious diseases are subjected to coercive measures, such as quarantine and forced treatment. The ECtHR has established that, under Article 5 of the ECHR, the essential criteria for determining whether the detention of a person “for the prevention of the spreading of infectious diseases” is lawful are:

- (1) The spread of the infectious disease poses a danger to public health or safety;
- (2) It is the least restrictive way of preventing the spread of the disease to safeguard the public interest; and
- (3) Both the danger of spreading the infectious disease and detention being the least restrictive means of safeguarding the public interest must persist throughout the period of detention.

Case Relating to Infectious Diseases and the Right to Bodily Integrity

- **Enhorn v. Sweden (ECtHR)(2005).** The Court found a violation of Article 5(1)(e) where an individual living with HIV was placed involuntarily in a hospital for almost one and a half years after having transmitted the virus to another man as a result of sexual activity. The Court concluded that the compulsory isolation was not the least restrictive means available to prevent him from spreading HIV, and therefore, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant’s right to liberty.¹³⁰

Right to Bodily Integrity In the Context of Sexual and Reproductive Health

The right to bodily integrity safeguards the person’s right to control her/his health and body and is pertinent to issues relating to sexual and reproductive health, such as forced sterilization, genital mutilation, and abortion. The European Commission of the EU has committed to ending violence against women and ending female genital mutilation (FGM), recognizing it as a violation of women’s human rights and the international Convention on the Rights of the Child (CRC).¹³¹ The EU Council has stated: “[FGM] constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and *physical* and mental *integrity*.” (emphasis added).¹³²

While these sexual and reproductive health issues directly involve the right to bodily integrity, they have been typically addressed by the ECtHR under either the right to privacy (ECHR, Art. 8) or the right to freedom from torture and cruel, inhuman, and degrading treatment (ECHR, Art. 3).

¹³⁰ ECtHR. *Enhorn v. Sweden*. App. No. 56529/00. January 25, 2005.

¹³¹ European Commission. Communication from the Commission to the European Parliament and the Council: Towards the elimination of female genital mutilation. November 25, 2013.

¹³² EU Council. Council Conclusion on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence. December 6, 2012. para. 1.

Cases Relating to Sexual and Reproductive Health and the Right to Bodily Integrity

- ***I.G., M.K. and R.H. v. Slovakia (ECtHR)(2013)***. The Court found that the sterilization of two Roma women without their full and informed consent amounted to a violation of Article 3. The Court also considered the government's failure to conduct an effective official investigation into the sterilizations was a procedural violation of Article 3.¹³³
- ***V.C. v. Slovakia (ECtHR)(2012)***. The Court found that the sterilization of a woman at a public hospital without her informed consent amounted to a violation of Article 3. The Court found that the applicant experienced fear, anguish and feelings of inferiority as a result of her sterilization. Although there was no proof that the medical staff concerned had intended to ill-treat her, they had acted with gross disregard to her right to autonomy and choice as a patient.¹³⁴

Right to Life

As the right to life relates to patients' rights, the ECtHR has recognized positive obligations, beyond the State's obligation to refrain from intentionally and unlawfully taking the life of an individual.¹³⁵ The ECtHR has clarified that Article 2 of the ECHR requires that the State undertake the necessary measures to protect the lives of those living in its jurisdiction, which include the obligations to establish an effective judicial system and to investigate deaths other than those resulting from natural causes.¹³⁶ Specifically, in cases of deaths occurring during medical care, it is required 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.¹³⁷ Additionally, the State is required to regulate and monitor private health-care institutions.

In terms of medical negligence claims, the ECtHR has held that where a State has "made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients [the Court] 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 by themselves to call a Contracting State to account from the standpoint

133 ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 5966/04. April 29, 2013; see ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012.

134 ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012.

135 ECtHR. *Powell v. The United Kingdom*. App. No. 45305/99. May 4, 2000. (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).

136 See ECtHR. *Nitecki v. Poland*. App. No. 65653/01. March 21, 2002; ECtHR. *Erikson v. Italy*. App. No. 37900/97. October 26, 1999.

137 ECtHR. *Calvelli and Ciglio v. Italy*. App. No. 32967/96. January 17, 2002. (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).

of its positive obligations under Article 2 of the Convention to protect life.¹³⁸ Further, 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, a breach of the right to life for denial of health care will likely be found only in exceptional cases.¹³⁹ However, the ECtHR has held that an issue may arise under this right “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”¹⁴⁰—in other words, where there are preexisting obligations, these must not be applied in a discriminatory manner.

It is worth noting that the ECtHR has also left open the possibility that the right to life could be implicated in a situation in which sending a terminally ill person back to their country of origin could seriously shorten her/his life span or could amount to cruel and inhuman treatment due to inadequate medical facilities.¹⁴¹ Moreover, to date, there have been only a few substantive decisions on euthanasia.¹⁴²

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 2(1):** 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.

Right to Life in the context of Mental Health

The ECtHR has held that the right to life can impose a duty to protect those in custody, including cases in which the risk derives from self-harm.¹⁴³ 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.”¹⁴⁴

Cases Relating to Mental Health and the Right to Life

- **Çoşelav v. Turkey (ECtHR)(2013).** A juvenile detained in an adult prison committed suicide. The Court concluded that there was a violation of the right to life, finding that authorities had not only been indifferent to his grave psychological prob-

138 ECtHR. *Wiater v. Poland*. App. No. 42990/08. May 15, 2012. para 34.

139 ECtHR. *Nitecki v. Poland*. App. No. 65653/01. March 21, 2002 (considering that the state had provided the applicant medical treatment and facilities, including covering a large part of the cost of the required medications, the Court found no breach of Article 2—the authorities paid 70 percent of the cost of the lifesaving drugs prescribed to applicant, with the latter expected to pay the remainder); see ECtHR. *Pentiacova v. Moldova*. App. No. 14462/03. January 4, 2005. (haemodialysis); ECtHR. *Wiater v. Poland*. App. No. 42990/08. May 15, 2012. (medication to treat narcolepsy); ECtHR. *Sentges v. Netherlands*. App. No. 27677/02. July 8, 2003 (robotic arm).

140 ECtHR. *Cyprus v. Turkey*. App. No. 25781/94. May 10, 2001.

141 ECtHR. *D v. The United Kingdom*. App. No. 30240/96. May 2, 1997. (issues under Article 2 were indistinguishable from those raised under Article 3).

142 See ECtHR. *Koch v. Germany*. App. No. July 19, 2012; ECtHR. *Haas v. Switzerland*. App. No. 31322/07. January 20, 2011; ECtHR. *Pretty v. The United Kingdom*. App. No. 2346/02. April 29, 2002.

143 ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. April 3, 2001.

144 ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. April 3, 2001.

lems but had been responsible for a deterioration of his state of mind by detaining him in a prison with adult inmates without providing any medical or specialist care, all of which led to his suicide.¹⁴⁵

- **Reynolds v. United Kingdom (ECtHR)(2012).** Upon admission, a voluntary psychiatric patient suffering from schizophrenia was determined to be a low risk of suicide by the psychiatric institution. The patient spoke of hearing voices telling him to kill himself and subsequently jumped from a window and died. The Court determined that the right to life was violated because appropriate measures had not been taken to protect the patient and because the applicant (the patient's mother) lacked recourse to domestic remedies to seek non-pecuniary damages for her son's death.¹⁴⁶

Right to Life in the context of Infectious Diseases

The ECtHR has addressed the right to life in relation to infectious diseases in the context of detention. The Court has recognized the State's responsibility to provide appropriate medical treatment to those in detention; failure to do so in cases involving the death of a detainee could result in the violation of the right to life.¹⁴⁷ However, in order for the positive obligations of the State regarding the provision of medical treatment to be triggered under this right, the State must have knowledge of the detainee's medical need. However, this does not entitle the State to turn a "blind-eye" to the detainee's condition. An obligation may arise on the part of the detainee to inform the State of his condition in order to procure adequate medical treatment.¹⁴⁸

Cases Relating to Infectious Diseases and the Right to Life

- **Oyal v. Turkey (ECtHR)(2010).** An infant was infected with HIV during a blood transfusion at a public hospital. The Court found a violation of the right to life from the inadequate remedies provided by domestic law for the negligence of hospital staff, who had failed to test the blood properly and screen donors effectively.¹⁴⁹
- **Salakhov and Islyamova v. Ukraine (ECtHR)(2013).** The Court found a violation of the right to life where a detainee living with HIV was not provided with adequate medical treatment, which resulted in the death of the detainee.¹⁵⁰

145 ECtHR. *Çoşelav v. Turkey*. App. No. 1413/07. March 18, 2013.

146 ECtHR. *Reynolds v. The United Kingdom*. App. No. 2694/08. June 13, 2012.

147 ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013.

148 ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013.

149 ECtHR. *Oyal v. Turkey*. App. No. 4864/05. June 23, 2010.

150 ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013.

Right to Life In the Context of Sexual and Reproductive Health

The ECtHR has left the determination of when life begins, in the context of embryos, to the law of the States.¹⁵¹ Additionally, because the ECtHR does not apply Article 2 of the ECHR to the unborn, the issue of abortion is typically addressed under the right to respect for private and family life under Article 8 of the ECHR. The Court has not interpreted Article 8 as conferring a right to abortion.¹⁵² However, the Court has recognized that the government is responsible for providing a legal framework (including “accessible and effective procedure[s]”) to determine access to lawful abortion, including procedures to resolve disputes between women seeking abortion services and medical practitioners.¹⁵³

Cases Relating to Sexual and Reproductive Health and the Right to Life

- ***Byrzykowski v. Poland (ECtHR)(2006)***. The Court found that the prolonged investigation into the death of woman following a cesarean was found to be a violation of the right to life, holding that a “prompt examination of cases concerning death in a hospital setting” is required under the procedural limb of this right, as such information can be disseminated to medical staff of the institution “to prevent the repetition of similar errors and thereby contribute to the safety of users of all health services.”¹⁵⁴
- ***Evans v. United Kingdom (ECtHR)(2007)***. The applicant was suffering from ovarian cancer and underwent in-vitro fertilization before her ovaries were removed. The applicant and her husband divorced, and her former husband withdrew his consent for the use of the embryos and requested that they be destroyed according to the contract with the clinic. The ECtHR found no violation of right to life, holding that the embryos created did not have a right to life.¹⁵⁵
- ***Vo v. France (ECtHR)(2004)***. Due to a mix-up with another patient with the same surname, the applicant’s amniotic sack was punctured, making a therapeutic abortion necessary. She maintained that the unintentional killing of her child should have been classified as manslaughter. The Court found no violation of the right to life, concluding that it was not desirable or possible at the moment to rule on whether an unborn child was a person under Article 2 of the ECHR.¹⁵⁶

151 ECtHR. *Evans v. The United Kingdom*. App. No. 6339/05. April 10, 2007.

152 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

153 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

154 ECtHR. *Byrzykowski v. Poland*. App. No. 11562/05. September 27, 2006.

155 ECtHR. *Evans v. The United Kingdom*. App. No. 6339/05. April 10, 2007.

156 ECtHR. *Vo v. France*. App. No. 53924/00. July 8, 2004.

Right to the Highest Attainable Standard of Health

The ECHR does not contain an express right to health, but the ECtHR has interpreted this entitlement under various rights protected by the ECHR, most notably the right to freedom from torture and other cruel, inhuman or degrading treatment, freedom from discrimination, and the right to private and family life. States have a duty to protect the health of detainees and lack of treatment may amount to a violation of Article 3, which prohibits torture and cruel, inhuman, and degrading treatment or punishment.¹⁵⁷ Nevertheless, a right to health is expressly recognized under Article 11 of the ESC, and as stated above, the ESCR has issued seven judgments based on Article 11 to date¹⁵⁸—only one of which falls into one of the contexts examined throughout this guide, namely sexual and reproductive health.¹⁵⁹ For this reason, the case law provided in this section is limited to this ESCR case.

According to the ESCR, Article 11 includes physical and mental well-being in accordance with the definition of health in the WHO Constitution.¹⁶⁰ Under this right, 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.¹⁶¹ The health care system must be accessible to everyone, and arrangements for access must not lead to unnecessary delays in provision. Access to treatment must be based on transparent criteria, agreed upon at the national level, taking into account the risk of deterioration in either clinical condition or quality of life.¹⁶² Additionally, 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.¹⁶³ Accordingly, the conditions of stay in hospitals, including psychiatric hospitals, must be satisfactory and compatible with human dignity.¹⁶⁴

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.¹⁶⁵

RELEVANT PROVISIONS

▶ **ECHR, Art. 3:**

▶ **Charter of Fundamental Rights of the European Union,¹⁶⁶ Art. 35:** Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the

157 ECtHR. *Hurtado v. Switzerland*. App. No. 17549/90. January 28, 1994; ECtHR. *Ilhan v. Turkey*. App. No. 22277/93. June 27, 2000.

158 ESCR. *International Federation of Human Rights Leagues (FIDH) v. Greece*. Collective Complaint No. 72/2011. January 23, 2013; ESCR. *Defence for Children International (DCI) v. Belgium*. Collective Complaint No. 69/2011. October 23, 2012; ESCR. *Médecins du Monde - International v. France*. Collective Complaint No. 67/2011. September 11/, 2012; ESCR. *Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*. Collective Complaint No. 45/2007. March 30, 2009; ESCR. *European Roma Rights Centre (ERRC) v. Bulgaria*. Collective Complaint No. 46/2007. December 3, 2008; ESCR. *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*. Collective Complaint No. 30/2005. December 6, 2006; ESCR. *Confédération Générale du Travail (CGT) v. France*. Collective Complaint No. 22/2003. December 8, 2004.

159 ESCR. *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, Collective Complaint No. 45/2007. March 30/, 2009.

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

161 COE. *Conclusions: Denmark. (XV-2).*

162 COE. *Conclusions: United Kingdom. (XV-2).*

163 COE. *Conclusions: Denmark. (XV-2).*

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

165 COE. *The Right to Health and the European Social Charter.*

166 *Official Journal of the European Communities. Charter of Fundamental Rights of the European Union. OJ C 364/01. December 7, 2000.*

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.

▶ **Declaration on the Promotion of Patients' Rights in Europe**¹⁶⁷

1.6 Everyone has the right to such protection of health as is afforded by appropriate measures for disease prevention and health care, and to the opportunity to pursue his or her own highest attainable level of health.

5.3 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 providers.

▶ **ESC**

Art. 11 – The right to protection of health: 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 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.

Art. 13 – The right to social and medical assistance: With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting 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 Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

▶ **European Charter of Patients' Rights**¹⁶⁸

Art. 8 (Right to the Observance of Quality Standards): Each individual has the right of access to high quality health services on the basis of the specification and observance of precise standards.

Art. 9 (Right to Safety): 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 treatments that meet high safety standards.

¹⁶⁷ WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

¹⁶⁸ Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

Art. 10 (Right to Innovation): Each individual has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations.

Right to the Highest Attainable Standard of Health in the Context of Sexual and Reproductive Health

According to the ESCR, the right to health under Article 11 of the ESC requires that the State “provide education and aim to raise public awareness in respect of health-related matters,” including sexual and reproductive health.¹⁶⁹ This education should be available in schools throughout the school year.¹⁷⁰ The ESCR considers sexual and reproductive health education to constitute “a process aimed at developing the capacity of children and young people to understand their sexuality in its biological, psychological, socio-cultural and reproductive dimensions which will enable them to make responsible decisions with regard to sexual and reproductive health behaviour.”¹⁷¹

Case Relating to Sexual and Reproductive Health and the Right to the Highest Attainable Standard of Health

- **International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia (ESCR)(2009).** The ESCR found a violation of the right to health where the State failed to provide adequate, sufficient, and non-discriminatory sexual and reproductive health education to students in public schools.¹⁷²

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

The right to freedom from torture and other cruel, inhuman or degrading treatment requires the State to prevent and protect people from and punish acts of inhuman or degrading treatment and torture. This right has been interpreted under Article 3 (prohibition of torture) of the ECHR. The ECtHR considers this right to be “one of the most fundamental values of a democratic society.”¹⁷³ It cannot be interpreted in absolute terms and the “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.”¹⁷⁴ According to the Court, “the assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its

169 ESCR. Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009). para. 43.

170 ESCR. Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009). para. 45.

171 ESCR. Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009). para. 46.

172 ESCR. Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009).

173 ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 39.

174 ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 40.

physical and mental effects and, in some cases, the sex, age and state of health of the victim.”¹⁷⁵ Examples of breaches of Article 3 in the context of patient care include: the continued detention of a cancer sufferer, causing “particularly acute hardship;”¹⁷⁶ significant defects in the medical care provided to a mentally ill prisoner known to be a suicide risk;¹⁷⁷ and systematic failings in relation to the death of a heroin addict in prison.¹⁷⁸

Medical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is State involvement and specific intent, it is torture. The former European Commission on Human Rights 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.”¹⁷⁹ In fact, the ECtHR has held that the need for adequate medical assistance and treatment beyond that available in prison could, in exceptional cases, justify the inmate’s release subject to appropriate restrictions in the public interest.¹⁸⁰ Moreover, 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.¹⁸¹ Additionally, the combined and cumulative impact on a detainee of both the conditions of detention and a lack of adequate medical assistance may also result in a breach of Article 3.¹⁸²

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.¹⁸³ 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.¹⁸⁴ Breaches will tend to amount to inhuman and degrading treatment rather than torture. If an individual suffers from multiple illnesses, the risks associated with any illness she/he suffers during her/his detention may increase and her/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.¹⁸⁵

Nevertheless, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. Instead, the ECtHR has reiterated the “right of all prisoners to conditions of deten-

175 ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 40.

176 ESCR. *Mouisel v. France*. Application No. 67263/01. November 14, 2002. (finding the detention amounted to inhuman and degrading treatment).

177 ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. March 4, 2001. (finding failure to refer to psychiatrist and lack of medical notes).

178 ECtHR. *McGlinchey and Ors v. The United Kingdom*. App. No. 50390/99. July 29, 2003. (finding inadequate facilities to record weight loss, gaps in monitoring, failure to take further steps including admission to hospital).

179 ECtHR. *Tanko v. Finland*. App. No. 23634/94. May 19, 1994.

180 ECtHR. *Wedler v. Poland*. App. No. 44115/98. April 16, 2007; see ESCR. *Mouisel v. France*. App. No. 67263/01. November 14, 2002.

181 ECtHR. *Hummatov v. Azerbaijan*. App. No. 9852/03; 13413/04. November 29, 2007; ECtHR. *Malenko v. Ukraine*. App. No. 18660/03. February 19, 2009.

182 ECtHR. *Popov v. Russia*. App. No. 26853/04. July 13, 2006; ECtHR. *Lind v. Russia*. App. No. 25664/05. December 6, 2007; ECtHR. *Kalashnikov v. Russia*. App. No. 47095/99. July 15, 2002.

183 Some of these interpretations may also be relevant to the context of those in compulsory military service, as such persons are effectively under the control of the State.

184 ECtHR. *Hurtado v. Switzerland*. App. No. 17549/90. January 28, 1994; ECtHR. *Ilhan v. Turkey*. App. No. 22277/93. June 27, 2000.

185 ECtHR. *Khudobin v. Russia*. App. No. 59696/00. January 26, 2007.

tion 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.”¹⁸⁶

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.¹⁸⁷

Experimental medical treatment may amount to inhuman treatment in the absence of consent,¹⁸⁸ and 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 3.¹⁸⁹ 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.¹⁹⁰

This right also requires that authorities ensure that there is a comprehensive record concerning the detainee’s state of health and the treatment she/he underwent while in detention¹⁹¹ and that the diagnoses and care are prompt and accurate.¹⁹² The medical record should contain sufficient information, specifying the kind of treatment the patient was prescribed, the treatment she/he actually received, who administered the treatment and when, and how the applicant’s state of health was monitored, etc. In the absence of such information, the court may draw appropriate inferences.¹⁹³ Contradictions in medical records have been held to amount to a breach of Article 3.¹⁹⁴

It is worth noting here the European Committee for the Prevention of Torture (CPT), established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and tasked with monitoring compliance with Article 3 of the ECHR 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.¹⁹⁵ The CPT has emphasized the impact of overcrowding on prisoners’ health.¹⁹⁶ It

186 ESCR. *Mouisel v. France*. App. No. 67263/01. November 14, 2002.

187 ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. April 3, 2001. (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).

188 ECtHR. *X v. Denmark*. App. No. 9974/82. March 2, 1983.

189 ECtHR. *Jalloh v. Germany*. App. No. 54810/00. July 11, 2006.

190 ECtHR. *Nevmerzhitsky v. Ukraine*. App. No. 54825/00. April 5, 2005. (finding that force feeding of prisoner on hunger strike was unacceptable and amounted to torture; see ECtHR. *Herczegfalvy v. Austria*. App. No. 10533/83. September 24, 1992. (finding that forcible administration of drugs and food to violent prisoner on hunger strike complied with established medical practice).

191 ECtHR. *Khudobin v. Russia*. App. No. 59696/00. January 26, 2007.

192 ECtHR. *Aleksanyan v. Russia*. App. No. 46468/06. June 5, 2009.

193 ECtHR. *Hummatov v. Azerbaijan*. App. No. 9852/03; 13413/04. November 29, 2007; ECtHR. *Melnik v. Ukraine*. App. No. 72286/01. June 28, 2006; see ECtHR. *Holomiov v. Moldova*. App. No. 30649/05. November 7, 2006.

194 ECtHR. *Radu v. Romania*. App. No. 34022/05. October 3, 2012.

195 COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. [CPT]. The CPT Standards.: “Substantive” sections of the CPT’s General Reports. (CPT/Inf/E [2002, rev. 2006]). October, 2006.

196 COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. CPT. The CPT Standards.: “Substantive” sections of the CPT’s General Reports. (CPT/Inf/E [2002, rev. 2006]). October, 2006.

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.¹⁹⁷

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 3:** No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
- ▶ **Declaration on the Promotion of Patients' Rights in Europe**¹⁹⁸
 - 1.3 Everyone has the right to physical and mental integrity and to the security of his or her person.
 - 5.10 Patients have the right to relief of their suffering according to the current state of knowledge.
 - 5.11 Patients have the right to humane terminal care and to die in dignity.
- ▶ **European Charter of Patients' Rights,**¹⁹⁹ **Art. 11 (Right to Avoid Unnecessary Suffering and Pain):** Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.

Freedom From Torture and Other cruel, Inhuman or Degrading Treatment in the context of Mental Health

The ECtHR recognizes the special position of mental health patients in relation to Article 3, particularly when those suffering from mental illness are subject to detention: "the mentally ill are in a position of particular vulnerability, and clear issues of respect for their fundamental human dignity arise whenever such persons are detained by the authorities."²⁰⁰ The Court has found that failure to provide psychiatric treatment to a person in need while subject to detention may constitute degrading treatment, thus amounting to a breach of Article 3.²⁰¹ The Court also recognizes that in addition to positive obligations that may arise in the context of those who are detained and suffer from mental illness (such as specialized psychiatric services), there are also negative obligations, where the State should avoid procedures that may aggravate the conditions of persons suffering from mental illness.²⁰² For example, the State should avoid placing detainees with mental illness in solitary confinement, which may aggravate the detainee's illness and/or present an increased risk of suicide.²⁰³

The State is also responsible for providing humane conditions in relation to detention, including adequate temperature control, food, and sanitary conditions.²⁰⁴ The Court has found degrading treat-

197 COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. CPT. The CPT Standards: "Substantive" sections of the CPT's General Reports. (CPT/Inf/E [2002, rev. 2006]). October, 2006.

198 WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

199 Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

200 ECtHR. *M.S. v. The United Kingdom*. App. No. 24527/08. August 3, 2012.

201 ECtHR. *M.S. v. The United Kingdom*. App. No. 24527/08. August 3, 2012.

202 ECtHR. *Renolde v. France*. App. No. 5608/05. January 16, 2009.

203 ECtHR. *Renolde v. France*. App. No. 5608/05. January 16, 2009.

204 ECtHR. *Stanev v. Bulgaria*. App. No. 36760/06. January 17, 2012.

ment in violation of Article 3 in cases where living conditions in institutions housing mental health patients are insufficient.²⁰⁵ Insufficient living conditions may include the failure on the part of the State to provide adequate food, heat, clothing, sanitary conditions and health services.²⁰⁶ Insufficient financial resources on the part of the State to provide adequate living conditions will not serve as a justification for failure to do so.²⁰⁷

Cases Relating to Mental Health and the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment

- ***Claes v. Belgium (ECtHR)(2013)***. The Court found the national authorities' failure to provide the applicant with adequate care during his detention for over 15 years in a prison psychiatric wing to constitute degrading treatment, and thus a violation of Article 3. The Court stressed that a structural problem existed on account of the inability to afford appropriate care for persons with mental disorders who were held in prison owing to the shortage of places in psychiatric facilities elsewhere.²⁰⁸
- ***Keenan v. United Kingdom (ECtHR)(2001)***. The applicant, who was suffering from paranoia, committed suicide in prison after being placed in the segregation unit as a punishment. The Court found that the lack of effective monitoring, lack of informed psychiatric input into his assessment, and significant defects in the medical care provided amounted to a violation of Article 3. Moreover, the imposition on him of a serious disciplinary punishment, which might well have threatened his physical and moral resistance, had not been compatible with the standard of treatment required in respect to a person suffering from mental illness.²⁰⁹
- ***M.S. v. United Kingdom (ECtHR)(2012)***. This case involved the detention of a man suffering from mental illness, held in police custody for more than three days. The Court found a violation of Article 3, holding that, although there had been no intentional neglect on the part of the police, the applicant's prolonged detention without appropriate psychiatric treatment had diminished his human dignity.²¹⁰

Freedom From Torture and Other cruel, Inhuman or Degrading Treatment in the context of Infectious Diseases

Persons suffering from infectious diseases may be more vulnerable to ill treatment. Under Article 3 of the ECHR, the government has an obligation to ensure the health and wellbeing of the individual in

205 ECtHR. *Stanev v. Bulgaria*. App. No. 36760/06. January 17, 2012.

206 ECtHR. *Stanev v. Bulgaria*. App. No. 36760/06. January 17, 2012.

207 ECtHR. *Stanev v. Bulgaria*. App. No. 36760/06. January 17, 2012.

208 ECtHR. *Claes v. Belgium*. App. No. 43418/09. April 10, 2013.

209 ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. April 3, 2001.

210 ECtHR. *M.S. v. The United Kingdom*. App. No. 24527/08. August 3, 2012.

detention, which includes providing the necessary medical assistance.²¹¹ This right can be implicated when people living with HIV in prisons or detention centers are denied treatment.²¹² Where the lack of such 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.²¹³ However, even when these results do not occur, a finding of degrading treatment may still be made if humiliation was caused to the victim by the stress and anxiety that she/he suffers from a lack of medical assistance.²¹⁴ For example, the ECtHR has found that lack of medical treatment for a person’s various illnesses (including TB) that were contracted in prison resulted in the individual’s considerable mental suffering, thereby diminishing his human dignity.²¹⁵

Cases Relating to Infectious Diseases and the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment

- ***A.B. v. Russia (ECtHR)(2011)***. The applicant, a person living with HIV and in prison, never received antiviral treatment for HIV; neither was he admitted to a hospital, due to a lack of beds. Medical staff rarely visited and provided no medication when they did. The Court found the lack of medical assistance to constitute a violation of Article 3.²¹⁶
- ***Khudobin v. Russia (ECtHR)(2007)***. Being HIV positive and suffering from several chronic diseases, including epilepsy, viral hepatitis and various mental illnesses, the applicant contracted a number of serious diseases during his detention on remand of more than one year, including measles, bronchitis and acute pneumonia. A request by his father for a thorough medical examination was refused. The Court found that the applicant had not been given the medical assistance he needed, in violation of Article 3. While the Court accepted that the medical assistance available in prison hospitals might not always be at the same level as in the best medical institutions for the general public, it underlined that the State had to ensure that the health and well-being of detainees were adequately secured by providing them with the requisite medical assistance.²¹⁷
- ***Logvinenko v. Ukraine (ECtHR)(2011)***. The Court concluded that the applicant, who was a person living with HIV and serving a life prison sentence, had suffered inhuman or degrading treatment as a result of the absence of comprehensive medical supervision and treatment for tuberculosis and HIV, as well as unsuitable prison conditions. The Court therefore found a breach of Article 3.²¹⁸

211 ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013. para. 126; see ECtHR. *Kudla v. Poland*. App. No. 30210/96. October 26, 2000.

212 ECtHR. *E.A. v. Russia*. App. No. 44187/04. August 23, 2013. (violation of Article 3 due to lack to medical attention/treatment of applicant’s HIV infection while in detention).

213 ECtHR. *McGlinchey and Ors v. The United Kingdom*. App. No. 50390/99. July 29, 2003.

214 ECtHR. *Sarban v. Moldova*. App. No. 3456/05. January 4, 2006.

215 ECtHR. *Hummatov v. Azerbaijan*. App. No. 9852/03; 13413/04. November 29, 2007.

216 ECtHR. *A.B. v. Russia*. App. No. 1439/06. January 14, 2011; see also ECtHR. *E.A. v. Russia*. App. No. 44187/04. August 23, 2013; ECtHR. *Yakovenko v. Ukraine*. App. No. 15825/06. January 25, 2008.

217 ECtHR. *Khudobin v. Russia*. App. No. 59696/00. January 26, 2007.

218 ECtHR. *Logvinenko v. Ukraine*. App. No. 13448/07. January 14, 2011.

- **Vasyukov v. Russia (ECtHR)(2011).** The Court found the authorities' failure to duly diagnose the applicant with tuberculosis contracted during his detention and to provide adequate medical care to constitute a violation of Article 3.²¹⁹

Freedom From Torture and Other cruel, Inhuman or Degrading Treatment In the Context of Sexual and Reproductive Health

The ECtHR has recognized that pregnant women occupy a position of particular vulnerability²²⁰ and that delayed access to medical treatment such as genetic testing (of a fetus) or abortion services may constitute degrading treatment in violation of Article 3 of the ECHR.²²¹ Additionally, the Court has repeatedly recognized that forced sterilization constitutes humiliating and degrading treatment.²²² In the case of women refugees, the ECtHR has emphasized that States have an obligation under international law, including Article 3 of the ECHR, to protect them by guaranteeing them the authorization to remain in the State if returning to their home country could subject them to a real risk of being subjected to treatment contrary to Article 3 in the receiving country, including female genital mutilation.²²³

Cases Relating to Sexual and Reproductive Health and the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment

- **Aden Ahmed v. Malta (ECtHR)(2013).** An asylum seeker was detained and suffered from episodes of depression, recurrent physical pain, a miscarriage, and an infection during detention. The Court found that the conditions of her detention, when coupled with her fragile health, amounted to a violation of Article 3.²²⁴
- **I.G., M.K. and R.H. v. Slovakia (ECtHR)(2013).** The Court found that the sterilization of two Roma women without their full and informed consent amounted to a violation of Article 3. The Court also considered the government's failure to conduct an effective official investigation into the sterilizations was a procedural violation of Article 3.²²⁵
- **V.C. v. Slovakia (ECtHR)(2012).** The Court found that the sterilization of a woman at a public hospital without her informed consent amounted to a violation of Article 3. The Court found that the applicant experienced fear, anguish and feelings of inferiority as a result of her sterilization. Although there was no proof that the

219 ECtHR. *Vasyukov v. Russia*. App. No. 2974/05. September 15, 2011.

220 ECtHR. *R.R. v. Poland*. App. No. 27617/04. May 26, 2011.

221 ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013; see also ECtHR. *R.R. v. Poland*. App. No. 27617/04. May 26, 2011.

222 ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012; ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 15966/04. November 13, 2012.

223 ECtHR. *Collins and Akaziebie v. Sweeden*. App. No. 23944/05. March 8, 2007.

224 ECtHR. *Aden Ahmed v. Malta*. App. No. 55352/12. July 23, 2013. paras. 97-100.

225 ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 5966/04. April 29, 2013; see ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012.

medical staff concerned had intended to ill-treat her, they had acted with gross disregard to her right to autonomy and choice as a patient.²²⁶

Right to Participation in Public Policy

The right to participation in public policy has been treated as an underlying determinant of health,²²⁷ and in the context of health services, it is the right and opportunity of every person to participate in political processes and policy decisions affecting her/his health and wellbeing at the community, national and international levels.²²⁸ This opportunity must be meaningful, supported and provided to all citizens without discrimination. The right extends to participation in decisions about the planning and implementation of health care services, appropriate treatments, and public health strategies.

There is no explicit provision guaranteeing the right to participation in public policy in the ECHR; however, the European Charter of Patients' Rights contains a "right to participate in policy-making in the area of health" that fosters citizens' "rights to participate in the definition, implementation and evaluation of public policies relating to the protection of health care rights." In addition, the ECtHR has addressed the restriction of voting rights of discrete populations under the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR 3).²²⁹

RELEVANT PROVISIONS

- ▶ **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**²³⁰

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 organizations 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 organizations aiming at involvement in decision-making in health care.

226 ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012.

227 Halabi, Sam. Participation and the right to health: lessons from Indonesia. *Health and Human Rights Journal*, Vol. 11, No. 1. P. 2009. p. 51.

228 CESCR, GC 14, para. 11. CESCR. CESCR General Comment No. 14: The right to the highest attainable standard of health. U.N. Doc. E/C.12/2000/4. August 11, 2000. para. 11.

229 See ECtHR. *Hirst v. The United Kingdom (No. 2)* App. No. 74025/01. October 6, 2005; see also ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

230 COE. Recommendation No. R (2000) 5. February 24, 2000. On the development of structures for citizen and patient participation in the decision-making process affecting 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**²³¹

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.

► **Ljubljana Charter on Reforming Health Care**,²³² **Art. 5.3:** 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.

Right to Participation in public policy in the context of Mental Health

Under the right to participation in public policy, people with mental disabilities have the right to participate in public life as long as the law allows them to do so, or through a representative.²³³ The law can still prevent some with mental illness from participating in public life if their mental capacities are too low, but restrictions can be accepted only if legally justified, proportionate, and decided by the Courts.²³⁴ The legal capacity of the patient is based upon official decisions.²³⁵

Under the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR 3) the Court has found that the complete removal of the voting rights of the mentally ill (those placed under partial or full guardianship) may breach Article 3, even if the guardianship status of such individuals is periodically subject to judicial review.²³⁶ The Court has considered that "if a restriction on fundamental rights applies to a particularly vulnerable group in society, who has suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question."²³⁷

231 COE. Committee of Ministers Recommendation No. R (2006) 18. November 8, 2006.

232 World Health Organization [WHO]. Ljubljana Charter on Reforming Health Care. June 19, 1996.

233 European Union Agency for Fundamental Rights [FRA]. The right to political participation of persons with mental health problems and persons with intellectual disabilities. October 2010.

234 European Commission for Democracy through Law (the Venice Commission), Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, adopted by the Venice Commission at 52nd session (18-19 October 2002). Opinion No. 190/2002, doc. CDL-AD (2002) 23 rev.

235 ECtHR. Alajos Kiss v. Hungary. App. No. 38832/06. August 20, 2010.

236 ECtHR. Alajos Kiss v. Hungary. App. No. 38832/06. August 20, 2010.

237 ECtHR. Alajos Kiss v. Hungary. App. No. 38832/06. August 20, 2010.

Case Relating to Mental Health and the Right to Participation in Public Policy

- ***Alajos Kiss v. Hungary (ECtHR)(2010)***. Where the applicant was an individual with manic depression placed under partial guardianship, the Court found the domestic law prohibiting individuals under partial or full guardianship from participating in elections to be in violation of Article 3 (prohibition of degrading treatment) of the ECHR.²³⁸

Right to Participation in public policy in the context of Infectious Diseases

Persons living with infectious diseases, such as HIV/AIDS have the right to meaningful participation in designing and implementing policies that may impact them.²³⁹ As individuals who are most affected by public policies aimed at protecting the public's health from infectious diseases, their engagement is crucial to creating comprehensive and successful public policy that not only protects the health of the larger community, but also respects the human rights of these individuals.

Right to Participation in public policy In the Context of Sexual and Reproductive Health

The right to participation in public policy is essential to protecting the sexual and reproductive health of women. The participation of the populations most affected by policies related to sexual and reproductive health helps to ensure that their needs are met, such as those related to family planning and access to contraceptives. In addition to granting them a sense of ownership, the involvement of affected individuals can make the policies and implementation efforts more culturally appropriate and thereby increasing access to individuals.²⁴⁰

Right to Equality and Freedom from Discrimination

The rights to equality and to freedom from discrimination are important to patient care and are essential components of the right to health. The COE has recognized and emphasized "effective access to health care for all without discrimination" as a "basic human right."²⁴¹ Article 14 of the ECHR prohibits discrimination based on "sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

238 ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

239 See Declaration of the Paris AIDS Summit, December 1, 1994; UNAIDS. UNAIDS Policy Brief: The Greater Involvement of People Living with HIV (GIPA). March 2007. p. 1.

240 CRF and UNFPA. Briefing Paper: The Right to Contraceptive Information and Services for Women and Adolescents. December 2010. p. 24.

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

Importantly, unless states have ratified Protocol No. 12 to the ECHR (which prohibits discrimination and does not require that other rights be implicated),²⁴² Article 14 is not a stand-alone provision—it must be argued in conjunction with one of the substantive provisions of the ECHR.²⁴³ 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.

International discrimination law has distinguished direct discrimination from indirect discrimination. “Direct discrimination” refers to discriminatory measures that have intent to discriminate. “Indirect discrimination” refers to “a practice, rule, requirement or condition [that] is neutral on its face” but has a negative and disproportionate impact on a group of individuals without justification.²⁴⁴ Under EU law, Directive 2000/43/EC of 29 June 2000 (which is applicable to the context of access to health care) establishes that “any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community.”²⁴⁵ In this directive, Article 2(2) defines “direct discrimination” as “occur[ing] where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.” It defines “indirect discrimination” as “occur[ing] where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” Further, the directive understands both harassment and instruction to discriminate to constitute discrimination.

In contrast, the ECtHR has not made such a distinction. Rather, the Court has established a test for determining whether to analyze the claim under Article 14 of the ECHR. Because a violation of Article 14 requires the violation of another right protected under the ECHR (again, unless the state has ratified Protocol No. 12), the Court must first establish whether the alleged discrimination indeed constitutes a violation of another right under the Convention. Second, the Court must determine whether there has been a violation of a “substantive provision.” If so, the Court’s analysis of the discrimination is subsumed within the discussion of that provision. Third, the Court will determine whether the applicant demonstrated a difference in treatment from similarly-situated individuals, a step that requires that the applicant identify with a group of persons in “analogous situations” and show the differential treatment. In response, the State may demonstrate that the differential treatment is justified.

Although the Court has hesitated to draw distinctions between direct and indirect discrimination, as well as to rely on statistical evidence that supports arguments of indirect discrimination, the Court for the first time recognized indirect discrimination in 2001 in *Hugh Jordan v. the United Kingdom*, where it established that even when a measure does not have a discriminatory purpose, it could still be considered discriminatory.²⁴⁶ For a more discussion on the issue, refer to Interights’ “Non-Discrimination in International Law: A Handbook for Practitioners.”²⁴⁷

242 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177). Entered into force on April 1, 2005.

243 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177). Entered into force on April 1, 2005.

244 Interights. *Non-Discrimination in International Law: A Handbook for Practitioners*. 2011. 18.

245 Official Journal of the European Union. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180 of 19.7.2000. July 19, 2000. (13).

246 ECtHR. *Hugh Jordan v. The United Kingdom* App. No. 24726/94. May 4, 2001. para. 154.

247 Interights. *Non-Discrimination in International Law: A Handbook for Practitioners*. 2011.

With respect to Article 11 (right to protection of health) of the ESC, the ECSR has stated that the health care system must be accessible to everyone and that restrictions on the application of Article 11 must not be interpreted in such a way as to impede disadvantaged groups' exercise of their rights to health.²⁴⁸ With regard to Article 13 (right to social and medical assistance), 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.

RELEVANT PROVISIONS

▶ **ECHR, Art. 14:** 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.

▶ **ESC**

Art. 11 – The right to protection of health: 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 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.

Art. 13 – The right to social and medical assistance: With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting 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 Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

²⁴⁸ ESCR. *Defence for Children International (DCI) v. Belgium*. Collective Complaint No. 69/2011. October 23, 2012.; COE. *Conclusions of the European Committee of Social Rights*. (XVII -2); *Conclusions 2005*. Statement of interpretation of Article 11.

Art. 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community: 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 specialized 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 specialized 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.

- ▶ **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,**²⁴⁹ **Art. 3:** Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.

Right to Equality and Freedom from Discrimination in the context of Mental Health

The ECtHR has recognized that persons with mental illness constitute a discreet population that suffers from particular vulnerabilities and that has been subject to discrimination.²⁵⁰ As such, the State enjoys a lower margin of appreciation when restricting the rights of vulnerable populations that have been subject to discrimination, such as mental health patients.²⁵¹

Case Relating to Mental Health and the Right to Equality and Freedom from Discrimination

- ***X. and Y. v. Netherlands (ECtHR)(1985).*** A 16 year-old girl suffering from mental disabilities was sexually assaulted while living in an institutional home for children with mental disabilities. Based on her age, the victim was considered competent

249 COE. 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. April 4, 1997.

250 ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

251 ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

to bring a complaint under domestic law; but because of her mental disability, the victim's father lodged a complaint on her behalf. The domestic courts provided no legal recourse for the sexual assault, stating that the victim should have brought the complaint herself. The ECtHR declined to examine the issue under Article 14 of the ECHR, even though the applicant argued that the lack of special protections for those with mental disabilities amounted to discriminatory treatment under the law.²⁵²

Right to Equality and Freedom from Discrimination in the context of Infectious Diseases

The right to equality and freedom from discrimination protects a person with an infectious disease, such as HIV/AIDS or tuberculosis, from discrimination. Citing Recommendation 1116 (1989) by the Parliamentary Assembly of the Council of Europe, the Court has held that health status falls under the "other status" category provided in Article 14 for the purposes of protecting individuals from discrimination.²⁵³ Where States afford differential treatment based on health status, the state has the obligation to provide a "particularly compelling justification."²⁵⁴

Case Relating to Infectious Diseases and the Right to Equality and Freedom from Discrimination

- ***Kiyutin v. Russia (ECtHR)(2011)***. In this case a man applied for residency status; however his application was denied because of his HIV positive status. The man lived in Russia, was married to a Russian woman and had fathered a child with her; however Russia had a policy of denying residency status to those living with HIV. The Court found that this policy constituted discrimination in violation of Article 14 and noted, for the first time, that persons living with HIV are protected as a distinct group against discrimination in relation to their fundamental rights, and that they are a "vulnerable group" and any restriction of their rights attracts a higher degree of scrutiny on the part of the ECtHR.²⁵⁵

Right to Equality and Freedom from Discrimination In the Context of Sexual and Reproductive Health

Victims of forced sterilization have brought cases under Article 14, but the ECtHR has opted to analyze the issue under a different article, such as Article 3 (prohibition of torture)²⁵⁶ and Article 8 (right to respect for private and family life).²⁵⁷

252 ECtHR. *X. and Y. v. The Netherlands*. App. No. 8978/80. 26 . March 26, 1985.

253 ECtHR. *Kiyutin v. Russia*. App. No. 2700/10. September 15, 2011. para. 57.

254 ECtHR. *Kiyutin v. Russia*. App. No. 2700/10. September 15, 2011. para. 65.

255 ECtHR. *Kiyutin v. Russia*. App. No. 2700/10. September 15, 2011.

256 ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 5966/04. April 29, 2013; see also ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012.

257 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

Case Relating to Sexual and Reproductive Health and the Right to Equality and Freedom from Discrimination

- ***E.B. v. France (ECtHR)(2008)***. The Court found that discriminatory treatment suffered by a homosexual woman who applied to adopt a child amounted to a violation of Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination). Although Article 8 does not guarantee a right to adoption, the Court held that discrimination on the basis of sexual orientation runs afoul of both Article 8 and Article 14.²⁵⁸

Right to an Effective Remedy

The right to an effective remedy guarantees individuals the ability to have human rights violations addressed at the domestic level and have appropriate relief.²⁵⁹ The ECHR enshrines the right to an effective remedy under both Articles 13 (right to an effective remedy) and 41 (just satisfaction). States are granted discretion on how they fulfill their obligations under this right, and the scope of their obligations depends on the nature of the case.²⁶⁰ Nevertheless, the Court has stated that the right to an effective remedy consists of “a thorough and effective investigation” in order to identify and hold accountable those responsible for the violation, as well as granting “effective access for the complainant to the investigatory procedure”—in addition to payment of compensation where appropriate.²⁶¹ The right to an effective remedy also requires that the availability of the remedy include the determination of the claim and the possibility of redress.²⁶²

Additionally, the ECtHR clarified that the right to an effective remedy is not absolute and that Article 13 must be read as requiring only that which is “as effective as can be” considering the limitations in scope that are set by the nature of the case.²⁶³ The remedy must be effective both in practice and in law, meaning that there must not be undue interference by State authorities.²⁶⁴ The Court has explained, however, that the effectiveness of the remedy cannot depend on “the certainty of a favourable outcome” for the victim.²⁶⁵

Victims’ ability to access courts is of critical importance to effectively exercise this right.²⁶⁶ The ECtHR has clarified that Article 13 is intended to provide States with an opportunity to remedy victims of human rights violations within their own national courts before the victim can seek recourse at the Court, which according to the Court grants an additional guarantee to individuals to ensure the full enjoyment of her/his rights.²⁶⁷

258 ECtHR. *E.B. v. France*. App. No. 43546/02. January 22, 2008.

259 ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 96.

260 ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 96; ECtHR. *Garayev v. Azerbaijan*. App. No. 53688/08. September 10, 2010. para. 82.

261 ECtHR. *Aksoy v. Turkey*. App. No. 26211/06. January 12, 2011. para. 98.

262 ECtHR. *Klass v. Germany*. App. No. 5029/71. September 6, 1978.

263 ECtHR. *Kudla v. Poland*. App. No. 30210/96. para. 151.

264 ECtHR. *Hagyó v. Hungary*. App. No. 52624/10. April 23, 2013. para. 96; ECtHR. *Kudla v. Poland*. App. No. 30210/96. October 26, 2000. para. 151; ECtHR. *Aksoy v. Turkey*. App. No. 21987/93. December 18, 1996. para. 95.

265 ECtHR. *Hagyó v. Hungary*. 52624/10. April 23, 2013. para. 96; ECtHR. *Garayev v. Azerbaijan*. 53688/08. September 10, 2010. December 18, 1996. para. 82.

266 ECtHR. *Kudla v. Poland*. App. No. 30210/96. October 26, 2000. paras. 147-148, 157.

267 ECtHR. *Kudla v. Poland*. App. No. 30210/96. October 26, 2000. paras. 147-148, 152.

RELEVANT PROVISIONS

▶ ECHR

Art. 6(1): 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.

Art. 13: 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.

Art. 41: If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

▶ ESC

Art. 11 – The right to protection of health: 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 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.

Art. 13 – The right to social and medical assistance: With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting 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 Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

Art. 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community: With a view to ensuring to persons with disabilities, ir-

respective 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 specialized 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 specialized 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.

- ▶ **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,**²⁶⁸ **Art. 3:** Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.

Right to an effective Remedy in the context of Mental Health

In highlighting the difficulties that mental health patients could face in challenging violations of their rights, the ECtHR has underscored that an assessment of whether an individual with mental disabilities has exhausted domestic remedies requires taking into consideration her/his “vulnerability, and in particular [her/his] inability in some cases to plead her/his case coherently.”²⁶⁹

Case Relating to Mental Health and the Right to an Effective Remedy

- ***B. v. Romania (No. 2)(ECtHR)(2013)***. The applicant diagnosed with paranoid schizophrenia was subjected to psychiatric confinement and lost guardianship of her three children. The Court found that the State had violated Article 8 of the ECHR when failing to ensure “adequate legal protection for the applicant during her successive admissions to psychiatric institutions and during the proceedings that resulted in her children remaining in care.” It ordered the State to provide the applicant with the necessary legal protection as required by ECHR.²⁷⁰

268 COE. 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. April 4, 1997.

269 ECtHR. *B. v. Romania (No. 2)*. App. No. 1285/03. February 19, 2013. para. 79.

270 ECtHR. *B. v. Romania (No. 2)*. App. No. 1285/03. February 19, 2013.

- ***Lashin v. Russia (ECtHR)(2013)***. The Court found a violation of the right to privacy where the applicant, a person with schizophrenia, was committed by the domestic courts to a psychiatric hospital against his will and without possibility of review, which prevented him from getting married.²⁷¹
- ***Kudla v. Poland (ECtHR)(2000)***. The applicant suffered from chronic depression and was held in detention for fraud charges. He attempted to commit suicide twice while in prison. The applicant repeatedly requested his release and appealed decisions to hold him in detention. The Court held that the State failed to provide the applicant with the necessary means for challenging the length of the proceedings for determining the charges held against him, and therefore, the State was in violation of Article 13 of the ECHR.²⁷²

Right to an effective Remedy in the context of Infectious Diseases

The right to effective remedy has been invoked to protect individuals with infectious diseases as marginalized populations that are stigmatized based on their health status. The Court has analyzed the importance of this right with respect to the lack of medical treatment provided to detainees who suffer from infectious diseases and the failure to provide detention conditions sensitive to the detainees' state of health.²⁷³

Case Relating to Infectious Diseases and the Right to Remedy

- ***Kozhokar V. Russia (ECtHR)(2010)***. The applicant was a detainee living with HIV and Hepatitis C. The Court joined the applicants' allegations under Article 3 with Article 13 and found that the State had violated Article 13 by not providing the applicant "effective and accessible" means through which he could challenge the prison conditions, including inadequate medical assistance.²⁷⁴
- ***Logvinenko v. Ukraine (ECtHR)(2010)***. The applicant was a detainee who suffered from HIV and tuberculosis. The Court found the State in violation of Article 3 when failing to provide adequate medical treatment and to ensure that the "physical arrangements" of his detention were compatible with his state of health. Because the State did not provide appropriate redress or effective remedies through which the applicant could bring complaints, the Court held that the State had violated Article 13.²⁷⁵

271 ECtHR. *Lashin v. Russia*. App. No. 33117/02. April 22, 2013.

272 ECtHR. *Kudla v. Poland*. App. No. 30210/96. October 26, 2000. paras. 147-148, 157.

273 See ECtHR. *Logvinenko v. Ukraine*. App. No. 13448/07. October 14, 2010; ECtHR. *Kozhokar V. Russia*. App. No. 33099/08. December 16, 2010.

274 ECtHR. *Kozhokar v. Russia*. App. No. 33099/08. December 16, 2010.

275 ECtHR. *Logvinenko v. Ukraine*. App. No. 13448/07. October 14, 2010.

■ Right to an effective Remedy In the Context of Sexual and Reproductive Health

In the context of sexual and reproductive health, the ECtHR has treated issues of effective remedy within its analysis of other rights, such as the right to privacy, to avoid overlap. This is not to say that the right to an effective remedy, as protected under Article 13 of the ECHR, is not imperative to issues of sexual and reproductive health. On the contrary, as shown in the cases provided in this sub-section, the ECtHR considers this right essential. For example, with respect to abortion, the Court has read Article 8 to require States that permit abortion to provide the legal framework to determine entitlements to lawful abortion and procedures to resolve disputes between women seeking abortion services and medical practitioners.²⁷⁶

Case Relating to Sexual and Reproductive Health and the Right to an Effective Remedy

- ***R.R. v. Poland (ECtHR)(2011)***. A mother of two was pregnant with a child thought to be suffering from a severe genetic abnormality and was deliberately denied timely access to the genetic tests to which she was entitled by doctors who were opposed to abortion. The Court found a violation of Article 8 because Polish law did not include any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to make, in the light of their results, an informed decision as to whether or not to seek an abortion.²⁷⁷
- ***Tysic v. Poland (ECtHR)(2007)***. The applicant was refused a therapeutic abortion, after being warned that her already severe myopia could worsen if she carried her pregnancy to term. Following the birth of her child, she had a retinal hemorrhage, which resulted in a disability. The Court found that denying her access to an effective mechanism that would determine her eligibility for a legal abortion was a violation of her right to privacy.²⁷⁸

3.4. Providers' Rights

Health care providers play a critical role in addressing the abuses that take place in health care settings. Accordingly, the application of the human rights framework to patient care implies that the interests of patients and health care providers are interrelated and the interests of both are to be protected. If providers are unable to fully exercise their rights, they may be deterred or made powerless to effectively prevent abuses of patients. This section highlights several relevant European regional standards as they appear in the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) and how they

276 ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010; see also ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

277 ECtHR. *R.R. v. Poland*. App. No. 27617/04. November 28, 2011.

278 ECtHR. *Tysic v. Poland*. App. No. 5410/03. September 24, 2007.

have been interpreted in relation to three key rights for health care providers. These include the right to (i) work in decent conditions; (ii) freedom of association and assembly, 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.

The chapter is divided into three major sections. Part I of this section covers the right to work in decent conditions, including the right to work and the right to fair pay and safe working 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 care providers and is followed by relevant standards from European legal instruments and case law to exemplify potential violations. Even if there is little or sometimes no direct reference to the standards provided in this chapter, health sector personnel enjoy the same level of protection as other workers.

Right to Work in Decent Conditions

The European Committee of Social Rights (ECSR) has provided extensive interpretation of the right to work in decent conditions, which is governed by the European Social Charter (ESC). The ESC enshrines the right to work (ESC, Art. 1), the right to just conditions of work (ESC, Art. 2), the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (ESC, Art. 20), and the right to safe and healthy working conditions (ESC, Art. 3). Although not the focus of this section, relevant ECHR standards 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.

Right to Work

The right to work requires that States “legally prohibit any discrimination, direct or indirect, in employment” and provide special protection with regard to gender, race or ethnic group.²⁷⁹ This right also protects the individual from the dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action.²⁸⁰ While not analyzed under the right to work, the ECtHR found a violation under Article 8 (right to privacy) and Article 14 (freedom from discrimination) where an employee was dismissed based on his HIV status.²⁸¹ The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, as enshrined under Article 20 of the ESC, protects the individual from a) discrimination in employment; b) any practice that might interfere with a worker’s right to earn a living in an occu-

279 Conclusions are drawn from the Digest of September 2008, by the COE; ECSR. Conclusions XVI-1, Austria, p. 25.

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

281 ECtHR. I.B. v. Greece. App. No. 552/10. October 3, 2013.

pation freely entered,²⁸² or cause her/him to be a subject of forced or compulsory labor. Legislation should prohibit any indirect discrimination, which 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.²⁸³ Furthermore, domestic law must at least provide for the power to 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.²⁸⁴ Domestic law must also provide appropriate and effective remedies that are adequate and proportionate and available to victims in the event of an allegation of discrimination. In the same way, this right establishes that impositions of predefined upper limits to compensation (derived from the violation of this right) that may be awarded to the workers are not in conformity with this right.²⁸⁵

Under EU law, Directive 2000/78/EC of 27 November 2000²⁸⁶ provides member states with a "guideline framework" in order to address employment discrimination. Recognizing that "[e]mployment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential," the directive prohibits "any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation." The directive is clear in that the requirements set out constitute "minimum requirements" and that member states can adopt higher standards but that the requirements under the directive should not be used to "justify any regression."

Right to Fair Pay and Safe Working Conditions

The right to just conditions of work (ESC, Art. 2) establishes limits on daily and weekly working hours, including overtime. The provisions of this right must be guaranteed through legislation, regulations, collective agreements, or any other binding means.²⁸⁷ Also, periods of "on call" duty during which the employee has not been required to perform work for the employer constitute effective working time and cannot be regarded as rest periods (within the meaning of Article 2, except in the framework of certain occupations or particular circumstances and pursuant to appropriate procedures). This right holds that the absence of effective work cannot constitute an adequate criterion for regarding such a period as a period of rest.²⁸⁸ 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.²⁸⁹

The right to just conditions of work likewise requires that wages be above the poverty line in a given country to be considered fair remuneration. A wage must not fall too far short of the national average

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

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

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

285 COE. Conclusions 2006: Albania.

286 Official Journal of the European Union. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373 of 21.12.2004. June 25, 2009.

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

288 ECSR. Confédération Française de l'Encadrement CFE-CGC v. France. Collective Complaint No. 16/2003. October 12, 2004.

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

wage. In fact, the ESCR has emphasized that minimum wage must be “sufficient to give the worker a decent standard of living.”²⁹⁰ In the same way, this right also establishes that employees who work overtime must be paid at a higher rate than the normal wage rate.²⁹¹ Also, this right ensures that women and men are entitled to have “equal pay for work of equal value.”²⁹² Accordingly, domestic law must provide for appropriate and effective remedies in the event of alleged wage discrimination.²⁹³ 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.²⁹⁴

The right to safe and healthy working conditions (ESC, Art. 3) requires that occupational risk prevention be a priority and that it 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.).²⁹⁵ Under this right, workers, all workplaces, and all sectors of activity must be covered by occupational health and safety regulations.²⁹⁶ In the same way, this right requires that States ensure that the policy and strategies adopted are 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).²⁹⁷ The right applies to both the public and private sectors.²⁹⁸

RELEVANT PROVISIONS

► ESC

Art.1(2) – 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...

Art.2(1) – 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...

Art. 3 – 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:

290 Conclusions 2003, France, p. 120

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

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

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

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

295 COE. Conclusions 2005: Lithuania.

296 COE. Conclusions 2005: Estonia.

297 COE. Conclusions 2003: Bulgaria. p. 31.

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

1. 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;
2. to issue safety and health regulations;
3. to provide for the enforcement of such regulations by measures of supervision;
4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

Art. 4 – 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.

Art. 22 – 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 organization and working environment;
- b. to the protection of health and safety within the undertaking;
- c. to the organization of social and socio-cultural services and facilities within the undertaking;
- d. to the supervision of the observance of regulations on these matters. Provisions related to women

- **ESC, Art. 20 – 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 recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

- a. access to employment, protection against dismissal and occupational reintegration;
- b. vocational guidance, training, retraining and rehabilitation;
- c. terms of employment and working conditions, including remuneration;
- d. career development, including promotion.

PROVISIONS RELATED TO PERSONS WITH DISABILITIES

- ▶ **ESC, Art. 15(2) – The right of persons with disabilities to independence, social integration and participation in the life of the community:** 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:...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...

Cases Relating to the Right to Work in Decent conditions

- ***Confédération Française de l'Encadrement CFE-CGC v. France (ESCR)(2004).*** The petitioners claimed that the Act of 17 January 2003 passed by the government allowed "on-call time" (périodes d'astreinte) to be considered rest time under the law. The Committee found that "on-call time" during which the employee has not been required to perform work for the employer, although they do not constitute effective working time, cannot be regarded as a rest period. The Committee therefore held that equating "on-call time" to rest periods constitutes a violation of the right to reasonable working time.²⁹⁹
- ***Marangopoulos Foundation for Human Rights (MFHR) v. Greece (ESCR) (2006).*** The ESCR found that the lack of legislation to ensure the security and safety of persons working in lignite mines as well as reduced working hours or additional holidays constituted a violation of Article 3 of the ESC, which works to ensure the right to safe and healthy working standards of the highest possible level. The ESCR emphasized that this article requires the government "to issue health and safety regulations providing for preventive and protective measures against most of the risks recognised by the scientific community and laid down in Community and international regulations and standards."³⁰⁰
- ***Syndicat national des Professions du Tourisme v. France. (ESCR)(2000).*** The ESCR found a violation of the right to non-discrimination in employment where entities offering guided tours (within the remit of the government) afforded dif-

299 ESCR. *Confédération Française de l'Encadrement CFE-CGC v. France*. Collective Complaint No. 16/2003. October 12, 2004.

300 ESCR. *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*. Collective Complaint No. 30/2005. December 6, 2006. §224.

ferential treatment between lecturer guides hired by them and interpreter guides and national lecturers holding a state diploma. The ESCR concluded that that difference in treatment had no reasonable and objective justification and constituted de facto discrimination in employment to the detriment of interpreter guides and national lecturers with a state diploma.³⁰¹

Right to Freedom of Association and Assembly

The right to freedom of association and assembly is enshrined under Article 5 (right to organize) of the ESC and Article 11 (freedom of assembly and association) of the ECHR. The right to freedom of association and assembly establishes that “association” is an autonomous concept that is not dependent on the classification adopted under domestic law. This factor is relevant but not decisive.³⁰² It also includes the freedom not to join an association or trade union.³⁰³

Additionally, it applies to private law bodies only, as public law bodies (i.e., those established under legislation) are not considered to be “associations.” However, this right allows for “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.”³⁰⁴

The ECtHR has confirmed that the right 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.³⁰⁵

This section covers two aspects of freedom of association: the freedom of association and assembly (ECHR, Art. 11) and the right to form trade unions and to strike (ESC, Arts. 5, 6, 21, and 22).

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 11 :(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.

301 ESCR. *Syndicat national des Professions du Tourisme v. France*. Collective Complaint No. 6/1999. October 10, 2000. para. 32.

302 ECtHR. *Chassagnou and Ors v. France*. App. No. 25088/94; 28331/95; and 28443/95. April 29, 1999. (hunters’ associations in France are held to be “associations” for purposes of Article 11 even though government argued that they were public law institutions).

303 ECtHR. *Young and Ors v. The United Kingdom*. App. No. 3455/05. February 19, 2009. (“closed shop,” compulsory membership of the rail trade union breached Article 11); see also ECtHR. *Sigurjonsson v. Iceland*. App. No. 16130/90. June 30, 1993.

304 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”.

305 See also International Centre for the Protection of Legal Rights. *INTERIGHTS Manual for Lawyers*. Article 11 of the European Convention of Human Rights: Freedom of Assembly and Association. Provides information on how the ECtHR has interpreted Article 11 of the ECHR.

Case Relating to the Right to Freedom of Association and Assembly

- ***Albert and Le Compte v. Belgium (ECtHR)(1983)***. The applicant claimed that the obligation to join in a specific organ (the *Ordre des médecins*) had the effect of eliminating freedom of association. The Court held that *Ordre des médecins* cannot be regarded as an association within the meaning of Article 11; that the existence of the *Ordre des médecins* and the resultant obligation on practitioners to be entered on its register and to be subject to the authority of its organs clearly have neither the object nor the effect of limiting, even less suppressing, the freedom of association.³⁰⁶

Trade Unions and the Right to Strike

The right to form trade unions and the right to strike establish that workers must be free to join and free not to join a trade union.³⁰⁷ Under this right, any form of compulsory trade union membership imposed by law is incompatible with the provisions of this right.³⁰⁸ The right to form trade unions and the right to strike also establish that domestic law must clearly prohibit all pre-entry or post-entry “closed shop” clauses and all union security clauses (automatic deductions from wages).³⁰⁹ 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 to the cited right.³¹⁰

The right to form trade unions and the right to strike protect trade union members 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.³¹¹ Under this right, trade unions and employers’ organizations must be independent from excessive State interference in relation to their infrastructure or effective functioning.³¹²

This right also establishes that 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.³¹³ However, the “right to strike” may be restricted; 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

306 ECtHR. *Albert and Le Compte v. Belgium*. App. No. 7299/75; 7496/76. February 10, 1983.

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

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

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

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

311 COE. Conclusions 2004: Bulgaria.

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

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

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 the ESC.³¹⁴ 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.

RELEVANT PROVISIONS

► ESC

Art. 5 – The right to organize: With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, 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.

Art. 6 – 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' organizations and workers' organizations, 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 labor 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.

Art. 19(4)(b) – 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 such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

- a. remuneration and other employment and working conditions;
- b. membership of trade unions and enjoyment of the benefits of collective bargaining...

Art. 22 – 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 meas-

314 COE. Conclusions I. Statement of Interpretation on Article 6§4; ECSR. Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation v. Bulgaria. Collective Complaint No. 32/2005. October 16, 2006.

ures 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 organization and working environment; ...
 - b. to the organization of social and socio-cultural services and facilities within the undertaking;
 - c. to the supervision of the observance of regulations on these matters.
- **Charter of Fundamental Rights of the European Union,**³¹⁵ **Art. 28:** Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Case Relating to Trade Unions and the Right to Strike

- ***European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB) v. Belgium (ESCR)(2011)***. The ESCR held in favour of the complainant trade unions, finding that although Belgium's Constitution and statutes did not enshrine a right to strike, this right (as understood under Article 6(4) of the ESC) was guaranteed in "established and undisputed" domestic case law. The Court also concluded that the restrictions on activities of strike pickets, under Belgian law, were incompatible with Article G of the ESC and constituted a violation of the right to strike under Article 6(4).³¹⁶
- ***Enerji Yapi-Yol Sen v. Turkey (ECtHR)(2008)***. Where a circular was issued by the government banning all civil servants from taking strike action, the Court held that the right to strike was not absolute and subject to restrictions. Moreover, the Court concluded that a ban on strike action could be imposed on civil servants, but it could not deprive all civil servants of the right to strike.³¹⁷
- ***Unison v. The United Kingdom (ECtHR)(2002)***. A trade union for public service employees, including healthcare providers in hospitals, challenged a decision preventing it from organizing strikes. The Committee held that the right to form trade union does not implicitly create a right to strike and declared the application inadmissible.³¹⁸

315 Official Journal of the European Communities. Charter of Fundamental Rights of the European Union. OJ C 364/01. December 7, 2000.

316 ESCR. *European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB) v. Belgium* Collective Complaint 59/2009. September 13, 2011.

317 ECtHR. *Enerji Yapi-Yol Sen v. Turkey*. App. No. 68959/01. April 21, 2009.

318 ECtHR. *Unison v. The United Kingdom*. App. No. 53574/99. January 10, 2002.

Right to Due Process and Related Rights

This section discusses four aspects of the right to due process and related rights: the interpretation of the right to a fair hearing; the guarantee of effective remedy; the protection of privacy and reputation; and the protection of freedom of expression and information. With respect to health care providers, these rights come into play when legal challenges concerning 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. This right encompasses matters such as licensing and medical negligence.

Right to a Fair Hearing

The right to a fair hearing, as protected by Article 6 of the ECHR, entitles every individual to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” This right applies to the process of determining the individual’s civil rights or criminal charges brought against her/him. It also applies to all related proceedings between the State and the individual or between private parties—the result of which is “decisive” for civil rights and obligations.³¹⁹ 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.

In civil proceedings, a litigant has the rights to real and effective access to a court, notice of the time and place of the proceedings, a real opportunity to present her/his case, and 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.³²⁰

Additionally, under this right, the principle of the “equality of arms” (both parties have equal procedural access to the court) does apply and can be violated by mere procedural inequality.³²¹ This right establishes that both parties have a right to be informed of the other’s submissions and other written material and have a right to reply.³²²

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 6:** 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 protec-

319 ECtHR. *Ringeisen v. Austria*. App. No. 2614/65. July 16, 1971.

320 ECtHR. *Airey v. Ireland*. App. No. 6289/73. October 9, 1979; ECtHR. *P and Ors v. The United Kingdom*, App. No. 11209/84; 1234/84; 11266/84; 11386/85. November 29, 1988.

321 ECtHR. *Fischer v. Austria*. App. No. 33382/96. January 17, 2002.

322 ECtHR. *Dombo Beheer BV v. The Netherlands*. App. No. 14448/88. October 27, 1993.

tion 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.

Case Relating to the Right to a Fair Hearing

- **Konig v. Germany (ECtHR)(1978).** As the result of disciplinary proceedings, a doctor was found to be unfit for practice. He then complained about the length of the proceedings. The Court found the right to practice medicine to be a civil right and that the length of the proceedings exceeded the ‘reasonable time’ required under Article 6 (more than 10 years of appeals process).³²³

Right to an Effective Remedy

The right to an effective remedy establishes that the availability of a remedy must include the determination of the claim and the possibility of redress.³²⁴ Under this right, all procedures, including judicial and nonjudicial, will be examined.³²⁵ This right also establishes that the nature of the remedy required to satisfy the obligation under the cited right depends 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.³²⁶ This right requires that the authority with the ability to provide the remedy must be independent of the body alleged to have committed the breach.³²⁷

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 13.** 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.

Case Relating to the Right to an Effective Remedy

- **Aksoy v. Turkey (ECtHR)(2011).** Where an individual claimed that he has been tortured by agents of the State, the Court held that the right to an effective remedy consists of “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”—in addition to payment of compensation where appropriate.³²⁸

323 ECtHR. *Konig v. Germany*. App. No. 6232/73. June 28, 1978.

324 ECtHR. *Klass v. Germany*. App. No. 5029/71. September 6, 1978.

325 ECtHR. *Silver v. The United Kingdom*, App. No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75. March 25, 1983.

326 ECtHR. *Aksoy v. Turkey*. App. No. 219987/93. December 18, 1996.

327 ECtHR. *Khan v. The United Kingdom*, App. No. 35394/97. October 4, 2000; ECtHR. *Taylor-Sabori v. The United Kingdom*, App. No. 47114/99. January 22, 2003.

328 ECtHR. *Aksoy v. Turkey*. App. No. 26211/06. January 12, 2011. para. 98.

Right to Protection of Privacy and Reputation

The right to protection of privacy and reputation protects the private life of the individual. For example, it provides protection against the unlawful bugging of telephone calls.³²⁹ Under this right, 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.³³⁰ This right also requires that, in addition to refraining from arbitrarily interfering, the State take measures necessary for ensuring the respect of this right, such as protecting it from third party abuse.³³¹

RELEVANT PROVISIONS

► ECHR

Art. 8:

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.

Art. 10:

1. 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.
2. 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.

Art. 13: 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.

329 ECtHR. *Halford v. The United Kingdom*. App. No. 20605/92. June 25, 1997. (concluding that bugging of private telephone calls made to an office telephone could constitute a breach of Article 8).

330 ECtHR. *Von Hannover v. Germany*. App. No. 40660/08; 60641/08. February 7, 2012.

331 ECtHR. *Von Hannover v. Germany*. App. No. 40660/08; 60641/08. February 7, 2012. paras. 98-99.

Right to Freedom of Expression and Information

The right to freedom of expression and information protects the individual from the restriction by the government to receive information that others may wish to impart. However, under this right, the State has no positive obligation to collect and disseminate information on its own motion.³³² This right establishes that 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.³³³

While rights to impart and receive information are not each enshrined under an article, they have been interpreted as part of the right to freedom of expression, which is protected by Article 10 of the ECHR. Moreover, 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.

RELEVANT PROVISIONS

- ▶ **ECHR, Art. 10 (1):** 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.

Case Relating to the Right to Freedom of Expression and Information

- ***Sosinowska v. Poland* (ECtHR)(2011).** A physician was sanctioned by the medical board for criticizing another physician’s decisions on diagnosis and treatment of the ward’s patients. The Court found that the medical board’s interference constituted a violation of Article 10, holding that the sanction “was not proportionate to the legitimate aim pursued and, accordingly, was not ‘necessary in a democratic society.’”³³⁴

332 ECtHR. *Guerra and Ors v. Italy*. App. No. 14967/89. February 19, 1998.

333 ECtHR. *Yankov v. Bulgaria*. App. No. 39084/97. March 11, 2004.

334 ECtHR. *Sosinowska v. Poland*. App. No. 10247/09. October 18, 2011.

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- 4.1. INTRODUCTION**
 - 4.2. THE INTERNATIONAL SYSTEM**
 - 4.3. THE EUROPEAN SYSTEM**
 - 4.4. COMPLAINT PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

4

International and Regional Procedures

4.1. Introduction

International and regional human rights monitoring mechanisms play an important role in implementing human rights. These mechanisms have been established to increase states' compliance with international and regional human rights treaties that they have ratified. While treaties are legally binding international law, treaty interpretations issued by these human rights monitoring mechanisms are not directly binding on states, although several bodies have the mandate to issue legally binding rulings. Moreover, treaty interpretations by these bodies have been influential even at the domestic level.¹

In general, human rights monitoring mechanisms take the form of either:

- ▶ an adjudicative body that acts in a judicial capacity and issues rulings that are binding on States parties that have ratified the respective treaty; or
- ▶ a body that examines reports submitted by States parties on their compliance with the respective human rights treaties and, in some cases, examine individual or group complaints of human rights violations under those treaties.

¹ See *Mini Numa Comty. v. Sec'y of Health & Ors., Juzgado del Distrito de Guerrero [JD] [District Court of Guerrero]*, J.A.I.A. 1157/2007-II (Mex.); see also Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002). (includes discussion for 20 countries of their record in complying with decisions of several major international HR committees).

This chapter is intended to serve as a quick reference for the user on how to navigate both the international and regional (European) systems, providing basic information on these human rights monitoring mechanisms, including contact information.

4.2. The International System

As discussed in Chapter 2, there are currently eight core international human rights treaties that contain guarantees related to the protection of human rights in patient care. While these treaties are only binding on those states that have ratified them,² their standards have strong moral and political force even for non-ratifying countries. Each of these treaties has a committee in charge of monitoring state compliance with the treaty. These are referred to as “treaty-monitoring bodies” or “treaty bodies.”

U.N. Treaty-Monitoring Bodies

In general, UN treaty-monitoring bodies monitor state compliance with their respective treaty using a combination of three types of mechanisms: 1) interpretative documents on the content of the relevant treaty; 2) evaluating state compliance with the relevant treaty based on reports that member states are required to submit on a regular basis; and 3) receiving and considering individual communications alleging state violations of one or more of the human rights protected by the relevant treaty, and issuing recommendations to the respondent state. Each of the bodies’ specific functions, contact information, and ways through which civil society can participate are detailed below.

A Note on the Use of Alternative Reports in u.n. treaty-monitoring bodies

Treaty-monitoring bodies offer different avenues for civil society participation, a key option being the submission of alternative reports (also known as “parallel” or “shadow” reports or “written information”). These reports can serve an important role within the periodic reporting process of UN treaty-monitoring bodies. They allow civil society to provide supporting or alternative information on the human rights situation of the country being reviewed. For this reason, this section of the chapter highlights shadow reports as one of the tools available to civil society used to influence treaty-monitoring bodies’ work.

Past shadow reports, as well as information for civil society regarding the submission of such reports, are accessible on the UN Office of the High Commissioner for Human Rights’ website.

Human Rights Committee

MANDATE

The Human Rights Committee (CCPR) oversees compliance with the International Covenant on Civil and Political Rights (ICCPR) by those states that have ratified the treaty. The CCPR issues interpretative documents on the ICCPR called “general comments.”

The CCPR monitors progress in implementing the ICCPR based on review of periodic reports submitted by the States parties, considers inter-state complaints of human rights violations, and examines “individual communications,” which are complaints submitted by individuals or groups of individuals alleging violations of the rights set forth in the ICCPR by States parties that have ratified the First Optional Protocol to the ICCPR.

² Office of the UN High Commissioner for Human Rights (OHCHR). Ratifications, Reservations and Declarations. <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. Accessed August 14, 2013.

As part of the periodic reporting procedure, States parties must report to the CCPR after one year of ratifying the ICCPR and upon request thereafter—approximately every four years. Once a state submits its report, the CCPR examines the report and issues “concluding observations,” providing its concerns and recommendations to the state on how to better implement the treaty.

The CCPR meets three times per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit alternative reports to the CCPR on any aspect of a State party’s compliance with the ICCPR. These reports should be submitted, by the relevant deadline, through the CCPR Secretariat based at the Office of the High Commissioner for Human Rights in Geneva, which also maintains a calendar of when States parties come before the CCPR. See “Participation in the work of the Committee” on the CCPR’s website.

Organizations may attend the CCPR sessions as observers, but are not permitted to speak during the review of states. To do so, they must complete and file an “accreditation request form” in advance. Those that have submitted reports to the CCPR may make a brief oral presentation on the first day of the session. Organizations may also organize informal lunchtime briefings with the Committee.

Additionally, under the CCPR’s individual complaints mechanism, NGOs are allowed to submit reports on behalf of individuals with the individual’s consent. See ‘Complaints procedure’ on the CCPR’s website.

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Committee on Economic, Social and Cultural Rights

MANDATE

The Committee on Economic, Social and Cultural Rights (CESCR) oversees State party compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR issues interpretative documents on the ICESCR called “general comments.”

The CESCR monitors progress in the implementation of the ICESCR based on periodic reports submitted by states that have ratified the treaty, considers inter-state complaints of human rights violations, and examines “individual communications,” which are complaints submitted by individuals or groups of individuals alleging violations of the rights set forth in the ICESCR by States parties that have ratified the Optional Protocol to the ICESCR.

As part of the periodic reporting procedure, States parties must report within two years of ratifying the ICESCR and every five years thereafter. Once a State party submits its report, the CESCR examines the report and issues “concluding observations,” providing positive observations, concerns, and recommendations on how the State party can better implement the treaty.

The CESCR meets twice per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, organizations can submit “parallel reports” to the CESCR on any aspect of a State party’s compliance with the ICESCR. Parallel reports should be submitted through the CESCR Secretariat based at the Office of the High Commissioner for Human Rights in Geneva, which also maintains a calendar of when States parties come before the CESCR. See “Participation in the work of the Committee” on the CESCR’s website.

Organizations may attend a CESCR session or a pre-session working group meeting. To do so, they must complete and file an “accreditation request form” in advance. Those that have submitted reports to the CESCR may make a brief oral presentation on the afternoon of the first Monday of the session and/or organize informal lunchtime briefings with the Committee.

Within the CESCR’s individual complaints mechanism, NGOs are allowed to submit reports on behalf of individuals with the individual’s consent. See ‘Complaints procedure’ on the CESCR’s website.

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Committee Against Torture

MANDATE

The Committee Against Torture (CAT Committee) oversees State compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or “Torture Convention”). The CAT Committee issues interpretative documents on the Torture Convention called “general comments.”

The CAT Committee monitors progress in the implementation of the Torture Convention based on periodic reports submitted by states that have ratified the treaty, considers inter-state complaints of human rights violations, and examines individual complaints of human rights violations allegedly committed by states that have expressly recognized the CAT Committee’s competence to receive individual complaints (under article 22 of the Convention).

As part of the periodic reporting procedure, States parties must report within one year of ratifying the Torture Convention and every four years thereafter. Once a state submits its report, the CAT Committee examines the report and issues “concluding observations,” which includes the Committee’s conclusions on the state’s compliance with the Torture Convention and can address previous recommendations.

The CAT Committee meets twice per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit “written information” to the CAT Committee on any aspect of a State party’s compliance with Torture Convention. Written information should be submitted through the CAT Secretariat at the Office of the High Commissioner for Human Rights in Geneva, which also maintains a calendar of when States parties come before the CAT Committee. See “Participation in the work of the Committee” on the CAT Committee’s website.

Organizations that have submitted written information may meet privately with the CAT Committee, prior to the Committee’s meeting with the delegation of the state being reviewed. National Human Rights Institutions (NHRIs) may likewise meet in private with relevant CAT Committee members and country rapporteurs, prior to the CAT Committee’s meeting with the state. To participate in this manner, organizations must complete and file an “accreditation request form” in advance.

The CAT Committee may also consider individual complaints of human rights violations allegedly committed by states that have made the necessary declaration under article 22 of the Torture Convention. See ‘Complaints procedure’ on the CAT Committee’s website.

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Committee on the Elimination of All Forms of Discrimination Against Women

MANDATE

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) oversees State compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The CEDAW Committee issues interpretative documents on the CEDAW called “general recommendations.”

The CEDAW Committee monitors country progress in the implementation of the CEDAW based on periodic reports submitted by States parties that have ratified the treaty. The Committee is also empowered to initiate inquiries into systemic violations of women’s rights, as well as examine and consider individual complaints relating to violations of rights allegedly committed by states that have ratified the Optional Protocol to CEDAW.

Under the periodic reporting procedure, States parties must report within one year of ratifying the CEDAW and at least every four years thereafter. Once the State party submits its report, the committee examines the report and provides conclusions on the state's implementation of the CEDAW, highlighting both positive aspects and areas of concern, as well as providing suggestions and recommendations on how the state can better implement the treaty.

The CEDAW Committee meets as many times as needed to carry out its functions.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit alternative or shadow reports to the CEDAW Committee on any aspect of a State party's compliance with CEDAW. These reports should be submitted through the Division for the Advancement of Women in New York, which also maintains a calendar of when States parties come before the committee. (See "Participation in the work of the Committee" on the CEDAW Committee's website and "Producing Shadow Reports to the CEDAW Committee: A Procedural Guide" by International Women's Rights Action Watch). NGOs can also request the CEDAW Committee to initiate inquiries into systemic violations of women's rights by states that have ratified the Optional Protocol under CEDAW.

Organizations may attend a CEDAW Committee's session as observers or present at pre-session meetings, which are limited to UN representatives and NGOs whose country reports are being reviewed. To do so, they must complete and file an "accreditation request form" in advance. Those that have submitted alternative or shadow reports to the CEDAW Committee may make an oral presentation during the informal consultation meeting, which is usually scheduled on the first day of the week. Organizations must also seek accreditation from the Committee to participate in this meeting.

Within the CEDAW Committee's individual communications mechanism, NGOs are allowed to submit reports on behalf of individuals with the individual's consent. See 'Complaints procedure' on the CEDAW Committee's website.

For more information, see "NGO Participation" on United Nations Entity for Gender Equality and the Empowerment of Women's (UN Women) website.

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Committee on the Elimination of Racial Discrimination

MANDATE

The Committee on the Elimination of Racial Discrimination (CERD) oversees State party compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The CERD issues interpretative documents on the ICERD called “general recommendations.”

The CERD monitors country progress in the implementation of the ICERD based on periodic reports submitted by states that have ratified the treaty, as well as through an early warning procedure, where the CERD undertakes measures to prevent certain situations from escalating into conflicts or matters requiring urgent attention. The CERD is also tasked with receiving and examining inter-state complaints of human rights violations, as well as individual complaints against states that have expressly recognized the CERD’s competence to examine individual complaints (under article 14 of the ICERD).

Under the periodic reporting procedure, States parties must report to the CERD one year after ratifying the ICERD and every two years thereafter. Once a State party submits its report, the CERD examines the report and issues “concluding observations,” providing its concerns and recommendations to the state on the implementation of the treaty.

The CERD meets twice per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit “alternative reports” to CERD on any aspect of a State party’s compliance with ICERD. Shadow reports should be submitted through the CERD Secretariat based at the Office of the High Commissioner for Human Rights in Geneva, which also maintains a calendar of when States parties come before the CERD. See “Participation in the work of the Committee” on the CERD’s website.

Organizations may attend a CERD session as observers. Organizations may participate in the informal pre-session meetings with NGOs held at the beginning of each week during the CERD’s session. Here, NGOs can provide information on the countries being reviewed that week. NGOs may also organize informal lunchtime briefings with the Committee. To engage in any of these activities, they must complete and file an “accreditation request form” in advance.

CERD may also consider individual complaints of human rights violations allegedly committed by states that have made the necessary declaration under article 14 of the ICERD. See ‘Complaints procedure’ on the CERD’s website.

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Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

MANDATE

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) monitors the implementation of the International Convention of the Protection of the Rights of All Migrant Workers and their Families (ICMW). The CMW issues interpretative documents on the ICMW called “general comments.”

The CMW monitors progress in the implementation of the ICMW based on periodic reports submitted by states that have ratified the treaty. As part of the periodic reporting procedure, States parties must report to the CMW one year after ratifying the ICMW, and then every five years. Once the State party submits its report, the CMW examines it and issues “concluding observations,” providing its concerns and recommendations to the state on the implementation of the treaty.

The CMW currently does not have competence to consider individual complaints. The optional protocol to the ICMW granting the Committee this power opened for signature in 2012, but as of this writing had not yet acquired the 10 ratifications needed for the individual complaint mechanism to enter into force.

The CMW Committee meets twice per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit “written submissions” (i.e., alternative reports) to the CMW Committee on any aspect of a State party’s compliance with the ICMW. Written submissions should be submitted through the CMW Secretariat at the Office of the High Commissioner for Human Rights in Geneva, which also maintains a calendar of when States parties come before the CMW Committee.

Organizations may attend a CMW session as observers. They may also present oral briefings before the Committee at public and/or informal meetings held during the session. To engage in any of these activities, they must complete and file an “accreditation request form” in advance.

The individual complaint mechanism for the CMW has not yet entered into force.

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Committee on the Rights of Persons with Disabilities

MANDATE

The Committee on the Rights of Persons with Disabilities (CRPD Committee) oversees state compliance with the Convention on the Rights of Persons with Disabilities (CRPD). Issuing interpretative documents on the treaty's content is part of the CRPD Committee's mandate, but as of this writing, has only issued draft general comments.

The CRPD Committee monitors progress in the implementation of the CRPD based on periodic reports submitted by states that have ratified the treaty, considers inter-state complaints of human rights violations, and examines individual complaints of human rights violations allegedly committed by states that have ratified the Optional Protocol to the CRPD.

As part of the periodic reporting procedure, States parties must report within two years of ratifying the CRPD and every four years thereafter. Once a State party submits its report, the CRPD Committee examines the report and issues "concluding observations," expressing general recommendations and suggestions on how the state can better implement the treaty.

The CRC Committee meets twice per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit "shadow reports" to the CRPD Committee on any aspect of a State party's compliance with the CRPD. Shadow reports should be submitted through the CRPD Secretariat at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also maintains a calendar of when States parties come before the CRPD Committee.

CONTACT INFORMATION

Secretariat

Committee on the Rights of Persons with Disabilities (CRPD)
 Human Rights Treaties Division (HRTD)
 Office of the United Nations High Commissioner for Human Rights (OHCHR)
 Palais Wilson - 52, rue des Pâquis
 CH-1201 Geneva, Switzerland
 Mailing address:
 UNOG-OHCHR
 CH-1211 Geneva 10, Switzerland
 Tel.: +41 (0) 22 917 97 03
 Fax: +41 (0) 22 917 90 08
 E-mail: crpd@ohchr.org
 Website: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>

Individual Communications

Petitions Team
 Office of the High Commissioner for Human Rights
 United Nations Office at Geneva
 1211 Geneva 10, Switzerland
 Fax: + 41 (0) 22 917 9022 (particularly for urgent matters)
 E-mail: petitions@ohchr.org

Committee on the Rights of the Child

MANDATE

The Committee on the Rights of the Child (CRC Committee) oversees State party compliance with the Convention on the Rights of the Child (CRC). The CRC Committee issues interpretative documents on the CRC called "general comments."

The CRC Committee monitors progress in the implementation of the CRC based on periodic reports submitted by states that have ratified the treaty. It also examines individual complaints of human rights violations allegedly committed by states that have ratified the Optional Protocol to the CRC.

The CRC Committee meets three times per year.

CIVIL SOCIETY PARTICIPATION

As part of the periodic reporting procedure, NGOs can submit “shadow reports” to the CRC Committee on any aspect of a State party’s compliance with the CRC. Shadow reports should be submitted through the CRC Secretariat based at the Office of the High Commissioner for Human Rights in Geneva, which also maintains a calendar of when States parties come before the CRC Committee.

CONTACT INFORMATION

Committee on the Rights of the Child (CRC)
 Human Rights Treaties Division (HRTD)
 Office of the United Nations High Commissioner for Human Rights (OHCHR)
 Palais Wilson - 52, rue des Pâquis
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 CH-1211 Geneva 10, Switzerland
 Tel.: +41 (0) 22 917 91 41
 Fax: +41 (0) 22 917 90 08
 E-mail: crc@ohchr.org
 Website: <http://www2.ohchr.org/english/bodies/crc/index.htm>

Individual Communications

Petitions Team
 Office of the High Commissioner for Human Rights
 United Nations Office at Geneva
 1211 Geneva 10, Switzerland
 Fax: + 41 (0) 22 917 9022 (particularly for urgent matters)
 E-mail: petitions@ohchr.org

International Labour Organization

MANDATE

The International Labour Organization (ILO) promotes the advancement of proper working conditions, decent employment opportunities, and the enhancement of social protection on work-related issues. The ILO is unique in its tripartite governing structure—representing governments, employers, and workers alike.

The ILO hosts biannual conferences that serve as a forum for labor dialogue, establishing and adopting international labor standards, and electing the ILO Governing Body. States that have ratified an ILO convention have a legal obligation to apply its provisions. To date, the ILO has adopted 189 international labor conventions.

There exist two kinds of mechanisms to monitor member state compliance with ILO conventions: a regular system of supervision and special procedures. Under the “regular system of supervision,” ILO Member States are required to submit reports every two years on the implementation of the eight fundamental and four priority conventions ratified and every five years for all other conventions. However, a State party may be asked to submit reports at shorter intervals. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) examines the report and communicates with the State party on the implementation of the conventions. Once adopted, the CEACR annual report is submitted to the International Labour Conference and examined by the Conference Committee on the Application of Standards (Conference Committee), which selects specific observations for discussion and invites States parties to respond and provide information on the matter(s) at issue. The Conference Committee usually issues conclusions and recommendations for improved implementation of the ILO convention(s).

The CEACR meets in November and December of each year, and the International Labour Conference is held in June.

The other mechanism is the ILO’s “special procedures,” where an industrial association of employers or workers can bring a complaint against member states. They may bring complaints before the ILO Governing Body against any member state for failing to comply with the ratified convention. A committee of the Governing Body examines the case and submits to the Governing Body its conclusions and recommendations. If the Governing Body is not satisfied with the state’s response, it may publish the representation and the response. Employers’ and workers’ organi-

zations can also bring a claim before the Committee on Freedom of Association—another special procedure. If the Committee finds a violation of freedom of association, it issues recommendations in the Governing Body's report and requests that the States parties later report on the implementation of its recommendations.

CIVIL SOCIETY PARTICIPATION

Civil society organizations can participate in a number of ways within the ILO. Employers' and workers' organizations elect representatives to form part of the Governing Body and various ILO consultative bodies, where they enjoy the same level of decision-making authority as governments. The ILO conventions and recommendations provide members states with procedures for consulting with workers' and employers' organizations and their representatives on all ILO matters. As outlined above, workers' and employers' associations are invited to submit information on the State party's implementation of a ratified convention in preparation of the CEACR's review of a state's report. The ILO also provides training and advisory services to these organizations.

Using the complaints mechanisms under "special procedures" (outlined above), employer and workers' organizations may file complaints with the International Labour Office against a member state for alleged violations of the ratified convention(s).

The ILO also works with local, national and regional organizations, such as professional associations, cooperatives, village development committees, water users' committees, rural or urban credit groups, NGOs concerned with local and national development or human rights, indigenous community organizations, and networks of homeworkers, especially women. They participate in the ILO's technical cooperation activities. With respect to indigenous peoples, the convention encourages states to consult with them in preparing reports. Indigenous peoples may also affiliate themselves with workers' associations or form their own workers' association in order to more directly communicate with the ILO.

In addition to integrating NGOs in its tripartite structure, international non-governmental organizations recognized by the ILO enjoy consultative status, which allows them to express their views on issues discussed at ILO meetings even though they do not have the right to vote. Also, NGOs that are part of the "Special List" have working relations with the ILO as they are understood to share the ILO's principles and objectives. Finally, International non-governmental organizations can also limit their level of engagement and only attend ILO meetings based on their specific interests.

For more information on civil society participation opportunities, visit: www.ilo.org/pardev/civil-society/lang--en/index.htm.

CONTACT INFORMATION

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CH-1211 Genève 22, Switzerland
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Fax: +41 (0) 22 798 8685
E-mail: ilo@ilo.org
Website: www.ilo.org

UN Charter Bodies

In addition to the treaty bodies above, there are a number of bodies created for the protection and promotion of human rights under the Charter of the United Nations.

Human Rights Council

The Human Rights Council (HRC) is the principal charter body of the UN system, which replaced the Commission on Human Rights in 2006 and is not to be confused with the Human Rights Committee (CCPR) created by the ICCPR. The HRC is a subsidiary organ of the United Nations General Assembly that addresses situations of human rights violations, including gross and systematic violations.

The HRC has four mechanisms for monitoring human rights:

- Universal Periodic Review (UPR);
- Special Procedures;
- Human Rights Council Advisory Committee; and
- Human Rights Council Complaints Procedure.

For more information, visit: www.ohchr.org/EN/HRBodies/HRC/Pages/HRIndex.aspx.

Universal Periodic Review

Established as part of the Human Rights Council's mandate, the Universal Periodic Review (UPR) consists of a regular review of the human rights records of all UN Member States. It was established in 2008 and completed the first review of all 193 Member States in 2011. The UPR – much as with the above-mentioned committees – requires States parties to submit reports on the actions that they have taken to improve human rights in their country and fulfill human rights obligations.

The UPR is not limited to specific treaty obligations, so it is able to consider a broader range of human rights issues than any of the individual committees. The UPR complements the committees; it does not replace them.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the HRC on any aspect of a state's compliance with human rights standards. Additionally, civil society organizations with consultative status with the United Nations Economic and Social Council (ECOSOC) are allowed to participate in the working group session and the adoption of the UPR for the relevant country. A schedule of countries coming up for UPR is maintained on the HRC's website: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

The HRC has published a practical guide on civil society participation in the UPR process, which is accessible at: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/PracticalGuideCivilSociety.pdf>

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 Human Rights Council (HRC) to investigate and address specific country situations or thematic issues throughout the world. At the time of this writing, the OHCHR web page (see link below) notes that as of October 1, 2013, there are 37 thematic and 14 country-specific Special Procedures.

The thematic Special Procedures that are most relevant to human rights in patient care include:

- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
- Working Group on arbitrary detention;
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment;
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;
- Special Rapporteur on the rights to freedom of peaceful assembly and of association;
- Special Rapporteur on violence against women, its causes and consequences; and
- Working Group on the issue of discrimination against women in law and in practice.

For more information, visit the HRC website: www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx

CIVIL SOCIETY PARTICIPATION

In addition to meeting with civil society during their country visits, Special Rapporteurs are able to receive individual complaints requesting assistance or investigation into human rights violations by States parties within their thematic areas. If warranted, the Special Rapporteur requests responses from States parties to the allegations and reports on the Special Rapporteur's findings to the Human Rights Council.

For more information on the process of submitting individual complaints to Special Rapporteurs, visit: www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx.

Advisory Committee

The Human Rights Council Advisory Committee (Advisory Committee) functions as a think-tank for the HRC and engages in substantive research and work at the direction of the HRC. The Advisory Committee is implementation-oriented, and the scope of its research and advice is confined to thematic issues pertaining to the mandate of the HRC. It is composed of 18 experts serving in their personal capacity for appointments of up to three years.

The Advisory Committee meets twice a year.

CIVIL SOCIETY PARTICIPATION

NGOs in consultative status with United Nations Economic and Social Council (ECOSOC) may submit written statements relevant to the work of the Advisory Meeting prior to the Advisory Committee's meetings. Additionally, oral submissions can be made during the course of the meetings on the work of the Advisory Committee.

For more information on civil society participation, visit: www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/NGOParticipation.aspx.

Complaints Procedure

The Complaints Procedure functions as a confidential forum for bringing complaints on “consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances”³ to the attention of the Human Rights Council (HRC). The procedure promotes a victim-oriented and timely approach to alleged violations. The complaints may be filed by individuals, groups, or NGOs as victims of human rights violations or based on having direct and reliable knowledge of the violations.

The Complaints Procedure is composed of two distinct working groups: the Working Group on Communications (WGC) and the Working Group on Situations (WGS). The WGC meets twice a year to assess the admissibility and the merits of a violation. The WGS meets twice a year in order to examine communication deemed admissible by the WGC and to present the HRC with a report on state violations and recommendations for a course of action.

CIVIL SOCIETY PARTICIPATION

As outlined above, NGOs may file a complaint with the Complaints Procedure as victims of human rights violations or based on direct and reliable knowledge of the violations. A complaint must be filed using the form available at: <http://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/HRCComplaintProcedureForm.doc>.

COMPLAINTS

Treaties and Human Rights Council Branch

OHCHR-UNOG

1211 Geneva 10, Switzerland

Fax: +41 (0) 22 9 17 90 11

E-mail: CP@ohchr.org

Website: www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx

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.

³ Human Rights Complaint Procedure (www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx).

CIVIL SOCIETY PARTICIPATION

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.

For more information on NGOs with consultative status, visit: <http://csonet.org/>.

ECOSOC agencies and commissions that may be relevant to patient care include:

- Commission on the Status of Women;
- Commission on Narcotic Drugs;
- Committee on Economic, Social and Cultural Rights; and
- International Narcotics Control Board.

4.3. The European System

As detailed in Chapter 3, the European system includes a number of avenues through which both patients' and providers' rights can be vindicated. This section provides basic information to help the user navigate through the European system.

European Court of Human Rights

MANDATE

The European Court of Human Rights (ECtHR) is a body of the Council of Europe (COE) that enforces the provisions of the European Convention on Human Rights (ECHR). The ECtHR adjudicates both disputes between states and complaints (known as "applications") submitted by individuals and groups alleging violations of human rights protected under the ECHR against a state or states, provided that they have exhausted all other options available to them domestically, and issues decisions which are binding on the respondents states. The ECtHR's procedural process is further elaborated below.

The COE's Committee of Ministers is responsible for monitoring the implementation of judgments made by the ECtHR.

CIVIL SOCIETY PARTICIPATION

Civil society may submit applications on behalf of individuals or groups of individuals before the ECtHR. NGOs can also file briefs on particular cases either at the invitation of the president of the court or, with permission of the ECtHR, 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.

An application form and more information on lodging applications before the ECtHR may be obtained from the ECtHR website (<http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=>).

CONTACT INFORMATION

European Court of Human Rights
 Council of Europe
 F-67075 Strasbourg-Cedex, France
 Tel: +33 (0) 3 88 41 20 18
 Fax: + 33 (0) 3 88 41 27 30
 Website: www.echr.coe.int

European Committee of Social Rights

MANDATE

The European Committee of Social Rights (ECSR) is a body of the Council of Europe (COE) that conducts regular legal assessments of state compliance with provisions of the European Social Charter (ESC) (adopted in 1961 and revised in 1996). These assessments are based on reports submitted by States parties at regular two- to four-year intervals, known as “supervision cycles.” The governmental committee and the COE’s Committee of Ministers also evaluate state reports under the ESC.

The ECSR publishes its conclusions every year and also receives collective complaints alleging widespread failures of compliance with the ESC, against states which have accepted the procedure under the Additional Protocol to the ESC.

CIVIL SOCIETY PARTICIPATION

Reports submitted by States parties under the ESC are public and may be commented upon by individuals or NGOs. International NGOs with COE consultative status and national NGOs recognized by their state may also submit collective complaints to the COE alleging violations of the ESC.

Instructions for NGOs seeking to obtain or renew entitlement for lodging collective complaints with the ECSR are available at: www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/Instructions_en.asp.

CONTACT INFORMATION

Department of the European Social Charter and the European Code of Social Security
 Conseil de l’Europe
 Directorate General of Human Rights and Rule of Law
 Agora
 Council of Europe
 1, quai Jacoutot
 F – 67075 Strasbourg Cedex, France
 Tel: +33 (0) 3 88 41 32 58
 Fax: +33 (0) 3 88 41 37 00
 E-mail: social.charter@coe.int
 Website: www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp

Committee of Ministers

MANDATE

The Committee of Ministers (CM) is the decision-making body of the Council of Europe (COE) composed of foreign ministers of all COE Member States (or their permanent representatives). The CM provides a forum for discussion on problems facing the region and their solutions.

The CM monitors the implementation of judgments of the ECtHR and evaluates reports produced by the European Committee of Social Rights (ECSR). The CM also makes separate recommendations to Member States on matters for which the CM 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, a consultative body composed of representatives of Member States’ parliaments.

CIVIL SOCIETY PARTICIPATION

International non-governmental organizations may be granted participatory status by the COE. Similarly, NGOs may enter into concluding partnership agreements with the COE. In this manner, organizations are able to support the work of the COE, including the CM, through their work.

With respect to the implementation of ECtHR judgments, NGOs may participate in the proceedings before the CM. They are allowed to submit communications to the CM at any time while the case is pending before the CM. Such communications may regard the respondent state’s level of compliance, demand that a state present an action plan/

report, submit suggestions on how action plans/reports should be executed, call for a public debate on the judgment during a human rights meeting (reserved for certain cases), call for a change in the standard of review by the CM, and the like.

CONTACT INFORMATION

Tel: +33 (0) 3 88 41 28 49
E-mail: cm@coe.int
Website: www.coe.int/cm

Advisory Committee

MANDATE

The Advisory Committee (AC) is the independent expert committee responsible for evaluating the implementation of the Framework Convention for the Protection of National Minorities (FCNM) in States parties and advising the Committee of Ministers (CM). It monitors country progress on implementing the FCNM by examining periodic reports submitted by States parties.

In addition to examining country reports, the AC may hold meetings with states and request additional information from other sources. The AC then prepares an opinion, which is submitted to the CM. Based on this opinion, the CM issues conclusions concerning the adequacy of measures taken by each State party. The CM may involve the AC in monitoring the follow-up to these conclusions and recommendations.

CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the AC on any aspect of a State party’s compliance with the FCNM. Shadow reports should be submitted through the FCNM’s Secretariat. NGOs may also submit written information outside the monitoring status of a state that regards the implementation of the FCNM, encourage states to ratify the FCNM, liaise with state officials during the preparation of the state report, participate in follow-up meetings after the AC publishes monitoring results, and contribute to the AC’s preparation of commentaries on specific issues.

For more information on civil society participation, visit: www.coe.int/t/dghl/monitoring/minorities/2_monitoring/ngO_intro_en.asp

CONTACT INFORMATION

Directorate General of Human Rights
Secretariat of the Framework Convention for the Protection of National Minorities
F-67075 Strasbourg-Cedex, France
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Fax: +33 (0) 3 90 21 49 18
E-mail: minorities.fcnm@coe.int
Website: www.coe.int/minorities

4.4. Complaint Procedure of the European court of Human Rights

Basic Facts on the European Court of Human Rights⁴

ORIGIN

When and how was the European Court of Human Rights created?

- ▶ The ECtHR was created in 1959 pursuant to the European Convention on Human Rights (ECHR).

⁴ Based on *Reported Killing as Human Rights Violations* by Kate Thompson and Camille Giffard (published by the Human Rights Centre, University of Essex).

When did it become operational?

- ▶ The ECtHR opened in 1959 as part of a two-tier structure comprising the ECtHR and the Commission on Human Rights, with the latter acting as a filtering mechanism to the ECtHR. This two-tier structure was replaced in 1998 by a single court, pursuant to revisions introduced by Protocol 11 to the ECHR.

PURPOSE**What is the European Court of Human Rights' general objective?**

- ▶ To examine complaints of violation of the ECHR

What are the European Court of Human Rights' functions?

- ▶ Interstate complaints (Article 33, ECHR)
- ▶ Individual complaints (Article 34, ECHR)
- ▶ Fact-finding (in the context of individual complaints only and an optional step in the procedure)

COMPOSITION**How many persons compose the European Court of Human Rights?**

- ▶ As many judges as there are States parties to the European Convention on Human Rights

Are these persons independent experts or state representatives?

- ▶ Independent experts

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" (a preliminary examination of the petition does not point to any appearance of a violation of rights protected under the ECHR—where the petition can be immediately declared inadmissible without having to proceed to the formal examination on the merits);
- ▶ 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 unavailable, ineffective or unreasonably prolonged (and an explanation as to such issues has been provided to the Court).

As of June 1, 2010, in accordance with Protocol 14 to the ECHR, 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 on the merits, and no domestic judicial remedy is available.⁵ These are known as "minor complaints."

WHAT SHOULD YOUR APPLICATION CONTAIN?

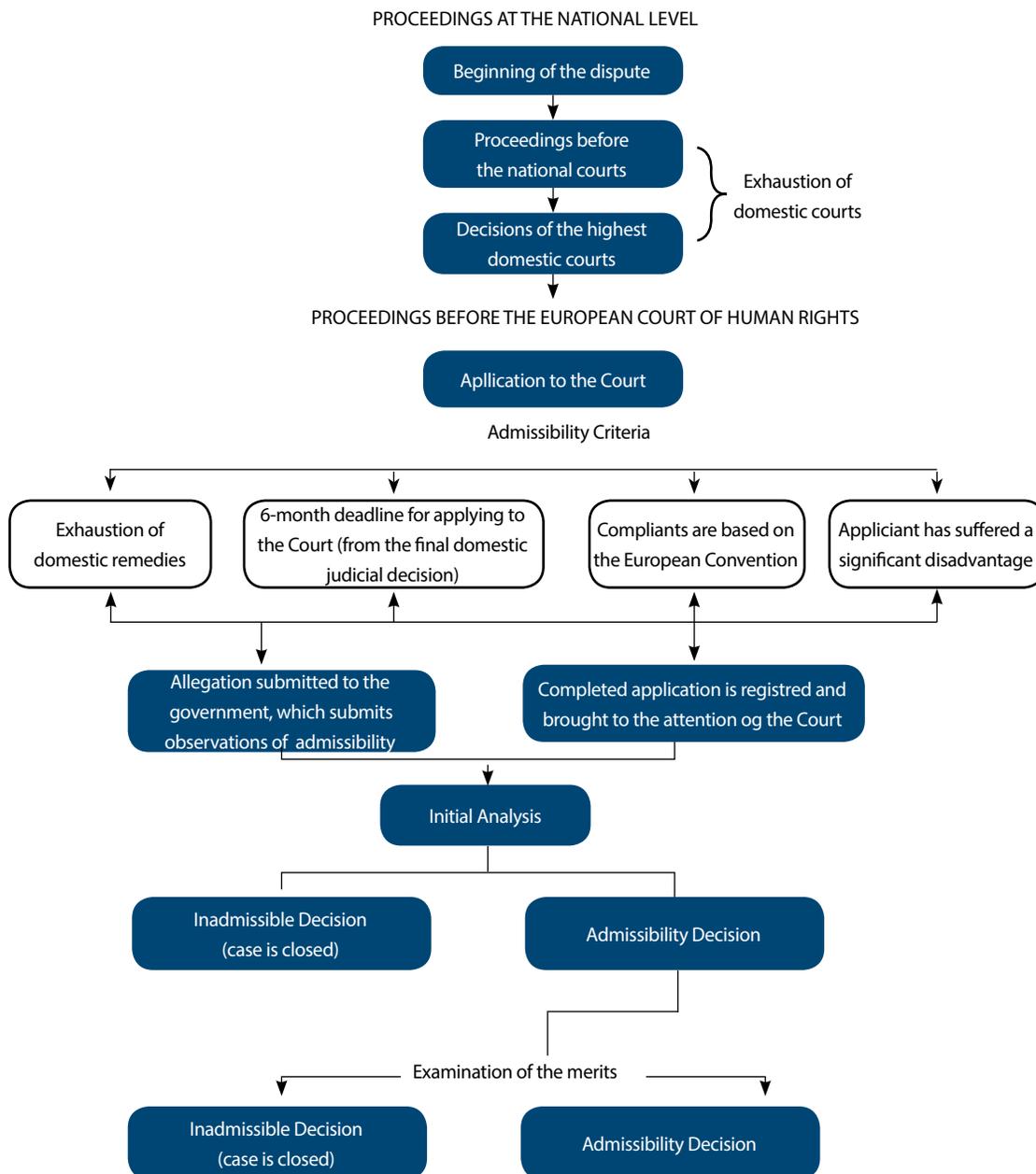
Your initial letter should contain:

- ▶ A brief summary of your complaints;
- ▶ An indication of which rights in the ECHR you think have been violated;
- ▶ An indication of the domestic remedies you have used or attempted to use; and
- ▶ A list of the official decisions in your case, including the date of each decision, by whom it was made, and an indication of what it said (attach a copy of each of these decisions).

⁵ Article 12 of Protocol 14 of the ECHR, amending article 35 of the ECHR.

An application form and more information on lodging applications before the ECtHR may be obtained from the ECtHR website (<http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=>).

TABLE: BASIC CHRONOLOGY OF THE INDIVIDUAL COMPLAINT PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS⁶



6 Based on *Reported Killing as Human Rights Violations* by Kate Thompson and Camille Giffard (published by the Human Rights Centre, University of Essex) and "Life of an Application" by the European Court of Human Rights, (http://www.echr.coe.int/Documents/Case_processing_ENG.pdf).

PRACTICALITIES OF THE USE OF THE INDIVIDUAL COMPLAINT PROCEDURE IN THE EUROPEAN COURT OF HUMAN RIGHTS

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 State; 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 mechanisms take to assist the court in reaching a decision?	Fact-finding hearings, expert evidence, written pleadings, 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).

A NOTE ON RESEARCHING EUROPEAN CONVENTION OF HUMAN RIGHTS CASE LAW

The original structure of the Court and mechanism for handling cases provided for a two-tier system of rights protection – the European Commission of Human Rights (now obsolete) as well as the European Court of Human Rights. In 1998, Protocol 11 of the European Convention on Human Rights came into force, eliminating the Commission of Human Rights and allowing for the emergence of a new European Court of Human Rights. If researching a particular topic under the Convention case law, research both Commission and Court decisions.



5.1. STATUS OF INTERNATIONAL AND REGIONAL LAW

5.2. STATUS OF PRECEDENT

5.3. LEGAL AND HEALTH SYSTEM

5

Country-Specific Notes

5.1. Status of International and Regional Law

The Process of developing of human rights in patient care in Serbia is to a great extent under the influence of the extensive movement for the health care reform in Europe. The role of important international organizations, such as the United Nations (UN), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe (COE), the World Medical Association (WMA), etc., should be emphasized.

Serbia has ratified the following treaties:

- ▶ Universal Declaration of Human Rights;
- ▶ International Covenant on Economic, Social, and Cultural Rights;
- ▶ European Social Charter;
- ▶ Convention on the Rights of the Child;
- ▶ International Covenant on Civil and Political Rights (ICCPR);
- ▶ 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;
- ▶ Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms;
- ▶ Convention on Biological Diversity; Convention concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents;
- ▶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;

- ▶ Convention Concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration;
- ▶ Convention Concerning Occupational Safety and Health and the Working Environment;
- ▶ Convention Concerning Occupational Health Services;
- ▶ Convention Concerning Safety in the Use of Asbestos;
- ▶ Protocol No 8. of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- ▶ Protocol No 7. of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- ▶ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- ▶ Protocol No 1. to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- ▶ Protocol No 2. to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- ▶ Council of Europe Convention on Action against Trafficking in Human Beings.

The following treaties have been signed, but not ratified:

- ▶ 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;
- ▶ Protocol No 15 of the Convention for the Protection of Human rights and Fundamental Freedoms.

Additionally, Serbia has signed and ratified the majority of international and regional (European) legal instruments concerning health, biomedicine and human rights. For more information please refer to Chapter 1.

5.2. Status of Precedent

Since the Republic of Serbia belongs to the continental law system countries, a precedent, i.e. the case law, cannot be treated as formal legal source.

Despite precedent is not formal legal source, the jurisdiction of the Supreme Court of Cassation, established in 2010, was expanded by the amendments and supplements to the **Law on Organization of Courts**¹ and implemented on 21 May 2014. In order to ensure uniform application of law, the Court forms its jurisprudence presenting it through opinions expressed in its decisions, and through conclusions and sentences adopted at its departmental sessions and the session of all the Judges.

According to **Article 43** of the **Law on Organization of Courts**, the session of departments of the Supreme Court of Cassation deliberates issues from the scope of work of court departments. The session of departments shall also be convened due to incompatibilities between some chambers arising in respect of the application of regulations or if one chamber departs from a legal opinion adopted

¹ Official Gazette RS 16/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011 and 101/2013.

by its case law or a legal opinion accepted by all chambers. A legal opinion adopted at the session of departments is binding for all chambers comprising the departments.

Decisions of the Supreme Court of Cassation relevant to case law and all general legal views shall be published in a special collection of works.

5.3. Legal and Health System

LEGAL SYSTEM

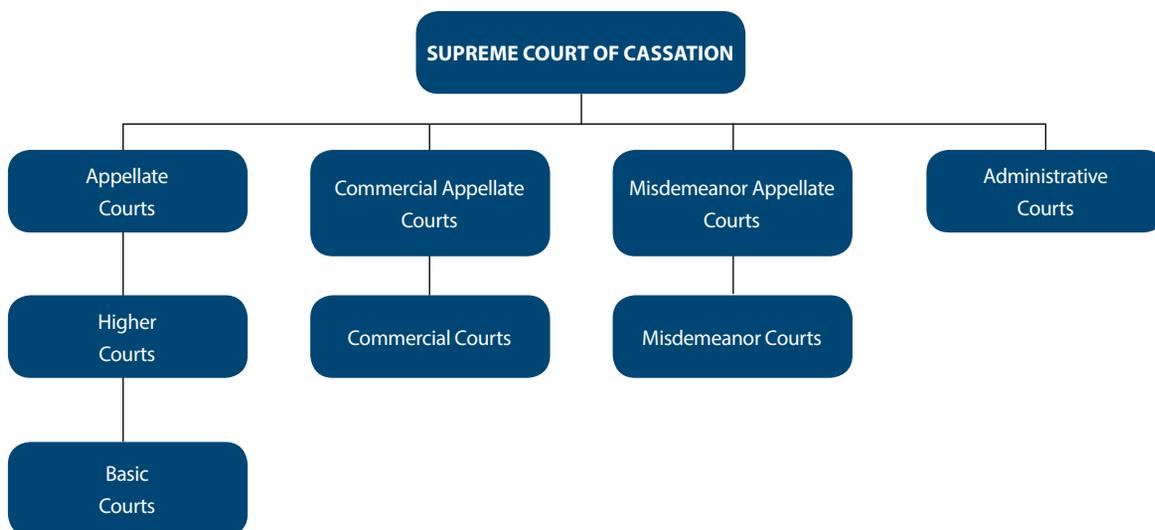
The Republic of Serbia belongs to the continental law system countries according to its legal system structure. Legal norms are codified in relevant regulations, governing all aspects of social life. The Constitution of the Republic of Serbia, the most important and the supreme legal act, adopted in 2006², is based on the fundamental principle that the legal system is unique. It anticipates that all international and domestic regulations have to be in compliance with constitutional and law principles. According to Article 194 of the Constitution, all laws and other general acts enacted in the Republic of Serbia must be in compliance with the Constitution. Ratified international treaties also may not be in contradiction with the Constitution. The same article anticipates that laws and other general acts enacted in the Republic of Serbia may not be in contradiction with the ratified international treaties and generally accepted rules of the international laws, since they are also part of the Serbian legal system.

Article 195 of the Constitution specially regulates the hierarchy of domestic legal acts. This article anticipates that all of the following must be in compliance with the law: bylaws of the Republic of Serbia; general acts of organizations with delegated public powers; political parties, trade unions and civic associations and collective agreements; statutes, decisions and other general acts of autonomous provinces and local self-government units.. Article 197 of the Constitution, being in compliance with the principles of legal safety and the rule of law, explicitly forbids retroactive effects of laws and legal acts. The exceptions are allowed in special circumstances only, as established in the procedure of adopting the Law. Article 1 of the Constitution explicitly specifies that Serbia is a republic, based on constitutional principles, such as the rule of law (authority within the limits of the governmental power and distribution of authority); social justice (socially responsible state managing the politics of equality); principles of civil democracy (sovereign citizens exercise their will through free elections); human and minority rights and freedoms in compliance with generally accepted rules of international law; and commitment to European principles and values.

The government system power is divided among legislative, executive and judiciary authority. The National Assembly is the holder of legislative power, the President and the Government are holders of executive power, while courts of both general and special jurisdiction are holders of judiciary authority. Courts of general jurisdiction include basic courts, high courts, appellate courts and the Supreme Court of Cassation – the highest court in the country, and special jurisdiction courts include commercial courts, the Commercial Appellate Court, minor offences courts, the High Minor Offences Court, and the Administrative Court).

Organizational structure of the legal system in Serbia is shown on Scheme 1.

² Official Gazette of RS 98/2006.

SCHEME 1. ORGANIZATIONAL STRUCTURE OF THE HEALTH CARE SYSTEM IN SERBIA

Source: Republic of Serbia. Supreme Court of Cassation. <http://www.vk.sud.rs/en> (assessed January 28, 2015)

HEALTH SYSTEM

In accordance with Article 1 of the Constitution, the Republic of Serbia is based on the rule of law, social justice and European principles and values. Health care is guaranteed by the Constitution, which anticipates that health insurance, health care and establishing of the health insurance fund are regulated by the republic laws³. Articles 68 and 97, paragraph 1/10 of the Constitution guarantee the right to health and provide for a health care system through compulsory health insurance.

The health care system, together with the health insurance, makes the unique health care system of the Republic of Serbia. It means that every citizen of Serbia, as well as persons with permanent or temporary residence in the territory of Serbia have the right to access health care services. Fundamental laws regulating health in Serbia are: Health Care Law⁴ and Health Insurance Law⁵. Besides that, there are many other regulations, general acts, strategic documents and national programs.

The Ministry of Health is in charge for designing and implementation of health politics. The Institute of Public Health of Serbia "Dr Milan Jovanović - Batut", and the National Health Insurance Fund⁶ also have significant levels of competence on this matter. The competence level of the National Health Insurance Fund is governed by Articles 208-210 of the Health Insurance Law. The Institute of Public Health of Serbia gathers and analyses information on population health and performance of health care institutions and suggests measures for improvement of public health. The National Health Insurance Fund is a national, autonomous public organization which signs agreements with the public and private health care providers. Payments for health care services are made on the basis of those agreements. Besides that, another important role of the Fund is defining the compulsory health care package.

3 Official Gazette of RS 98/2006.

4 Official Gazette of RS 107/2005, 72/2009, 88/2010, 99/2010, 57/2011, 119/2912 and 45/2013.

5 Official Gazette of RS 107/2005, 109/2005, 57/2011, 110/2012, 119/2012, 99/2014, 123/2014 and 126/2014.

6 Official Gazette of RS 107/2005, 109/2005, 57/2011, 110/2012.

Health care institutions, both public and private, are within the health care system in Serbia. Organizational structure of the health care system in Serbia is shown in Scheme 2.

There are three levels of the health care system:

- ▶ Primary health care consists of a well-developed network of primary health care centers (outpatient departments) founded by the state (on municipality level) or individual practitioners (in private practice). Primary health care founded by the state represent the first level of people's connection to health care services. They consist of teams of chosen physicians: general practitioner, gynecologist, pediatrician and dentist, as well as other specialists (in internal medicine, radiology, physical therapy, psychology, etc);
- ▶ Secondary health care activities comprise of different specialist services in general and special hospitals. This level of health care usually represents the continuation of diagnostic, therapeutic and rehabilitation activities, initiated at the primary health care level; and
- ▶ Tertiary health care activities are carried out at clinics, clinical hospitals and clinical centers, representing the highly specialized (subspecialized) level of health care.

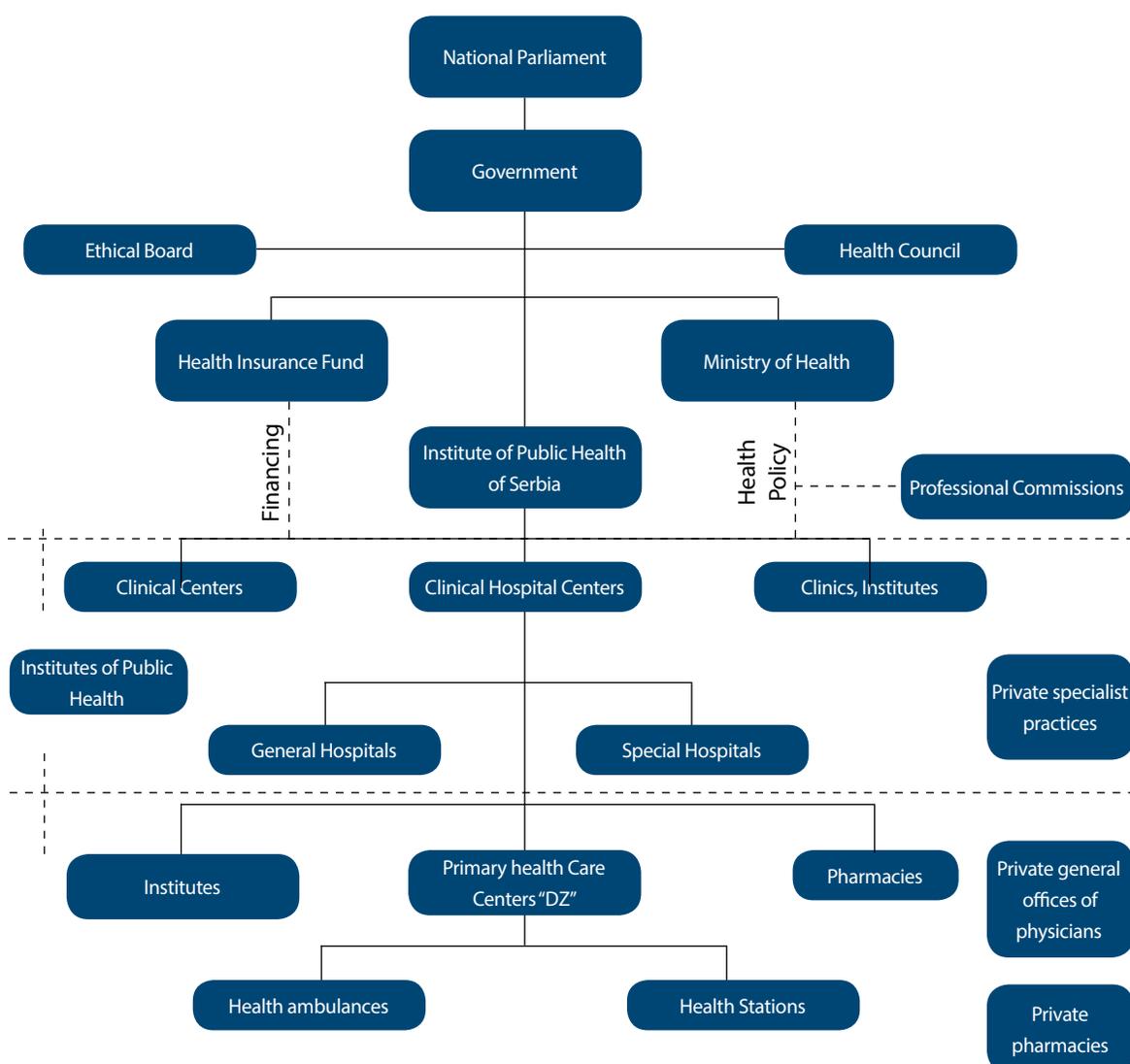
Besides the above-mentioned facilities, pharmacies, institutes of public health, the Blood Transfusion Institute and other institutes can also be parts of either the primary or tertiary health care level. Institutes of public health are founded for the territory of several municipalities and are in charge of activities of public health at all three levels of the administrative organization of the health care system in Serbia (Scheme 2).

Serbia decided to apply the so-called Bismarck model regarding the financing, ownership, organization and management of the health care system. This means that the health care system in Serbia is primarily financed from compulsory health insurance contributions paid by employees and employers, as well as by other citizens with other types of income (business companies' founders, private entrepreneurs, pensioners, farmers). The National Health Insurance Fund collects and manages the health insurance funds. The health care system is additionally financed from other sources, public or private. Public sources are provided from the state budget mostly, sometimes with copayment for certain health services and for drugs as a percentage of the cost of prescribed drugs, while private sources are provided by health care system users by direct payment for health care services, voluntary health insurance and sometimes with copayment by health insurance, etc.

Health insurance in Serbia can be compulsory and voluntary. Compulsory health insurance includes insurance covering diseases and injuries not related to work, as well as insurance covering work-related injuries or diseases. It guarantees the right to health care and right to salary benefit for the period of temporary inability to work, as well as the right to transportation benefit relating to the use of health care services. Compulsory health insurance is to be provided for: insured persons and members of their families, persons who are to be included into compulsory health insurance (pensioners, vulnerable groups – Roma, poor people, unemployed), persons provided with entitlements deriving from compulsory health insurance in particular circumstances (such as Roma without birth certificate number), as well as foreign citizens with whose countries an international agreement on social insurance has been signed.

Voluntary health insurance can be organized and carried out by the National Health Insurance Fund and legal entities dealing in insurance activities in accordance with the Health Insurance Law⁷, as well as investment funds for the voluntary health insurance, in accordance with the special Act of Voluntary Health Insurance⁸. Voluntary health insurance provides the insured persons the possibility of being insured against the risks of copayment for the cost of health care provided in the compulsory package of health services (health insurance complementary role). Besides that, persons not included in compulsory health insurance can take voluntary health insurance (alternative role of health insurance, solely within the competence of private insurers for now), as well as persons who want a wider range and standard of health care than compulsory health insurance can provide (additional health insurance).

SCHEME 2. ORGANIZATIONAL STRUCTURE OF THE HEALTH CARE SYSTEM IN SERBIA



Source: Compiled from the Health Care Law (Official Gazette of RS 107/2005, 72/2009, 88/2010, 99/2010, 57/2011, 119/2912 and 45/2013)

7 Official Gazette of RS 55/2004, 70/2004 - corr., 61/2005, 61/2005 - etc. law, 85/2002 - etc. law, 101/07, 63/09.

8 Official Gazette of RS 108/2008 and 49/2009.

The compulsory package of health services is basically determined by the Health Insurance Law (Article 34) and includes: 1) prevention and pre-stage diagnosis of disease; 2) medical examinations and treatment of women relating to family planning, pregnancy, delivery and postnatal period up to 12 months after delivery; 3) medical examination and treatment in case of sickness and injury; 4) medical examination and treatment of dental diseases; 5) rehabilitation in case of sickness or injury; 6) medicines and medical supplies, and 7) prosthetics, orthotics and other devices for movement, standing and sitting, sight, hearing and speech, dentures and other auxiliary and sanitary devices (medical-technical devices). In accordance with the authorization from Article 47 of the Health Insurance Law, the final list of compulsory health insurance package services is determined by the National Health Insurance Fund in the general by-law adopted for each calendar year (Rule of the range and scope of the right to health care deriving from compulsory health insurance and of copayment for 2014)⁹.

In case a health care institution is not able to provide a health service covered by the compulsory health insurance package within a period of 30 days, an insured person can “seek” this service in another health care institution. All costs will be reimbursed by the respective health insurance branch. The requirement for reimbursement is official confirmation that the health care institution in charge was not able to provide the necessary health service within the stated period.

For certain types of health care services which are not urgent, an order of use may be established depending on medical indications and health status of the insured, whereas the waiting time cannot be such to endanger health or life of the insured. The National Health Insurance Fund establishes types of health care services for which the waiting lists are to be made, as well as criteria for standardized measures for the patient’s health status evaluation, for putting patients on waiting lists and for determining the longest waiting time for health care services to be delivered.

⁹ Official Gazette of RS 3/2014, available at http://www.rfzo.rs/download/pravilnici/participacija/Pravilnik_obimsadrzaj16012014.pdf (accessed September 11, 2015).

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 of 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
- Right to access medical record
- Right to second professional opinion
- Right to be released from inpatient health care institution on personal demand

6.2. PATIENTS' RESPONSIBILITIES

- Responsibility to personal health
- Responsibility to inform regarding health status
- Responsibility to act in compliance to general acts of health care institution
- Responsibility to other users of health care services
- Responsibility to health care providers

6

National Patients' Rights and Responsibilities

6.1. Patients' Rights

6.1.1. RIGHT TO PREVENTIVE MEASURES

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

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

The health services have the duty to pursue this end by raising people's awareness, guaranteeing health procedures at regular intervals free of charge for various groups of the population at risk, and making the results of scientific research and technological innovation available to all."

b) Right as Stated in the Country Constitution/Legislation

Constitution of the Republic of Serbia²

Article 68 states that everyone has the right to protection of its mental and physical health and that the "Republic of Serbia helps development of health and physical culture".

1 European Charter of Patients rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

2 Official Gazette of RS 98/2006.

Law on Health Care³

Article 3 guarantees that every citizen of Serbia, as well as persons with permanent or temporary residence in Serbia, is entitled to health care, in compliance with the law, and it is his/her duty to preserve and improve his/her health and the health of other citizens, as well as the conditions of living and working environment).

Article 8 clearly specifies that social care for the health of the population, realized on the level of the Republic, autonomous province, municipality, or city, employer, and individual comprises preservation and improvement of health, detection, and control of risk factors influencing onset of diseases, acquiring of the knowledge and habits concerning healthy lifestyle; prevention, control and early detection of diseases.

Article 11, paragraph 1, paragraph 2/15 states that social care for health under equal conditions is exercised by providing: health care to the population groups exposed to an increased risk of contracting diseases; health care related to prevention, control, and early detection; treatment of diseases of major social and medical importance; and health care for the socially-vulnerable populations. Health care includes, inter alia, persons for whom targeted preventive examinations or screening are provided pursuant to the relevant government programs.

Health Insurance Law⁴

Article 35 establishes the following measures provided to insured persons:

- 1) Health education consisting of special lectures or advisory sessions given by health professionals with regard to protection, preservation and improvement of health; gaining healthy lifestyle knowledge and habits; discovering and curbing risk factors;
- 2) General and other medical examinations of children, school children, university students up to 26 years of age, women with regard to pregnancy and adults in accordance with the national program relating to prevention and early diagnosis of diseases of major social and medical importance (screening programs);
- 3) Preventive dental examinations and prophylactic measures for dental diseases prevention for pregnant women, children under the age of 18 and the elderly with profound physical and mental disability;
- 4) Health care education with regard to family planning, pregnancy prevention, birth control and surgical sterilization, pregnancy testing, testing and treatments of sexually transmitted diseases and HIV infections;
- 5) Inoculation, immunoprophylaxis and chemoprophylaxis that is compulsory under the national program on immunization of the population against certain contagious diseases;
- 6) Hygienic, epidemiological and other measures and activities prescribed by law with regard to curbing, discovering and treatment of HIV infection and other contagious diseases in order to be prevented from spreading.

(Author's Note: Every insured person can receive the health education information described in the Health Insurance Law by attending the lectures, roundtables, or other similar events where the information is presented and discussed. Dates and times are posted publicly in health care institutions as well as in the media.

3 Official Gazette of RS 107/2005, 72/2009 - anoth. act, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013.

4 Official Gazette of RS 107/2005, 109/2005, 57/2011 and 119/2012.

The chosen doctor/ specialist in a particular field (general medicine, gynecologist, pediatrician, dentist) is to provide the information in collaboration with a nurse.)

Law on Protection of Patients' Rights⁵

Article 8 ensures the right to preventive measures:

"A patient is entitled to adequate health services for preservation and improvement of his/her health, prevention, suppression and early diagnosis of disease and other health disorders.

Each health care institution is obliged to implement preventive measures, stated in **paragraph 1** of this Article, by raising awareness of the population and providing health care services in appropriate periods of time for high risk population groups, in accordance with law".

Law on Protection of Persons with Mental Disabilities⁶

"Mental health protection implies prevention of mental disabilities, improvement of mental health, analysis and diagnostics of a patient's mental status, treatment and rehabilitation, as well as suspecting the existence of mental disabilities" (**Article 3**).

"A person with mental disabilities is entitled to protection and improvement of his/her mental health through prevention, care, treatment and psychosocial rehabilitation in adequate health or other relevant institutions, recovery and inclusion in family, working and social environment, with respect to the choices that he/she has made" (**Article 7**).

Law on Protection of Population against Infectious Diseases⁷

The law governs protection of the population against infectious diseases; determines infective diseases endangering the health of the population and whose prevention and suppression are of global interest for Serbia; determines preventive measures, as well as methods and resources of their implementation, system of control and mechanisms to enforce the law, and other related important issues (**Article 1**).

Law on Medicines and Medical Supplies⁸

The law governs the conditions and procedures of medicines and medical supplies industry and trading in order to ensure control and to prevent side effects of medicines and medical supplies implementation.

Law on Food Safety⁹

The law governs general conditions for safety of food and feed, duties and responsibilities of food and feed business operators, a rapid alert system, emergency measures and crisis management, food and feed hygiene and quality (**Article 1**).

5 Official Gazette of RS 45/2013.

6 Official Gazette of RS 45/2013.

7 Official Gazette of RS 125/2004.

8 Official Gazette of RS 30/2010 and 107/2012.

9 Official Gazette of RS 41/2009.

Law on General Product Health Safety¹⁰

The law determines health requirements that must be fulfilled regarding general products' safety for human use (**Article 1**), in order to ensure a high level of life and health protection, as well as interest protection of consumers (**Article 2**). The law states the specific requirements as well as organizations responsible for monitoring. Those are the Ministry of Health and health inspectors chosen by Ministry of Health, usually from Public Health Institutes.

Law on Chemicals¹¹

The Law on Chemicals regulates integrated chemicals management in accordance with the principle of precaution and on the principle that the manufacturer, importer or downstream user either manufactures, places on the market and/or uses chemicals in such way that they do not have adverse effects on human health and the environment (**Articles 1 and 2**).

Law on Occupational Safety and Health¹²

The Law on Occupational Safety and Health governs occupational safety and health standards and defines obligations and responsibilities for their implementation:

- **Article 4:** All preventive measures must be undertaken in order to prevent occupational accidents, occupational diseases and work-related diseases.
- **Article 7, paragraph 1:** Preventive measures must be provided by implementation of contemporary technical, ergonomic, health, educational, social, organizational and other measures and means for elimination of risks causing accidents and health damage of the workers, and/or their minimization .
- **Article 11, paragraph 1:** "The employer must provide preventive occupational safety and health measures, as well as financial resources for their implementation".

Law on Infertility and Biomedical Assisted Reproduction Treatment¹³

This law governs prevention of disease transmission risks, as well as preservation of quality :

"Authorized health institutions, as well as other legal of physical entities, are obliged to undertake all necessary measures in order to prevent and reduce transmission of risk related to infectious or other diseases" (**Article 30, paragraph 1**).

Law on Protection of the Population from Exposure to Tobacco¹⁴

The law defines the measures that limit usage of tobacco products, for the purpose of protection of the population from exposure to tobacco smoke.

The law also defines and monitors prohibition of smoking and implementation of Law (**Article 1**).

Government is implementing a program for the prevention and suppression of the use of tobacco. The funding of the program is provided from the Budget fund set up in accordance with the law governing the use of tobacco (**Article 15**).

10 Official Gazette of RS 92/2011.

11 Official Gazette of RS 36/2009, 88/2010, 92/2011 and 93/2012.

12 Official Gazette of RS 101/2005.

13 Official Gazette of RS 72/2009.

14 Official Gazette of RS 30/2010.

- Pursuant to the regulations governing required minimum levels of health care, the insured has the right to preventive health care and assistance in the eradication of the smoking habit (**Article 20**).

Law on Protection from Ionizing Radiation and on Nuclear Security¹⁵

The law stipulates measures for protection of human life, health and environment from harmful effects of ionizing radiation and nuclear safety measures regarding nuclear activities and regulates the conditions for practices with sources of ionizing radiation and nuclear materials, as well as radioactive waste management (**Article 1**).

Law on Environmental Noise Protection¹⁶

The law regulates the following: environmental noise protection subjects; environmental noise protection measures and conditions; environment noise measurement; access to the relevant information about the noise; control and other issues relevant to environment and human health protection (**Article 1**). The Agency for Environmental Protection is the agency responsible for implementation (**Article 6**).

c) Supporting Regulations/Bylaws/Orders

Each year the Health Insurance Fund proposes and the Government of Serbia endorses bylaws, which describe the procedure for utilization of health care services covered by health insurance¹⁷.

In addition, the Government endorses numerous preventive programs for different population groups and for specific diseases (Table 1). In this way, the Government fulfills its responsibility described in the following statement:

“The Government shall develop the national programme relating to prevention and early diagnosis of diseases of major social and medical importance; the national program relating to dental health protection of children up to 18 years of age, students up to 26 years of age, and pregnant women; the national program relating to immunization of the population against certain contagious diseases; and the medical measures and activities’ standards arising out of such programs¹⁸.”

TABLE 6.1. EXAMPLES OF PREVENTIVE PROGRAMS FOR DIFFERENT POPULATION GROUPS AND FOR SPECIFIC DISEASES

PROGRAM	SOURCE
National program of health care of women, children and youth	Official Gazette of RS 28/2009
National program of preventive health care for children with psychophysiological disorders and speech pathology	Official Gazette of RS 15/2009
National program of prevention and early detection of Diabetes Type 2	Official Gazette of RS 17/2009
National program Serbia against cancer	Official Gazette of RS 20/2009
National Program on early detection of breast carcinoma	Official Gazette of RS 73/2013
National program on early detection of cervical cancer	Official Gazette of RS 73/2013 and 83/2013
National program on early detection of colorectal carcinoma	Official Gazette of RS 73/2013
National program of prevention, treatment and control of cardiovascular diseases up to 2020.	Official Gazette of RS 11/2010
Healthcare Development Plan of the Republic of Serbia	Official Gazette of RS 88/2010

15 Official Gazette of RS 36/2009 and 93/2012.

16 Official Gazette of RS 36/2009 and 88/2010.

17 Official Gazette of RS 1/2015.

18 Official Gazette of RS 107/2005, 109/2005, 57/2011 and 119/2012.

d) Relevant provisions of health care providers' codes of ethics

Article 7 of the **Code of Ethics of the Serbian Medical Chamber**¹⁹ obliges health care providers to develop health education both in their workplaces and in public life, helping people to improve their quality of life. Physicians are engaged in health education and health culture and participate in preventing everything that could endanger people's health, as well as in suppression of backwardness, superstition, prejudices and pseudo-physicians.

Article 46 of the **Dentists Code of Ethics**²⁰ states that "... during his/her practice a dentist must work permanently on individual and global improvement of health, with respect to life and humanity".

The Code of Ethics of the Serbian Chamber of Nurses and Health Technicians²¹ states that "... nurses and health technicians are obliged to deal with health education and to raise the level of population health culture".

e) Practical examples

Example(s) of Compliance

- 1) Medical checkup is compulsory for all students of the first and the third year of undergraduate medical studies. Medical examination includes anamnesis (medical history), checkup by a general practitioner who can refer the student for additional examinations, such as usual laboratory analysis and gynecological checkup (for female students). Regular physical examinations of pupils and students are provided under the Physical Examination Program for Pupils and Students in the Republic of Serbia, a mandatory and free preventive program administered by the Ministry of Health. Detailed methodological instructions for the implementation of this program for chosen physicians and primary health care teams working in primary health care institutions were produced in 2010 by the Republic Commission for Women's, Children's and Youth's Health Care.
- 2) Compulsory vaccination is free and available in primary health care institutions – "Dom zdravlja".
- 3) Improvements have been achieved in the prevention of violence, in particular abuse and neglect of children. The health system has taken initial steps to address violence and implement the Special Protocol on Prevention of Child Abuse and Neglect (CAN) by forming CAN special expert teams in more than 85% of health care institutions and by increasing capacities of the health professionals to address this issue within health system and through inter-sectoral collaboration. The health system currently has no national data on the protection of children from abuse and neglect, and only 8% of the total reported cases of CAN come from health and education institutions despite the fact that they have been the first line contact with children and their families. In response to these facts, the Institute for Public Health has taken the lead in developing a sustainable data collection and reporting system. These efforts will lead to the development of a database on the national level, which will provide much needed data to complement the basic monitoring carried out by civil society.

19 Official Gazette of RS 121/2007.

20 Official Gazette of RS 14/2008.

21 Official Gazette of RS 67/2007.

- 4) A recent evaluation of the Program for Promotion, Support and Protection of Breastfeeding²² and the "Baby-friendly Hospital" initiative²³ suggests a stagnation or even reversal in the implementation of the 10 steps for the operation of baby-friendly maternity wards that were introduced as good practice in the previous decade. As a response to these findings, the Ministry of Health has prepared an Action Plan and standards for healthcare adjusted to the needs of mothers and newborns, which are expected to help integrate good practices into the services provided at maternity wards and other institutions for perinatal care. More intensive efforts will have to be invested into the implementation of the proposed measures.
- 5) The Strategy for Development and Health of Young People defines a number of particularly vulnerable groups of young people, such as young people without parental care, poor and street children, young people placed in residential institutions, young people excluded from the educational system, young people requiring special support, as well as refugees and internally displaced persons. *(Authors' note: Although there is a strategy, and that strategy identifies vulnerable groups of young people, a national response on impaired mental health, violence especially within family, and sexual health has not yet been fully implemented although the policy framework exists. A formalized discussion on these issues to intensify preventive interventions is highly recommended).*
- 6) In 2005 the National Guidelines for primary care physicians for health care of pregnant women were developed. These recommendations subsequently were integrated into the national program for health care of women, children and adolescents.

Example(s) of Violation

- 1) The implementation of the right to healthcare is to a large extent dependent on the availability of stable financing. The capacity of the mandatory health insurance system to provide adequate funding has come under considerable strain since 2009 as a result of the economic recession and growing unemployment. A number of surveys reveal that there is an unmet demand from parents for more counseling and advisory services in the area of prenatal health and children's growth and development, particularly in early years. Planned expansion of programs for the early detection and care of children with disabilities, in line with national guidelines, have not progressed due to lack of a national plan for systematic capacity building of health professionals in this area and its prioritization, as well as to budget constraints within the Ministry of Health and government more broadly.
- 2) Regardless of national averages, a recent expert report expresses serious concern about the present immunization system in Serbia²⁴. With the introduction of the system of chosen pediatricians and the abolishment of the posts of primary immunization focal points at the Primary Health Centers, the immunization coverage dropped within a very short period of time. This is a cause for concern, and consideration should be given to urgently reverting to the previous system. Fur-

22 The Council for Child Rights of the Government of Serbia. Overview of the implementation of the National Action Plan for Children for the period 2004-2009. Belgrade: Government of RS 2009.

23 Becker G, Zisovska E. Evaluation of the Baby-friendly Hospital Initiative in Serbia for the period 1995-2008. Belgrade: UNICEF Belgrade 2009.

24 Institute of Public Health of Serbia. Centre for disease prevention and control. Report about immunisation performed in Republic of Serbia in 2011. Belgrade: Institute of Public Health of Serbia IZJZS 2012. <http://www.batut.org.rs/download/izvestaji/izvestaj%20o%20sprovedenoj%20imunizaciji%202011.pdf> (accessed January 30, 2015)

thermore, untimely and incomplete procurement of vaccines has created gaps in the coverage of the immunization system and has left a substantial number of pre-school and school-aged children without complete immunization. This in turn seriously jeopardizes the collective population immunity. Even when sufficient quantities of vaccines are procured in a timely manner, such as the case with Hepatitis B vaccine, coverage of children with this vaccine remained unacceptably low. The lack of information systems and electronic records further jeopardizes the quality of collected data and the overall reporting on immunization. *(Authors' note: at the time of this writing, the level of coverage of children with Hepatitis B vaccine is now acceptable).*

Actual Case(s)

A principal of an elementary school failed to require a medical checkup of a teacher suffering from an infectious disease, although she received the information about his health condition twice. Furthermore, she did not require medical checkup of all employees, endangering the health of both teachers and pupils²⁵. The Ombudsman (Protector of Citizens) gave recommendations and informed the Ministry of Education and Ministry of Health – Health Inspection as well as the school, teacher and parents. *(Author's note: it is not known to the authors whether the case is processing further.)*

f) Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to preventive measures. Whether an injured party must file a complaint first with the applicable administrative body before filing a claim in the applicable court depends upon the level of severity. For example, in the case that a doctor failed to check for the presence of HIV in the blood of a person donating blood, and that failure allowed transmission of the HIV virus through a blood transfusion, then the failure to test for HIV may be considered or alleged to be a criminal act. In that instance, the information would go first to the director of the health care institution, then to the Ministry of Health, and then to the applicable court.

Under the administrative procedure, subjects seeking to exercise their rights or whose rights have been violated file a case with the responsible administrative body or with the body which has the public authority. Chapter 8 of this guide describes the administrative procedure in more detail.

While an administrative procedure is pending review by state government bodies or other bodies and organizations with public authority, patients may request that the Ombudsman protect their rights. Such requests may be submitted in response to a protracted administrative procedure or when one's rights are violated through the actions or neglect of the aforementioned bodies. It is possible to initiate a court case at the same time, as the Ombudsman makes only recommendations. However, in case a court procedure has been initiated, the Ombudsman does not act according to the complaint. For more information, see the section titled "Alternative mechanisms for protection/exercising of rights and obligations" in Chapter 8 of this guide.

A misdemeanor charge may be filed by the responsible government body, either as part of a regular investigation, upon the claim of an authorized civil servant, or upon the claim of an authorized civil servant in conjunction with the aggrieved party. This kind of procedure may be initiated when misde-

25 Finding of The Ombudsman (Protector of Citizens). Available at: <http://www.ombudsman.pravadeteta.com/> (accessed August 28,2015)

meanor responsibility is enumerated in a specific law, for a physical person, legal person and/or the individual representative of the legal person responsible for violation of the right regulated and guaranteed under the specific law in question. Misdemeanor bodies are the courts and public institutions and other institutions authorized for public responsibilities, authorized for pronouncement of misdemeanor sanctions, and whose authority is regulated in a separate law. If a misdemeanor violation of one's rights contains elements of a criminal case, the responsibility is considered criminal. For the procedure determining the criminal responsibility, see details in Chapter 8.

If a misdemeanor violation of one's rights has caused material or non-material damage, then responsibility for such damage is determined under civil procedure. This procedure is described in Chapter 8. If there is injury or damage to his/her health, for example, a patient's medical record and report(s) by physician(s), such as a hospital discharge paper/report, can be one form of proof to support a claim for material or non-material damages arising from violation of the right to preventive measures.

g) Cross-referencing Relevant International and Regional Rights

Please find a discussion of international and regional standards relevant to the Right to Preventive Measures under the Right to the Highest Attainable Standard of Health in Chapter 2 (International) and Chapter 3 (Regional).

Human rights include civil, cultural, economic, political and social rights. Those rights, guaranteed by international documents, are based upon the **Universal Declaration on Human Rights**²⁶. Two covenants comprehend rights stated in the Universal Declaration on Human Rights: **the International Covenant on Civil and Political Rights** and **the International Covenant on Economic, Social, and Cultural Rights**. Both documents, legally binding for States Parties, cite the rights related to health, including right to health. **Article 12 of the International Covenant on Economic, Social, and Cultural Rights**²⁷ recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and stipulates steps to be taken by States Parties. Those steps include: reduction of the stillbirth rate and of infant mortality; healthy development of the child; improvement of all aspects of environmental and industrial hygiene; prevention, treatment and control of diseases; and access to health care services by all people. The Committee on Economic, Social and Cultural Rights in **General Comment 14**²⁸ interprets the right to health even wider, including not only timely and adequate health care but integral determinants of health also. Those determinants include access to safe and potable water and adequate sanitation, food and nutrition, housing, healthy environment and healthy working conditions, access to education and information related to health, including sexual and reproductive health.

26 Universal Declaration on human rights. Available at: <http://www.poverenik.org.rs/yu/pravni-okvir-pi/medjunarodni-dokumenti-pi/146-univerzalna-deklaracija-o-ljudskim-pravima.html> (accessed August 28,2015)

27 International Covenant on Economic, Social and Cultural Rights. Available at: <http://www.ljudskaprava.gov.rs/index.php/yu/ljudska-prava/konvencije/54-pakt-o-ekonomskim-socijalnim-kulturnim-pravima/62-pakt-o-ekonomskim-socijalnim-kulturnim-pravima> (August 28,2015)

28 UN. The right o the highest attainable standard for health:08/11/2000.E/C.12/2000/4. (General Comments). Available at: [www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4).

6.1.2. RIGHT OF ACCESS

a. Right 2 as Stated in the European Charter of Patients' Rights (ECPR)²⁹

“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.

An individual requiring treatment, but unable to sustain the costs, has the right to be served free of charge. Each individual has the right to adequate services, independently of whether he or she has been admitted to a small or large hospital or clinic. Each individual, even without a required residence permit, has the right to urgent or essential outpatient and inpatient care. An individual suffering from a rare disease has the same right to the necessary treatments and medication as someone with a more common disease.”

b. Right as stated in the constitution /national legislation

The Constitution of the Republic of Serbia³⁰

Article 68, guarantees the right to protection of mental and physical health.

- Everyone shall have the right to protection of his/her mental and physical health.
- Health care for children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and elderly persons shall be provided from public revenues unless it is provided in some other manner in accordance with the law.
- Health insurance, health care, and the establishing of health care funds shall be regulated by the law.
- The Republic of Serbia shall assist development of health and physical culture.

Law on Protection of Patients' Rights³¹

The Law on the Protection of Patients' Rights guarantees equal rights to qualitative and continuous health care in accordance with the state of health of each individual and generally accepted professional standards and ethical principles being of best interest for the patient, with respect to his/her personal beliefs (**Article 3**).

This law also shall be applied to the health care of foreign citizens, in accordance with the legislation and ratified international agreements (**Article 4**).

Article 6 guarantees the right of availability of health care:

“A patient is entitled to available and qualitative health care in accordance with his/her state of health, with respect to the available financial possibilities of the health care system. During the health care process, a patient is entitled to equal access to health care service, without discrimination related to financial status, housing, type of disease, time of access to health care facility or any other distinctiveness that could be the cause of discrimination.”

²⁹ European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

³⁰ Official Gazette of RS 98/2006.

³¹ Official Gazette of RS 45/2013.

Law on Health Care³²

Article 3 determines the right to health care:

“A citizen of the Republic of Serbia (hereinafter referred to as “the Republic”), the same as any other person who has permanent or temporary residence in the Republic, is entitled to health care, in accordance with the law. It is his/her duty to preserve and improve his/her health and the health of other citizens, as well as the conditions of living and working environment.”

The law states that “...social care for health, under equal conditions, shall be exercised in the territory of the Republic by providing health care to the groups of the population who are exposed to an increased risk of contracting diseases, by health care services to citizens related to prevention, control, early detection, and treatment of diseases of major social and medical importance, and by health care for the socially-vulnerable populations.” **(Article 11, paragraph 1).**

Health care for the persons covered by compulsory health insurance shall be provided from the funds of compulsory health insurance, while care for others (uninsured) shall be provided from the budget of the Republic and transferred to the organization in charge of compulsory health insurance **(Article 12)**. *(Authors’ note: In this process, the organization in charge of the compulsory health insurance fund then pays the health care provider directly for the care of those who are not covered by compulsory health insurance, using the money transferred from the state budget for this purpose. Therefore, the organization in charge of compulsory health insurance is the entity that directly pays all health care providers for care to all persons whether insured or uninsured.)*

Creating conditions for accessibility and equal use of primary health care is part of the social care of the autonomous province, municipality, or city, and each may adopt special health care programs for certain categories of the population, and/or kinds of diseases that are specific to the autonomous province, municipality, or city **(Article 13, paragraphs 1, 2, 3)**.

The Law on Health Care is based on principles of accessibility, equity and comprehensiveness of the health care.

- “The principle of accessibility to health care shall be realized by providing of adequate health care to the citizens of the Republic, which is physically, geographically, and economically accessible, and/or culturally acceptable, and in particular of the health care on the primary level” **(Article 19)**.
- “The principle of equity of health care shall be realized by the ban on discrimination while providing health care on the grounds of race, sex, age, national affiliation, social origin, religious beliefs, political or other affiliations³², income scale, culture, language, kind of disease, mental or bodily disability” **(Article 20)**.
- “The principle of comprehensiveness of health care shall be realized by inclusion of all citizens of the Republic in the health care system, with the implementation of uniform measures and procedures of health care, which include health promotion, prevention of diseases at all levels, early diagnostics, treatment, and rehabilitation” **(Article 21)**.

³² Official Gazette of RS 107/2005, 72/2009 – sec. law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013.

Health Insurance Law³³

The Health Insurance Law governs entitlements deriving from compulsory health insurance of insured persons and other citizens covered by compulsory health insurance, the compulsory health insurance organization and financing, and voluntary health insurance; and it governs other issues relevant for the health insurance system (**Article 1**). It specifies that health insurance in the Republic of Serbia is both compulsory and voluntary (**Article 2**).

Compulsory health insurance is organized in accordance to the principle of solidarity and reciprocity (**Article 5, paragraph 1**). Exercise of the solidarity and reciprocity principle is described in **Article 11**; this includes:

- establishing intergenerational solidarity and reciprocity, as well as solidarity and reciprocity between genders, between the healthy and the sick, and between the poor and the rich in providing and using the entitlements deriving from compulsory health insurance.
- establishing such a compulsory health insurance system where the compulsory health insurance expenses are borne by the insured and other contribution payers, in proportion to one's financial ability, whereas the entitlements deriving from compulsory health insurance are used by the persons with insurance risk.

Article 33 states the content of health care services delivered to a patient in the case of illness or injury outside of work, as well as in the case of work-related injury or illness.

- "The right to health care in the case of injuries and diseases not related to work covers health care with regard to prevention, early-stage diagnosis, family planning, pregnancy, the birth and postnatal period up to 12 months after delivery, as well as other health care services at primary, secondary and tertiary levels, depending of health status of the insurant.
- The right to health care in the case of work-related injuries or diseases covers the health care at primary, secondary and tertiary levels" (**Article 33, paragraphs 1 and 2**).

Article 34 specifies measures comprised by compulsory health insurance:

- medical rehabilitation in the case of illness and injury;
- medicines and medical supplies;
- prosthetic, orthotic and other devices for moving, standing and sitting, sight, hearing and speech, dentures and other devices.
- the National Health Insurance Fund adopts a general by-law for each calendar year.

Article 47 states that this act, officially approved by the Government, governs:

- the scope, range and standards of the right of access to health care deriving from compulsory health insurance for certain types of health care services and diseases,
- the percentages to be paid from compulsory health insurance funds up to the total amount of health care service price, and
- the percentage to be paid by the insured .

Articles 59 and 60

If the scope and range of the rights of access to health care covered by the compulsory health insurance cannot be exercised due to insufficient income realized by the National Health Insurance Fund,

33 Official Gazette of RS 107/2005, 109/2005, 57/2011 and 119/2012.

i.e. due to any special circumstances, the Government may deliver an enactment by which priority shall be established in providing and executing health care (**Article 59**). The Republic is the guarantor for the obligation of the National Health Insurance Fund in exercising the rights deriving from compulsory health insurance (state guarantee), for emergency medical aid and health care provided to the insured in inpatient health facilities, which is established as priority (**Article 60**).

- The Health Insurance Law gives special attention to those suffering from rare diseases, specifying that “in case that the National Health Insurance Fund is not able to provide sufficient funding from compulsory health insurance income, the funding of treatment of patients suffering from certain rare diseases will be provided from the budget of the Republic of Serbia, as well as from other sources, in accordance to law” (**Article 59, paragraph 2**). (*Author’s note: A list of covered rare diseases is not part of the law; a commission within the Ministry of Health determines the diseases to be covered, following the recommendation of the World Health Organization.*)

Law on Protection of Persons with Mental Disabilities³⁴

Article 8 guarantees right to equal conditions of treatment, stating that a person with mental disabilities is entitled to:

- equal conditions of treatment appropriate to his/her health needs, under the same conditions as other health care services users
- treatment in the least restrictive environment, with use of the least restrictive and coercive medical procedures treatment in accordance to his/her religion and culture”.

Law on Exercising of Rights to Health Care of Children and Women during Pregnancy, Delivery and Postnatal Period³⁵

The law governs the right to health care protection and right to the transportation benefit relating to the use of health care services for all children of all ages and for women during pregnancy, delivery and postnatal periods, regardless of the ground upon which they obtained health insurance, if the mentioned rights could not be exercised on the basis of compulsory health insurance in accordance with the Health Insurance Law (**Article 1**). (*Authors’ note: The law does not direct health care providers to do anything specific but requires that all health care services for the named groups are to be provided regardless of whether the individual person does or does not have health insurance. In case of a violation of this right, a misdemeanor case may be opened in response.*)

Law on Organ Transplantation³⁶

This law is based on principles of availability and non-discrimination implemented in a way that ensures equal transplantation opportunities for all transplant recipients, if medically justified, regardless their gender, religion, nationality, age, social and economic status, political or other beliefs with respect to ethical principles and medical criteria for donating and receiving of organs (**Article 7**).

34 Official Gazette of RS 45/2013.

35 Official Gazette of RS 104/2013.

36 Official Gazette of RS 72/2009.

Law on Infertility and Biomedical Assisted Reproduction Treatment³⁷

The law is based on the principle of equality, ensuring equal conditions regarding infertility treatment by biomedical assisted reproduction (BAR) for both men and women in accordance to law (**Article 8**).

c. Supporting Regulations/Bylaws/Orders

Numerous bylaws regulate in detail the right to equal access and require non-discrimination in the provision of healthcare. As an example, the National Health Insurance Fund adopts: a general bylaw for each calendar year prescribing equal access for all groups, as well as rights and access; a bylaw regulating equal access to medicine and medical equipment; and a bylaw regarding protection of rights of insured persons.³⁸ In addition, the Ministry of Health endorsed the bylaw in 2013 regulating the way of dealing with remarks given by the Counselor for protection of insured persons' rights related to the right of equal access.

Equal access to health services at the primary care level is provided by 158 state-owned primary health centers, with a well-developed network of outpatient facilities and offices, covering the territory of one or more municipalities or towns, in accordance with the Health Institutions Network Plan³⁹. Primary health care is provided by a chosen doctor who is either a general practitioner or a specialist in general medicine, in occupational medicine, pediatrics, gynecology or dentistry. According to the same plan, secondary and tertiary health care services are provided by hospitals as the continuation of diagnostics, treatment and rehabilitation initiated at the primary level, or when specialized care is required. There are 40 general hospitals, 37 special hospitals for acute and chronic conditions and rehabilitation, 6 teaching hospitals, 16 institutes, 4 clinical-hospital centers (at the metropolitan level, founded by the City of Belgrade), 4 clinical centers (at the national level, founded by the State), and 23 public health institutes. Since 2000, significant progress has been made in developing the overall health policy in Serbia. The aim of an ambitious reform program undertaken from 2004 to 2010 was to strengthen preventive health care and services, with a view to decreasing rates of preventable diseases and total health care costs. The reform also included the restructuring of hospitals to respond to patient needs more effectively and the development of a new basic package of health care services aligned with existing resources. The changes in the financing of the health system were supposed to introduce an approach where resources are allocated based on patient needs and not on staff structures. The payment system for primary health care was made dependent on capitation, while a model of diagnostic related groups was introduced as the framework for payments in the secondary health care. Equal access to health care is implemented through a number of multi-sectorial and sectorial strategies, policies and programs (Table 6.2).

37 Official Gazette of RS 72/2009.

38 National Health Insurance Fund. <http://www.rfzo.rs/index.php/dokumenta> (accessed August 28,2015)

39 Official Gazette of RS 42/2006, 119/2007, 84/2008, 71/2009, 85/2009, 24/2010.

TABLE 6.2. EXAMPLES OF MULTI-SECTORIAL AND SECTORIAL STRATEGIES THAT DIRECTLY OR INDIRECTLY SUPPORT RIGHT TO EQUAL ACCESS TO HEALTH SERVICES IN SERBIA

MULTI-SECTORIAL STRATEGIES	SECTORIAL STRATEGIES
Poverty Reduction Strategy RS, 2003	National Strategy for the Fight against HIV/AIDS, 2005 HIV Infection and AIDS Strategy, 2001
Action Plan for Children, 2004	Strategy for Youth Development and Health, 2006
Pro-natal Strategy, 2008	Tobacco Control Strategy RS, 2007
National Strategy for Youth, 2008	Strategy for Mental Health Protection Development, 2007
National Strategy on Protection of Children from Violence, 2008	Strategy for Fight against Drugs for 2009-2013, 2009
National Strategy for Promotion of Status of Women and Promotion of Gender Equality, 2009	Strategy for Prevention and Control of Chronic Non-communicable Diseases, 2009
Strategy for Improvement of the Status of Roma, 2009	Public Health Strategy, 2009
National Strategy for Preventing and Combating Domestic Violence and Violence in Intimate Partner Relationships, 2011	Strategy for the Continuous Improvement of Health Care Quality and Patient Safety, 2009

Source: Website of the Government of the RS (www.srbija.gov.rs) and Ministry of Health of the RS (www.zdravlje.gov.rs).

In order to support the implementation of reforms, the Healthcare Development Plan of the Republic of Serbia⁴⁰ sets a number of specific goals to be met by 2015. These include the implementation, monitoring and evaluation of multi-sectorial and sectorial strategies and plans aimed at improving health among children and adolescents. An important objective is to enhance health care for women of reproductive age, school-aged children and adolescents, persons with disabilities, as well as socially marginalized groups. As an example, the plan highlights the importance of continuing the consistent implementation of the National Program of Health Care of Women, Children and Adolescents⁴¹. Detailed methodological instructions for the implementation of this Program were produced in 2010 by the Republic Commission for Women's, Children's and Youth's Health Care.

d. Provider codes of ethics

The Code of Ethics of the Serbian Medical Chamber⁴² states that an honorable duty of physicians is to dedicate their professional work to protection of health and treatment of people, in accordance to their conscience, humanity, devotion and the best knowledge. In accordance to that, a physician has to respect human life from its beginning to the end, offering health protection and respecting the human body and privacy after death. A physician must offer his/her medical help to everyone, regardless of age, sex, race, nationality, religion, social status, education or social background, with respect to human rights and human dignity (**Article 4**).

40 Official Gazette of RS 88/2010.

41 Official Gazette of RS 28/2009.

42 Official Gazette of RS 121/2007.

The Dentists Code of Ethics, Article 5,⁴³ states that “a dentist always offers his/her professional help to everyone, regardless of race, religion, nationality, political beliefs and social status.”

The Code of Ethics of the Serbian Chamber of Nurses and Health Technicians⁴⁴ emphasizes the following principle:

- “Nurses and health technicians build professional relationships with all health care services users (II principle).
- Nurses and health technicians have a moral obligation to treat all users of health care services with the same responsibility and understanding. Their devotion must be based on the principle of equality to everyone”.

e) Practical examples

Example(s) of Compliance

1. Emergency health care service, if needed, is provided in the nearest health care institution to any patient, even if his/her health insurance document is not verified in the National Health Insurance Fund Branch with the same official seat as the respective health care institution. A patient without a verified health insurance document is entitled to emergency health care service. As an example, after a serious traffic accident at the beginning of 2015, over 40 foreign citizens (illegal immigrants from Nigeria, Bangladesh and Syria) were injured and all of them received not only emergency care, but full treatment in the hospital – hospitalization in the general hospital in Leskovac and Nis Clinical Center free of charge.
2. The health sector has formulated a number of strategies and projects to improve the accessibility of health care and the overall health status among the Roma population. A particularly successful initiative has involved the hiring of Roma health mediators assigned to multidisciplinary teams in primary health care centers, which conduct home visits in 59 towns and municipalities in Serbia. The Roma health mediators have the task of linking members of the Roma population in Roma settlements with health care services and informing them of how to fulfill their rights for health care services. The Ministry of Health is working on regularizing the post of Roma Health Mediator, with a view to fully integrating it into the public health system.
3. The Ministry of Health has made considerable progress in adopting legislation⁴⁵ that recognizes the vulnerability of the Roma population and access to health services. These laws, often consisting of specific articles of laws such as the law on health care or the law on health insurance, also take account of the need to ensure the right to health care and health insurance for Roma who lead a nomadic life or otherwise lack permanent residence.

(Authors' note: However, there are also elements of violation of the right of access to health care services because the inconsistent application of this legislation in practice continues to be a challenge, as many employees of local health insurance offices are unaware of relevant regulations and in some cases refuse to register applicants so that they can claim their entitlements. Furthermore, many Roma, including chil-

43 Official Gazette of RS 14/2008.

44 Official Gazette of RS 67/2007.

45 The Law on Health Insurance (Article 22, Official Gazette of RS 119/2012) and Rules of Procedure on the Method and Procedure of Exercise of Rights from Mandatory Health Insurance

dren without permanent or temporary residence, continue to be unable to obtain health insurance as they do not have the required citizens' unique personal number (CUPN). Some branch offices are issuing health booklets with temporary CUPN numbers that enable beneficiaries to access some health services. However, this temporary measure is often not sufficient and can still lead to eligible beneficiaries being denied health care or medication free of charge⁴⁶, except in the case of emergency care, which is available to everyone, regardless of residence).

4. While there has been progress in the enactment of strategies and legal regulations in the area of health and health care of children, there are still challenges and problems when it comes to inter-sectorial coordination among national, regional and local levels of healthcare services. Guided by the "Health in All Policies" concept, the government has established a Coordination Body "Health in All Policies" consisting of 12 relevant ministers and 11 inter-ministerial expert working groups addressing relevant public health issues. Their role is to develop and promote inter-sectorial and integrated approaches to health, develop partnerships, build capacities of relevant institutions and monitor implementation of the defined public health inter-ministerial plans.

Example(s) of Violation

1. There are significant differences in the accessibility of healthcare among children and women in vulnerable groups. Poor families, children and women living in Roma settlements, persons with disabilities, persons placed in institutions and children without parental care are all at a higher risk of certain diseases. Recent studies and analyses of social exclusion of women and children in rural areas of Serbia also indicate that health care services are insufficiently accessible and available among the poor, unemployed and those engaged exclusively in agricultural activities. These reports also underline that people living in rural areas are dissatisfied with the current network of rural satellite health departments ("zdravstvena stanica")^{47; 48}. Financial concerns, e.g. additional expenses for travel and loss of time, are frequently referred to as obstacles to using healthcare services even in areas with reasonably high availability. The same surveys suggest that although the Constitution guarantees equal access to health insurance for all citizens of Serbia, the share of the rural population without such insurance ranges from 7.5% in Vojvodina to 16.5% in Southeastern Serbia, and up to 28% among vulnerable groups. In rural areas, up to half of people without health insurance report that they resort to self-medication.
2. As transport is not always available, expectant mothers or newborn babies are unable effectively to access the medical care and assistance they need, especially when complications arise. A pooling of resources for neonatal intensive care at large regional and interregional maternity units, coupled with adequate transport, could significantly improve the accessibility of such key services. According to the UNICEF pediatricians' focus group discussion, health outcomes for mothers and infants often suffered because of poor communication and coordination among gynecologists

46 Analysis of the Main Obstacles and Problems in Access of Roma to the Rights to Health and Health Care. Belgrade: Praxis 2011. www.praxis.org.rs (accessed August 28, 2015)

47 Cvejić S, Babović M, Petrović M, Bogdanov N, Vuković O. Social Exclusion in Rural Areas of Serbia. Belgrade: UNDP Serbia, Sector for Inclusive Development 2010. 84-86. <http://www.secons.net/admin/app/webroot/files/publications/SocialExclusioninRuralAreasinSerbia2010.pdf> (accessed August 28, 2015)

48 Bogdanov N, Tomanović S, Cvejić S, Babović M, Vuković O. Access for women and children to services in the rural areas of Serbia and proposed measures to improve their situation. Belgrade: UNICEF Serbia 2011. 38-41. http://www.unicef.org/serbia/Access_for_women_and_children_to_services_eng.pdf (accessed August 28, 2015)

and pediatricians, as well as insufficient interaction between medical professionals and health policy makers. Participants of focus group called for a more proactive approach to preventive care to help reduce perinatal mortality among risk groups. Others stressed that a more rigorous analysis of the causes of such deaths would allow for a more evidence-based and effective response. There were also concerns that physicians are not systematically held accountable for malpractice and neglect, and that patients have little effective recourse when their right to health is compromised. More work would further need to be done to ensure that parents are aware of the importance of healthy living before, during and after pregnancy. To this end, counseling and health care during pregnancy need to be more accessible to mothers in remote and marginalized regions.

Actual Case(s)

1. The complaint was filed to the Protector of the Citizens / the Ombudsman of Serbia, by patient. An outpatient department of a hospital charged for use of the Vacutainer blood collection system in lab diagnostics, although this service was covered by compulsory health insurance funding (Finding of the Protector of Citizens /The Ombudsman of Serbia). The Protector of the Citizens issued warning and the recommendation that the outpatient department should abolish that hospital charge in the future, and cover expenses of all patients produced by this act.
2. Patients of a mental care institution suffering from somatic diseases were sent to a general hospital to be examined by the specialists. They were sent back to the mental care institution without being examined, with the explanation that they were not sedated before being sent to the general hospital. The recommendation of the Protector of the Citizens / the Ombudsman of Serbia was that in such cases a mental care institution has to inform the director of the respective health care institution, as well as the Ministry of Health, that patients were not sedated, providing adequate medical documentation⁴⁹.

f. Practice Notes for Lawyers

For more information, please see “Right to Preventive Measures , Practice Notes”, as the procedures described are the same, as well as Chapter 8.

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.

6.1.3. RIGHT TO INFORMATION

a. Right 3 as Stated in the European Charter of Patients’ Rights (ECPR)⁵⁰

„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.

49 The Protector of the Citizens / the Ombudsman of Serbia Civic defender Finding. Available at: <http://www.ombudsman.pravadeteta.com/> (accessed August 28,2015)

50 European Charter on Patients’ rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

Health care services, providers and professionals have to provide patient-tailored information, particularly taking into account the religious, ethnic or linguistic specificities of the patient. The health services have the duty to make all information easily accessible, removing bureaucratic obstacles, educating health care providers, preparing and distributing informational materials. A patient has the right of direct access to his or her clinical file and medical records, to photocopy them, to ask questions about their contents and to obtain the correction of any errors they might contain. A hospital patient has the right to information which is continuous and thorough; this might be guaranteed by a “tutor”. Every individual has the right of direct access to information on scientific research, pharmaceutical care and technological innovations. This information can come from either public or private sources, provided that it meets the criteria of accuracy, reliability and transparency.

b. Right as Stated in the Country Constitution/Legislation

The patient is the user in health care system. Part of this system is informing of the public.

Patients’ Rights Law

Article 7 of the Patients’ Rights Law⁵¹ states that the right to information implies that a patient has the right to all information related to his/her health, health service and way of using it, as well as to all available information based on research and technological innovations. A patient is entitled to information about the name and professional status of health care providers participating in his/her treatment. Besides medical information, he/she is entitled to information related to health insurance and procedures for exercising those rights. A patient is entitled to prompt information, provided in a manner of best interest to the patient.

Article 11 of the Patient Rights Law states that patient has the right to get in time and complete information about diagnostic and therapeutic procedure in order to decide about his/her consent.

Health Care Evidence Law

The right to information correlates with the obligation of health institutions and other legal subjects to provide that information. Information may be related to issuing of medical results, certificates, discharge papers and other documents related to treatment. The law explicitly regulates both the patient’s obligations and rights to obtain discharge papers with epicrisis after treatment, childbirth or rehabilitation issued by inpatient institution (**Article 13**)⁵². According to this law, a patient is entitled to all information that affects him/her. Besides that, the obligation of providing broader information related to preservation of health and healthy lifestyle, as well as to harmful factors of the living and working environment, which may have negative consequences for health also exists (**Article 13**).

51 Official Gazette of RS 45/2013.

52 Official Gazette of RS 14/81 and 44/91. See: Art. 62 of Law - 24/85-1357. See: Art. 43 of Law - 6/89-397. See: Art. 96, par. 2 of Law - 17/92-569. See: Art. 27 of Law - 53/93-2467. See: Art. 2 of Law - 67/93-3111. See: Art. 20 of Law - 48/94-1497. See: Art. 102 of Law - 101/2005-28; Health Care Evidence Law, Official Gazette of RS 101/2005.

Law on Public Health

Information of a patient's interest may be related to information about other people's health, such as information related to public health, for example, that is to be processed in order for health programs and medical decisions to be rationally designed. The main objective of such decisions is to support education and to train people to take good care of their own health. Reports, analysis and evaluations, carried out by institutes for public health, should be available to the public (**Article 21**)⁵³.

Law on Health Care

Each person is entitled to be informed about protection of personal life in cases of epidemics and other major disasters and accidents (threat from ionizing radiation, poisoning, etc.). The competent public health care facility and private practice entities shall timely and truthfully submit data about the break out of epidemics and disasters to the competent authorities of the municipality, city, autonomous province, and the Republic, which shall inform the public thereon (**Article 41**)⁵⁴. (*Authors' note: the competent authorities include both medical and administrative ones.*)

In the implementation of health care, a health care facility and private practice entity shall apply scientifically- verified, tested, and safe health care technologies in prevention, diagnostics, treatment, and rehabilitation. The health care technologies, in the sense of this law, imply all health care methods and procedures that can be used for improvement of the health of people, in prevention, diagnostics, and treatment of diseases and injuries, as well as in rehabilitation. This includes safe, quality, and efficient medicines and medical devices, medical procedures, as well as the conditions for providing of health care (**Article 67**). (*Authors' note: This Article relates only to technologies that are evidence-based from scientific research; the Health Inspection is responsible for monitoring the application of all technologies.*)

Health Insurance Law

The insured patient is entitled to all kinds of information deriving from compulsory health insurance and transparency of the National Health Insurance Fund in meeting the needs of the insured people, as well as organizations and other stakeholders who are interested in the Fund's activities (**Article 12**)⁵⁵. A health care services provider is obliged to issue a written notification to the insured about the reasons why a health care service is not medically necessary, i.e. justified for health condition of the insured, and why the insured is to be put on a waiting list, as well as the established order of such waiting list. If the certain health care service is provided on the personal request of the insured, regardless of the prior notification, all expenses relating to the health care service delivered therein shall be borne by the insured (**Article 57**).

c. Supporting Regulations/Bylaws/Orders

The right to information is also governed by supporting regulations, such as the Rulebook on keeping medical records, data entering methods and reports writing⁵⁶. As an example, the patient has the right to ask and obtain information regarding why a specific diagnostic procedure was applied and whether he/she will need additional diagnostic intervention. He/she also has the right to obtain information about all possible complications of procedures or complications of diseases.

53 Official Gazette of RS 72/2009.

54 Official Gazette of RS 107/2005, 72/2009 – sec. law, 88/2010, 99/2010, 57/2011, 119/2012 i 45/2013 - sec. law.

55 Official Gazette of RS 107/2005, 109/2005, 57/2011 i 119/2012 See: CC RS IUz-361/2012 - 55/2013-75.

56 Official Gazette of RS 30/2013.

d. Provider codes of ethics

According to the norms of health care providers, a patient is entitled to be informed of procedures and medical technical capacities of the respective health care institution, relevant to his treatment, as well as qualification of all medical staff dealing with him (**Article 43 of Code of Ethics of the Serbian Medical Chamber**)⁵⁷. Health care providers are required to provide all information to patient.

e. Practical examples

Example of Compliance

1. A hospital published different types of guidelines for patients and members of their families, describing various types of disorders, treatments, involving family members in treatment, etc. In addition, the notice board contained information on institution rules, both in Serbian and Hungarian languages, with the daily activities schedule. *(Authors' note: These are actually internal publications of the hospitals, similar to leaflets, which hospitals deliver to their patients. Each hospital makes its own design with text and eventually pictures to inform patients.)*
2. The patient asks a healthcare provider for information regarding his medical condition, including the expected results of medical interventions suggested by the healthcare provider. The healthcare provider explains medical data to the patient and discusses anticipated results of the proposed intervention, with special emphasis on the possible side effects and risks. *(Authors' note: the Serbia Law on Patient Rights contains two articles, 7 and 11, about the right to information, but different types of information. Although the example here is closely related to informed consent, a right discussed below, it is also the case in Serbia that the patient has the right to know, before treatment, the doctor's name, number of years of working experience and qualification in the particular specialization, as stated in Article 7.)*
3. The Strategy for Development and Health of Young People underlines the importance of an interdisciplinary approach to health protection of children, particularly at the local level. The Strategy also focuses on improving information and availability of health services for children and adolescents, as well as targeted actions directed at risk groups.
4. The management of health problems of children with developmental difficulties (physical and mental) is recognized as a priority by the Ministry of Health; this includes proper dissemination of information for parents. Qualitative studies - including focus group discussions of parents and health care service providers - commonly recognize two key weaknesses that hinder implementation of recently-adopted regulations, programs, and instructions in this area: low levels of information among both potential health system users and professionals, and poor organization of health care services (Decree on National Program of Health Care for Women, Children and Youth⁵⁸; Decree on National Program of Preventive Health Care for Children with Psycho-physiological Disorders and Speech Pathology)⁵⁹.
5. In 2012 the Republic of Serbia began the process of making the second and third periodic reports on the implementation of the Convention on the Rights of the Child by constituting a working

57 Official Gazette of RS 121/2007.

58 Official Gazette of RS 28/2009.

59 Official Gazette of RS 15/2009.

group. Also, the Republic of Serbia is going through the second cycle of the Universal Periodic Review (UPR), which takes place in the period from 2012 to 2016. The Serbian government in its session on 18 October 2012 adopted the Conclusion on the acceptance of the report of Serbia for the second cycle of the Universal Periodic Review. After a dialogue with the state delegation the UN Human Rights Council sent to the Republic of Serbia the conclusions and recommendations with, among others, references to the exercise of the rights of the child. Therefore, measures are applied to improve human rights, including children's rights, in Serbia following these conclusions and recommendations.

Example(s) of Violation

1. Many Roma have limited access to information, which combined with a lack of trust in institutions, often prevents them from using healthcare services in case of need. An example is less utilization of preventive services, such as vaccination and counseling services during pregnancy.
2. Although substantial types of services intended for children are provided through child development counseling services, the data on these services are, unfortunately, not routinely published and therefore neither is the information about the possibility to utilize such services.
3. The implementation of strategic goals aiming at strengthening the participation of young people in decisions concerning their health is still lagging behind the anticipated progress in achieving these goals. There is, for example, a need to further develop and evaluate the work of counseling services for young people, according to established procedures in relation to the right to information. Local self-governments also need to be more empowered to take over some of the competences and responsibilities in this field. A recent survey conducted by young people through a network of youth associations suggests that only one in three young persons is aware of the existence of such counseling services for young people, and that only 15% of them know where to find these services⁶⁰.

Actual Case(s)

1. A. Ž. brought her three-year-old child to an outpatient department for inhalation treatment. She asked the nurse for help and for explanation about the procedure, since she was inexperienced with that treatment. The nurse failed to provide her an explanation on using the inhalation device. A. Ž. submitted the complaint to the Counselor for protection of patients' rights. The Counselor prepared the report about violation of this right and submitted it to A. Ž., to the Head of the outpatient department, and to the Director of the hospital. The Director informed the Counselor about measures which were taken at the hospital. The Counselor informed A. Ž., who was happy with measure (a written warning to the nurse about this violation of A. Ž.'s rights).
2. During hospitalization, after a laparoscopic procedure, D.J. developed a high fever, his health condition rapidly deteriorated, and eventually he lapsed into a coma. His mother and sister tried to get information on the prognosis related to his health status. None of the physicians provided them with information of the patient's health status; the patient died afterwards. (*Authors' note: His mother and*

60 The Report on the Rights of the Child in the Republic of Serbia from the perspective of children and youth. Child Rights Centre 2012. Available at: <http://www.cpd.org.rs/en/home.html> (accessed January 20, 2015)

sister subsequently submitted a complaint to the Counselor for Protection of Patients' Rights. The Counselor prepared the report about violation of the right to information and submitted it to the director of the hospital, who implemented a resulting adequate measure. As previously noted, the Serbia Law on Patients' Rights contains two articles (7 and 11) on the right to information, each one about a different type of information. In this instance, the applicable article is Article 11)

f. Practice Notes for Lawyers

The patient's right to access any type of information regarding his health, healthcare provision, or available scientific research and technological innovations must be taken seriously, since they represent the basis for the realization of patients' rights and for consent to medical interventions. This information also serves as the basis for healthcare providers' liability in cases when such information has not been provided. Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of this right.

For example, if the medical doctor does not provide all necessary information to the patient and the patient complains, the process to obtain the information begins with submission of a written complaint to the Counselor for the Protection of Patients' Rights, as noted in examples above. The Counselor's subsequent report about the alleged violation of the right to information is to be submitted to the Director of the health institution where the alleged violation occurred. The Director and the Managerial Board of the institution decide whether there is need for a measure to be implemented in response to the allegation and implement, and, if so, implement the applicable measure.

Additionally, the patient can submit a written complaint to the Health Council, the Counselor for Protection of Insured Persons' Rights, the applicable Branch of the National Health Insurance Fund and Health Inspection. Likewise, a misdemeanor procedure can be opened. Articles 44-47 of the Serbia Law on Patients' Rights provides the applicable offenses related to health care providers and patient counselors (and corresponding penalties of 10,000-50,000 RSD for providers and 20,000-50,000 for patient counselors). The full procedures are explained in detail in Chapter 8 of this practitioner guide.

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.

6.1.4. RIGHT TO CONSENT

a. Right 4 as Stated in the European Charter of Patients' Rights (ECPR)⁶¹

„Every individual has the right of 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.

Health care providers and professionals must give the patient all information relative to a treatment or an operation to be undergone, including the associated risks and discom-

61 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

forts, side effects and alternatives. This information must be given with enough advance time (at least 24 hours notice) to enable the patient to actively participate in the therapeutic choices regarding his or her state of health. Health care providers and professionals must use a language known to the patient and communicate in a way that is comprehensible to persons without a technical background. In all circumstances which provide for a legal representative to give the informed consent, the patient, whether a minor or an adult unable to understand or to will, must still be as involved as possible in the decisions regarding him or her. The informed consent of a patient must be procured on this basis. 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. A patient has the right to refuse information about his or her health status.”

b. Right as Stated in the Country Constitution/Legislation

Law on Protection of Patients’ Rights

Basic determinants and explanation of the right to consent are contained in the law, which governs a patient’s right to make decisions freely regarding his/her life and health, except when this decision could endanger life and health of others. No medical treatment or any other measure can be carried out without consent of the patient (**Articles 15 to 19**)⁶². A patient exercises this right by written or oral consent, i.e. acquiescently, if he/she does not explicitly oppose the recommended medical treatment or measure, if the patient is legally competent to consent; in the case of a patient who is not legally competent, consent must be provided by his/her legal representative. Written consent of the patient, i.e. consent of the patient or his/her legal representative, is requisite when invasive diagnostic or therapeutic treatment is recommended. A patient may withdraw his/her consent (orally or by signing it) to recommended medical treatment or measure before or during the procedure.

Other related rights derive from the right to consent. For example, a patient is entitled to authorize a representative to give the consent on his/her behalf in case that he/she is not capable of making decisions (**Article 16**). *(Authors’ note: This also applies to the right of a patient to declare his medically-important opinion (advanced directive), which must be in written form. The advance directive covers only the consent which can be given on his behalf by another person related to some medical interventions. The law does not specify different types of advance directives. The advanced directive is considered a legal document and part of medical record. Recipients of advanced directives are not prescribed by the law; they can be any person who the patient nominates.)*

The right to decline medical treatment or measure is part of the right to consent (**Article 17**). A legally competent patient has the right to decline recommended medical treatment, even if it could save or prolong his/her life. A physician or other health care provider is obliged to explain the consequences of such a decision to the patient and to ask for written consent that will be kept in the patient’s medical record. In case the patient refuses to give his written consent, an official written note has to be made. Therefore, written consent or declination of the patient or his/her legally appointed representative regarding recommended medical treatment or procedure will be kept in the patient’s medical record.

62 Official Gazette of RS 45/2013.

Article 18 states that the right to consent can also be exercised through specific forms of consent that are legally relevant in practice and regulated by law. Those forms can be in regard to the the capacity of patients or to medical procedures. For example, if a patient is unconscious or not capable to give his consent for any other reason, emergency medical measures may be undertaken without the patient's consent, and family members will be informed whenever it is possible. Such medical measures may be undertaken according to the finding of the Board of Experts, which consists of senior medical doctors - usually three from the medical field, in an emergency case. There is a Board of Experts finding in each individual case. Also according to **Article 18**, the specific form of consent also refers to the medical treatment of children and persons whose capability of making decisions is questionable. If the legally appointed representative of a child or legally incompetent patient is not available or declines the recommended emergency medical treatment, such treatment may be undertaken if it is in the best interest of patient, as determined by the Board of Experts. Assumptive consent can be applied in the case, regulated by law, when a surgical procedure needs to be extended and when this extension could not have been presumed. This extension is based on the surgeon's assessment that it is necessary and that it has to be done at short notice⁶³. (*Authors' note: "extended" and "extension" in this context refers to the performance of an additional surgical procedure, not originally planned, due to appearance of its need during an ongoing operation as absolutely necessary and cannot be delayed.*)

Article 19 of Law on Protection of Patients' Rights and Articles 65 and 132 of the Family Law

- In case that the patient is a child or a legally incompetent person, a medical procedure may be undertaken if the legally appointed representative gives his consent (substitute consent) upon being informed prior to the surgery, in accordance to law (**Article 19, Law on Protection of Patients' Rights**). The competent health care provider is obliged to include a child or legally incompetent person in the decision-making process, in accordance with their maturity and mental competences. Due attention must be given to a child's opinion in all issues concerning the child and in all proceedings where his/her rights are decided on, in accordance with the age and maturity of the child.
- **Article 65 of the Family Law**⁶⁴ states that a child who has reached 10 years of age shall have the right to freely and directly express his/her opinion in every court and administrative proceedings where his/her rights are decided upon.
- The competent health care provider who believes that a legally- appointed representative does not act in the best interest of a child or legally-incompetent person is obliged to inform the relevant guardianship authority (**Article 19, paragraph 3, Law on Protection of Patients' Rights; Article 132, paragraph 2 (temporary guardian), of the Family Law**).
- A child who has reached the age of fifteen (15) and who is able to reason has the right to give consent to a recommended medical procedure in accordance with a previously provided explanation (**Article 19, Law on Protection of Patients' Rights; Article 62, paragraph 2 of Family law**). However, a decision of a child who has reached the age of fifteen (15) cannot be treated as substantive if the child refuses the recommended medical procedure. In that case, the physician is obliged to obtain consent from the legally- appointed representative.

Article 25, Law on Protection of Patients' Rights: Written consent is required in medical research. This written consent document has to be filled by the patient or his legally-appointed representative,

63 Official Gazette of RS 45/2013.

64 Official Gazette of RS 18/2005 and 72/2011 - sec. Law.

after the patient or representative is informed about the purposes, objectives, procedures, expected outcomes, possible risks and accompanying undesirable factors. Written information has to be provided upon the request of the patient. *(Author note: though it not explicitly stated in any law or article, the written consent document is a part of medical record and must be placed in the patient's medical record).*

Law on Cell and Tissue Transplantation and Law on Organ Transplantation

In addition to general requirements related to patients' consent, there are also specific requirements that can be caused by patient capacities, or a medical measure or procedure for which consent is given. Informed consent procedure remains the same, with respect to additional requirements. For example, laws governing transplantation consider consent as expression of free will in written form that includes how and to whom consent is given, including keeping the consent in the patient's medical record (**Article 21, Law on Cell and Tissue Transplantation** and **Article 21, Law on Organ Transplantation**)⁶⁵.

In case of a living donor of organ/cell/tissue, consent of both donor and recipient is required before transplantation. In case of organ/cell/tissue transplantation from a deceased person, the consent procedure is more strict. That transplantation is allowed only if a legally-competent decedent did one of the following:

- 1) gave and personally signed a written consent for donating organ/cell/tissue in case of his/her death and signed if in the presence of at least one witness confirming the authenticity of the signature and that it expressed the free will of the donor; or
- 2) authorized another person to give written consent on his/her behalf for donating organ/cell/tissue in case of his/her death- signed in his/her presence and in the presence of at least one witness confirming the authenticity of the signature and that it expressed the free will of the donor.

According to the written consent of the donor and upon his/her death, an organ may be taken after the family members are informed except in the case when family members are explicitly against the removal and, in writing or orally, they provide the facts undoubtedly proving that the deceased changed his/her opinion before he/she died. (**Articles 50 and 56, Law on Cell and Tissue Transplantation; Law on Organ Transplantation**)

Law on Protection of Persons with Mental Disabilities

If a patient with mental disabilities understands the nature, consequences and risk of the recommended medical treatment and, in accordance with that, is capable of decision-making and expressing his/her free will to be subjected to such treatment, he/she will give exclusive written consent (**Article 16**)⁶⁶. A patient may request the presence of a person in whom he/she has confidence during giving his/her consent on recommended treatment.

A patient is not allowed to disclaim his/her right to give or decline consent. However, if the patient is legally incompetent, consent for recommended treatment must be given by the legally-appointed representative (**Article 18**).

65 Official Gazette of RS 72/2009.

66 Official Gazette of RS 45/2013.

On admission to a mental care institution, a patient with mental disabilities gives his/her written consent to the psychiatrist, who is obliged to determine the legal competence of the patient as well as to enter the consent in the patient's medical record (**Article 20**).

Law on Abortion

Acceptance of a freely-chosen or medically-indicated abortion is implied by the personal request of a pregnant woman for such procedure. The law explicitly approves the abortion on the personal request of the pregnant woman only (**Article 2**)⁶⁷. Written consent of a parent or guardian is required if the abortion has to be performed on a juvenile under the age of 16. In that instance, if consent of a parent or guardian cannot be provided due to absence or detainment, consent by a relevant guardianship authority must be provided.

Law on Infertility and Biomedically-Assisted Reproduction Treatment

Infertility treatment of a patient by applying Biomedically-Assisted Reproduction (BAR) treatment requires informed consent based on the right to free decision-making (**Article 9**)⁶⁸. Consent without information provided in accordance to law will be treated as invalid. Consent must be provided for each procedure separately and can be withdrawn in written form as long as sperm cells, non-fertilized oocytes, or early embryos are not yet implanted into the uterus of the woman. Prior to every implantation of sperm cells, non-fertilized oocytes, or early embryos, a physician must check whether the consent has been given or withdrawn (**Articles 37 and 38**).

Law on Blood Transfusion

Prior to a blood transfusion, written consent must be given. According to **Article 23**, a blood and blood components recipient may orally withdraw his/her consent before the beginning of the procedure. A physician is obliged to make an official note about the withdrawal of consent in the recipient's medical record⁶⁹.

Law on Protection of the Population against Infectious Diseases

If a patient or other legally-responsible person requires confirmation of identification of some infectious disease carriers, his/her consent for lab tests is assumed, in accordance to law (**Article 13**)⁷⁰. *(Authors' example: a patient may request information about an infective agent that produced disease; the laboratory will perform analysis of blood delivered for analysis by a doctor; the lab technician considers that there is written consent from the patient for his/her blood to be tested.)*

Law on Medicines and Medical Supplies

The written consent for participation in a clinical trial must be signed and dated by the patient/subject. Illiterate subjects may give verbal/oral consent for participation in the clinical trial in the presence of at least one witness (**Article 61**)⁷¹. *(Authors' note: the law does not prescribe who is qualified to be a witness.)*

67 Official Gazette of RS 16/95. See: Art. 101 of Law - 101/2005-28.

68 Official Gazette of RS 72/2009.

69 Official Gazette of RS 72/2009.

70 Official Gazette of RS 125/2004.

71 Official Gazette of RS 30/2010 and 107/2012.

Laws Applicable to Information and Patient's Informed Consent

In all previously mentioned cases, exercising the right to consent is based on previously provided information related to a recommended medical treatment or procedure. The patient's right to information is part of the *informed consent* concept, regardless of routine or special procedure. Consent given without information is not obligatory to the patient, in accordance with law. In that case, the health care provider who carries out the medical procedure bears the risk of harmful consequences (**Article 16 of Law on Protection of Patients' Rights**)⁷².

According to **Article 11 of the Law on Protection of Patients' Rights**, a patient is entitled to information that is necessary for decision-making related to the recommended medical treatment. Information must comprise:

- 1) diagnostics and prognosis of disease;
- 2) a short description of the recommended procedure, the objective and benefit of the recommended medical procedure, the duration and possible consequences of performing, or failure to perform, the recommended medical procedure;
- 3) type and presumption of possible risks and painful and other secondary or permanent consequences;
- 4) alternative methods of treatment;
- 5) possible changes of health status after the recommended medical procedure has been performed, as well as possible changes in lifestyle;
- 6) medicines' effects and possible side effects.

The health care provider has to provide information on diagnosis and treatment even if the patient does not require this information.

Information is to be provided orally, using everyday language, and considering age, education and emotional status of the patient. If the physician estimates that a patient, for any reason, does not comprehend the information that was given to him/her, this information may be provided to a family member. In case that the patient is not familiar with the official language that is in use in the territory of the relevant health care institution, he/she is entitled to ask for a translator, which health care institutions are required to have. If a patient is a deaf mute, an interpreter is to be provided. A patient may disclaim his/her right to information, except in the case when information is related to the necessity of the recommended medical treatment, i.e. if failure of procedure is of great risk. Exceptionally, a physician may suppress or minimize information regarding diagnosis, course and risks of recommended medical treatment if there is serious threat that information might endanger a patient's health. In that case, the information is to be provided to a family member (**Article 11, paragraph 5**).

Since information is an integral part of consent, attributes or type of consent may impact the nature of information. A patient is entitled to information related to costs of treatment, for example. A physician is obliged to enter into the medical record that he/she provided the required information to the patient, his/her family member or the legally- appointed representative (**Article 11, paragraph 10**).

In transplantation procedures, health care providers are also obliged to provide full information regarding the purpose and nature of the recommended procedure, success rate, usual consequences and possible risks, i.e. to explain potential severe adverse reactions and side effects and possible al-

72 Official Gazette of RS 45/2013. Connect to physician's responsibility to provide information.

ternative procedures (**Article 21 of Law on Cell and Tissue Transplantation/Law on Organ Transplantation**)⁷³.

In case a patient with mental disabilities withdraws his/her consent for a recommended medical treatment, the physician is obliged to explain the consequences of interruption of applying this treatment. When consent for the recommended medical treatment is provided by a legally-appointed representative of a child or a person with mental disabilities, the psychiatrist is obliged to inform him/her in a way and in accordance with the procedure established by law (**Articles 17 and 18 of Law on Protection of Persons with Mental Disabilities**)⁷⁴.

A physician, as the leader of an IVF team, is obliged to provide all information related to in vitro fertilization, especially regarding the health status of the patient, diagnosis, prognosis, possible consequences and risks for woman, man and child. The physician is also obliged to inform patients about other possibilities for solving or mitigating the causes of fertility, including procedures not provided by his health care institution, and non-medical choices such as adoption of a child or abandonment of treatment. The physician is obliged to teach partners about the procedure of preserving gametes and embryos, as well as to get to know their need regarding the deadline for keeping gametes and their decision on unused embryos. The physician also provides patients with information regarding the psychosocial counseling related to planned biomedical-assisted reproduction treatment (**Article 36 of Law on Infertility and Biomedical Assisted Reproduction Treatment**)⁷⁵.

A physician is to inform a blood or blood components recipient of all consequences of a blood transfusion before the procedure so that the patient can decide whether he/she will accept to have the procedure or not. The blood recipient is entitled to appoint a person who will be informed of all consequences of the blood or blood components transfusion and who will give consent on his/her behalf in case of his/her being incompetent to make the decision on his/her own (**Article 23 of Law on Blood Transfusion**)⁷⁶.

In clinical trials, subjects or their legally appointed representatives must be fully informed, in writing and in language they can understand, about the clinical trial and of their right to withdraw their consent to participate in the clinical trial at any time (**Article 61 of Law on Medicines and Medical Supplies**)⁷⁷.

c. Supporting Regulations/Bylaws/Orders

The right to consent is governed by by-laws, such as the Rulebook on the consent form and content related to organ transplantation⁷⁸ and the Rulebook on the consent form, consent disclaimer and consent disclaimer of a family member, i.e. a person closed to the deceased, for taking organs or tissues from the deceased⁷⁹.

73 Official Gazette of RS 72/2009.

74 Official Gazette of RS 45/2013.

75 Official Gazette of RS 72/2009.

76 Official Gazette of RS 72/2009.

77 Official Gazette of RS 30/2010 and 107/2012.

78 Official Gazette of RS 89/2012.

79 Official Gazette of RS 89/2012.

Informed consent for participating in clinical trials is governed by law. It requires consent to participate in a relevant clinical trial, signed and dated by a participant or by his/her legally appointed representative in case that the participant is legally incompetent. The consent is to be given freely, after the information on nature, significance, consequences and health risks have been provided (**Articles 2, 6 and 48 of Rulebook on information form content, i.e. documents related to approval of clinical trial and its procedure**⁸⁰).

The right to acceptance in the BAR procedure is governed not only by law but also by the Rulebook on information form content⁸¹. A physician is obliged to provide all information to the patient in the presence of at least one member of the BAR team. Information is to be provided in writing and to be clear and understandable.

(Authors' note: most of the laws applicable to the right to consent are new; regulation of the right to consent to date is governed by the laws themselves and the rulebooks noted in this section.)

d. Provider codes of ethics

Code of Ethics of the Serbian Medical Chamber

Article 45

- After being provided with relevant information, a patient is entitled to accept or decline outpatient or inpatient treatment also in accordance to medical profession rules⁸².
- A patient may give his/her consent or refusal of consent orally or in writing, having the right to decline a medical check-up or treatment even when doing so endangers his/her life.
- If a patient is vitally endangered, unconscious or legally incompetent, the physician may undertake relevant and urgent medical procedure, autonomously or in accordance with a consent signed by a member of the patient's family.
- If the patient is a juvenile or deprived of legal capacity and medical treatment is indicated but not urgent, his/her legally-appointed representative (spouse, parent, guardian, close relative) is the only person who may give written consent. If this is not possible, Social Services must be consulted.

Article 24

Regulations related to the medical profession emphasize the right to consent regarding the new treatment procedure for which voluntary, unforced, informed and signed consent is unconditionally required. A person, who should participate in medical researches or new, experimental procedures, has to be completely informed by a doctor on the importance, expected results and possible risks of such procedure.

Article 25

- A procedure can be aborted at any time upon personal request of a patient.
- Exceptionally, if a new treatment procedure or medicine is the only option for saving a patient's life and the patient is not capable of decision-making, consent may be given by his/her legally appointed representative.

80 Official Gazette of RS 64/2011 and 91/2013.

81 Official Gazette of RS 37/2013.

82 Official Gazette of RS 121/2007.

- If the patient becomes capable of decision-making during the experimental procedure, the researcher must obtain his/her written consent to continue.
- A patient may refuse his/her consent for participation in research without any consequences. Usage of pedagogical, professional or new methods for scientific purposes only, carried out on persons with mental disabilities, children, prisoners, dying people or people who are in any way inferior to researchers, is forbidden.
- New diagnostic procedures or treatments that could cause reduction of physical or mental capability of patients are allowed only in emergencies that could arise during treatment, if they are used for recovery or palliative care.

Article 49

The code of ethics contains the following rules related to a patient's right to truth:

- a) information related to the health status of a patient has to be solely in his/her favor;
- b) if the patient is in a certain psychological condition, information is not recommended, as it may influence the further course of treatment badly; in that case relatives are to be informed;
- c) information related to the health status of a patient has to be provided only by a physician, not by other medical personnel;
- d) if there is no hope for recovery or if patient is terminally ill, it is the responsibility of the physician to inform the family about it, unless the patient has decided otherwise.

A patient's entitlement to truth about his/her health condition, as well as anticipated procedures and treatment, and expected outcomes is exercised in accordance to those rules. A patient is also entitled to access his/her own medical record (and to a copy of the medical record, as also stated in Article 23 of the Law on Protection of Patients' Rights).

(Authors' note: Formulation of the term "in his favor" regarding information provided to a patient is not clear in the code of ethics. However, given the rest of the text of Article 49, which includes the recommendation not to provide information to the patient about certain psychological conditions for fear of negative influence on the course of treatment, the term "in his favor" in this context appears to mean something akin to "positive" (in terms of diagnosis or treatment). An example of an applicable "certain psychological condition" is noted in Article 11 of the Law on the Protection of Patients' Rights: the situation in which giving information to the patient can result in putting his/her health in a dangerous situation, such as patient suicide resulting from desperation after being given certain diagnoses such as HIV/AIDS. The code of ethics does not specify how the patient must convey to the physician that he/she has "decided otherwise" that the physician is not to inform the patient's family that he/she is terminally ill or there is no hope for recovery.)

e. practical examples

Example(s) of Compliance

1. D.M. was admitted to the Clinic for cardiovascular diseases as an emergency case. Stents were placed in her right leg, and the day after, three coronary bypasses were placed. Physicians asked for written consent and obtained it from D.M. before each surgery.
2. A healthcare provider orally conveys information about a different option for treatment to an illiterate person, who then signs a written statement of consent for the acceptance of, or statement of refusal of, treatment in the presence of two witnesses.

Example(s) of Violation

1. M.S. has undergone surgery due to spinal fixation placement. After a couple of days, M.S. underwent another surgery and the spinal fixation was removed, without prior informed consent. M.S. was conscious and capable to sign consent.
2. Patients are admitted to a mental care institution on the basis of their consent to „admission“, without specifying whether consent is related to treatment, i.e. recommended medical measure or/and hospitalization only.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to consent. These procedures are described in detail in Chapter 8 of this guide.

The penalty for failure of a physician or health care provider to obtain a patient's informed consent is defined in Article 46 of the Law on Protection of Patients' Rights; offenses are provided in Articles 44-47. Penalties range from 10,000-50,000 RSD for the failure to obtain the patient's consent. Failure to obtain adequate patient consent could also lead to a criminal case if there are negative consequences from a medical intervention before which the patient did not give the requisite written consent for the treatment or procedure.

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

6.1.5. RIGHT TO FREE CHOICE

a. Right 5 as Stated in the European Charter of Patients' Rights (ECPR)⁸³

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

The patient has the right to decide which diagnostic exams and therapies to undergo, and which primary care doctor, specialist or hospital to use. The health services have the duty to guarantee this right, providing patients with information on the various centers and doctors able to provide a certain treatment, and on the results of their activity. They must remove any kind of obstacle limiting exercise of this right.

83 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

A patient who does not have trust in his or her doctor has the right to designate another one.”

b. Right as Stated in the Country Constitution/Legislation

Law on Protection of Patients' Rights

The right to free choice of physician, health care institution and recommended medical procedures is one of the fundamental patient's rights, according to law (**Article 12**)⁸⁴. In order to ensure patients' exercise of this right, a health care institution is obliged to post and to update on regular basis the list of its organizational units and health care providers in a prominent place.

Exercising of this right is connected to the patient's right to ask for a second opinion regarding his/her health status. This opinion is to be provided by physician not directly involved in the patient's medical treatment. The patient exercises this right on his/her own personal request (**Article 13**)⁸⁵.

Health Insurance Law

A patient exercises his/her right to free choice within different levels of health care, both in public health care institutions and in private practice when there is a contract between a private practice and the public Health Insurance Fund. His/her choice of physician at the primary health care level (general practitioner, gynecologist, pediatrician and dentist) is fundamental. An insured patient is entitled to have only one chosen physician within the fields stated above and specified by law (**Article 146**)⁸⁶.

c. Supporting regulations/bylaws/orders

There currently are no supporting regulations, bylaws, or orders for this particular right.

d. Provider code(s) of ethics

Code of Ethics of the Serbian Medical Chamber

The right to free choice of physician is fundamental principle of a patient's autonomy. According to this right, every patient is entitled to be treated by a physician who makes medical and ethical choices freely and independently, without interference (**Article 42**)⁸⁷.

- The physician respects the right of a legally competent patient to choose his/her physician, i.e. medical help, freely, in accordance to information that he/she obtained. If a patient is legally incompetent, the choice is to be made by a legally appointed representative. Exceptionally, in the absence of a legally appointed representative, a physician may apply treatment only in the case in which the life of the patient is in danger and there is no time to wait for a decision to be made by the representative.
- A chosen physician should not object if a patient wants to be examined by another physician.

A patient, or his/her family members if the patient is legally incompetent, is also entitled to suggest to the patient's physician to address another physician or consulting body for a second opinion (**Article 74**).

84 Official Gazette of RS 45/2013.

85 Official Gazette of RS 45/2013.

86 Official Gazette of RS 107/2005, 109/2005, 57/2011 and 119/2012 See: CC RS IUz-361/2012 - 55/2013-75.

87 Official Gazette of RS 121/2007.

e. Practical examples

Example(s) of Compliance

Every patient and citizen in Serbia is entitled to choose a physician in an outpatient department – primary health care services (a free-standing facility for primary health services). A chosen physician is obliged to accept a patient who chose him, and a written agreement about registration with the chosen physician is prepared.

Example(s) of Violation

1. D.G. chose a physician, who treated him and followed the course of his disease for several years. After five years, the physician left that institution and another physician became involved in D.G's treatment. The second physician on his own initiative asked for the treatment to be changed. Patient D.G. refused the changing of treatment for he had the benefit of current treatment.
2. It was adopted in the Health Insurance Law (Article 146) that patient / citizen who does not choose his physician in the primary health care will not be eligible for the public / state health insurance. (*Authors' note: however, this is abolished on 14.10.2014 by decision of the Constitutional Court, because the Constitutional Court found that this request was not in concordance with the Constitution of Serbia. Therefore Article 146 is changed as in the text above.*)

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to free choice; these procedures are described in detail in Chapter 8 of this guide.

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,

6.1.6. RIGHT TO PRIVACY AND CONFIDENTIALITY

a. Right 6 as Stated in the European Charter of Patients' Rights (ECPR)⁸⁸

„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.

All the data and information relative to an individual's state of health, and to the medical/surgical treatments to which he or she is subjected, must be considered private, and as such, adequately protected. Personal privacy must be respected, even in the course of medical/surgical treatments (diagnostic exams, specialist visits, medications, etc.), which must take place in an appropriate environment and in the presence of only those who absolutely need to be there (unless the patient has explicitly given consent or made a request).“

b. Right as Stated in the Country Constitution/Legislation

Constitution of the Republic of Serbia

A patient's right to privacy and confidentiality is part of the constitutional proclamations of fundamental human rights, related to inviolability of mental integrity of everyone (**Article 25**)⁸⁹, confidentiality of letters and other means of communication (**Article 41**), as well as on the protection of personal data (**Article 42**). The Constitution stipulates that everyone has a right to be informed of personal data collected about him/her in accordance to law and the right to court protection in case of their abuse (**Article 42**).

Family Law

Everyone has a right to have his/her family life respected (**Article 2**)⁹⁰.

Criminal Law

Protection of privacy and confidentiality is also part of Criminal Law and its violation is considered as the subject of criminal act in cases of unauthorized disclosure of secret or collecting of personal data (**Articles 141-146**)⁹¹.

Law on Personal Data Protection

Data related to health status are considered to be particularly sensitive in accordance to law that governs rights to protection of collected and processed data, as well as protection of personal data limitations (**Article 16**)⁹². Personal data means any information relating to a natural person, regardless of the form of its presentation or the medium used (paper, tape, film, electronic media etc). “Natural

88 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

89 Official Gazette of RS 98/2006.

90 Official Gazette of RS 18/2005 and 72/2011 - sec. law.

91 Official Gazette of RS 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012 and 104/2013.

92 Official Gazette of RS 97/2008, 104/2009 - sec. law, 68/2012 - Decision of CC and 107/2012.

person” means any data subject identified or identifiable on the basis of his/her proper name, unique personal identification number, address code or any other distinguishing feature of his/her physical, psychological, spiritual, economic, cultural or social identity (**Article 3**). The Law also governs the consent to processing of data, right to access to collected personal data and right to obtain a copy of collected personal data (**Articles 17-21**)⁹³.

Law on Protection of Patients’ Rights

A patient is exercising his/her right to protection of privacy during diagnostic procedures and treatment in general. This right relates both to physical and mental personality (**Article 14**)⁹⁴. Only health care providers who are directly involved in medical examination and treatment of a patient may participate in those procedures. Students of high and higher education related to health care services, as well as health care providers, are also allowed to participate in medical examination and other medical procedures for the purpose of their mandatory practical exercise, residency or professional development, unless the patient refuses it.

A patient may give his/her consent regarding the presence of other persons during his/her medical examination and other medical procedures. The presence of other persons will not be allowed upon the request of a patient. A patient has the right to be visited during his hospitalization, in accordance with house rules of the health care institution, as well as to forbid visits of certain person(s) (**Article 14**).

A patient is entitled to confidentiality of all his/her personal data, including those related to his/her health status and possible diagnostics and medical procedures. A health care provider is forbidden to give personal data of patient to other persons, unless the patient is legally incompetent, has a legal representative, and the legal representative authorizes release of the patient’s personal data (**Articles 14 and 21**). A patient is entitled to access his/her medical record (**Article 20**) and on its copy (**Article 23**).

A patient has the right to deny the access to his/her medical data to all health care providers and other employees of a related health care facility or other legal subject to whom those data are available and needed in compliance to law. Data related to human substances from which the patient can be identified, such as blood, DNA, cells, etc., are considered to be particularly sensitive (**Article 21**).

If a patient is a child who has reached the age of 15 and who is capable of reasoning, he/she has the right to confidentiality of his/her medical record, as well as the right to access to his/her medical record (**Articles 20 and 24**). Additionally, a child who is capable of reasoning is entitled to confidential advising without his/her parents’ permission, regardless of age, when this is in his/her best interest. Legal provisions in law related to the parental right to obtain all information about the child’s health condition from the relevant health care facility shall not be applied in either case (**Article 68, paragraph 3 of Family Law**)⁹⁵. The exception to a child’s right to confidentiality exists when his/her health or life is endangered. In that case, the health care provider is obliged to give information to the parent or legally appointed representative of the child (**Article 24 of Law on Protection of Patients’ Rights**)⁹⁶.

93 Official Gazette of RS 97/2008, 104/2009 - sec. law, 68/2012 - Decision of CC and 107/2012.

94 Official Gazette of RS 45/2013.

95 Official Gazette of RS 18/2005 and 72/2011 - sec. law

96 Official Gazette of RS 45/2013.

A patient or his/her legally appointed representative has the right to release a relevant health care provider from the obligation to keep data related to the patient's health status confidential by signing his/her consent. Exceptionally, data related to the health status of a patient could be provided to an adult member of his/her family (over the age of 18) if this is necessary for avoiding a health risk to the family member even if patient did not give his written consent (**Article 22**). When a patient releases his/her physician of his obligation to confidentiality, the physician will assess what information he/she should keep as confidential, if their disclosure could harm the patient.

Law on Abortion

The right to confidentiality is also emphasized regarding medical records on abortion. Those data are confidential and the relevant health care facility is obliged to keep them in a special archive (**Article 12**)⁹⁷.

Law on Exercising of Rights to Health Care of Children and Women during Pregnancy, Delivery and Postnatal Periods

The right to confidentiality is excepted in the case of obligation of the relevant gynecologist to inform the National Health Insurance Fund upon the confirmation of pregnancy or abortion, in compliance to law (**Articles 5 and 6**)⁹⁸. *(Authors' note: Reporting to the National Health Insurance Fund to confirm pregnancy or abortion is required by the law even in cases not covered by the insurance fund, although a common belief is that doctors in private practice do not always report/confirm.)*

Law on Protection of Persons with Mental Disabilities

Data on the health status of persons with mental disabilities are considered to be sensitive, in compliance with law (**Article 39**)⁹⁹. Exercising of this law is excepted in the following cases, defined by law (**Article 40**):

- 1) knowledge that person with mental disabilities is preparing to commit a criminal act;
- 2) if the criminal proceeding would be significantly slowed down or impossible without revealing of confidential personal data;
- 3) if this is of public health and safety interest;
- 4) to prevent another person with mental disabilities from being exposed to direct and severe life, safety or health danger, i.e. if keeping data confidential could seriously endanger life or health of this person or other persons with mental disabilities.

Even in such cases, a patient with mental disabilities is entitled to access to his/her medical record, in compliance to law (**Article 42**).

Law on Cell and Tissue Transplantation and Law on Organ Transplantation

A patient is entitled to data confidentiality related to donors and recipients of cells or tissues that are considered as official secrets (**Article 38 of Law on Cell and Tissue Transplantation, Article 31 of**

97 Official Gazette of RS 16/95. See: Art. 101 of Law - 101/2005-28.

98 Official Gazette of RS 104/2013.

99 Official Gazette of RS 45/2013.

Law on Organ Transplantation)¹⁰⁰. Cell or tissue donation is anonymous, unless otherwise regulated by law. All data, including genetic data, related to donor and recipient of cell or tissue, available to other persons should be anonymous, so that both donor and recipient cannot be identified. It is not allowed to provide a donor or members of his/her family with data related to a recipient, and vice versa (**Article 39 of Law on Cell and Tissue Transplantation**). A patient has the right to protection of his/her data kept by the Serbian central Committee for Biomedicine, banks of cells and tissue, as well as authorized health care institutions, in order to prevent unauthorized use, destruction, change and abuse of data. Therefore, certain data should be replaced by the identification code that each patient receives upon the special application form and entering data in global information database (**Article 42 of Law on Cell and Tissue Transplantation**). A patient (donor or recipient) is entitled to protection of his/her identity related to use and publishing of personal data of a donor, i.e. recipient in scientific, educational and statistical purposes, as well as in the media (**Article 44 of Law on Cell and Tissue Transplantation, Article 37 of Law on Organ Transplantation**).

Law on Blood Transfusion

Within the procedure related to blood transfusion, a patient is entitled to confidentiality of personal data, data related to the health status of the donor, tests results, and reasons why the procedure could not be performed. The authorized institution for blood transfusion is to provide data protection against unauthorized access (**Article 27**)¹⁰¹.

Law on Infertility and Biomedical Assisted Reproduction (BAR) Treatment and Family Law

The right to measures of BAR treatment exercises, among other things, compliance to the legal principle of protection of privacy. According to this principle, all data of persons undergoing BAR procedures, donors and the medical records related to BAR are to be kept in compliance with the law that governs conditions for collecting and processing of personal data (**Article 11 of Law on Infertility and Biomedical Assisted Reproduction Treatment**)¹⁰². Data related to a man and woman from whom reproductive cells, i.e. embryos, are taken, as well as data about donor and recipient, i.e. information from medical records, are official secrets. The paternity of a man who donated semen cells may not be revealed (**Article 58, paragraph 5 of Family Law**)¹⁰³. Information must be provided to participants of BAR procedure only, unless law differently regulates it (**Article 31 of Law on Infertility and Biomedical Assisted Reproduction Treatment**)¹⁰⁴.

c. Supporting Regulations/Bylaws/Orders

This right to privacy and confidentiality is regulated by supporting bylaws, for example Article 7 of Rulebook on the global register of reproductive cells donor¹⁰⁵.

100 Official Gazette of RS 72/2009.

101 Official Gazette of RS 72/2009.

102 Official Gazette of RS 72/2009.

103 Official Gazette of RS, 18/2005 and 72/2011 - sec. law.

104 Official Gazette of RS 72/2009.

105 Official Gazette of RS RS 85/2013.

d. Provider codes of ethics

Code of Ethics of the Serbian Medical Chamber

Public presentation of a patient for scientific and educational purposes is possible only with his/her consent (**Article 21**)¹⁰⁶. A Patient has the right to expect that his/her physician will respect confidentiality of his/her personal and medical data (**Article 19**). If a physician is released from obligation of professional confidentiality by court order, he/she must inform the patient about that, unless the court determines otherwise (**Article 20**).

Although the right to confidentiality of a patient's personal data can be interpreted widely, a patient's right to demand that a physician is to keep his/her personal data as a professional secret from family members, even upon the patient's death, except if this could endanger life and health of other people, should be emphasized. This is related to personal and medical data, i.e. everything that health care providers may find out about the patient and his/her personal, family and social circumstances, as well as all information related to diagnostics, treatment and follow-up of the disease (**Article 19**).

Confidentiality is applied to type and aspects of data usage. Data can be used in scientific records and publications, as well as in education only if the patient's anonymity is provided (**Article 21**).

e. Practical examples

Example(s) of Compliance

A person, unsatisfied with a reply of the Health Commission, addressed the civic defender, emphasizing that the health care institution denied her right to access the medical record of her son. She believed that she is entitled to this, as his mother. After considering her allegations, it was determined by the civic defender that her son is an adult, over the age of 18, and that he did not give his consent for his health status data to be disclosed to a family member. It was also determined that his medical data disclosure is not necessary for prevention of health risk to his family member.

Example(s) of Violation

1. Video cameras were placed at the Gynecology department of a general hospital. After discussion with the director and the defender of patients' rights of this institution, it was determined by the defender of patients' rights that video cameras were placed in the gynecologist's office. It was demanded by the Ministry of Health to the director of the health institution to react fast, remove cameras and destroy any recorded data, which was done (Source: Civic defender).
2. During his visit to the mental care institution, the civic defender discovered that most of the toilet cabins are without doors, and that some of the existing doors do not have locks. There are no shower cabins, patients are taking showers in the shared room with more showers that are not separated, and the privacy of patients is not provided (Source: Civic defender, who sent the report to the director of the hospital who was responsible to correct the situation).
3. A recent amendment to the Law on Health Insurance provides additional safeguards regarding the right to privacy and data confidentiality¹⁰⁷ for children between 15 and 18 years of age. The amended law also provides improved health care for victims of domestic violence and victims of human traffick-

106 Official Gazette of RS 121/2007.

107 Official Gazette of RS 57/2011.

ing. The amendments stipulate that a child who is 15 years of age and considered mentally competent and able to make his/her own decisions is entitled to see his/her medical records. The child is also entitled to confidentiality of all data contained in such medical records. Under the same amendment, health information cannot be shared with parents, guardians or legal representatives, without the child's express authorization. The only exception to this rule allows the attending health professional to communicate health information to the child's parents if this is deemed necessary for avoiding serious danger to the life and health of the patient. However, social norms and practice frequently make it hard to fully implement these legal provisions. Such problems have been recorded in reports prepared by civil society associations. *(Authors' note: It is the failure to fully implement the legal provisions that makes this an example of violation. For example, if a child is the subject of suspected sexual violence because of physical and mental health signs but the child refused to admit or uncover the sexual violence, the doctrine of the best interest of the child requires that a physician can report this to the child's family, to the social services, and to the police. This is a violation of the child's right to privacy. Another example is a child who does not want something to be known about his/her health status and refuses therapy that could help him; in that case, the physician can abolish the child's right to privacy as well.)*

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the Right to Privacy and Confidentiality; these procedures are described in detail in Chapter 8 of this guide.

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.

6.1.7. RIGHT TO RESPECT OF PATIENTS' TIME

a. Right 7 as Stated in the European Charter of Patients' Rights (ECPR)¹⁰⁸

„Each individual has the right to receive necessary treatment within a swift and predetermined period of time. This right applies at each phase of the treatment.

The health services have the duty to fix waiting times within which certain services must be provided, on the basis of specific standards and depending on the degree of urgency of the case. The health services must guarantee each individual access to services, ensuring immediate sign-up in the case of waiting lists. Every individual that so requests has the right to consult the waiting lists, within the bounds of respect for privacy norms. Whenever the health services are unable to provide services within the predetermined maximum times, the possibility to seek alternative services of comparable quality must be

¹⁰⁸ European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28, 2015)

guaranteed, and any costs borne by the patient must be reimbursed within a reasonable time. Doctors must devote adequate time to their patients, including the time dedicated to providing information.”

b. Right as Stated in the Country Constitution/Legislation

The right to respect of patients’ time is governed by **Article 29 of Law on Protection of Patients’ Rights**¹⁰⁹ that states:

“In case that there are no conditions for medical measures to be provided instantly, a patient has the right to a predetermined medical check-up, diagnostic procedures, and other medical measures and procedures within the shortest period of time available.

A health care institution is obliged to undertake a diagnostic procedure recommended by the Board of Experts instantly, i.e. within the period set by Board, for the purpose of providing an opinion related to further treatment.

A health care institution is obliged to respect a patient’s time and to inform the patient timely about any term change of a previously scheduled health care service defined by paragraph 1 of this Article.”

Health Insurance Law

Article 56¹¹⁰ stipulates the types of health care services for which the waiting lists are to be made, as well as: criteria; standardized measures for the patient’s health status evaluation for purposes of putting him/her on a waiting list; the longest waiting period for health care services to be delivered; necessary data; and methodology for creating such waiting lists.

c. Supporting Regulations/Bylaws/Orders

Article 22 of the Rulebook on Waiting Lists¹¹¹ stipulates the maximum waiting period for health care services to be provided.

“The waiting period for health care services to be provided shall be determined in accordance to criteria and the anticipated waiting period (**Annex 1 of this Rulebook**), the scheduled date for medical examination by the chosen physician, i.e. the scheduled date for obtaining the health care service for which the waiting list is established (**Article 8 of this Rulebook**). **Annex 1** of this Rulebook determines the maximum waiting period for a health care service to be provided.”

d. Providers’ codes of ethics

The Code of Ethics of the Serbian Medical Chamber does not regulate respect of patients’ time directly. The same is true for codes of ethics of other health care providers in Serbia.

e. Practical examples

Example(s) of Compliance

1. A patient obtained a referral form from his physician to be examined by a specialist. He addressed the hospital and was told that an appointment cannot be scheduled within the legally determined peri-

109 Official Gazette of RS 45/2013.

110 Official Gazette of RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - Decision of CC and 119/2012.

111 Official Gazette of RS 75/2013.

od of 30 days. The patient requested confirmation of the impossibility to provide the medical service (PZ form). After receiving the confirmation, he received the medical examination from a specialist in private practice.

(Authors' note: a PZ form is a document that must be filled out by the physician, hospital, or other state-owned health care institution, explaining the reasons why a patient who has obligatory health insurance was not admitted to the hospital within 30 days, from date of the request for the appointment for examination in this particular case, for example. With the PZ form, the patient can then request health services from a private health care practice provider, and the health services will be covered by health insurance.)

2. Based on a patient's health condition and the urgent need of medical procedures to improve that condition, the healthcare provider takes all necessary steps to provide timely treatment to the patient in accordance with the capabilities of the healthcare facility and its medical and support staff.

Example(s) of Violation

Patient A. scheduled to be examined by her chosen general practitioner in the outpatient department at 9 A.M. She came at the scheduled time. At 9.10 A.M. two other patients came and were accepted by the physician. The nurse explained that they have an advantage as emergency cases. In the meantime, a patient who had a scheduled appointment at 8.40 arrived at 9.30. Patient A was told that the patient who was 50 minutes late had priority and that she, Patient A, would have to wait. Patient A asked to be allowed to change physicians.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to respect of patients' time; these procedures are described in detail in Chapter 8 of this guide.

g. Cross-referencing Relevant International and Regional Rights

Legally binding international regulations related to respect of patients' time include the Universal Declaration on Human Rights¹¹² and General Comment No 14¹¹³ as well as the Right to the Highest Attainable Standard of Health, issued by Committee on Economic, Social, and Cultural 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 and under the Right to Life in Chapter 2 and Chapter 3.

112 Universal Declaration of Human Rights, General Assembly of the United Nations, adopted December 10, 1948.

113 General Comment No. 14 (2000), The right to the highest attainable standard of health, 11/08/2000.E/C.12/2000/4. (General Comments)

6.1.8. RIGHT TO OBSERVANCE OF QUALITY STANDARDS

a. Right 8 as Stated in the European Charter of Patients' Rights (ECPR)¹¹⁴

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

The right to quality health services requires that health care institutions and professionals provide satisfactory levels of technical performance, comfort and human relations. This implies the specification, and the observance, of precise quality standards, fixed by means of a public and consultative procedure and periodically reviewed and assessed.“

b. Right as Stated in the Country Constitution/Legislation

Law on Health Care

The principle of continuous enhancing of the quality of health care is stated in **Article 23**¹¹⁵:

“The principle of continuous enhancing of the quality of health care shall be realized by the measures and activities by which, in line with the modern achievements of medical science and practice, the possibilities of favorable outcomes are increased and the risks and other unwanted consequences for the state of health of individuals and the community as a whole are reduced.“

Law on Protection of Patient's Rights

Article 9¹¹⁶ is related to the right to quality of provided health care: „A patient has the right to timely and high quality health care service, in accordance to his/her health status and established professional standards. The right to high quality health care service considers the adequate level of performed health care services and human relationship with the patient.“

Law on Public Health

Article 13¹¹⁷ governs health management and health care system quality and efficiency. Activities within the implementation of public health in the above-mentioned fields include:

- 1) Monitoring, improvement and promotion of indicators of quality and efficiency of health care institutions, in order to achieve highest level of accessibility, availability and quality of health care, in accordance to law;
- 2) Improvement of health management and expertise necessary to the implementation of health care and public health activities, in order to meet health care recipients' needs related to prevention and treatment in a safe, efficient and economical way.

c. Supporting Regulations/Bylaws/Orders

The Strategy on Continuous Enhancing of the Quality of Health Care and Patients' Safety¹¹⁸ tends to achieve the highest quality of health care services and patients' safety in the Republic of Serbia.

114 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

115 Official Gazette of RS 107/2005, 72/2009 - sec. law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 - sec. law

116 Official Gazette of RS 45/2013.

117 Official Gazette of RS 72/2009.

118 Official Gazette of RS 15/2009.

d. Provider codes of ethics

The right to observance of quality standards is not directly governed by the **Code of Ethics of the Serbian Medical Chamber** or the codes of ethics of other health care providers.

e. Practical examples

Example(s) of Compliance

1. Following the Strategy for Quality Improvement and Patient Safety with Action Plan, healthcare providers in Serbia use medical materials, equipment, and medications in accordance with the prescribed regulations for evidence-based medicine after those materials are provided by the healthcare facility.
2. Based on the same Strategy, a patient satisfaction survey is performed on a yearly basis in each health care facility (primary, secondary and tertiary level), and results are analyzed and used for improvement of quality of care.

Example(s) of Violation

The father of A.R. addressed different health care institutions several times because his daughter's health condition was getting worse and none of the recommended treatments gave results. According to interpretation by the health care institutions, her bad health status was a result of her mental disabilities. A.R. died because of pneumonia. In this case, timely and quality health care service failed.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to observance of quality standards; these procedures are described in detail in Chapter 8 of this guide.

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.

6.1.9. RIGHT TO SAFETY

a. Right 9 as Stated in the European Charter of Patients' Rights (ECPR)¹¹⁹

„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 treatments that meet high safety standards.

¹¹⁹ European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

To guarantee this right, hospitals and health services must continuously monitor risk factors and ensure that electronic medical devices are properly maintained and operators are properly trained. All health professionals must be fully responsible for the safety of all phases and elements of a medical treatment. Medical doctors must be able to prevent the risk of errors by monitoring precedents and receiving continuous training. Health care staff that report existing risks to their superiors and/or peers must be protected from possible adverse consequences.”

b. Right as Stated in the Country Constitution/Legislation

Law on Protection of Patients’ Rights

Article 10¹²⁰ governs patients’ right to safety:

„ A patient is entitled to safety in receiving health care services, in accordance with the latest achievements of health care protection and science, for the purpose of achieving the most favorable treatment outcome and minimizing the adverse effects’ risks to the patient’s health. A health care institution is obliged to take care of safety in the process of providing health care services, as well as to continuously monitor risk factors and to undertake measures for their reduction, in accordance to regulations governing the quality standards in health care. A patient cannot suffer due to the damage caused by inappropriate performing of a health care service.”

Law on Public Health

Article 13¹²¹ states that public health care activities in the field of health management and health care system quality and efficiency cover, among other things, identification, analysis and recommended measures for preventing consequences of adverse events, for the purpose of making health care more safe and minimizing population health risks.

c. Supporting Regulations/Bylaws/Orders

The vision of the **Strategy on Continuous Enhancing of the Quality of Health Care and Patients’ Safety**¹²² is to achieve safe and secure health care by joint efforts of all key actors in the health care system in the best interest of patients.

d. Provider codes of ethics

The right to safety is not directly governed by the **Code of Ethics of the Serbian Medical Chamber** or other health care provider professional codes in Serbia.

e. Practical examples

Example(s) of Compliance

1. The testing of donated blood and blood components is a mandatory part of the patient safety system.
2. A pharmacist or another person working to prepare and dispense medications directly to patients are responsible for informing the patient about how to use the medication and about any possible side effects resulting from its use. In addition, due to patient safety concerns, the pharmacist or the person dispensing medications to patients is responsible for checking the expiration date of the medicine.

120 Official Gazette of RS 45/2013.

121 Official Gazette of RS 72/2009.

122 Official Gazette of RS 15/2009.

Example(s) of Violation

1. D.M. underwent the amputation of her left leg. She was released from the hospital with a prescribed obligation for her wound to be bandaged every day for ten days. Patient D.M. developed an infection because the home care physicians did not use sterile instruments during bandaging.
2. D.J. did not experience any difficulties during her third pregnancy. Physicians stated that her pregnancy was regular and that there would be no difficulties in childbirth. During the last trimester of pregnancy it was proved that DJ had health problems for a while and that those problems should have been noticed at the early beginning of pregnancy. If a relevant examination and analysis had been performed, her pregnancy would have been terminated. Patient D.J. died during childbirth.
3. A healthcare provider or pharmacist issues prescription medications in cases when patients lack the necessary prescriptions from a doctor. This represents both a breach of legal regulations and a risk to the safety of the patient, especially when the medications have strong side effects or when the medication is known to have particularly harmful effects in the event of an overdose.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to safety; these procedures are described in detail in Chapter 8 of this guide.

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.

6.1.10. RIGHT TO INNOVATION

a. Right 10 as Stated in the European Charter of Patients' Rights (ECPR)¹²³

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

The health services have the duty to promote and sustain research in the biomedical field, paying particular attention to rare diseases. Research results must be adequately disseminated.“

b. Right as Stated in the Country Constitution/Legislation

Article 7 of Law on Protection of Patients' Rights¹²⁴ regulates the right to innovation:

“A patient is entitled to all information related to his/her health status health care service and the way of using it, as well as to all available information related to the latest scientific and technology

¹²³ European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

¹²⁴ Official Gazette of RS 45/2013.

achievements. A patient is entitled to information related to health insurance rights and procedures for exercising those rights. A patient has the right to obtain the above-mentioned information timely and in a way that is in his/her best interest.”

c. Supporting regulations/bylaws/orders

There are no supporting regulations, bylaws, or orders in regard to the patient right to innovation at the time of this writing.

d. Providers codes of ethics

Article 23 of Code of Ethics of the Serbian Medical Chamber¹²⁵ relates to new treatment methods:

“A physician shall responsibly and consciously apply modern treatment methods in his/her clinical practice, in accordance to the principles of medical ethics, humanity, medical tradition and modern medicine standards. A physician is to be provided with facilities to implement and respect new scientifically proved diagnostic, treatment and prevention methods. Expected benefit must be provided in the process of new treatment methods planning with regard to health and life risks of subjects participating in research.”

e. Practical examples

Example(s) of Compliance

Sometimes patients have a right to innovative procedures, as an example in heart surgery, which are not present in the country, but are delivered by foreign experts, such as heart surgeons who came to the country within programs of international cooperation (from Italy, Japan, and other countries). Besides those are examples when Serbian surgeons are gaining new skills, and benefits are also obvious for patients who are receiving innovative treatments.

Example(s) of Violation

A patient went to a hospital because of cardiovascular difficulties. Physicians told him that coronary stents placement is required. In order to obtain higher quality of health care protection, the patient suggested that the hospital should provide more expensive stents. He would cover the amount that cannot be covered by the National Health Insurance Fund. The hospital sent a memo to the Ministry of Health and the National Health Insurance Fund, with suggestion that this procedure should become practice. It was refused.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the Right to Innovation; these procedures are described in detail in Chapter 8 of this guide.

125 Official Gazette of RS 121/2007.

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.

6.1.11. RIGHT TO AVOID UNNECESSARY SUFFERING AND PAIN

a. Right 11 as Stated in the European Charter of Patients' Rights (ECPR)¹²⁶

„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 treatments and simplifying patients' access to them.“

b. Right as Stated in the Country Constitution/Legislation

Article 28 of Law on Protection of Patients' Rights¹²⁷ governs the right to avoid unnecessary suffering and pain:

„A Patient is entitled to highest level of relieving of suffering and pain, in accordance to generally accepted standards and ethical principles, which implies pain management and palliative care. This right does not imply euthanasia.“

c. Supporting Regulations/Bylaws/Orders

Numerous bylaws are regulating the right to avoid unnecessary suffering and pain, such as the **Strategy on Palliative Care with Action Plan**¹²⁸.

d. Providers' codes of ethics

Relieving suffering and pain is regulated by **Article 61 of Code of Ethics of the Serbian Medical Chamber**¹⁰:

“One of the main physician's tasks in treating an incurable patient is to undertake effectively all treatment procedures necessary to relieve the patient's physical pain and mental suffering. A physician introduces the patient's family members with information about his/her health status, if consent is first provided for this by the patient, trying to increase their understanding of the patient's difficulties and adequate support. When treating a terminally ill patient, a physician is to provide decent conditions for dying because continuous intensive treatment in this stage of disease would exclude the patient's right to dignified death“.

e. Practical examples

Example(s) of Compliance

1. A healthcare provider prescribes morphine to a terminally ill patient at the patient's request. The morphine is provided based on the patient's subjective feeling of pain, even though there is no indication of the need to administer such therapy.

126 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

127 Official Gazette of RS 45/2013.

128 Official Gazette of RS 17/2009.

2. At a patient's request, a dentist administers combined (injection and spray) local anesthetic during dental intervention in order to relieve the patient's subjective feeling of nausea.
3. A gynecologist informs a pregnant patient about the option to request epidural or spinal anesthesia during normal childbirth for the purpose of decreasing labor pains; based on the patient's consent, the gynecologist prescribes a short-term anesthetic to be administered by an anesthesiologist.

Example(s) of Violation

A patient decides to give birth by caesarian section in order to decrease the pain associated with childbirth, but her doctor refuses the request because there is no objective need for such a procedure. *(Authors' opinion: Despite there is no indications for caesarian section, doctor should perform other methods to avoid unnecessary pain (epidural anesthesia).*

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the Right to Avoid Unnecessary Pain and Suffering; these procedures are described in detail in Chapter 8 of this guide.

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.

6.1.12. RIGHT TO PERSONALIZED TREATMENT

a. Right 12 as Stated in the European Charter of Patients' Rights (ECPR)¹²⁹

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

The health services must guarantee, to this end, flexible programs, oriented as much as possible to the individual, making sure that the criteria of economic sustainability does not prevail over the right to health care."

b. Right as Stated in the Country Constitution/Legislation

The Law on Health Care¹³⁰ and **the Law on Protection of Patients' Rights**¹³¹

These two laws guarantee that the patient, according his/her individual needs and capabilities, has the right to care, treatment, and rehabilitation that improve his health status in order to achieve the

129 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

130 Official Gazette of RS 107/2005, 72/2009 – sec. law, 88/2010, 99/2010, 57/2011, 119/2012 i 45/2013 - sec. law.

131 Official Gazette of RS 45/2013.

highest possible level of personal health, in line with available medical methods and with healthcare and health insurance regulations.

Both laws regulate the right to personalized treatment through all principles by respecting 19 defined rights. Medical intervention or personal care may be provided only in the presence of persons necessary for conducting the intervention or personal care, except when the patient has agreed to or requested otherwise. The legislation in Serbia generally stipulates a personalized approach toward every patient, especially in exercising his rights through all principles.

Those 19 rights are listed in the Law on Protection of Patients' Rights:

1. Right to Access Health Care
2. Right to Information
3. Right to Preventive Measures
4. Right to Observance of Quality Standards
5. Right to Safety
6. Right to Notification
7. Right to Free Choice
8. Right to Second Professional Opinion
9. Right to Privacy and Confidentiality
10. Right to Consent
11. Right to Access Medical Record
12. Right to Confidentiality on Patients' Medical Record
13. Right of Patient Participating in Medical Research
14. Children's Right in Inpatient Health Care Institution
15. Right to be released from Inpatient Health Care Institution on patients' personal demand
16. Right to avoid unnecessary suffering and pain
17. Right to respect of patients' time
18. Right to complain
19. Right to compensation

Law on Protection of Persons with Mental Disabilities¹³²

According to this law, following his admission to a healthcare facility, a person with mental disability is placed under the supervision of a team of specialists for treatment and rehabilitation in order to improve his health status to a degree that the person may be treated further within the community. The program includes regular check-ups at least once per month in order to follow the person's mental health condition. The team of specialists is responsible for preparing a personalized scheme of the treatment and rehabilitation of the person with mental disorders.

132 Official Gazette of RS 45/2013.

c. Supporting Regulations/Bylaws/Orders

There are no supporting regulations, bylaws, or orders relating to the patient Right to Personalized Treatment at the time of this writing.

d. Providers' codes of ethics

The Code of Ethics of the Serbian Medical Chamber¹³³ and the codes of ethics of other chambers of health professionals regulate this right. As an example, physicians should be involved in the processes of patient admission and discharge, treatment, and rehabilitation, and they should take into consideration the patient's specific characteristics, including those caused by the illness. Such patients shall be treated with the utmost care (Articles 40-65).

e. Practical examples

Example(s) of Compliance

The civic defender's findings showed that individual treatment of patients in a mental care institution did not contain elements of contemporary medical practice. In accordance with the recommendation of the civic defender, a plan of individual treatment during hospitalization was created for each patient and the plans were entered into their individual medical records (group therapy, working therapy, etc).

Example(s) of Violation

A certain number of patients require specialized devices or expensive drugs (usually those with rare diseases) that are available in Serbia, but the equipment and/or drug is not placed on the list of orthopedic devices and/or the positive list of drugs covered by the Health Insurance Fund due to low demand or the lack of financial resources. Thus, patients and/or parents must buy these devices and/or drugs using their own funds.

Actual Case(s)

No violations of this right have been reported or are otherwise known to the working group responsible for the preparation of this guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the Right to Personalized Treatment; these procedures are described in detail in Chapter 8 of this guide.

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.

133 Official Gazette of RS 121/2007.

6.1.13. RIGHT TO COMPLAIN

a. Right 13 as Stated in the European Charter of Patients' Rights (ECPR)¹³⁴

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

The health services ought to guarantee the exercise of this right, providing (with the help of third parties) patients with information about their rights, enabling them to recognize violations and to formalize their complaint. A complaint must be followed up by an exhaustive written response by the health service authorities within a fixed period of time. The complaints must be made through standard procedures and facilitated by independent bodies and/or citizens' organizations and cannot prejudice the patients' right to take legal action or pursue alternative dispute resolution.“

b. Right as Stated in the Country Constitution/Legislation)

Law on Protection of Patients' Rights

The right to complain is regulated by **Article 30**¹³⁵. The Law states that everyone has right to complain when he/she was deprived of rights related to health care and information. According to this article, a patient who believes that he/she was deprived of rights related to health care by health care providers is entitled to make a complaint to the following: the health care professionals who are managing the process of work, the director of the health care institution, the private practice founder, or the counselor for protection of patients' rights (hereafter "patients' counselor").

Article 41¹³⁶ regulates the role of the patients' counselor in the process of exercising the patients' right to complain. This article states that a patient (or his/her legally appointed representative) may submit his/her complaint to the patients' counselor in writing or orally, on the record (in official minutes made about patients' complaints). A patients' counselor is obliged to determine all circumstances and facts related to the allegations of a complaint within 5 working days after the complaint was filed. After determining all relevant circumstances and facts, the patients' counselor writes a report and submits it to the applicant or the applicant's legal representative, the head of the department and the director of the institution, or the founder of a private practice, within 3 working days after completing the report.

The director of the health care institution is obliged to provide the patients' counselor the information regarding the measures that were undertaken at the health care institution in relation to the patients complaint within 5 working days upon receiving the patients' counselor report.

This article also states whom the applicant may address if he/she is not satisfied with the patients' counselor report: Health Councilor Health Inspection, i.e. the relevant body of the National Health Insurance Fund branch where the applicant (patient) obtained his/her health insurance.

The obligations of the patients' counselor consist of preparing a monthly report related to submitted complaints to the director of the health care institution, for the purpose of informing the director and

134 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed August 28,2015)

135 Official Gazette of RS 75/2013.

136 Official Gazette of RS 75/2013.

his/her then taking relevant measures within his competences. The patients' counselor also submits quarterly, semi-annual and annual reports to the Health Council.

Health councils are established on the municipality level, and their duties are governed by the statute of the municipality, the local self-governance authority. Some of their tasks are related to protection of patients' rights, as further specified in **Article 42 of Law on Protection of Patients' Rights**.

c. Supporting Regulations/Bylaws/Orders

The Rulebook on managing of complaints, patients' counselor proceedings, and report form and content,¹³⁷ regulates the patients' right to complain more closely.

d. Provider codes of ethics

The right to complain is not directly governed by the **Code of Ethics of the Serbian Medical Chamber**, neither by codes of ethics of other chambers of health care professionals.

e. Practical examples

Example(s) of Compliance

1. The patients' counselor is obliged to act on all complaints, regardless when injury occurred. Rights stated in the Law on Protection of Patients' Rights do not expire.
2. Patients submit their allegations related to the relevant hospital to the patients' counselor of the local governance unit. Information on exercising this right, as well as basic facts related to counselor (name and last name, phone number, address, and working hours) are announced or posted at all departments and at the hospital entrance.
3. A patient complains about his treatment by a healthcare provider when informing the patient of about his condition and the possibilities for treatment. The patient submits his complaint to the Office for the Protection of Patients' Rights at the relevant healthcare facility, and the healthcare provider addresses the complaint.

Example(s) of Violation

1. A patients' counselor refused to act on a complaint submitted by a patient in January 2014 because violation of right occurred the previous year, before the patients' counselor office was established.
2. A patients' counselor considered a complaint to be irregular because it was submitted by a legal representative, hired by patient.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the Right to Complain; these procedures are described in detail in Chapter 8 of this guide.

137 Official Gazette of RS 71/2013.

g. Cross-referencing Relevant International and Regional Rights

Legally binding international and regional documents related to right to complain include the following:

- International Covenant on Civil and Political Rights¹³⁸;
- Optional protocol of the International Covenant on Civil and Political Rights¹³⁹;
- International Covenant on Economic, Social, and Cultural Rights¹⁴⁰;
- The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in Time of War;
- Convention on Prevention and Punishment of the Crime of Genocide¹⁴¹;
- UN Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment¹⁴²;
- Convention on the Elimination of All Forms of Discrimination Against Women¹⁴³;
- Convention on the Rights of the Child¹⁴⁴, and the Charter of the United Nations¹⁴⁵.

Also please find a discussion of international and regional standards relevant to the Right to Complain in Chapter 2 (international) and Chapter 3 (regional).

6.1.14. RIGHT TO COMPENSATION

a. Right 14 as Stated in the European Charter of Patients' Rights (ECPR)¹⁴⁶

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

The health services must guarantee compensation, whatever the gravity of the harm and its cause (from an excessive wait to a case of malpractice), even when the ultimate responsibility cannot be absolutely determined.“

b. Right as Stated in the Country Constitution/Legislation)

Law on Protection of Patients' Rights

The right to compensation for medical malpractice is governed by **Article 31**¹⁴⁷. This article states that a patient who suffers bodily injury or deterioration of his/her health status due to malpractice of

138 Official Gazette of SFRJ 7/1971. Available at: <http://www.ljudskaprava.gov.rs/index.php/yljudska-prava/konvencije/53-medunarodni-pakt-o-gradanskim-i-politickim-pravima> (accessed January 04, 2015)

139 Official Gazette of SRJ. 4/2001.

140 Official Gazette of SFRJ 7/1971. Comment: On March 12, 2001. SRJ gave successored statement in UN related to rejoin to International Covenant on Economic, Social and Cultural Rights.

141 Official Gazette of General Assembly Presidium FNRJ 2/1950.

142 Official Gazette of SFRJ 9/1991.

143 Official Gazette of SFRJ 11/1981.

144 Official Gazette of SFRJ 15/9190 and Official Gazette SRJ 4/1996 and 2/1997.

145 Charter of the United Nations. Available at: <http://www.un.org/en/documents/charter/index.shtml> (accessed January 04, 2015)

146 European Charter on Patients' Rights. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (accessed January 03, 2015)

147 Official Gazette of RS 45/2013.

health care providers is entitled to compensation in compliance to the rules on damage responsibility. This article also states that the right to compensation cannot be excluded or limited in advance of provision of a health care service. (*Authors note: the term “malpractice” refers only to professional mistakes of health care providers.*)

Law on Contracts and Torts (Law on Obligations)

Article 16148 states: “Everyone shall be bound to refrain from an act which may cause damage to another.”

Article 154, paragraph 1 states that: “Whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault.”

Article 155 offers a definition of damage: “Injury or loss shall be a diminution of someone’s property (simple loss) and preventing its increase (profit lost), as well as inflicting on another physical or psychological pain or causing fear (non-material damage, or mental anguish).”

Article 158 offers the definition of fault: “Fault shall exist after a tort-feasor has caused injury or loss intentionally or through negligence.”

Article 200 states that in specific instances, a court shall award equitable damages independently of redressing property damage, even if there is no award to redress property damage. Those include instances of the following:

- physical pains suffered
- mental anguish suffered due to reduction of life activities
- becoming disfigured
- offended reputation, honor, freedom or rights of personality
- death of a close person
- fear suffered.

Law on Criminal Procedure

The right to compensation can also be exercised in a criminal procedure, where the injured party may submit a claim for restitution (**Articles 252-260**¹⁴⁹).

Health Insurance Law

The patients’ right to compensation is indirectly stated in **Article 195**¹⁵⁰, but only in cases of damages inflicted to the respective branch of the National Health Insurance Fund and caused by the health care provider for treating of an insured in an illegal manner. (*Author note: It is not clearly stated, but we assume that damage is related to increased costs of treatment of consequences due to incorrect treatment, which produced financial damage.*)

c. Supporting regulations/bylaws/orders

There are no supporting regulations, bylaws, or orders in regard to the patient right to compensation at the time of this writing.

148 Official Gazette of SFRJ 29/1978, 39/1985, Decision of USJ and 57/1989; Official Gazette of SRJ 31/1993 and Official Gazette of SCG 1/2003 – Constitutional Charter

149 Official Gazette of RS 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

150 Official Gazette of RS 107/2005, 109/2005 – corr., 57/2011, 110/2012 – Decision of CC and 119/2012.

d. Provider codes of ethics

The right to compensation is not directly governed by the **Code of Ethics of the Serbian Medical Chamber**, neither by codes of ethics of other chambers of health care professionals.

e. Practical examples

Example(s) of Compliance

A patient is reimbursed for purchases of medications included in the Positive List of Medications for regular therapy within the protocol of treatment. The insured patient is reimbursed for his expenditures on medications that are not stocked by the hospital pharmacy under contract with the fund.

Example(s) of Violation

M.S. submitted a claim for compensation for injury that occurred as result of spinal surgery. The procedure lasts eight years because the prosecutor could not provide the findings and opinions of expert witnesses.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the Right to Compensation; these procedures are described in detail in Chapter 8 of this guide.

A person can file both a tort action and a criminal action for the same alleged injury / damage resulting from an act of a healthcare provider in the delivery of health care services.

A claim in a criminal court against a healthcare provider may be brought by the state/state prosecutor on behalf of the injured party/patient or by a lawyer representing the injured person/patient, depending upon the severity of either the case itself or the sanctions sought. If it is a "hard" case, in which the particular law envisions or allows placement in prison, for example, then there is the state prosecutor, while in the case when it is a "soft" case, there is a lawyer representing the injured person/patient.

A court may decide upon a claim for restitution within the criminal procedure. If the facts of the criminal proceedings do not provide a reliable basis either for full or partial award, the court will refer the injured party/patient to pursue the claim for restitution in civil litigation. If the injured party/patient is not satisfied with the decision of the court related to the compensation upon the claim for restitution, the court will refer the injured party/patient to pursue the claim for full compensation in civil litigation.

g. Cross-referencing Relevant International and Regional Rights

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

Additional patients' rights in serbia (not included in the european charter of patients' rights)

6.1.15. RIGHT TO ACCESS MEDICAL RECORD

a. Right to access patient medical record by patient, legal representative, or family

The patient's right to access his/her medical record is not included in the European Charter of Patients' Rights, but it is included in domestic legislation, particularly the laws on protection of patients' rights and patients with mental disabilities, as well as articles in the ethics codes of health care providers.

b. Right as stated in the country constitution/legislation

Law on Protection of Patients' Rights

This right is governed by **Article 20**¹⁵¹ which state that a patient is entitled to access his/her medical record.

- In case that the patient is a child or a legally incompetent person, his/her legally appointed representative is entitled to access the patient's medical record. The child is entitled to access his/her medical record when he/she reaches the age of 15 and is legally competent.
- A patient's family members exceptionally are entitled to access his/her medical records, if this is significant to the health treatment of the child.
- A Health care provider is obliged to keep medical records properly, in accordance to law, and to make records of all medical procedures undertaken, such as anamnesis, diagnostics, diagnostic measures, treatment and treatment results, as well as advices provided to patients.

Law on Protection of Persons with Mental Disabilities

Article 42¹⁵² states that a person with mental disabilities is entitled to access his/her medical record, in accordance to law.

c. Supporting regulations/bylaws/orders

There are no supporting regulations, bylaws, or orders in regard to the patient right of access to his/her medical records at the time of this writing.

d. Provider codes of ethics

The Code of Ethics of the Serbian Medical Chamber indirectly governs patients' right to access the medical record¹⁵³. **Part III of the Code** regulates the relationship to the patient. **Article 49** emphasizes the patients' right to truth and information related to his/her health status. Informing a patient about his/her health status must be exclusively in his/her favor. In case of a special mental condition of the patient and if explanations could affect negatively the further course of treatment, information is not recommended. In such cases, it is required to inform the patient's family and to provide them access to medical record of the patient.

151 Official Gazette of RS 45/2013.

152 Official Gazette of RS 45/2013.

153 Official Gazette of RS 121/2007

(Authors' note: The meaning of the term "in his/her favor" in the statement above is not clear. The Code of Ethics of the Serbian Medical Chamber was adopted in 2007; and it is the authors' opinion that this statement in the Code requiring informing a patient of information that is "exclusively in the patient's favor" only may not be in concordance with Article 11, Right on Information, in the new Law on Protection of Patients' Rights. Article 11 requires a physician to give all information to the patient.)

e. Practical examples

Example(s) of Compliance

A person whose mother died in a hospital claimed access to her mother's medical record. The health care institution required that the applicant (daughter) had to submit a written claim. After submission of the claim, the hospital approved her access to her mother's medical record and made an appointment for her to review it.

Example(s) of Violation

A physician from the outpatient department denied a patient the access to her own laboratory results. He insisted to interpret her results personally to her. He explained his actions by the fact that the patient did not possess enough knowledge to understand the results on her own.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to access one's own medical record; these procedures are described in detail in Chapter 8 of this guide.

g. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

6.1.16. RIGHT TO SECOND PROFESSIONAL OPINION

a. Patient right to request a second professional opinion from a physician or dentist who did not participate directly in providing previous health care

The patients' right to a second professional opinion is not included in the European Charter of Patients' Rights, but it is included in domestic legislation, particularly the law on protecting patients' rights and the provisions governing the insureds' rights to choice of physician.

b. Right as Stated in the Country Constitution/Legislation

Article 13 of Law on Protection of patients' Rights¹⁵⁴ governs this right.

¹⁵⁴ Official Gazette of RS 75/2013.

This article states that a patient is entitled to ask for a second professional opinion related to his/her health status from a physician or dentist who did not participate directly in providing his/her health care. A patient exercises this right by personal request. This article also states that a health care institution is obliged to announce and update on regular basis the list of departments and physicians or dentists working at those departments.

(Authors' note: the law does not state to whom or through what process a patient must make his/her personal request for a second professional opinion. As noted above, the list of doctors and dentists working in the health care institution is publicly announced and therefore could be used by a patient for selection of provider from whom to seek a second opinion. It is not clear in this Article, however, whether the patient may seek a second opinion from a provider who does not work in the same health care institution.)

c. Supporting Regulations/Bylaws/Orders

The Rulebook on modality and procedure for exercising the rights from compulsory health insurance¹⁵⁵ governs choice of physician and change of physician. **Article 23, paragraph 1** states that an insured is to select a physician (*Author's note: this refers to a physician in a health care institution at the primary level*) for the period of at least one year, and that he/she may change physician before expiration of this period, under conditions specified in **Article 31**. A health care institution is obliged to display the requirements for selection of physician and make it visible (**Article 27**). (*Authors' note: requirements / process for changing physician are not stated in this Rulebook*).

d. Provider codes of ethics

The Code of Ethics of the Serbian Medical Chamber indirectly governs the patient's right to a second professional opinion¹⁵⁶.

Part IV of the Code regulates relations between physicians.

Article 71 of the Code governs opinions related to another physician's work. This article states that a negative opinion about another physician in the presence of the patient, health care staff or public shall not be tolerated. Professional criticism is allowed only in the presence of physicians, including the one being criticized. The assessment must be objective and argument-based, without any subjectivity.

Article 73 states that a physician may treat any patient who comes to his office asking for help in accordance with his professional competences and treatment possibilities. If a patient previously was treated by another physician, that prior physician is to be informed by the patient himself/herself or by members of the patient's family.

e. Practical examples

Example(s) of Compliance

A patient obtained a referral form in order to be examined by a specialist, who provided a written report after examining the patient. The patient was not satisfied with this opinion, and he had to go

¹⁵⁵ Official Gazette of RS 10/2010, 18/2010 – corr., 46/2010 – corr., 80/2010, 60/2011 – Decision of CC and 1/2013.

¹⁵⁶ Official Gazette of RS 121/2007.

back to the outpatient department and ask for another referral form in order to schedule an appointment with another specialist.

Example(s) of Violation

A patient obtained a written report issued by a specialist who prescribed treatment. The patient was sufficiently informed about the prescribed medicine and its side effects. She asked for a second professional opinion (in another hospital). Another specialist made the same diagnosis, but he prescribed other medicines that the patient accepted. The patient showed the doctor the report issued by the previous specialist after she had received the new report with the different recommended treatment. When he saw the name of his colleague on the first report, the specialist changed his mind, saying that he recommended the wrong treatment and that the recommendation of the previous specialist should be accepted since “he was unerring”.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to a second professional opinion; these procedures are described in detail in Chapter 8 of this guide.

g. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

6.1.17. RIGHT TO BE RELEASED FROM INPATIENT HEALTH CARE INSTITUTION ON PERSONAL DEMAND

a. a patient has the right to release from a hospital upon his own personal demand except in cases regulated by law

The patients' right to be released from a hospital on the patient's own personal demand is not included in the European Charter of Patients' rights, but it is included in domestic legislation, particularly the law protecting patients' rights.

b. Right as Stated in the Country Constitution/Legislation

Law on Protection of Patients' Rights

Article 27¹⁵⁷ governs this right. This article states that a patient is entitled to leave a hospital on his/her personal demand, except in cases regulated by law. A patient is obliged to provide a written statement related to his/her intention to leave the hospital. The statement will be kept in his/her medical record.

157 Official Gazette of RS 45/2013.

(Authors' note: Article 27 does not state what cases are "regulated by law" for purposes of preventing a patient from leaving a hospital on his/her own personal demand. However, Articles 19-23 of the Law on Protection against Communicable Diseases address this issue, at least in relation to communicable diseases.)

A physician is obliged to keep information related to a patient's leaving the hospital without providing a written statement in the patient's medical record. If the patient is a child or a person lacking legal capacity, the physician is obliged to inform immediately the patient's legally-appointed representative or relevant guardianship authority on the patient's leaving the hospital. The relevant guardianship authority is responsible and placed in the Centre for Social Work at the municipality level.

If the patient is a child or a person lacking legal capacity, and a decision related to leaving the hospital is made by the patient's legally-appointed representative contrary to the best interest of patient, the physician is obliged to inform relevant guardianship authority immediately. to recommended treatment, and a legally appointed representative is not provided or is not reachable to give his/her consent. In that case, the patient may be subjected to a medical measure without anyone's consent.

Law on Protection of Persons with Mental Disabilities¹⁵⁸

Article 17 states that consent to treatment given by a person with mental disabilities may be withdrawn at any time, in writing. The consequences of such decision must be previously explained.

Article 19 of this law also emphasizes the limitation a of patient's right to leave an inpatient health care institution on the patient's own demand, in case that a person with mental disabilities is not capable to give consent to recommended treatment, and a legally appointed representative is not provided or is not reachable to give his/her consent. In that case, the patient may be subjected to a medical measure without anyone's consent.

c. Supporting regulations/bylaws/orders

There are no supporting regulations, bylaws, or orders in regard to the patient right to be released from an inpatient healthcare institution on the patient's own demand at the time of this writing.

d. Provider codes of ethics

The Code of Ethics of the Serbian Medical Chamber indirectly governs the patient's right to leave an inpatient health care institution on his/her own demand¹⁵⁹. The Code also states that a physician is allowed to interrupt the treatment in exceptional cases if a patient continues to behave inappropriately after the warning (**Articles 52 and 53**). Interruption of treatment is not possible, however, if the disease threatens to endanger a patient's life, in other words, when the patient's health status requires urgent medical help.

(Authors' note: This section of the Code does not state what content must be included, or what process must be followed, in a physician's warning to a patient in exceptional cases in order to interrupt treatment. Neither is there indication of what is to be considered an "exceptional case" that is not one of a life-threatening disease or of need for urgent medical care for which treatment cannot be interrupted.)

158 Official Gazette of RS 45/2013.

159 Official Gazette of RS 121/2007.

Nothing is stated in other health provider codes of ethics regarding the patient's right to leave an inpatient health care institution on his/her own demand.

e. Practical examples

Example(s) of Compliance

A patient insisted to be released from a hospital despite physicians' recommendation to stay two days more due to the complications after termination of pregnancy. Physicians prepared discharge papers and a report of all possible risks and consequences that could be caused by early release. The patient confirmed that she was fully informed of the risks and consequences and signed the discharge papers.

(Authors' note: The patient confirmed, in a written and signed document as required, that she was fully informed of the risks and consequences; and she signed the discharge papers. The signed confirmation is a composite part of the discharge document.)

Example(s) of Violation

A patient was on the waiting list for cardiac surgery. After several years, on a Wednesday, he was admitted to the hospital in order to undergo preoperative procedures. On Friday, he was asked whether he would like to go home for the weekend and come back on Monday morning. The patient signed the consent form offered by a nurse, who explained to him that he was obliged to sign it. Upon his return to the hospital on the following Monday morning, the hospital refused to admit him, stating that he was not on the waiting list anymore, for he provided a written statement that he did not want to go to the surgery.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to be released from a hospital on the patient's own demand; these procedures are described in detail in Chapter 8 of this guide.

g. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

6.2. Patients' responsibilities

6.2.1. RESPONSIBILITY TO PERSONAL HEALTH

a. Patients are to participate in their own health care

Serbian law imposes responsibility on patients for the active participation in their own health protection and treatment.

b. Responsibility as stated in constitution/national legislation

Article 33 of Law on Protection of Patients' Rights¹⁶⁰ states that in the process of receiving health care services, a patient is obliged to participate actively in protection, preserving and improvement of his/her personal health (**paragraph 1**), and to comply with instructions and to perform measures prescribed by the health care provider (**paragraph 3**).

Article 38 of Law on Protection of Persons with Mental Disabilities¹⁶¹ states that a person with mental disabilities is required to actively participate in treatment, in compliance with previously agreed treatment.

c. Examples from practice

Example of Compliance

M.G. addressed her physician for a cold. The physician prescribed her medicine to which she was allergic. This information was not in her medical record. The physician suggested that additional analysis should be done, in order for the allergy to be confirmed. The physician entered new information into the patient's medical record and prescribed her another treatment.

Example of Violation

A patient suffering from diabetes was recommended by his physician to comply with the prescribed nutrition procedure. The physician emphasized that the patient's health status would get worse otherwise and that medicines were not sufficient for treatment of his condition. The patient did not follow recommendations and soon he had to be admitted to the hospital.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

d. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to consent; these procedures are described in detail in Chapter 8 of this guide.

e. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

6.2.2. RESPONSIBILITY TO INFORM REGARDING HEALTH STATUS

a. Patients are to provide full information to health care providers

Serbian law requires patients to provide full and correct information about their health status to their health care providers.

¹⁶⁰ Official Gazette of RS 45/2013.

¹⁶¹ Official Gazette of RS 45/2013.

b. Responsibility as Stated in the Country Constitution/Legislation

Article 33, paragraph 2, of Law on Protection of Patients' Rights¹⁶² states that it is the patient's responsibility to provide full information regarding his/her health status to the health care provider.

Article 16 of Law on Protection of Population against Infectious Diseases¹⁶³ states that in the course of an epidemiological procedure, a person is required to provide correct and full details of importance for the disclosure and spread of infectious disease - in other words, for disclosure, prevention and suppression of infection disease epidemics, as well as to undergo relevant medical procedures, if necessary.

c. Practical Examples

Example(s) of Compliance

A patient was admitted to the hospital due to necessary surgery. He announced that he was an alcoholic. Surgical and anesthesiology procedures were prepared carefully and the surgery was successful. The patient was then sent for addiction treatment after recovery.

Example(s) of Violation

A patient was admitted to the hospital. He denied that he was suffering from any infectious disease and that he received any treatment for such disease. He did not state, however, that he has been diagnosed mental illness and that he was taking antipsychotics regularly. He continued to take his medications during hospital treatment. Side effects occurred due to the combination of treatment in the hospital with treatment by antipsychotic medications, and his health status significantly deteriorated.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

d. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to consent; these procedures are described in detail in Chapter 8 of this guide.

e. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

6.2.3. RESPONSIBILITY TO ACT IN COMPLIANCE TO GENERAL ACTS OF HEALTH CARE INSTITUTION

a. Patients must comply with general acts, rules on stay and behavior, or particular measures and instructions of health care institutions

¹⁶² Official Gazette of RS 45/2013.

¹⁶³ Official Gazette of RS 125/2004.

b. Responsibility as Stated in the Country Constitution/Legislation

Article 32, paragraph 2 of Law on Protection of Patients' Rights¹⁶⁴ states that a patient is obliged to act in compliance to general acts of the health care institution, private practice, higher education institutions or other legal entities performing health care activities, related to rules on stay and behavior at those facilities.

Article 38 of Law on Protection of Persons with Mental Disabilities¹⁶⁵ states that a person with mental disabilities is obliged to act in compliance to rules on stay and behavior regulated by general acts of the mental care institution.

Article 37 of Law on Protection of Population against Infectious Diseases¹⁶⁶ states that a person suffering from infectious disease, or an infection carrier, is obliged to act in compliance to particular measures and instructions of the health care institution, or physician's orders, especially regarding prevention of spreading of infectious disease.

c. Practical Examples

Example(s) of Compliance

Visits to the patients in hospitals are allowed from 14:00 to 16:00 on working days. Visitors who act in compliance to those rules provide undisturbed work of hospital's staff, as well as necessary rest of patients.

Example(s) of Violation

A patient suffered cerebral infarction and was admitted to a hospital. Smoking is explicitly forbidden in the hospital. A nurse noticed that the patient was smoking in the toilette and called her attention to the fact that smoking was not allowed. Although she was warned, the patient refused to stop smoking in the toilette. (*Authors' note: According to the Law on Protection against exposure to Tobacco Smoke*¹⁶⁷ (Article 27) a patient will be punished for misdemeanor by fine).

Actual Case(s)

No cases involving violations of this right has been reported or is otherwise known to the working group responsible for the preparation of this Guide.

d. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to consent; these procedures are described in detail in Chapter 8 of this guide.

e. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

164 Official Gazette of RS 45/2013.

165 Official Gazette of RS 45/2013.

166 Official Gazette of RS 125/2004.

167 Official Gazette of RS 30/2010.

6.2.4. RESPONSIBILITY TO OTHER USERS OF HEALTH CARE SERVICES

a. Patients must respect the rights of other patients

b. Responsibility as Stated in the Country Constitution/Legislation

Article 34 of Law on Protection of Patients' Rights¹⁶⁸ states that a patient is obliged to respect rights of other patients, established by this law, who receive health care services in a health care institution, private practice, higher education institutions or other legal entities performing health care activities.

c. Practical Examples

Example(s) of Compliance

Patient complaints about cold ear due to air-conditioned working in the room during the summer time. Other patients in the same room respect his wish to switch off air-conditioner.

Example(s) of Violation

No violations of this right have been reported or are otherwise known to the working group responsible for the preparation of this guide.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

d. Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to consent; these procedures are described in detail in Chapter 8 of this guide.

e. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards relevant in Chapter 2 and Chapter 3.

6.2.5. RESPONSIBILITY TO HEALTH CARE PROVIDERS

a. Patients must treat health care providers with respect during treatment

b. Responsibility as Stated in the Country Constitution/Legislation

Article 35 of Law on Protection of Patients' Rights¹⁶⁹ emphasizes patients' responsibility to health care providers. A patient is obliged to treat health care providers with respect during receiving of health care services. Obstruction of health care providers during performing health care activities is forbidden. (*Athors' note: there are different possible examples of violation such as attacking physically doctor, shouting, etc. According to Article 35 physician can refused to give a treatment to the patient*)

¹⁶⁸ Official Gazette of RS 45/2013.

¹⁶⁹ Official Gazette of RS 45/2013.

c. Provider codes of ethics

Article 53 of Code of Ethics of the Serbian Medical Chamber¹⁷⁰ states that a physician is entitled to refuse treatment of a patient, except in case of emergency, if the patient is not cooperative, behaves improperly, or tries to exert abuses, or if patient's full confidence in the physician does not exist. *(Authors' note: The Law on Protection of Patients' Rights is supporting this (Article 36).*

d. Practical Examples

Example(s) of Compliance

Physician warns a patient not to address him without respect and with loud voice. A Patient accepts immediately and excuse to him.

Example(s) of Violation

No violations of this right have been reported or are otherwise known to the working group responsible for the preparation of this guide.

Actual Case(s)

No cases involving violation of this right have been reported or are otherwise known to the working group responsible for the preparation of this Guide.

Practice Notes for Lawyers

Administrative, misdemeanor, criminal, and civil protection cases may be opened in response to violations of the right to consent; these procedures are described in detail in Chapter 8 of this guide.

f. Cross-referencing Relevant International and Regional Rights

Please find a discussion of relevant international and regional standards in Chapter 2 and Chapter 3 of the Guide.

7.1 HEALTH CARE PROVIDERS' RIGHTS

Right to work in decent conditions:

Right to freedom of association

Right to due process

Right to strike

Right to benefitted length of service

Right to independently provide healthcare services

Right to an independent professional opinion

Right to refuse to provide health care

Right to provide patient information without consent

Right to medical intervention without patient consent
or approval of authorized person

Right to specialization and sub-specialization

Right to the peaceful resolution of disputes

Right to compensation of damages arising from injury or damage

at work or in connection with the work of a health care institution /owner
of a private practice in cases stipulated by the law

Additional rights in working relations

7.2 PROVIDERS' RESPONSIBILITIES

Responsibility to provide healthcare

Obligation to conduct medical examination

Responsibility to provide emergency medical assistance and working in exceptional
conditions

Responsibility for equal treatment and non-discrimination

Responsibility to respect the patients' personality and human dignity

Responsibility to provide quality medical care responsibility to inform and to obtain
informed consent

Responsibility to maintain confidentiality and professional secrets

Responsibility for keeping health records and compulsory notification

Responsibility for licensing, continuing medical education and re-licensing

Responsibilities and duties of health care providers in health care of persons who are
detained or imprisoned

Responsibilities and duties to colleagues and profession

Responsibility to spread the scientific and medical knowledge in population, to
promote healthy lifestyles, including use of personal example

7

National Providers' Rights and Responsibilities

7.1. Health care 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 care 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 the section, there is a brief explanation of how that right relates to health care providers; and 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.

In Serbia, health care professionals, according to Article 165 of the **Law on Health Care**¹, are those „persons who have completed medical, dental or pharmaceutical faculty, as well as persons who have completed another school of the health profession, a profession that performs health care activities in health care facilities or private practice, under the conditions stipulated by this Law.“

1 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – State Law and 93/2014.

In addition to the right to work in decent conditions, to due process and to freedom of association, the rights of health care professionals are mostly rights other employees in the Republic of Serbia have, except for some specific rights related to the performance of health care services, which are most often subject to the laws and regulations in the health care field. Also, Codes of Professional Ethics provide specific rights that are related exclusively to health care professionals.

7.1.1. RIGHT TO WORK IN DECENT CONDITIONS:

a. Health care providers enjoy a range of rights related to decent-safe and healthy - working conditions when providing health care.

b. Right as Stated in the Country Constitution / Legislation

Constitution of the Republic of Serbia

The right to work is guaranteed by **the Constitution of the Republic of Serbia² (Article 60)** which provides that everyone has the right to free choice of employment, the availability of jobs, under the same conditions, the respect of his personality at work, safe and healthy working conditions, necessary protection at work, limited working hours, daily and weekly rest, annual paid holiday, fair compensation for work done and legal protection in case of termination of employment. No one can renounce these rights; and for women, young people and people with disabilities, special protection is enabled at work along with special conditions in accordance with the Law.

Labor Law and Law on the Employment of Foreigners

The right to work in decent conditions is provided in the **Labour Law³** as an obligation of the employer to provide employee working conditions for the safety and protection of life and health at work (**Article 16, paragraph 1, point 2**) and that the employee provide information on working conditions, work organization, rules on the fulfillment of duties, rights and obligations which are stipulated in the labor regulations on the safety and protection of life and health and to ensure the performance of work under the contract of employment (**Article 16, paragraph 1, point 2, 3 and 4**).

The right to free access to the labor market in the Republic of Serbia, or employment, self-employment and rights in case of unemployment are also stipulated for foreign nationals in the **Law on the Employment of Foreigners⁴**.

An employee who works in especially difficult, strenuous and unhealthy occupations, established by the Law or some general Act and where, despite the application of appropriate security measures and the protection of life and health at work and means and equipment for personal protection at work, there is an increased adverse effect on the health of the employee, according to the provisions of the **Labour Law (Article 52)**, working hours will be shorter in proportion to the damaging effects of working conditions on health and working ability, with a maximum of 10 hours per week (for jobs

2 Official Gazette RS 98/2006.

3 Official Gazette RS 24/2005, 61/2005, 54/2009, 32/2013 and 75/2014.

4 Official Gazette RS 128/2014.

with increased risk). Shorter working hours are determined on the basis of expert analysis done by services of occupational medicine in accordance with the Law. An employee who works part-time has all the rights of employment as for working full time.

Law on Occupational Safety and Health

Law on occupational safety and health⁵ regulates the implementation and promotion of health and safety at work for persons participating in work processes, as well as persons in the working environment, in order to prevent injuries, occupational diseases and diseases related to work. This Law stipulates the obligation of the employer to provide for the employee a workplace and working environment in which measures of health and safety at work are applied (**Article 9**).

The employer is obliged to make a Risk Assessment Act in writing to all workplaces in the working environment and to determine methods and measures for risk removal (**Article 4**). The Law defines risk assessment as a systematic recording and evaluation of all factors in the work process that can cause occupational injuries, illness or damaged health status, as well as determining ways to eliminate or reduce risk. The Risk Assessment Act contains a description of the work process with risk assessment of injury and / or damage to health in the workplace in the working environment and measures to eliminate or reduce risk in order to improve the safety and health at work.

Employees have the right to refuse to work if:

- 1) there is an immediate danger to the employee's life and health because prescribed measures for safety and health in the workplace are not implemented;
- 2) in the course of training for safe and healthy work employee was not familiar with all the risks and measures for their removal;
- 3) the employer did not provide the required medical examination or if the medical examination determines that employee does not meet the health requirements for that work at the workplace with increased risk;
- 4) working hours are longer than full-time or are at night if, in the judgment of occupational health services, such work could worsen the employee's health condition;
- 5) prescribed measures for safety and health at work are not applied to working instruments (equipment, etc) (**Article 33**).

Law on Protection against Ionizing Radiation and Nuclear Safety

A number of health care workers, due to the nature of their work (nuclear medicine, radiology), are occupationally exposed to ionizing radiation or in the process of work they are within the field of ionizing radiation or work with nuclear materials. **The Law on Protection against Ionizing Radiation and Nuclear Safety**⁶, provides measures to protect life and health along with the protection of the environment from harmful effects of ionizing radiation and nuclear safety measures during all procedures related to nuclear materials. It regulates conditions for carrying out activities with sources of ionizing radiation, nuclear materials and management of the radioactive waste.

5 Official Gazette RS 101/2005.

6 Official Gazette RS 36/2009 and 93/2012.

One of the basic principles on which the legal protection against ionizing radiation is based is the restriction of individual exposure (each activity must be planned so that the exposures of individuals are always below the prescribed limits). The Law establishes protection measures in **Article 8**:

- 1) the use of the equipment and means of protection against ionizing radiation, control efficiency and protection;
- 2) control and monitoring of the health status of the exposed personnel;
- 3) maintaining records of exposure to ionizing radiation of the exposed personnel, patients and population;
- 4) implementation of the prescribed measurements at certain intervals to assess the level of exposure to ionizing radiation, the provision of personal dosimetry control, regular checking of the correctness of these tools and their proper use, additional training and performing regular health checks for the employees.

Article 41 states that special measures are the prohibition and the restriction of work with ionizing radiation for: 1) persons under the age of 18; 2) women during pregnancy; 3) women during breastfeeding a child, if they work with open sources of ionizing radiation.

According to the **Article 45** of the Law „systematic X-ray of the population is prohibited, unless in exceptional cases, when such measure is prescribed by the Ministry of Health, with the approval granted by the Agency (Serbian Radiation Protection and Nuclear Safety Agency) on the fulfillment of measures for protection against ionizing radiation for the systematic X-ray of the population.“

Law on the Prohibition of Discrimination

Prohibition of discrimination, including discrimination in the field of labor, is regulated by the **Law on the Prohibition of Discrimination**.⁷ This Law regulates the general prohibition of discrimination and forms and cases of discrimination, as well as methods of protection against discrimination (**Article 1**).

Discrimination and “discriminatory treatment” means (**Article 2**):

any unwarranted or unequal treatment, or omission (exclusion, restriction or preference) in relation to individuals or groups as well as members of their families or persons close to them, directly or indirectly, which is based on race, color, ancestry, citizenship, nationality or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial status, birth, genetic characteristics, health status, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other.

In **Article 4** it is stated that everyone is obliged to respect the principle of equality and freedom from discrimination.

Discrimination in the field of labor, i.e. violation of equal opportunities for employment or equal conditions of labor rights is prohibited. Protection from discrimination includes the person employed, the person who performs temporary and occasional jobs based on a service contract or other agreement, the person on the additional work (overtime), the person who performs a public function, a member of the army, a person seeking a job, a student and student in practice, a person in professional training without employment, a volunteer and any other person who for any reason participates in work

⁷ Official Gazette RS 22/2009.

(Article 16). Unlike discrimination in other areas of social life, discrimination in labor is almost never clearly visible and it is difficult to prove, for various reasons, primarily because it is covered by the legal form which derives from the authority of the employer to freely choose its associates.

Law on the Prevention of Harassment at Work

Health care workers and all citizens are entitled to work in an atmosphere of mutual respect, cooperation and openness. Mistreatment of employees is a form of illegal and unethical communication in the workplace. **The Law on the Prevention of Harassment at Work⁸ (Article 6, paragraph 1, and paragraph 2)** defines abuse as

„any active or passive behavior towards an employee or group of employees that is repeated, and which has the purpose or effect of violating the dignity, reputation, personal and professional integrity of the health status of employees, which causes fear or creates a hostile, humiliating and offensive environment, deteriorating working conditions, or causes the isolation of the employee or the employee’s own initiative to terminate the employment contract or any other agreement.“

The abuse, in the meaning of this Law, shall be considered also to include an encouragement or inducement of others to behave in the described manner. The Law on the Prevention of Harassment at Work prohibits harassment and sexual harassment at work and related to work and establishes measures to improve relations at work, measures to prevent child abuse and sexual harassment, and procedures to protect employees who are exposed to abuse or sexual harassment. According to the norms of this Law, the employer is obliged to allow employees to perform their work in a healthy and safe environment in which they will not be subjected to abuse or sexual harassment by the employer or other employees.

Protection from abuse can be accomplished in one of the following ways **(Articles 13-33)**:

- 1) mediation with the employer;
- 2) the process of determining the liability of the employee who is charged with assault by the employer;
- 3) the process of peaceful settlement of an individual labor dispute before an arbitrator of the Agency for the peaceful settlement of labor disputes; and
- 4) Court procedure.

According to the Law on the Prevention of Harassment at Work **(Article 32)**, the procedure in a dispute because of harassment at work is urgent, so the Court’s obligation, after a claim has been filed with the court, is to submit the complaint alleging harassment with attachments to the defendant for a reply within 15 days of the receipt of the complaint. Also, because this procedure belongs to labor disputes, according to the Labour Law, the Court is expected to take a final verdict within six months from the date of the original filing of the complaint with the Court.

c. Supporting Regulations/Bylaws/Orders

Regulations on detailed conditions for the provision of health care services in health care institutions and other forms of health services⁹, are issued by the Ministry of Health and prescribe the requirements in terms of personnel, equipment, facilities and medicines for the establishment

8 Official Gazette RS 36/2010.

9 Official Gazette RS 43/2006, 112/2009, 50/2010, 79/2011, 10/2012 – State Regulations, 119/2012 – State Regulations and 22/2013.

and performance of health care activities that must be met by health care institutions, thus providing conditions for the right to work in decent conditions.

Regulations on conditions and methods of internal organization of health care institutions¹⁰ issued by the Ministry of Health, further regulate the right to work in decent conditions.

Special collective agreement for health care institutions founded by the Republic of Serbia¹¹

- **Article 37** provides the special protection of health care workers who work in extremely difficult, strenuous and unhealthy occupations where despite the application of appropriate security measures and the protection of human life and health, resources and equipment for personal protection, there is an increasing adverse effect on the health of the employee. The protection consists in the reduction of the working hours in proportion to the damaging effect of the working conditions on the health and working ability of the employee. Working hours can not be shorter than 30 hours per week.
- **Article 38** includes particularly difficult jobs: activities in terms of ionizing radiation, emergency services, neonatology, pathology and forensic medicine, working with mental patients, providing chemotherapy, and working in surgery rooms, hemodialysis, intensive care, hematology, with infectious materials and other activities determined by the collective agreement with the employer.
- The employer is obliged to provide for the employee to work at the workplace and working environment in which the measures of health and safety at work are applied, in accordance with the regulations on safety and health at work (**Article 58**).
- An employee with the immediate threat to life and health because of unimplemented measures for safety and health at work is entitled, in accordance with the Law, to refuse to perform duties. An employee is entitled to a salary that is the same as he worked at his workplace, he does not violate the duty to work, and his contract of employment can not be canceled on this basis (**Article 62**).

A more detailed elaboration of standards on the prevention of harassment at work is contained in the **Rulebook of conduct of the employer and employees regarding the prevention and protection from the harassment at work**.¹² The Rulebook contains a set of norms regarding actions that represent abuse from which both the employer and the employee should refrain:

- 1) actions relating to the inability of appropriate communication (*such as: deliberately preventing the employee to express his/her opinion and an unjustified termination of the employee because of his/her speech, shouting, making threats and insulting, harassment by phone calls and other means of communication, if it is not related to the work which the employee performs, and any other comparable conduct*);
- 2) behaviors that can lead to a distortion of good interpersonal relationships (*such as: ignoring the presence of the employee or the employee is intentionally and unjustifiably isolated from other employees through avoiding and interrupting the communication with him/her, unjustifiable physical isolation of employee from the employee's work environment, unreasonable confiscation of employees resources required to perform the job; unjustified failure to call for joint meetings, unjustified ban on communicating with employees and other comparable conduct*);

¹⁰ Official Gazette RS 43/2006.

¹¹ Official Gazette RS 1/2015.

¹² Official Gazette RS 62/2010.

- 3) behavior that can lead to distortions of the personal reputation of the employee (*such as: verbal attack, ridicule, gossip, inventing stories, spreading untruths about employees in general and in relation to his/her private life, negative comments on the personal characteristics of the employee, imitating the voice, gestures and ways of moving of the employee, the humiliation of the employee with derogatory and degrading words and other comparable conduct*);
- 4) behaviors that can lead to distortion of the professional integrity of the employee (*such as: unjustified constant criticism and degradation of an employee; not giving tasks that the employee is not justified by the needs of the working process; preventing employee to perform tasks; giving degrading tasks which are below the level of the employee's knowledge and qualifications; giving difficult tasks or those that are above the level of the employee's knowledge and skills; determination of undue deadlines for the execution of the employee's tasks; frequent changes in work tasks or unwarranted interruptions in the work, which are not part of its work process; unduly excessive monitoring of the employee's work; intentionally and unjustified denial or withholding of information related to work; manipulating the content and business objectives of the employee; malicious, abusive, authority-giving tasks that are not related to the job for which the employee is actually employed; unjustified, unfounded or excessive use of cameras and other technical means which enable the control of employees; unjustified and deliberate exclusion of the employee from education, professional training and development and other comparable conduct*);
- 5) behavior that can lead to deterioration of the health of the employee (*such as: unjustified constant threat, e.g. termination of employment or other contract and pressures which keep the employee in constant fear, the threat of applying the physical force, physical harassment with no elements of the criminal offense, intentionally causing conflicts and stress and other comparable conduct*);
- 6) behavior that could be construed as sexual harassment (*such as: humiliating and inappropriate comments and actions of a sexual nature, attempt or execution of a rude and unwanted physical contact, forcing the acceptance of a sexual nature with promises of rewards, threats or blackmail and other comparable conduct*).

d. Providers' Codes of Ethics

Code of Professional Ethics of the Medical Chamber of Serbia¹³ (Article 13) stipulates that doctors have the right and duty, through their professional and other organizations, to advocate for proper evaluation of their work, as well as to ensure, personally or through an employer, against claims for damages in the performance of their professional duties.

e. Practice examples

Example(s) of Compliance

1. According to the special collective agreement for health care institutions founded by the Republic of Serbia¹⁴, additional rights, in comparison with employees in other sectors, are regulated, for example: shorter working hours in the case of working with ionizing radiation sources, working in the Emergency medical assistance, Emergency services, in neonatology, etc.
2. Following the adoption of the Law on the Prevention of Harassment at Work, many directors of health institutions in Serbia sent a memo to employees with precise instructions on how to behave in case of

¹³ Official Gazette RS 121/2007.

¹⁴ Official Gazette RS 1/2015. <http://sloga.org.rs/wp-content/uploads/2015/01/poseban-kolektivni-ugovor-za-zdravstvo.pdf> (accessed on: January 20, 2015)

harassment at work, along with provisions of the Law and the Rulebook of conduct of the employer and employees regarding the prevention and protection from the harassment at work.

Example(s) of Violation

1. All the protection against discrimination (The Commissioner for Information of Public Importance and Personal Data Protection, Inspection, the Court) is conducted after discrimination has occurred, which clearly shows the lack of prevention as a form of protection. *(Author's note: Realistic assessment of safety and health at work and the indisputable fact that the suffering of discriminatory working conditions pose a threat to health, leads to a conclusion that the prevention of discrimination must be tackled by trade union organizations, then Committees for Safety and Health at Work, persons responsible for safety and health at work with the employer and employee representatives for safety and health at work.)*
2. The Commissioner for Information of Public Importance and Personal Data Protection addressed to the Minister of Labour, Employment and Social Policy a letter indicating the number of problems related to the processing of personal data in the field of labor relations and the need to start solving them in a systematic way as soon as possible. The Commissioner pointed out that the Government of the Republic of Serbia, more than 3 years ago, adopted the Strategy on Personal Data Protection, but to this day has not adopted an Action Plan for the implementation of the Strategy with defined activities, holders of specific tasks and deadlines for execution and that until now, there is no adoption of an action plan concerning the processing of personal data in the field of labor relations, which is an important step. Nevertheless, the most important issues of personal data in the field of labor relations is not regulated by the Law but, contrary to the Constitution and the Law, in the best case, are regulated by the use of bylaws (e.g.: regulations on the work card; regulations on issuance and content of the certificate of temporary incapacity for work; regulations on record keeping in the field of health and safety at work, regulations on the content of the data and methods of record keeping in the field of employment), which is in contradiction with the Constitution and the Law on personal data protection.

Actual Case(s)

1. A labour dispute initiated before the First Basic Court in Belgrade in 2013 by Dr. BO against the employer- a health care institution where she was employed as a physician. The plaintiff was employed by the defendant for a period of five years, based on successive contracts concluded for a definite time. Upon expiration of the last contract of employment, which was concluded for a period of six months, plaintiff continued to work at the same job for three more months. Through trade union organizations in which she was a member, the plaintiff addressed a request to the Director of the health care institution where she worked to receive her for an indefinite period of time. Her application was rejected, so she asked for the Court protection. The request to the Court was to annul as illegitimate the decision by the director of the health care institution on the termination of the employment contract and to establish that the current working relationship that has been conceived for a limited time become effective for an indefinite period instead in accordance with the provisions of the Labour Law¹⁵ which stipulates that an employee, whose contract is based on a definite period of time, becomes employed for an indefinite period, if the employee

15 Official Gazette RS 24/2005, 61/2005, 54/2009, 32/2013. (Article 37, paragraph 4)

continues to work for at least five working days after the deadline for which the employment is stated. The plaintiff proved her claims that she continued to work with the health care institution after the expiration of the employment contract for a definite time with the discharge lists of patients that she had been treating during this period and having patients as witnesses. The Court's assessment of all the evidence found that the claim is well-founded and obligated the defendant, a health care institution, for a contract of employment for an indefinite period of time with the plaintiff. Health care institution instituted a new contract of indefinite period of time.

2. Health care workers in the Clinical Hospital Center, in an official talk with authorized staff persons of the Protector of Citizens – Ombudsman of Serbia, expressed discriminatory attitudes towards Roma minority as patients, that are in violation of the prohibition of discrimination prescribed by the Law. Employees of the Clinical Hospital Center XY refused to cooperate with the Protector of Citizens, did not put all the information at their disposal, refused to talk with the authorized persons of the Protector of Citizens and tried to prevent the performance of direct supervision by the authorized persons.
3. This case is also the procedure that is before the National Agency for the peaceful settlement of labor disputes (Case No. 116-02-00145 / 2013-02) that was launched against the employer by the trade union organization in which a member, Dr. RJ, was a victim of mistreatment of employees. In the procedure before an arbitrator that was completed in a month, during which four public hearings were held, it was found that the Head of the Clinical department RJ for a long period of time was continuously exposed to harassment at work by the Director of the clinic MP. The abuse was committed in a series of successive actions. The director MP, unauthorized (without the decision of the Director General) and illegally (without the Annex of the contract on employment) permanently cancelled the duties of the Head of the Department and deployed the victim of mistreatment of employees RJ to a non-existent position within the organizational unit that has never existed factually or legally (not provided by Regulations on conditions and methods of internal organization of health care institutions¹⁶). The acting arbitrator found that this behavior of the MP undermined the dignity, reputation, personal and professional integrity, health and position of the staff member RJ as a victim of mistreatment of employees and caused RJ mental suffering on a daily basis, spending time at work under stress, with increased fear of the possible consequences. Such conduct is in contradiction of the responsibilities of the employer arising from the norms of the Law on the Prevention of Harassment at Work and the Rulebook of conduct of the employer and employees regarding the prevention and protection from harassment at work. The decision of the arbitrator, which became legally binding and mandatorily enforceable, is that the Director of the Health care institution in which the Clinic where the abuse happened is a unit, is obliged to protect the employee RJ from further abuse at work, so that RJ would, not later than within 15 days of the ruling, be provided with a working environment in which she can conduct her work smoothly, in an atmosphere of mutual respect, cooperation, teamwork, openness, security and equality.

f. Practice Notes for Lawyers

In accordance with the **Law on Peaceful Settlement of Labor Disputes**¹⁷, a procedure may be initiated in cases where the employer violates the rights of employees. The procedure of a labor dispute is initiated when all other protection mechanisms are exhausted. For details, see Chapter 8 of this Guide.

Protection against discrimination can be achieved in one of these three ways:

- 1) in the procedure before the Commissioner for Protection against Discrimination;
- 2) in the procedure before the Inspection of the Ministry of Labor and Employment of the Republic of Serbia, which monitors and sanctions discrimination; and
- 3) in Court procedure.

A person who believes that he/she suffered discrimination can initiate the request for protection of his/her violated rights by filing a complaint to the Commissioner for the Protection of Equality. The Commissioner is appointed by the National Assembly by a majority of votes of members, at the proposal of the Committee responsible for Constitutional matters. The Commissioner enjoys immunity as a Member of Parliament in the National Assembly. On behalf of and with the consent of the person whose rights have been violated, an organization that deals with the protection of human rights, or other person, may file a complaint to the Commissioner. In the procedure before the Commissioner, provisions of the Law governing general administrative procedure are applied. Upon receipt of a complaint, the Commissioner establishes the facts by examining the submitted evidence and taking statements from the complainant and from the person against whom the complaint was filed, as well as from other persons. The Commissioner first proposes the implementation of the conciliation procedure in accordance with the Law governing the mediation process before taking other steps in the procedure.

A person who believes that he/she suffered discrimination may also seek Court protection by filing a lawsuit. The procedure is urgent. The revision, as extraordinary legal remedy, is still permitted, according to the Law on the Prohibition of Discrimination.¹⁸ The verdict in a lawsuit may require:

- 1) prohibition of an activity that threatens discrimination, prohibition of further enforcement actions of discrimination, or prohibition of repetition of discrimination;
- 2) finding that the defendant acted in a discriminatory manner toward the plaintiff or another;
- 3) enforcement of actions to redress the consequences of discriminatory treatment;
- 4) compensation for material and non-material damages;
- 5) publication of the verdict.

Provisions of the Law on Civil Procedure are applied. If the plaintiff proves that the defendant committed an act of discrimination, the defendant then bears the burden of proving that such an act has not been a violation of the principle of equality and the principle of equal rights and obligations.

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

¹⁷ Official Gazette RS 125/2004 and 104/2009.

¹⁸ Official Gazette RS 22/2009.

g. Cross-referencing Relevant International and Regional Rights

Please see discussion on International and Regional standards relevant to the Right to Work in Decent Conditions in Chapter 2 (International) and Chapter 3 (Regional).

7.1.2. RIGHT TO FREEDOM OF ASSOCIATION

a. Health care providers have the right to form, join, and run associations without undue interference and it is critical for their ability to effectively defend their rights and provide good care.

b. Right as Stated in the Country Constitution / Legislation

Constitution of the Republic of Serbia

The ability of health care workers to form, join and run professional associations without undue external influence is critical to their ability to effectively defend their rights and to provide quality health care. The right to freedom of association is guaranteed by the **Constitution of the Republic of Serbia**¹⁹ whose **Article 55** states that it „guarantees freedom of political union, labor union and any other association, along with the right to stay out of any association“.

Law on Health Care

According to the **Law on Health Care**²⁰, **Article 167**, all health care providers (doctor, nurses, dentist, graduate pharmacist and graduate pharmacist medical biochemist) are required to enroll in the appropriate Chamber, which is thoroughly regulated by a special Law - the Law on Chamber of Medical Workers.

Law on Chamber of Medical Workers

Article 1 of the **Law on Chamber of Medical Workers**²¹, stipulates that „This Law establishes the chambers of medical workers as independent, professional organizations; governs the membership in the chambers of medical workers, their work and organization; and mediates in disputes and with Courts of Honour, as well as other issues of importance to the work of the Chamber“.

Article 2 states that „in order to improve the conditions for carrying out the above professions (*Author's note: doctor, dentist, graduate pharmacist and graduate pharmacist medical biochemist*), to protect their professional interests, organized participation in the promotion and implementation of health and safety interests of citizens in exercising their right to health care are established: 1) the Serbian Medical Chamber, 2) the Serbian Dental Chamber, 3) the Serbian Pharmaceutical Chamber, 4) the Serbian Chamber of Biochemists, and 5) the Serbian Chamber of Nurses and Medical Technicians.“

Each of these Chambers has the status of a legal entity, with rights, obligations and responsibilities established by the Law and the Statute of the Chamber (**Article 3**).

19 Official Gazette RS 83/2006 and 98/2006.

20 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law

21 Official Gazette RS 107/2005 and 99/2010.

Law on Associations

The **Law on Associations**²² regulates the establishment and legal status of associations, their registration and deletion from the register of association, membership and bodies, status changes and termination of the association, as well as other issues relevant to the work of the association.

c. Supporting Regulations/Bylaws/Orders

The work of professional associations of health workers is regulated by their Statutes.

In **Article 1** of the **Statute of the Serbian Medical Chamber**²³ it is stated that „the Serbian Medical Chamber is the required, independent and professional organization of physicians - medical doctors - who perform health services as a profession in the Republic of Serbia“.

Article 2 of the **Statute of the Serbian Medical Chamber** (hereinafter: the Chamber) „stipulates in detail the name, address, internal organization and work of the Chamber, jobs that should be done within the Chamber and its legal powers, manner of performing the work of Chamber, composition, method and procedure of selection and jurisdiction of the Chamber bodies, the number of members in the Chamber, the election and revocation of members in the Chamber, the Chamber’s body which appoints a mediator, and the mediation procedure; Chamber organ that forms the Courts of Honour, the composition of the Courts of Honour, conditions and manner of appointment and dismissal of judges, the jurisdiction of the Courts of Honour, minor and serious violations of the professional duty and reputation of the Chamber, the procedure before the Court of Honour, the imposition of measures, the method of the enforcement of measures and deadlines for initiating the procedure and the enforcement of measures, as well as other issues of importance for the resolution of disputes, rights and duties of the members of the Chamber, the Branches of the Chamber, organizations and bodies of the Branches and its headquarters, carrying out professional activities, mediation of disputes, professional service of the Chamber, general acts of the Chamber, financing of the Chamber and other issues relevant to the work and organization of the Chamber.“

In addition to the Serbian Medical Chamber, other Chambers have their own Statutes which govern their work more closely: **the Statute of the Serbian Dental Chamber**²⁴, **the Statute of the Serbian Pharmaceutical Chamber**²⁵, **the Statute of the Serbian Biochemists Chamber**²⁶ and **the Statute of Nurses and Medical Technicians of Serbia**²⁷.

d. Providers’ Codes of Ethics

Chambers, as professional associations of health care workers have formulated Codes of professional Ethics, which establish ethical principles in the performance of their professional duties. Ethical principles are binding on all members of the Chamber, so there are: **Code of Ethics of the Serbian Medical**

22 Official Gazette RS 51/2009, 99/2011 – State Laws

23 Official Gazette RS 111/2006, 68/2008, 14/2010, 36/2011 – decision of the Constitutional Court, 43/2011 and 22/2012.

24 Official Gazette RS 89/2007, 85/2008 and 37/2014.

25 Official Gazette RS 106/2006, 118/2008, 5/10 and 113/2013.

26 Official Gazette RS 70/2006.

27 Official Gazette RS 115/2006, 21/2008, 69/2008 and 10/2012.

Chamber²⁸, **Code of Ethics of the Serbian Dental Association**²⁹, **Code of Ethics of Biochemists**³⁰, **Code of Ethics of Pharmacists of Serbia**³¹, as well as the **Code of Ethics of the Serbian Chamber of Nurses and Medical Technicians**³².

The **Code of Ethics of the Serbian Medical Chamber, (Article 3)** states that „the Ethics Committee of the Chamber ensures the implementation of the Code of Ethics in accordance with the Law and the Statute of the Chamber, especially considering the ethical principles related to the exercise of the profession, giving opinions on the work of the Chamber members in accordance with the Code of Ethics, by promoting the principles of professional ethics to ensure ethical conduct of members of the Chamber and performing other tasks related to the implementation and observance of the Code of Ethics“.

e. Practice examples

Example(s) of Compliance

Health care providers have a legal obligation to establish Chambers of medical workers. They also have a legal obligation to enroll in the appropriate Chamber. Since there is no element of voluntariness, chambers of medical workers do not represent a true example of freedom of association. In Serbia, there are various professional associations of medical workers, which are established freely, without state intervention, such as the Serbian Medical Society in which there are numerous sections and branches. The Serbian Medical Society is a voluntary, non-governmental association of doctors established in order to promote medical science and practice, the protection and promotion of public health, education of health care providers and the protection of patients. The Society is open to all physicians and dentists from state institutions and private practice, as well as for doctors from abroad (Statute of the Serbian Medical Society).³³ The Association of Physicians of Vojvodina and the Society of Physicians of Kosovo and Metohija are organized on the same principles. A special form of organizing represents the Academy of Medical Sciences of the Serbian Medical Society, which has a number of tasks, primarily the education of doctors and dentists and encouraging their scientific work. In addition to these, there are other associations of health care providers, such as: The Union of Doctors and Pharmacists, the Union of Nurses and Technicians, Association of Health Care Providers of Niš and others.

Example(s) of Violation

In searching for examples, the working group responsible for preparing this Guide did not come across any information regarding actual violations of the right to freedom of association.

Actual Case(s)

The Court found that the person NN, from December 2002 to June 2005, was a member of the Executive board at the trade union organization of the Blood Transfusion Institute and that he should

28 Official Gazette RS 121/2007.

29 Official Gazette RS 14/2008.

30 Official Gazette RS 106/2006.

31 Official Gazette RS 6/2007.

32 Official Gazette RS 67/2007.

33 Serbian Medical Society: <http://www.sld-rs.org/> (accessed on: January 20, 2015)

have never been fired pursuant to Article 51 of the Collective agreement. This article stipulates that while exercising one of the functions in the trade union organization, employee who is a member of executive organs of the trade union organization can not be found to be redundant. The first instance Court in Novi Sad issued a verdict in which it accepted the request of the prosecutor and annulled the decision of the Blood Transfusion Institute. A different verdict would be a violation of the rights of health care provider to freedom of association and to work in the union.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

g. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to the Right to Freedom of Association in Chapter 2 (International) and Chapter 3 (Regional).

7.1.3. 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, misdemeanor, civil and criminal procedures, 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.

Health care providers can protect their rights in several ways through different types of procedures. Initiating a particular procedure depends on the nature of the right to be protected.

b. Right as Stated in the Country Constitution / Legislation

Substantive and procedural norms that are relevant for this area are governed by the Constitution of the Republic of Serbia, a number of laws, decrees, regulations, statutes and codes.

Constitution of the Republic of Serbia

The highest legal act, **the Constitution of the Republic of Serbia**³⁴, does not contain a provision that specifically regulates the right to health care providers to protect their rights. The right to a fair trial is defined in **Article 32**. That right guarantees equal treatment in the procedures before the judicial authorities to all citizens.

Criminal Code and Criminal Procedure Code

In criminal procedures, health care providers can appear as a defendant or as the damaged party. In both cases, norms of the **Criminal Code**³⁵ and the **Criminal Procedure Code**³⁶ are applied. Also, they can protect their rights as participants in the procedure and there are no specific norms that govern their position.

34 Official Gazette RS 98/2006.

35 Official Gazette RS 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012 and 104/2013.

36 Official Gazette RS 72/2011, 101/2011.

The substantive provisions of the Criminal Code provide in **Section 23**: “Criminal offenses against public health” list several offenses under which health care providers can become defendants in criminal procedures (Failure to comply with health regulations during the epidemic – **Article 248**; transmission of infectious diseases – **Article 249**; negligent provision of medical aid – **Article 251**; unlawfully performing medical experiments and testing of the drug – **Article 252**; failure to provide medical aid – **Article 253**; serious offenses against public health – **Article 259**).

In addition to these crimes, health care providers can respond for others: illegal abortions – **Article 120** (Crimes against life and body); unauthorized disclosure of secrets – **Article 141** (Crimes against the rights and freedoms of man and citizen); not reporting the crime or the perpetrator – **Article 332** (Criminal offenses against the judiciary); taking a bribe – **Article 367** (Criminal offenses against official duties). In these instances, health care providers have the status of the accused. Table 7.1. shows criminal offenses in which health care providers can appear as defendants.

TABLE 7.1. CRIMINAL OFFENSES IN WHICH HEALTH CARE PROVIDERS CAN APPEAR AS DEFENDANTS

Group of criminal offenses	Article of the Criminal Code	Criminal offense
Crimes against life and body	Article 120	Illegal abortions
Crimes against the rights and freedoms of man and citizen	Article 141	Unauthorized disclosure of secrets
Criminal offenses against public health	Article 248	Failure to comply with health regulations during the epidemic
	Article 249	Transmission of infectious diseases
	Article 251	Negligent provision of medical aid
	Article 252	Unlawfully performing medical experiments and testing of the drug
	Article 253	Failure to provide medical aid
	Article 259	Serious offenses against public health
Criminal offenses against the judiciary	Article 332	Not reporting the crime or the perpetrator
Criminal offenses against official duties	Article 367	Taking a bribe

The source: Criminal Code, Official Gazette RS 85/2005, 88/2005 – corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014

Health care providers may have the position as the damaged party like all other citizens. However, in accordance with the requirements of this Guide, it is important to mention a few examples of crimes that can be committed against health care providers: coercion – **Article 135** (if the doctor is forced or threatened to provide certain medical services); serious bodily injury – **Article 121**; light bodily injury – **Article 122**; Giving a bribe – **Article 368**. Table 7.2. shows criminal offenses in which health care providers can appear as the damaged party.

TABLE 7.2. CRIMINAL OFFENSES IN WHICH HEALTH CARE PROVIDERS CAN APPEAR AS THE DAMAGED PARTY

Group of criminal offenses	Article of the Criminal Code	Criminal offense
Crimes against life and body	Article 121	Serious bodily injury
	Article 122	Light bodily injury
Crimes against the rights and freedoms of man and citizen	Article 135	Coercion
Criminal offenses against official duties	Article 368	Giving a bribe

The source: Criminal Code, Official Gazette RS 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014

Thus, the procedural norms that have general validity for all defendants (blaming, convicted and damaged) apply to the health care providers, respecting the right of access to judicial authorities, the right to a fair trial and the right to an effective remedy.

Filing an appeal against the first instance verdict is available in accordance with the Constitution.

Civil Procedures

In civil procedures, there are no specific norms that regulate the situation of health care providers as a plaintiff or defendant. In this process, they can propose the presentation of evidence that they believe are relevant, but the final decision on the execution of the importance of the evidence would will be determined by the Court. As a party in the procedure, they can have a lawyer or they can protect their rights independently (without proxy). Depending on the rights that are protected, they can ask for compensation of material and non material damage.

The possibility of initiation of the misdemeanor procedure³⁷ is provided in a number of laws in the field of health care. It is important to emphasize that these provisions are mainly aimed as sanctions for employees in health care institutions. Such provisions enhance the responsibility of the persons who are responsible for decision-making in health care institutions.

Law on Occupational Safety and Health

On the other hand, there are the same laws and norms on which employees can protect their rights violated by their employers. Thus, the **Law on Occupational Safety and Health**³⁸ enables employees to initiate a misdemeanor procedure to Misdemeanor Court against their employers who do not provide the statutory requirements for work operations (standard in **Chapter XI Penalty Provisions**). When in a misdemeanor procedure a violation of rights and responsibilities is determined by the Court, a fine may be imposed by the Court which is prescribed in each Law.

Labor Law

Labor disputes are a special type of dispute, but norms of civil procedure are applicable. Here there is just a difference in an area that is regulated and the rights that are protected. In this area, it is always

37 Official Gazette RS 65/2013.

38 Official Gazette RS 101/2005.

about the relationship between employees and employers. In the **Labour Law**³⁹ there are no special rights of employees in the health care system.

c. Supporting Regulations/Bylaws/Orders

Specific legal acts, which closely regulate rights in connection with work in the health sector are:

1. Regulation on minimum work process during the strike in health care institutions⁴⁰

Although this regulation defines the duties of employees in health care institutions, it can not be contrary to the Law on Strike⁴¹ governing the right to strike (*included below*). In this way, health care providers are indirectly protected from the negative consequences that may arise due to the suspension of work;

2. Rulebook on detailed conditions for the issuance, renewal or revocation of the license of members of the Medical Chambers⁴²

For doctors to perform independently, they must obtain a license from the competent Chamber. The license is issued after internship is done, internship exam is passed and physician is in the list of Medical Chamber for a period of seven years;

3. Rulebook on conditions, criteria and standards for the conclusion of contracts with health care providers and for determining compensation for their work in the year 2015⁴³

Standards of this Rulebook govern the contractual relationship between the National Health Insurance Fund and health care institutions. Certain provisions directly regulate the labor rights of health care providers. According to the rulebook, the health care institution is obliged to respect working hours, right to earnings (to respect the criteria for determining compensation for wages and salary supplements), the right to adequate working conditions and other rights;

4. A special collective agreement for health care institutions founded by the Republic of Serbia⁴⁴

As in the case of the previous bylaws, a special collective agreement must be in accordance with the Labour Law. However, unlike the Law, this agreement regulates in detail the rights of employment of employees in health care institutions. In case of violation of the rights of employees, they can refer to the general and the specific norms of collective agreements and initiate a labor dispute.

d. Providers' Codes of Ethics

The doctor may protect his/her rights before the Court of Honour of the Medical Chamber. According to the **Statute of the Serbian Medical Chamber**⁴⁵, there are Courts of Honour at the Regional Medical Chamber (first degree), and the Supreme Court of Honour at the Serbia Medical Chamber (second degree). Courts of Honour are formed in Belgrade, Novi Sad, Kragujevac, Nis and Kosovska

39 Official Gazette RS 24/2005, 61/2005, 54/2009 and 32/2013.

40 Official Gazette RS 25/1997.

41 Official Gazette SRJ 29/1996.

42 Official Gazette RS 119/2007, 23/2009 and 40/2010.

43 Official Gazette RS 147/2014, 9/15, and 63/2015.

44 Official Gazette RS 36/2010, 46/2013 - the Agreement, 74/2013 - the Agreement and 97/2013 - the Agreement

45 Official Gazette RS 111/2006, 68/2008, 14/2010, 36/2011.

Mitrovica. In the procedure before a Court of Honour, the disciplinary liability of a member of the Medical Chamber is determined and norms of the administrative procedure of the Law on Administrative Procedure⁴⁶ are applied. Because of the breach of professional duty or the reputation of the Chamber, under **Article 240**, the Court of Honor may impose one of several sanctions. If the doctor is unsatisfied with the decision of the Court of Honor, he/she may appeal within 15 days of the delivery of the decision. An appeal is conducted by the Supreme Court of Honour. The list of possible Court of Honor sanctions include:

- a public reprimand;
- a fine up to 20% of the average monthly salary in the Republic of Serbia (duration of one to six months);
- a temporary ban on independent work in performing certain health-related activities (duration of six months to one year, exceptionally up to five years);
- temporary prohibition of independent work in the provision of health care services (duration of six months to one year, exceptionally up to five years).

There are several Chambers in Serbia that bring together different professions in the field of health care and medicine:

- Serbian Medical Chamber – Statute and Code of Ethics⁴⁷
- Serbian Chamber of Nurses and Medical Technicians - Statute⁴⁸ and Code of Ethics⁴⁹
- Serbian Dental Chamber - Statute⁵⁰ and Code of Ethics⁵¹
- Serbian Pharmaceutical Chamber – Statute⁵² and Code of Ethics⁵³
- Serbian Chamber of Biochemists – Statute⁵⁴ and Code of Ethics⁵⁵.

Every Chamber has its Court of Honour which is governed by the Statute. The principles of operation of the Courts of Honour are identical and based on the same principles. Courts of Honor are organized as first and second instance.

Codes of Ethics of each Chamber contain moral principles, principles, rights and duties of its members. Violations of the rights contained in the Codes entail certain sanctions ranging from a warning to expulsion from the Chamber and the revocation of the license.

e. Practice examples

Example(s) of Compliance

The right to the protection of the rights and legal remedies which have been described are always applied in cases of necessity to provide protection for doctors and other health care providers.

46 Official Gazette SRJ 33/97 and 31/2001 and Official Gazette RS 30/2010.

47 Official Gazette RS 121/2007.

48 Official Gazette RS 115/2006, 21/2008 and 69/2008.

49 Official Gazette RS 67/2007.

50 Official Gazette RS 89/2007, 85/2008 and 37/2014.

51 Official Gazette RS 14/2008.

52 Official Gazette RS 106/2006, 118/2008, 5/2010 and 113/2013.

53 Official Gazette RS 6/2007.

54 Official Gazette RS 70/2006 and 26/2014.

55 Official Gazette RS 106/2006.

Example(s) of Violation

The practice of realising information for media regarding a health care provider who is under suspicion of medical malpractice are often released while the investigation is still in progress.

Actual Case(s)

The President of the Supreme Court of Honour of the Serbian Medical Chamber, upon the proposal of the patient, filed a request for disciplinary action for a violation of professional duties (pursuant to Article 195, paragraph 1, point 3 and 4 of the Statute of the Serbian Medical Chamber). Proceedings were initiated against three doctors because of a patients' general dissatisfaction with the services during childbirth at the Clinic for Gynecology and Obstetrics. A Judicial Panel also gathered detailed evidence for two months, while respecting the right of doctors to their protection and decided that all three health care providers did not breach any of their professional duties, since they have taken all necessary measures in accordance with their profession and current regulations.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

g. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to the Right to Due Process in Chapter 2 (International) and Chapter 3 (Regional).

7.1.4. RIGHT TO STRIKE

a. A strike is a suspension of work that employees organize to protect their professional and economic interests, under Article 1 of the Law on Strike⁵⁶.

A strike, as a form of labor conflict, is an organized, joint and conducted in the same time, suspension of the work operation, slowing down on the work activities or other ways of disabling normal functioning of the work process in one organization or more, by the employees in order to gain certain economic, social and political interests.

b. Right as Stated in the Country Constitution / Legislation

Constitution of the Republic of Serbia

The right to strike is guaranteed by the highest legal act, **the Constitution of the Republic of Serbia**.⁵⁷ In **Article 61** the employees' right to strike is recognized, in accordance with the Law and collective agreements. The right to strike may be restricted only by the Law, in accordance with the nature or type of the professional activity.

⁵⁶ Official Gazette SRJ 29/1996 and Official Gazette RS 101/2005.

⁵⁷ Official Gazette RS 98/2006.

Law on Strike

According to the **Law on Strike**⁵⁸, a strike can be organized in a company or other legal entity or in a certain part, or by a person performing an economic or other activity or service (hereinafter referred to as the employer), in the branch and a certain activity, or as a general strike. A strike may be organized as a warning strike which may last no longer than one hour (**Articles 2 and 3**).

The decision to go on strike and warning strike at the employer brings the organ of the trade union that is determined by the general act of trade unions or most employees. Decision on strike will determine: requests of employees; the time of the beginning of the strike; gathering place for participants in the strike if the strike is manifested by gathering of employees and the strike committee, which represents the interests of employees and leads the strike in their name (**Articles 3 and 4**).

Law on Health Care⁵⁹

Article 75 establishes the minimum work process, working hours and manner of determining the working hours in specific situations. The same Article stipulates that during a strike, a health care institution will, depending on the activity, provide a minimum of work process which includes:

- continuous and uninterrupted performance of regular vaccination according to established deadlines;
- implementation of sanitary-epidemiological measures for emergency outbreak or during outbreaks of infectious diseases;
- diagnosis and therapy including patient transport, emergency and acute diseases, conditions and injuries;
- taking, processing and administering blood and blood products;
- supply of the most important medicines and medical devices;
- health care and nutrition of hospitalized patients, and
- other forms of necessary medical assistance.

It is forbidden to organize strikes in health care institutions that provide emergency medical assistance (**Article 75**).

c. Supporting Regulations/Bylaws/Orders

Special Regulation on minimum work process during a strike in health care institutions⁶⁰

Articles 1 to 5 state that a minimum work process during a strike in health care institutions is regulated, established by the Government of RS, that includes:

- providing emergency medical aid, including medical transportation to the nearest appropriate health care institution;
- receiving cases of emergency and urgent diseases, conditions and injuries in the hospital;
- complete health care for children, youth and pregnant women, as well as diagnostics (clinical, laboratory, X-ray and other) and therapy (prescribed medications, surgical and other) for the acute diseases,

58 Official Gazette SRJ 29/1996 and Official Gazette RS 101/2005

59 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – State Law and 93/2014.

60 Official Gazette RS 25/1997.

- conditions and injuries in other population groups and persons in outpatient and inpatient departments;
- total health care of patients in the ICU, semi-intensive and special care units;
 - taking, treatment, processing and administering blood and blood products;
 - supplying the population and health care institutions with the most important medicines and medical supplies;
 - providing nutrition to hospitalized patients;
 - implementation of vaccination according to the **Regulations on immunization and protection with drugs**⁶¹;
 - performing preventive health care referred to in **Article 3** of the **Regulation on the scope and content of health care**⁶² that can-not be delayed because of regulatory deadlines, scheduled inspections and tests, or because of danger to individual and collective health;
 - taking hygienic and epidemiological measures for an emergency outbreak or during outbreaks of infectious diseases;
 - other forms of necessary medical assistance, as well as evaluating the health and working capacity of the insured (and other aid - maintenance of tools and equipment, heating, etc.), depending on the type of health services performed by health care institutions.

Article 3 states that health care institutions are required to provide this form of health care in the course of the day and for emergencies also during the night. Against persons who are not following minimum working hours during the strike, the Director of Health care institution will initiate appropriate measures provided for in this Law .

Special collective agreement for health care institutions founded by the Republic of Serbia,⁶³ Article 136

- Staging and participating in a strike in accordance with the Law does not constitute a violation of a duty, as the employee participating in a strike exercises basic rights of the employment.
- An employer may not prevent a strike organized in accordance with the Law, nor prevent employees to participate in the strike. Also, an employer may not take coercive measures to bring an end to a strike organized in accordance with the Law and regulations, nor assign favorable earnings or other more favorable working conditions for employees who do not participate in the strike.

d. Practice examples

Example(s) of Compliance

Health care providers sometimes organize a strike for salary increases, but at the same time they respect the principles of unimpeded delivery of health care services and are governed by the Law on strike.⁶⁴

61 Official Gazette RS 11/2006,25/2013,63/2013,99/2013,118/2013 and 65/2014.

62 Official Gazette RS 43/1993.

63 Official Gazette RS -1/2015

64 Official Gazette SRJ 29/1996 and the Official Gazette RS 101/2005.

Example(s) of Violation

Health care providers in the services for urgent medical care, unlike other employees, does not have the right to strike in order to solve their social rights, such as the right to a salary increase.

Actual case(s)

No cases involving violation of this right have been reported or otherwise known to the working group responsible for the preparation of this Guide.

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.5. RIGHT TO BENEFITTED LENGTH OF SERVICE

a. Right to benefitted length of service is provided in areas where the work is difficult, dangerous or harmful to the health of the employee.

In such instances, Serbian law requires calculation of time worked, for purposes of length of insurance, to be accelerated depending upon the level of danger of the work. The more dangerous the work, the more credit the employee is given for each month of actual time worked at the job.

b. Right as Stated in the Country Constitution / Legislation

The right to benefitted length of service is regulated by the **Law on Pension and Disability Insurance**⁶⁵ (**Article 52**) as it is a right of the insured who work in particularly difficult, dangerous and unhealthy workplaces or jobs or the insured person who works in the workplace or jobs where, after reaching certain age, cannot successfully carry out their professional activities. The insurance length of effective duration is calculated with an accelerated rate, depending on the weight, dangers and hazards of work, or the nature of the job, and can-not exceed 50%. Working places or jobs in which the insurance service is calculated at an accelerated rate, procedures and manner for their determination, as well as the degree of the acceleration of insurance length is determined by the Minister of Labour, Employment, Veteran and Social Affairs responsible for pension and disability insurance, following the proposal of the Fund.

c. Supporting Regulations/Bylaws/Orders

Regulations on working places or jobs in which the insurance length is calculated with an accelerated rate⁶⁶

These include jobs that are particularly difficult, dangerous and harmful to health, even though all general and special safety measures prescribed by the regulations are applied. For some jobs, the

65 Official Gazette RS 34/2003, 64/2004 - decision of the Constitutional Court, 84/2004 – State Law, 85/2005, 101/2005 – State Law, 63/2006 - decision of the Constitutional Court, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014 and 142/2014.

66 Official Gazette RS 105/2003, 126/2004, 93/2005, 3/2007, 8/2007, 56/2007 and 23/2008.

performance of professional activities is restricted after reaching a certain age, or because of the nature and difficulty of the job, or physiological functions decline and prevent the worker's further successful performance.

The levels of acceleration of insurance length depend on the weight, dangers and hazards of the work, or the nature of the work. For example, every 12 months effectively spent at the workplace it could count as 14, 15, 16 or 18 months of employment.

Health care providers working in health care institutions in Radiology as: physician specialists - radiotherapists, radiological technician in radiotherapy, radiotherapeutic and radiological physicist and the person responsible for protection against ionizing radiation, for every 12 months effectively spent in the workplace are calculated as 15 months, and employees in the Emergency Department, as: a doctor who provides emergency medical care, nurse, technician and senior technician every 12 months effectively spent in the workplace are calculated as 14 months of insurance length (**Articles 2 and 33, paragraph 1 and 2**).

d. Providers' Codes of Ethics

In the Codes of Ethics there are no provisions on insurance length which is calculated with an accelerated rate.

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.6. RIGHT TO INDEPENDENTLY PROVIDE HEALTHCARE SERVICES

a. Independent provision of health care services includes provision of health care services without the direct control of any other health care professional.

b. Right as Stated in the Country Constitution / Legislation

The Constitution of the Republic of Serbia⁶⁷

Article 60 stipulates the right to choose one's profession and to pursue professional activities which assume that the autonomy and freedom of the medical profession are historically grounded, but that in legal terms, their origin is in the right to work, guaranteed by the Constitution. The right to work in accordance with the Law includes the right of everyone to a free choice of employment and to equal terms for all jobs. Within specific provisions, the legal basis for health insurance, health care and establishing of health care funds is regulated by the Law, where all forms of health care activities in the field of protection of human health are gaining importance (**Article 68**). In this context, there is the

67 Official Gazette RS 98/2006.

guaranteed freedom of entrepreneurship, that may be restricted in order to protect human health, as well as to result in equality of all forms of ownership (**Articles 83 and 86**).

Law on Health Care

The right to independently provide health care services in a health care institution, in private practice or with another employer who can perform certain tasks of health care services is provided by the **Law on Health Care**⁶⁸ (**Article 168**). It is a right of health care providers that once they have completed an internship and passed the certification exam, are enrolled in the directory of the Chamber and receive or renew the license - authorization for independent work.

The Law on Health Care stipulates that health care providers cannot carry out independent work until they complete their internship and pass the exam. An internship for health care workers with a university degree lasts 12 months, except for medical doctors whose basic studies in medical school for a period of six years requires an internship which lasts for six months. The internship is carried out according to the established program and under the direct supervision of a health care professional who has at least five years of work experience after passing the professional exam. This internship can be done in the framework of voluntary work, as work beyond the employment. By the end of their internship, health care providers are obliged to pass the licensing exam within 12 months from the date of completion of the internship program before a Commission formed by the Minister of Health.

Health care professionals who performed one part or all of an internship abroad, may request that the Ministry of Health acknowledge/approve that part of the internship, or the entire internship, for the purpose of qualifying to take the licensing exam, if the program matches the internship stipulated in the Law on Health Care. The Minister has the option of granting approval or acknowledgement.

c. Supporting Regulations/Bylaws/Orders

The plan and the internship program, with detailed conditions that must be met by health care institutions and private practices where the internship can be done, as well as all other issues of importance for the performance of the internship such as duration, type of health services to deliver, are prescribed by the Minister of Health. In this sense, it is significant to mention the **Rulebook on internship and professional exam of health care providers**⁶⁹.

d. Providers' Codes of Ethics

Code Of Ethics of The Serbian Medical Chamber⁷⁰

Article 10 stipulates that in the performance of his/her call, a doctor is autonomous and independent within the limits of his/her professional competence, so that he/she is responsible for his/her work before his/her own conscience, patients and the society.

Article 5 states that the right of doctors to decide on sensitive issues relating to health and human life includes a special personal responsibility and duty to provide appropriate health care services, as contained in the ethical principles of performing professional duties and ethical behavior and keeping the noble tradition of the medical call in the Code of Ethics of the Serbian Medical Chamber.

68 Official Gazette RS 107/2005, 72/2009 - State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 - State Law and 93/2014.

69 Official Gazette RS 50/2006, 112/2009 and 50/2010.

70 Official Gazette RS 121/2007.

e. Practice examples

Example(s) of Compliance

The regulations govern the right to independent work and provision of professional, health care services for doctors and health care providers who have completed their education and obtained a license.

Example(s) of Violation

The patient had shortness of breath that indicated that there may be respiratory failure due to respiratory tract infection. The doctor decided to intubate the patient to provide his breathing function. The family of the patient was too overwhelmed during the visit, when they saw their cousin intubated and they filed a complaint to the Director of the Clinic. The director has done nothing to protect the right of doctors to independent professional opinion and judgement, instead gave doctor a warning for intubating the patient.

Actual case(s)

In 2010, the patient JM filed a complaint to the Court of Honour of the Serbian Medical Chamber (Regional Chamber of Belgrade) against three physicians-specialists in vascular surgery who were involved in his treatment, stating that he was „wrongly treated for gangrene of the large toe of his right foot, because the gangrene was not recognized in time; but the wound was treated as a harmless infection that later led to the need to continue treatment with surgery, with the amputation of a part of the right foot of the patient, at the end.“ During actions of investigation, the judge reviewed the medical records on the treatment of the patient, including discharge papers and medical records maintained by the treating doctor in the local health care center, with all attachments, where it is stated that for a period of 12 years the patient suffered from diabetes and impaired peripheral blood vessels, and that during that period the patient developed a manifestation of diabetic foot. The judge investigator found that there were no flaws in the work of physicians and that the loss of the foot was caused by the advanced stage of the disease, largely contributed to by the patient’s inadequate behavior concerning the illness, such as: delayed answering for an appointment with the patient’s chosen physician at the local health care center, irregular taking of the therapy, failure of scheduled follow-up visits, and alcohol consumption. The health records of the patient (maintained by the treating physician at the local health care center showed that the patient’s high blood sugar began in 1999, that the next visit of the patient to a physician was recorded after one year and four months, and that the diagnosis of *diabetes mellitus* was first recorded in the medical record on December 15, 2000. The next recorded visit of the patient to a physician was after four years, on December 13, 2004. In 2005, 2006 and 2007, there are no recorded visits. The next visit was recorded on March 24, 2008, when it was noted during the examination by a physician that the patient did not take therapy. The next visit was recorded in July 2009, due to burns on the feet from the sun because, as the patient said, he „did not feel the high temperature“. It was the first clinical manifestation of diabetic foot as a complication of diabetes. In the period from October 21 to October 23, 2009, the plaintiff was hospitalized in a special hospital for cerebrovascular diseases from which he was discharged at personal request with more final diagnoses, including polyneuropathy of dual nature, as diabetic, and etilic resulting from chronic alcohol consumption. It was also found that in the actions of physicians there

were no deviation from the rules of the medical profession and that the treatment was carried out with appropriate medicines, in the right doses, in accordance with the protocol for the treatment required by that phase of the disease and immediately after the first visit on December 23, 2009, was introduced therapy with two broad-spectrum antibiotics (Longacef and Garamicin) in appropriate doses with bandaging. Also, according to the best clinical practice, non-invasive examination of the blood circulation of the leg was done in the outpatient department of the vascular surgery. After the investigation, the judge found that the request to initiate the procedure was unfounded.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

g. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.7. RIGHT TO AN INDEPENDENT PROFESSIONAL OPINION

a. A health care provider has the right to an independent professional opinion without any influence, within their professional capacity.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care

Health care providers, according to the **Law on Health Care (Article 169)**, perform health activities in accordance with current medical doctrine and in accordance with the Code of professional ethics. For their work, health care providers are professionally, ethically, financially and criminally responsible.

The Law excludes any impact on independent professional opinion; but in certain specific situations, it allows specific influence of the health care provider's personal and religious beliefs. It is the, so-called, clause or conscientious objection, when a health care provider may refuse to provide health care if the health care service to be provided is not in accordance with his conscience; the health care provider also can refuse to provide a health care service that is not in accordance with international rules of medical ethics (**Article 171**).

c. Providers' Codes of Ethics

In the performance of his/her call, in accordance with the **Code of Ethics of the Serbian Medical Chamber⁷¹ (Article 10)**, the doctor is autonomous and independent within the limits of his/her professional competence, and is responsible for his/her work before his/her conscience, patients and the society. The doctor's independence and professional reputation are kept without by not connecting and standing out of his/her name for personal gain. The doctor has the right to a public appearance, but should avoid gaining a reputation with self-promotion or advertising through the media in an inappropriate way.

71 Official Gazette RS 121/2007.

d. Practice examples

Example(s) of Compliance

The doctor is free to decide, according to his best knowledge, what is the most applicable diagnostic procedure for his patients, regardless of the cost of diagnostic procedures.

Example(s) of Violation

The right of a doctor to an independent professional opinion is limited with financial resources of the health system of Serbia, in the case of prescribing certain expensive drugs in primary health care. For example, although the general medicine practitioner is aware of a modern hypertension therapy, he can not prescribe a drug that is more expensive than the amount that is allowed, based on his professional opinion, but must have a report of a specialist for internal diseases.

Actual Case(s)

The Serbian Medical Chamber addressed to the Protector of Citizens on April 12, 2012. with the letter alleging that the Dr. MV addressed to the Ethics Committee of the Serbian Medical Chamber on the criminal charges brought against her by the Basic Public Prosecutor's Office in Niš for the crime of prevention and obstruction of evidence from Article 336 of the Criminal Code. It was submitted by the Ministry of Internal Affairs of the Republic of Serbia, Directorate of Police, Police Department in Niš. The Serbian Medical Chamber asked for the opinion of the Protector of Citizens about this case. The reasoning of the Ethics Committee of the Serbian Medical Chamber, among others, stated that diagnostic methods for reliably establishing the presence of drug packets in digestive organs, primarily in the stomach and the final part of the colon, are invasive medical interventions. Any invasive medical intervention involves, to a lesser or a greater extent, the risk of damage to the health of a patient on which it is applied. As a rule, when an invasive medical intervention is implemented, before the appropriate explanation (information) in order to obtain the informed consent of the patient, it is necessary that the expected benefits (welfare) of multiple interventions exceed the potential risk to the health of the patient. The prevailing attitude of the modern medicine for the treatment of persons who are presumed or known to have swallowed drug packets, if they do not have any symptoms (ie. unless there is no consequent health disorder or there are no signs of acute poisoning) is that they should be allowed to expell ingested substance spontaneously. The Protector of Citizens fully endorsed the stated opinion of the Ethics Committee of the Serbian Medical Chamber, a qualified and competent body.⁷²

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

The Protector of Citizens, in addition to the right to initiate and conduct the procedure, has the right to the provision of good services, mediation and providing advices and opinions on matters within its competence, act preventively in order to improve the work of administration and to improve the protection of human rights and freedoms. Precisely in that way, the Protector of Citizens reacted to the case of Dr. MV, which is exposed to criminal prosecution due to her actions.

72 Protector of Citizens, Subject 75-49/12, 28.05.2012. <http://www.ombudsman.rs/> (accessed August 28, 2015)

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.8. RIGHT TO REFUSE TO PROVIDE HEALTH CARE

a. A health care provider has a right to refuse to provide health care, except the emergency medical care.

b. Right as Stated in the Country Constitution / Legislation

Law on Protection of Patients' Rights

A doctor or other health care provider, after prior warning of patient that he does not comply with his responsibilities defined in **Articles 32-35** (for his/her health, towards other patients and towards health providers), may, in accordance with the **Law on Protection of Patients' Rights**⁷³ (**Article 36**), terminate further provision of health care to the patient, except for emergency medical assistance, and is obliged to notify in writing the Director of the health care institution and to put the reasons for such refusal in the medical records of the patient. In this case, the health care institution or private practice, will ensure that adequate medical care will be provided for the patient by another doctor.

Law on Health Care

In life-threatening cases, a patient's physician is bound to the limits of his/her capabilities and expertise, without delay, to provide emergency medical assistance.

The **Law on Health Care**⁷⁴ (**Article 169**) requires physicians and other health care providers to do their jobs in accordance with current medical doctrine and in accordance with the Code of professional ethics. They should never leave their workplaces until they provide replacement even if their working hours are up, because doing so could undermine the successful performance of health care services and endanger the patient's health (**Article 170**).

The health care provider may refuse to provide health care if the health care service to be provided is not in accordance with his/her conscience, or with international rules of medical ethics. The provider can do so by expressing his/her conscientious objection. The health care provider is obliged to report his/her conscientious objection to the Director of the health care institution, to his/her immediate supervisor, or to the founder of a private practice when applicable. The Health care institution or private practice shall be bound by conscientious objection of health care providers, as well as to ensuring the provision of health care to the patient by another health care professional. A health care provider cannot refuse to provide emergency medical assistance, however. (**Article 171**).

Law on Infertility Treatment with Assisted Reproductive Technologies⁷⁵

Article 35 stipulates that the health care provider, as well as any other person, has the right to refuse

73 Official Gazette RS 45/2013.

74 Official Gazette RS 07/2005, 72/2009 - State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 - State Law and 93/2014.

75 Official Gazette 72/2009.

to participate in the process of biomedical assisted fertilization (hereinafter BMAF) highlighting his/her ethical, moral or religious beliefs - a conscientious objection. When a conscientious objection is raised in a BMAF procedure, a physician and other health care providers shall be entitled to refuse to participate in fertilization procedures due to their ethical, moral or religious beliefs. The physician must not suffer any adverse consequences if he raises a conscientious objection. The exception is in urgent cases where mandatory participation in the procedure of BMAF is required to a point of the replacement of the person who raised an objection of conscience by another appropriate health care professional authorized for implementation of these procedures.

c. Providers' Codes of Ethics

Article 53 of the Code of Ethics of the Serbian Medical Chamber⁷⁶ provides that a doctor has the right to refuse to provide treatment if there is no relationship of full confidence in the work of the doctor between the doctor and the patient, or if the doctor believes that he is not professional enough in his knowledge about the patient case or that there are no technical possibilities for successful treatment. The doctor has the right to terminate the process of treating a patient if the behavior of the patient is inappropriate, after the patient has been warned, especially when the patient refuses to cooperate, acts inappropriately or attempts to abuse the doctor. However, the doctor may not terminate the treatment procedure when the health condition of the patient requires immediate medical attention, especially when the patient's life is threatened, even if the patient is behaving inappropriately, such as insulting and threatening behaviour by patient.

The doctor may not refuse to provide the emergency medical assistance that corresponds to his professional qualifications, regardless of whether on duty or not and regardless of whether the doctor is explicitly asked for assistance (**Article 6**).

The doctor has the right to refuse to perform abortions or sterilizations which are not in accordance with his belief and conscience, except in cases of emergency medical assistance, in which where the doctor is obliged to refer the patient to another qualified physician and to ensure the execution of these interventions in accordance with the Law (**Article 59**).

d. Practice examples

Example(s) of Compliance

Dr XZ refused to provide a health care service to the patient MM. The patient, with its rude and aggressive behavior, interfered with the doctor in carrying out a rectoscopic examination. The doctor had warned the patient that he may cancel further provision of health care because the patient was not an emergency case. The doctor informed the Director of the health care institution about this in writing and enrolled the reason for refusing to provide health care in the medical records of the patient.

Example(s) of Violation

The doctor SS refused to continue to treat the patient NN because the patient did not follow the instructions: he did not take prescribed medications regularly, did not hold a special diet and was not subjected to the treatment prescribed for smoking cessation, which exacerbated his health status.

76 Official Gazette RS 121/2007.

The Director issued the measure of temporary suspension from work for doctor SS, thereby violating the right of a doctor to refuse to provide health care in accordance with the Article 36 of the Law on Protection of Patients' Rights.

Actual Case(s)

Dr MV, the doctor on duty at the Clinic for Endocrinology, Diabetes and Metabolic Diseases, Clinical Center in Niš, on June 8, 2011, refused to carry out medical intervention to MI who was brought to the Clinic by police officers – to induce vomiting in order to remove a possible drug package from patients' stomach. She was ordered to do the medical intervention by the investigating judge of the Higher Court in Niš, after her patient MI did not give its consent for it. The patient MI who did not consent to drink the liquid to wash the stomach, was not forced to a compulsory medical intervention for the removal of the stomach content. The document of the Ethics Committee of the Serbian Medical Chamber No. 225 from February 01, 2012, implies that the work and actions of Dr. MV, specialist in internal medicine, employed at the Clinical Center in Niš, Clinic for Endocrinology, Diabetes and Metabolic Diseases, on June 8, 2011, when she refused to carry out the medical intervention on a patient, who was able to give a valid informed consent to intervention, but denied it, was in line with the standards of professional medical ethics contained in international ethical standards of the medical profession and Code of Ethics of the Serbian Medical Chamber.⁷⁷

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.9. RIGHT TO PROVIDE PATIENT INFORMATION WITHOUT CONSENT

a. A health care provider is entitled to provide patient information without patient consent or approval of an authorized person when necessary for the wellbeing of the patient, family or society.

b. Right as Stated in the Country Constitution / Legislation

The Constitution of the Republic of Serbia⁷⁸ (Article 42) stipulates the right to protection of personal data.

Criminal Code of the Republic of Serbia

Unauthorized disclosure of secrets is a criminal offense, which is committed by a doctor who without authorization discloses a secret which he/she learned in the exercise of his/her call of the **Criminal**

⁷⁷ Protector of Citizens, Subject 75-49/12, 28.05.2012. <http://www.ombudsman.rs/> (accessed August 28, 2015)

⁷⁸ Official Gazette RS 98/2006.

Code of the Republic of Serbia⁷⁹ (Article 141), but it is not a crime when the person (or doctor) discovers a secret in the public interest or in the interest of another person, which outweighs the interest of keeping the secret.

Law on Protection of Patients' Rights

The patient has the right to confidentiality of all personal information, including information relating to the state of his/her health and potential diagnostic and therapeutic procedures; and a health care provider is not allowed to disclose information to other persons pursuant to the **Law on Protection of Patients' Rights⁸⁰ (Article 14)**.

Exceptionally, the data on the health status of a patient may be shared with an adult member of the family, even when the patient has not given consent to the disclosure of information about his/her condition, but the disclosure of such information is reasonably necessary to avoid health risks for family members (**Article 22**).

Also, the competent health care provider, despite the demands of a child not to disclose information about the status of his health, in accordance with the Law on Protection of Patients' Rights (**Article 24**) has to share information about patients' health status with his legal representative in the event of a serious threat to the life and health of the child.

Law on Exercising Rights to Health Care of Children and Women during Pregnancy, Delivery, and Postnatal Period

The right to confidentiality is exempt by the Law when there is a requirement of a specialist in gynecology and obstetrics that immediately, by establishing the pregnancy, or after performing termination of the pregnancy, notify the National Health Insurance Fund in connection with the exercise of supervision required under the provisions of the **Law on exercising Rights to Health Care of children and women during pregnancy, delivery and postnatal period⁸¹ (Articles 5 and 6)**.

Law on Protection of Persons with Mental Disabilities

The right to confidentiality is concerning also data on the health status of people with mental disabilities that also belong to the most sensitive personal data in accordance with the **Law on Protection of Persons with Mental Disabilities⁸²**. It is not considered a disclosure of data from medical records of persons with mental disabilities when: 1) detecting the knowledge that a person with mental disabilities is preparing to commit a criminal offense; 2) detecting, initiating or conducting criminal procedure for the most serious crimes, if the criminal procedure have been slowed or the conduct of the procedure would have been impossible without the disclosure otherwise protected personal data; 3) it is in the interest of public health and safety; 4) to prevent exposure to other persons with mental disabilities immediate and serious danger to life, health and safety, or if the data storage significantly endanger the life or health of that person or other persons with mental disabilities.

79 Official Gazette RS 5/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

80 Official Gazette RS 45/2013.

81 Official Gazette RS 104/2013.

82 Official Gazette RS 45/2013.

c. Providers' Codes of Ethics

The Code of Ethics of the Serbian Medical Chamber⁸³ (Article 20) provides that the doctor is to be relieved of the obligation of professional silence if the patient consents to it, when it is necessary for the wellbeing of the patient, his family or the society, or, if it is decided in accordance with the Law. Doctors who have been ordered by the Court to breach the obligation of professional silence should inform the patient unless the Court determines otherwise.

d. Practice examples

Example(s) of Compliance

Patient MM, 16 years old, spoke to her doctor at the health care institution because of a problem with frequent vomiting. The doctor stated that the patient herself causes vomiting due to the desire to reduce body weight, despite the fact that she is malnourished. He concluded that it was anorexia and started the appropriate treatment. At the same time he informed her parents about this health problem.

Example(s) of Violation

A mother of a preschool child RR complained to the Director of the health care institution that the doctor VR discovered information to the Director of the preschool that her child had lice. Director of the health care institution decided to warn the doctor for disclosing this information which violated a physicians right to provide patient information without consent about its health condition when it is in general interest. This was about the protection of all other children in preschool institution from getting lice, as the child continued to attend the institution and did not apply the measure to remove lice and therapy for caused skin changes.

Actual case(s)

In the case of domestic violence from her partner, SJ died because of her injuries. The Protector of Citizens has, on his own initiative, initiated a control process of the legality and the regularity of work, among other institutions, of the General hospital in Pancevo. After analyzing the evidence, the Protector of Citizens found that employees in the General hospital in Pancevo failed to submit written information on domestic violence against SJ to the Center for Social Work, although SJ did not give consent. Submission of written information on domestic violence to the Center for Social Work is in accordance with a Special protocol for the protection and treatment of women who are subjected to violence (Ministry of Health), as well as in accordance with the Law on Protection of Patients' Rights (Article 14, 22 and 24). The Protector of Citizens has sent a recommendation to the General hospital that in any future cases of diagnosed cases of domestic violence, they should use their competences and powers to the greatest extent possible.⁸⁴

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

83 Official Gazette RS 121/2007

84 Protector of Citizens, Subject 13-3575/12, 20.08.2013. <http://www.ombudsman.rs/> (accessed August 28, 2015)

In accordance with the Article 332 of the Criminal Code of the Republic of Serbia - Failure to report the crime and the offender, doctors are obliged to, even without the consent of the patient, report the following acts for which the Code provides a penalty of 5 or more years in prison, if they learn about them in the course of their official duties: serious bodily injury, all injuries inflicted with firearm and other weapons, etc. In accordance with the Article 194, paragraph 3 and 4 of the same Code, doctors are required to report, even without the consent of the patient, the following acts: domestic violence cases that have led to serious bodily injuries or severe damages to health, committed against a minor, or that have led to death of the family member.

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.10. RIGHT TO MEDICAL INTERVENTION WITHOUT PATIENT CONSENT OR APPROVAL OF AUTHORIZED PERSON

a. A health care provider is entitled to medically intervene without the consent of a patient or the approval of an authorized person in urgent and immediate conditions established by the law and in accordance with professional ethics.

b. Right as Stated in the Country Constitution / Legislation

Law on Protection of Patients' Rights

The inviolability of the human body and the voluntariness of treatment in the medical profession constitute the governing rule, which can be waived only under the conditions strictly defined by the Law. The governing principle is the patient's consent (*informed consent*). The **Law on Protection of Patients' Rights**⁸⁵ (**Article 15**) provides that a physician or other health care provider has the right to undertake medical measures against the wishes of the patient or his legal representative in exceptional cases, as specified by the Law and which are in accordance with medical ethics.

Health Insurance Law

The exception to the principle of patient consent exists for emergency and urgent situations in health care; and such actions are allowed, regardless of whether it is the will or consent of the patient or the will of his legal representative. The **Health Insurance Law**⁸⁶ (**Article 53**) defines urgency and necessity of health care. Emergency medical care and necessary health care include imminent and immediate medical assistance to be provided to avoid risk to life, serious or irreparable weakening or damage to health, or death of an insured. It is medical assistance provided during 12 hours from the time of receipt of the patient by the health care provider in order to avoid the occurrence of an anticipated emergency medical condition. Necessary health care covers health care that is appropriate or necessary for the diagnosis, treatment of illness, or injury to the patient, which is in accordance with

85 Official Gazette RS 45/2013.

86 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

the standards of good medical practice in the country and which is not provided at the request of the patient or health care professional for placing the patient in a more favorable position in relation to other persons, or for the purpose of obtaining special benefits for the health care institution, private practice or health care professional. Emergency and necessary health care in upholding patients' rights under mandatory health insurance are determined by professional medical bodies in the process of patients' exercising those rights.

Law on Transfusion Activities

In a situation where the patient is unconscious and needs blood, or is otherwise unable to give his/her consent to blood transfusions, immediate transfusion of blood and blood components may be performed without the recipient's consent, based on the opinion of a competent medical doctor who provides emergency medical measure in accordance with the **Law on Transfusion Activities**⁸⁷ (**Article 25**).

Law on Health Care

The exception to the principle of voluntary treatment exists in the field of psychiatric treatment, which in accordance with the **Law on Health Care**⁸⁸ (**Article 44**) allows a degree of coercion. If a doctor psychiatrist or neuropsychiatrist estimates that the nature of mental illness of a patient is such that it may threaten the patient's life or the lives and property of others, the doctor may refer the patient to the hospital and the attending physician may take the patient to a hospital without obtaining the patient's consent in accordance with the Law. There is an obligation that within one day after the receipt of the patient, the Council of the stationary health care institution must decide whether to keep the patient in the hospital; and within 48 hours of the hospital's receiving the patient, the competent Court should be informed. Method, procedure and organization, as well as the conditions of treatment and accommodation of mentally disabled persons shall be regulated by a special Law.

Law on Protection of Persons with Mental Disabilities

More specific solutions are given in the **Law on Protection of Persons with Mental Disabilities**⁸⁹ (**Article 19**) which stipulates that medical interventions measures can be performed without the consent of persons with mental disabilities, as long as there are legally prescribed reasons. A decision on taking medical measures without the consent of the patient with mental disabilities must be brought to the Council of the health care institution immediately after the occurrence of the reason for the decision. The health care institution must immediately inform the patient's legal representative of the reasons for treatment without consent of the patient with mental disabilities and must instruct the representative about the right to object, in accordance with the Law. Such measure also is permitted on a mental health patient who, as a result of mental illness, is unable to express his/her consent to the proposed method of treatment and has no legal representative or in situations when there is no requirement to obtain the consent of a legal representative, if:

1. the treatment is necessary to prevent significant deterioration of the patient's health;
2. medical measures are aimed at restoring the patient's ability to make decisions on consent to proposed medical measures;

87 Official Gazette RS 72/2009.

88 Official Gazette RS 07/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – State Law and 93/2014.

89 Official Gazette RS 45/2013.

3. undertaking medical measures without the consent of the person with mental disorders is necessary to prevent threats to the life and safety of the patient or the life and safety of other persons.

If a patient with mental disabilities has no legal representative, the health care institution shall notify the competent authority of guardianship and propose to initiate the procedure for setting up a legal representative, in accordance with the provisions of the Law governing family relations.

A patient with mental disabilities whom the physician or psychiatrist estimates seriously and directly endangers s/her own life, health or safety, or the life, health or safety of another person can be forcibly placed in a psychiatric institution without his/her consent, only if less restrictive ways are not available, according to the procedure for involuntary detention and involuntary accommodation in accordance with the Law. For the foregoing reasons, the patient can be placed in a psychiatric institution without the consent of his legal representative, according to the procedure for retention without consent and accommodation without consent, in accordance with this Law. The patient may be kept or placed without his/her consent in a psychiatric institution, only when it is the only way to provide the patient with the necessary medical measure and lasts only as long as the medical reasons for detention without consent or accommodation without consent continue (**Article 21**).

c. Providers' Codes of Ethics

The Code of Ethics of the Serbian Medical Chamber⁹⁰ (Articles 30 and 31) provides that a physician/ psychiatrist has the right to send a mentally disabled person to a psychiatric institution if there are medical indications and after obtaining the approval of the family. The psychiatrist must not participate in procedures where a mentally healthy patient is forcibly hospitalized. Forced treatment and feeding are allowed only if the person is not capable to consciously decide. In psychiatric hospitals, a physician seeks to apply the norms and standards that apply to other health care institution. The physician should provide emergency medical assistance in case a person incapable of reasoning put his/her life in danger with suicidal intentions, no matter what is the will of that person, and whether there is active or passive resistance.

d. Practice examples

Example(s) of Compliance

In prison, patient NN went on hunger strike because of the delay of a court verdict. He refused the doctor's advice that he must stop the strike because he is endangering his health status with fasting from food and water. After losing consciousness after several days of strike, the doctor, without the consent of the patient, applied the parenteral nutrition and other necessary treatment.

Example(s) of Violation

During childbirth, patient KS lost a lot of blood, so the doctor SM conducted transfusion, without her consent, since it was a life-threatening situation. After releasing from the hospital, the patient had filed a complaint to the Councilor for protection of patients' rights that she was not asked for a consent before the transfusion. Doctor SM was unduly punished with a disciplinary measure by the Director of the health care institution since he conducted transfusion without the consent of the patient.

90 Official Gazette RS 121/2007.

Actual Case(s)

Accompanied by police officers, DK was brought in a specialized hospital for psychiatric illnesses in Vrsac, in the ambulance car. Aggressive behavior, extreme psychomotor agitation and threats of a suicide in the building of the municipality of Vrsac were estimated as a reason for an immediate hospitalization in a closed women's ward where patients are held because of the risk that they could, due to the lack of insight into the nature of their illness, decide to abandon treatment. Upon recovery, DK approached the Protector of Citizens that there was an omission with her hospitalization. In a further procedure, the Protector of Citizens noted that the adoption of the Law on Protection of Persons with Mental Disabilities (Article 21) provides that a person with mental disabilities, for which a medical doctor or a psychiatrist estimate that as a result of mental illness, the patient is seriously and directly endangering his own life or safety, or life, health or safety of another person, may be placed in a psychiatric institution without its consent.⁹¹

e. PracticE Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.11. RIGHT TO SPECIALIZATION AND SUB-SPECIALIZATION

a. Health care institution or private practice is obliged to provide training and reference to a specialization or sub-specialization to health care providers for the advancement of their knowledge.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care

The right of specialization and sub-specialization is regulated by the **Law on Health Care**⁹² (Articles 183 to 186).

Article 184 states that „health care providers with higher education can be professionally trained - acquire specialization, provided that they have completed an internship and passed the exam, unless the Law provides otherwise.“

Also, in **paragraph 2 of the Article 184** of this Law it is stated that „a health care provider with higher education can improve his/her skills after the completion of specialization in the area of sub-specialization, provided that he/she worked in health care services in accordance with this Law as a specialist in a particular branch of medicine, dentistry or pharmacy.“

91 Protector of Citizens, Subject 13-3575/12, 20.08.2013. <http://www.ombudsman.rs> (accessed August 28, 2015)

92 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 i 45/2013 – State Law and 93/2014.

Notwithstanding paragraph 1 of this Article, in the areas of medicine, dentistry or pharmacy lacking the number of professionals needed, the Ministry may approve specialization for an unemployed health care provider with higher education who has completed an internship and passed the exam, as well as sub-specialization after passing the specialist exam.

The Minister, for each calendar year, no later than December 31, of the prior year, shall decide on the areas of medicine, dentistry or pharmacy that are deficient in number in the Republic of Serbia, based on the opinion of the Institute of Public Health of Serbia, established for the territory of the Republic, in accordance with the Law.

Article 183 of the Law on Health Care prescribed accompanying regulations and internal acts of medical institutions that regulate this right, which are endorsed by the Ministry of Health.

Specialization also refers to persons who attended a university of medical profession, but who do not perform health care services. In **Article 185** of this Law, it is stated that regarding „a person who has graduated from the university of a medical profession, and does not practice health care activity as a professional in a health care institution or private practice, who is employed by the state authorities, territorial autonomy, local government unit, in college or in a school for medical profession, scientific institute, the legal entity that carries out the manufacture, distribution and control of drugs and medical devices, the agency in charge of the medicines and medical devices, an organization that provides health insurance, a social welfare institution, an institution for the execution of institutional sanctions, and/or as an employer who organized the clinic of occupational medicine in accordance with the Law - the Minister may approve the decision of specialization or sub-specialization for employers in the above, in accordance with this Law and the regulations adopted for its implementation.“

In **Article 186** of the Law on Health Care it is stated that the Ministry of Health and the Minister prescribe the types, duration and content and programs of specialization and sub-specialization, methods of performance of the specialist training and specialist exam, composition and operation of the Examining Board, conditions to be met by health care institutions and private practices, i.e., Medicines and Medical Devices Agency of Serbia, to perform a part of the specialist training, conditions and manner of recognition of time spent at work as part of the training, as well as the form and diplomas on the passed specialist exam or passed examination of specialization.

c. Supporting Regulations/Bylaws/Orders

Regulation on specialization of health care providers⁹³ determines the types, duration and the content of the specialization and sub-specialization; programs of conducting specialization or sub-specialization; performance of the residency and passing specialist exams; composition and functioning of the Committee for the examination; the conditions that should be met by health care institutions and private practices, ie, Medicines and Medical Devices Agency of Serbia, for the specialist training; conditions and manner of recognition of the time spent at work as a part of the residency, as well as an index and a diploma on the passed specialist exam or the sub-specialist exam (**Article 1**).

A Health care institution or private practice is obliged to provide professional training for a health care provider, and to make reference to the specialization and sub-specialization, in accordance with

93 Official Gazette RS 10/2013, 91/2013, 113/2013, and 109/2014.

the Plan of professional development of staff that the institution employs. The Plan should include: (1) program of training for health care providers; (2) the number of specializations and sub-specializations that are granted annually; (3) the criteria and detailed requirements for the approval of specialization and sub-specialization, and (4) other issues of importance to the professional training of health care providers, in accordance with the Law.

The Ministry of Health determines whether there are conditions for carrying out the program of specialization or sub-specialization in health care institutions and private practice, by issuing a decision.

d. Providers' Codes of Ethics

The Code of Ethics of the Serbian Medical Chamber⁹⁴ (Article 8) is indirectly linked to specialization, and directly to the continuous professional development of doctors. In this article it is stated that „medical schools, hospitals and professional medical associations have the responsibility for developing and making available to all physicians the participation in continuous professional development.“

This section of the Code emphasizes the duty of the physician to transmit his/her expertise to colleagues and other health care professionals, which is in accordance with the Law.

In addition, the Code states that it is the personal obligation of doctors to improve their awareness and increase knowledge in the field of humanities, natural and social sciences (Article 8).

e. Practice examples

Example(s) of Compliance

Teaching assistants at the Faculty of Medicine are granted paid absence for professional and scientific training at home and abroad, under the Plan for professional training, which stimulates the development of competence in teaching, research and medical activities.

Example(s) of Violation

Health care institution BZ refused to send LJS to specialization because there are not enough doctors in the institution to work with patients and the institution is not able for hiring new physicians. This has undermined the right of LJS defined in the Plan of education, professional training and development of employees in BZ.

Actual case(s)

The opinion of the Commissioner for protection of equality has been made concerning complaints by GM from NB, against the Health care center „NB“ on the occasion of the competition for admission to specialization that were announced in August and October 2014. During the proceedings, it was established that the Rule book amending and supplementing the Rule book on education, vocational training and development of employees of the Health care center „NB“ prescribed criteria for a referral to specialization, namely: the average score at the faculty, the average score from the relevant field of medicine/dentistry/pharmacy from the specialization for which they are applying for and the age of the candidate. Analysis of the provided criteria, showed that the age of the candidates is the only cri-

94 Official Gazette RS 121/2007.

terion that does not apply to professional skills and achievements of the candidate, and in the course of the proceedings, it was established that due to this way of scoring, persons older than the age of 39 are placed in an unequal position compared to younger candidates. Commissioner for protection of equality believes that setting criteria related to the age of a candidate is not justified because it is not a decisive condition for referral to specialization, concerning the nature and characteristics of the residency, as well as the conditions under which it is performed. Commissioner for protection of equality has given an opinion that the criteria relating to the age of the candidate in competition for admission to the specialization of the Health care center „NB“ that was announced in August, October 2014 and in February 2015, GM was discriminated on the basis of personal characteristics – her age. That is why Health care center „NB“ was recommended to remove the criteria for the specialization that refers to the age of candidates, with the recommendation of the Commissioner for protection of equality put on a notice board or other visible place in the Health care center, as well as to take care when determining the future criteria for the specialization, they do not violate the provisions of the Law on Prohibition of Discrimination.⁹⁵

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

g. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.12. RIGHT TO THE PEACEFUL RESOLUTION OF DISPUTES

a. The possibility for peaceful settlement of disputes is very rarely used. Mostly none of the parties suggest a simple way to resolve contentious situations.

b. Right as Stated in the Country Constitution / Legislation

Law on Peaceful Settlement of Labor Disputes

Disputes between employers and employees can be resolved with the application of the **Law on Peaceful Settlement of Labor Disputes**⁹⁶. According to this Law, the Republic Agency for peaceful settlement of labor disputes is established as a separate organization. The health care provider who is interested in resolving the contentious situation more quickly and with less financial cost may submit a proposal to the Agency. The proposal must contain the name and address or the title and place of institutions, which are in the dispute and the subject matter of the dispute. The opposing party has a period of three days to comment on the proposal.

⁹⁵ Commissioner for protection of equality, Subject 07-00-533/2014-02, 9. 3. 2015. <http://www.ravnopravnost.gov.rs/> (accessed August 28, 2015)

⁹⁶ Official Gazette RS 125/2004 and 104/2009.

Law on Mediation

Another possibility for a peaceful settlement of disputes is foreseen in the **Law on Mediation**⁹⁷. The mediation procedure is voluntary and can be applied to all conflict situations from labor disputes to criminal ones. The main role in the procedure has an intermediary or mediator. The parties are equal and principles of privacy and confidentiality are respected. The most important part of the mediation procedure is the urgency, which means that the dispute can be resolved much more efficiently than in a regular court procedures.

Law on Civil Procedure

The Law on Civil Procedure⁹⁸ (**Article 193**) provides the obligation to submit proposals for the peaceful settlement of the dispute to the State Advocate in all cases where the defendant is the Republic of Serbia. If it is not according to the Law, the Court shall dismiss the complaint as inadmissible. When it comes to disputes whose subject is the right of the Collective Agreement, if it was not possible to find a solution by peaceful means, litigation is initiated (**Articles 443 and 444**).

Criminal Procedure Code

One aspect of a peaceful settlement of the dispute is envisaged by the **Criminal Procedure Code**⁹⁹ (**Article 283**) where the Public Prosecutor may defer prosecution for no longer than one year in order to oblige the suspect to:

- eliminate the adverse consequence resulting from a criminal offense or to compensate for the damages caused;
- pay a certain amount of money for a humanitarian organization, fund or public institution;
- perform certain socially beneficial or humanitarian work;
- undergo rehabilitation for alcohol or drugs;
- undergo psychosocial treatment to remove the causes of violent behavior;
- fulfill the obligation established by a final decision of the Court and respect the limit established by a final Court decision.

Application of the principles of opportunism is possible only for criminal offenses punishable by fine or imprisonment up to five years. If the suspect performs the obligation in time, the public prosecutor shall dismiss criminal charges.

c. Providers' Codes of Ethics

The Statute of the Serbian Medical Chamber¹⁰⁰ provides for the establishment of the Mediation Committee whose main role is to resolve the dispute in out of court procedures, between Chamber members and between members of the Chamber and patients. In addition, the professional service of the Medical Chamber may refer the parties to a mediation procedure after submission of the proposal to initiate the procedure before the Court of Honour (**Article 219**).

97 Official Gazette RS 18/2005.

98 Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

99 Official Gazette RS 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

100 Official Gazette RS 111/2006, 68/2008, 14/2010, 36/2011 - decision of the Constitutional Court, 43/2011 and 22/2012.

In its statute, the Mediation Committee defines roles of other Chambers in the area of health care and medicine: the **Statute of Nurses and Medical technicians of Serbia**¹⁰¹ (**Articles 64 to 68**); the **Statute of the Serbian Biochemists Chamber**¹⁰² (**Articles 67 to 72**); the **Statute of the Serbian Dental Chamber**¹⁰³ (**Articles 77a to 77.d**); the **Statute of the Serbian Pharmaceutical Chamber**¹⁰⁴ (**Articles 67 to 72**). The provisions governing the work of this body must be in accordance with the basic principles and the principles of mediation. This means that the **Law on Mediation**¹⁰⁵ should be applied as the main rule.

d. Practice examples

Example(s) of Compliance

In a health care institution there has been a conflict between a doctor and a nurse. Upon receiving the appeal of the nurse, the Director of the health care institution organized a process of a peaceful resolution of the dispute in the presence of mediators who are, from the list of possible mediators, chosen by the doctor and the nurse in the conflict. With this way, their conflict was resolved.

Example(s) of Violation

Despite repeated information to the Director of the health care institution about the conflict between his two employees at the intensive care ward, the Director failed to take the attempt of a peaceful solution to their conflict, which has escalated with a physical altercation in front of patients.

Actual Case(s)

Dr. JR exercised her right to the peaceful resolution of a labor dispute by initiating an arbitration procedure against the employer, before the National Agency for the peaceful settlement of labor disputes¹⁰⁶ (case No. 116-02-00145/ 2013-02). After the presentation of evidence, the acting arbitrator in the procedure concluded that JR has been exposed to harassment at work, that she was treated contrary to the employer's obligations arising from the norms of the **The Law on the Prevention of Harassment at Work** and the **Rulebook of conduct of the employer and employees regarding the prevention and protection from harassment at work**. The decision of the arbitrator obliged the director of the health care institution that employed JR to protect her from further abuse at work, so that she would, not later than within 15 days of the ruling, be provided with a working environment where she could conduct her work untroubledly, in an atmosphere of mutual respect, cooperation, teamwork, openness, security and equality.

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

101 Official Gazette RS 115/2006, 21/2008, 69/2008 and 10/2012.

102 Official Gazette RS 70/2006, 26/2014.

103 Official Gazette RS 89/2007, 85/2008 and 37/2014.

104 Official Gazette RS 106/2006, 118/2008, 5/2010 and 113/2013.

105 Official Gazette RS 18/2005.

106 The Republic Agency for peaceful settlement of labor disputes. Case 116-02-00145/2013-02, <http://www.ramrrs.gov.rs> (August 31, 2015)

f. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.1.13. RIGHT TO COMPENSATION OF DAMAGES ARISING FROM INJURY OR DAMAGE AT WORK OR IN CONNECTION WITH THE WORK OF A HEALTH CARE INSTITUTION / OWNER OF A PRIVATE PRACTICE IN CASES STIPULATED BY THE LAW

a. Health care providers are entitled to compensation of damages arising as a result of injury or damage at work and the right to compulsory insurance in case of accidents or occupational diseases.

b. Right as Stated in the Country Constitution / Legislation

The Constitution of the Republic of Serbia¹⁰⁷ (Article 69) stipulates that the rights of employees and their families to social security and insurance are regulated by the Law.

The Labour Law¹⁰⁸

Article 164 provides that an employer is obliged to pay damages if an employee sustains an injury or damage at work or in connection with the work, in accordance with the law and the general act.

The Law on Health Care¹⁰⁹

Article 14 provides the obligation of the employer to implement measures for the prevention and early detection of occupational diseases, diseases related to work and the prevention of occupational injuries and chronic diseases.

Health Insurance Law

Compulsory health insurance, according to the **Health Insurance Law¹¹⁰ (Article 9)**, includes insurance in case of injury or occupational diseases. The amount of compensation that should be provided by the compulsory health insurance, as well as from the employer, if the insured is unable to work due to occupational disease or injury at work, is 100% of his/hersalary for work compensation (**Article 97**).

Law on Occupational Safety and Health

The obligation of the employer is to provide the employee the workplace and working environment where measures of health and safety at work are applied, according to the **Law on Occupational Safety and Health¹¹¹ (Article 9)**. For the performance of health care of the employees, the employer hires occupational health services. Occupational Health Service is required to perform duties in accordance

107 Official Gazette RS 98/2006.

108 Official Gazette RS 24/2005, 61/2005, 54/2009, 32/2013 and 75/2014.

109 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law and 93/2014.

110 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

111 Official Gazette RS 101/2005.

with this law to determine and examine causes of occupational diseases and diseases related to work, and to participate in the analysis of injury, occupational diseases and diseases related to work.

Law on Chamber of Medical Workers

The Law on Chamber of Medical Workers¹¹² provides affairs of the Chamber of Medical Workers (which refers to the Serbian Medical Chamber, Serbian Dental Chamber, Serbian Pharmaceutical Chamber, Serbian Chamber of Biochemists and the Serbian Chamber of Nurses and Medical Technicians), including the initiative and taking measures to ensure the members of the Chamber with the provision of risk insurance (**Article 8**) that may arise due to technical errors in performing health care activities in accordance with the Law on Health Care.

Law on Protection of Population against Infectious Diseases

Regarding employees' medical checkups, treatment and care of patients in health care institutions and other forms of performing health care activities in departments with an increased risk of infection, health care institutions are required to ensure the performance of mandatory medical checkups on the terms and in the manner prescribed by the **Law on Protection of Population against Infectious Diseases**¹¹³ (**Article 24**) and to bear the costs of these checkups, as well as to keep sanitary booklets as evidence on the health status of employees at the premises of the health care institution.

c. Supporting Regulations/Bylaws/Orders

Regulations on determining occupational diseases¹¹⁴ determine occupational diseases, jobs, i.e. jobs at which these diseases occur, and the conditions under which they are considered occupational diseases.

d. Providers' Codes of Ethics

The Code of Professional Ethics of the Medical Chamber of Serbia¹¹⁵ (**Article 13**) stipulates that doctors have the right and duty to take over their professional and other organizations advocating for proper evaluation of their work, as well as to provide personally or through an employer against claims for damages in the performance of doctors' professional duties.

e. Practice examples

Example(s) of Compliance

The laboratory technician was, during blood sampling, infected with hepatitis B, which is why he opened a longer sick leave. The National Health Insurance Fund fully acknowledged salary reimbursement during his sick leave.

Example(s) of Violation

During a regular control, a health care technician employed in the X-ray cabinet at the General hospital, was found with unacceptable level of radiation exposure. After further examination, it was found

112 Official Gazette RS 107/2005 and 99/2010

113 Official Gazette RS 125/2004

114 Official Gazette RS 105/2003

115 Official Gazette RS 121/2007

that health care technicians in the X-ray cabinet were using old aprons for radiation protection that do not meet standards.

Actual Case(s)

A civil procedure for compensation of material and non-material damages was initiated before the Second Municipal Court in Belgrade XII-P-br. 1063 / 2008 by ILJ filing a lawsuit against the employer - the health care institution where she worked- when during her regular job as a specialist in anesthetists in surgical room she fell and fractured her hip. The plaintiff slipped in the surgical room with a wet and slippery floor. Before the planned surgery for echinococcus cysts on the liver, in front of the surgical room a barrier cloth was set, moistened with disinfectant to disinfect the soles on the working shoes of the members of the surgical team to prevent the transfer of infected biological material to other parts of the health care institution. Setting the barrier is a necessary preventive measure that cannot be avoided to prevent the emergence and spread of intrahospital infections, no matter that in the short-term (until the disinfectant on the soles is dry) this presents a potential danger to members of the surgical team. The floor in the surgical room in which the plaintiff was working at the time of injury was made from materials which, according to the requirements of building standards used for floors in surgery rooms, are slippery in the dry state and which do not conduct electricity. The defendant health care institution collectively insured all employees for protection against injuries before the occurrence of described injuries. The insurance contract, in addition to the premium agreed for each insured event, agreed the fee for each day spent on sick leave. The plaintiff after her sick leave, charged the insured sum from the insurance fund, in the amount determined for each insured event. However, according to her assessment, that amount was insufficient to cover the damage, so she filed a lawsuit against the employer demanding compensation for both material and non-material damage. At the suggestion of the defendant employer, the insurance fund entered into the lawsuit as an intervener because it had had a direct legal interest that the defendant employer succeed in a lawsuit. The defendant employer failed to prove that the plaintiff contributed to the occurrence of the damage or that she did not comply with the necessary caution that is necessary in such a situation, after crossing the barrier she did not wait for soles to dry and then continue to move through the room. In deciding on the merits of the claim, the Court dismissed the plaintiff's request for material damage, but found a responsibility of the defendant for the non-material damages. Therefore, the Court partly granted the plaintiff's claim and the obligation of the defendant to the plaintiff; the employer was required to pay monetary amounts that are slightly smaller than those requested by the lawsuit, but in the opinion of the Court were sufficient considering the fact that the amount serves the purpose of the institution of damages. The defined monetary amounts awarded are for the following: the physical pain, the suffered fear, mental suffering due to cosmetic disfigurement, and mental suffering due to impairment of vital activities for which the expert assessment found to be 25% permanently.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.1.14. ADDITIONAL RIGHTS IN WORKING RELATIONS

Health care providers have some additional rights related to their employment that are stipulated by **the Labour Law**¹¹⁶:

- The right to salary (**Article 104**);
- The right to fixed working hours (**Article 50**);
- The right to a daily break and annual vacation time (**Articles 67 and 68**);
- The right to attend employee education programs and the right to paid leave for educational purposes (**Articles 49 and 77**).

From the perspective of labor rights protection, supervision of the implementation of the Labour Law and other regulations on labor relations, general acts and contracts governing the labor rights, obligations and responsibilities of employees, is conducted by the Labor Inspection. Labour inspectors are, in accordance with the Labour Law (**Article 269**), authorized to order the employer to rectify established violations of laws, bylaws and labor contracts within a specified period. The penalty for not doing so are fines (**Article 273**).

a. Cross-referencing Relevant International and Regional Rights

Please look for a discussion on International and Regional standards relevant to this right in Chapter 2 (International) and Chapter 3 (Regional).

7.2. Providers' responsibilities

7.2.1. RESPONSIBILITY TO PROVIDE HEALTHCARE

a. Health care providers are required to provide health care to citizens

Provision of health care includes the implementation of measures and activities that are used for the improvement and protection of human health, in accordance with current doctrine and with the use of health care technology.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care

The right to perform professional medical activity is directly connected with the duty to provide health care to those who request it, since it is an important determinant of health care services and professions in accordance with the provisions of the **Law on Health Care**¹¹⁷ (**Article 3**). Places of health-related activities such as health care institutions and other forms (private practice) together make the health care service. The health care service is a form of public service that is established for the implementation and provision of health care to citizens and for which, by Law, funds are provided, as well as for the operation and development of health care services (**Articles 6 and 7**). The Law defines health care as a business activity which provides health care for citizens, which includes imple-

116 Official Gazette RS 24/2005, 61/2005, 54/2009, 32/2013 and 75/2014.

117 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law and 93/2014.

mentation of measures and activities for human health, in accordance with the doctrine of health and the use of health care technologies, used to maintain and improve the health of people, performed by a health care service. Measures and health care activities should be based on scientific evidence, that should be safe, secure and effective and in accordance with the principles of professional ethics **(Article 5)**.

A health care institution must meet the conditions prescribed by the Law to be able to practice health care activity, and when it comes to private practice, to carry out certain tasks of health services that are given to it by Law or by the decision of the Minister. Since it provides a small part of the services and does not represent the state service, the Law **(Article 62)** specifically prescribes the duties of private practice, which requires it to:

- 1) provide emergency medical care to all citizens;
- 2) participate at the invitation of the competent national authorities in dealing with the prevention and control of infectious diseases, as well as to protect and rescue the population in case of natural and other major disasters and extraordinary circumstances;
- 3) perform constant checking of the quality of its professional work in accordance with the Law;
- 4) make a working hours schedule and adhere to that schedule;
- 5) make a price list of health care services and issue an invoice for health care services;
- 6) regularly submit to the competent institution or the Institute of Public Health medical - statistical reports and other records in the health care field, in accordance with the Law;
- 7) organizes or provides measures for the disposal or destruction of medical waste, in accordance with the Law.

The Law prohibits the performance of certain tasks when it comes to private practice. Private practice can not practice health care activity in the field of emergency medical supplies and blood products, removal, storage and transplantation of organs and body parts, production of serums and vaccines, pathoanatomical–services –autopsy and health care activities in the field of public health **(Article 56)**. It is forbidden to undertake medical research in private practice **(Article 38)**.

The duty to provide emergency medical assistance is subject to specific legal provisions. In the state health sector this task is extremely strong and is present in all aspects, with the strict obligation to work and the prohibition of strike **(Article 75)**. It is different in the private health care sector, where the establishment of the emergency medical assistance is not allowed but, on the other hand, law specifies certain duties in this regard, stating that private practice is required to: 1) provide emergency medical care to all citizens; and 2) participate at the invitation of the competent national authorities in dealing with the prevention and control of infectious diseases, as well as to protect and rescue the population in case of natural and other major disasters and extraordinary circumstances. In accordance with the activities it carries out, private practice providers should also be constantly available to provide emergency transportation, on its own or through a contract with the nearest health care institution that can provide such transport **(Articles 62 and 63)**.

Health Insurance Law

The Health Insurance Law¹¹⁸ (Article 52) provides that the duty of providing health care is conditional on the content, scope and protection standards of the health insurance regulations. The content of health care include the procedures and methods of diagnosis, treatment and rehabilitation for the prevention, suppression, early detection and treatment of diseases, injuries and other health disorders, which are covered by compulsory health insurance. The scope of health care means the number and duration of procedures and methods of diagnosis, treatment and rehabilitation, as well as other sizes that can be used to express the volume of the content of individual health care (systematic provision of health care services in a given period of time, for example.), which represent the content of rights from compulsory health insurance. Standards of health care include the conditions for the use of procedures and methods that represent the content of compulsory health insurance, including restrictions on the use and method of providing these health care services.

Law on Medicines and Medical Devices

The duty also applies to pharmaceutical health care, particularly with regard to drugs available on the market. A legal entity who supplies drugs in large quantities is obliged to provide a continuous supply of drugs in the market in accordance with a permit for wholesale medicinal products and retail trade in medicines, as a part of health care, performed in a pharmacy founded as a health care institution, as well as a pharmacy founded as a private practice under the provisions of the **Law on Medicines and Medical Devices¹¹⁹ (Articles 132 and 145)**.

c. Providers' Codes of Ethics

The professional status of a doctor or other health care provider, in the decision-making process on sensitive issues of human health and life, implies a special personal responsibility and duty of the doctor to provide appropriate services in accordance with the **Code of Professional Ethics of the Medical Chamber of Serbia¹²⁰ (Article 5)**.

d. Practice examples

Examples of Compliance

1. Most health care centers in Serbia, until recently, were not accessible to persons with disabilities due to physical barriers to the provision of health care services. A change is shown in recent examples of health care centers and hospitals that constructed access ramps which allow the entry of persons with disabilities. Also, the Clinical Center of Serbia and the Clinic for Otorhinolaryngology and Maxillofacial Surgery incorporated eight induction systems, while the Clinic for Ophthalmology installed a tactile panel and the induction system. An interesting example of good practice is from Vranje, where the institution Pharmacies Vranje opened the window for health insured persons who have a hearing impairment. Medicines are issued by two pharmaceutical technicians who have completed the initial course of sign language.

118 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

119 Official Gazette RS 30/2010 and 107/2012.

120 Official Gazette RS 212/2007.

2. Recently, a potential new method of treatment was defined, for treating multiple sclerosis - a simple operation of angioplasty of the jugular vein. Serbia is one of the first countries in the region where the application of this new method is made possible at the expense of the National Health Insurance Fund, so that people with multiple sclerosis can have this simple operation performed with no costs, at the Clinical Center of Belgrade and Clinical Center of Nis.
3. In November 2010, the first therapeutic park at Ada Ciganlija Lake was opened, which occupies 10 acres, which will at first serve the youth living with disabilities. Horticultural therapy has long been known in the world as very effective for people with developmental disabilities, as well as all types of stress, and substance abuse. The garden is equipped with benches, an amphitheater for workshops and events and a garden where users of the park will be able to work with plants. In addition to horticultural therapy, the garden is accessible for all people with different types of disabilities, to actively spend some quality time.
4. The baby received the vaccine prescribed by the Law that all newborn babies receive the first days of their lives (Hepatitis B vaccine). The mother was an insulin-dependent diabetes patient and her HbSAg status was unknown. The parent of the baby came to the „information“ that the risks of vaccination are significantly greater than the risk of infection with the disease against which vaccination is carried out and that ingredients of vaccines could lead to severe neurological and immunological damage in a child and even death. The Court of Honour of the Serbian Medical Chamber initiated the procedure against the Dr. LS, neonatologist, despite efforts to respect the rules of the profession and all legal provisions (giving vitamin K and the corresponding vaccine at birth). It is the combination of two laws (on the protection of the population from infectious disease and patients' rights). All institutions that the neonatologist contacted gave preference to the Law on protection of Patients' Rights, but it is encouraging that the Minister of Health decided to give preference to the Law on protection of population against infectious diseases.

Example(s) of Violation

Examples of violation of health care provision can be seen in cases of innovative drugs in clinical practice, when doctors are guided by the best possible protection for the patient, but in the case of a new drug that is not yet on the list of drugs covered by health insurance, then there is a violation of the patient's right because the patient has to pay for that expensive drug.

Actual Case(s)

1. In the First Municipal Court in Belgrade, in 2000, a lawsuit was filed by parents of AB and AD who died in their 24th and 26th years, respectively, against the government of the FRY and the Republic of Serbia. The complaint stated : „Sons of the plaintiff were sick from hemophilia and were long-term treated at the Institute for Mother and Child in Belgrade, where the failure of the defendant (govermen) to make regulations about the import of blood products that would prevent the importation of products infected with HIV resulted in infection of plaintiffs' sons with this virus; and they both contracted AIDS and from that disease they both died.“ The medical expertise related to the declaration of an expert on the cause of death of AB and AD, who both suffered from hemophilia - in particular the existence of a causal connection between the use of therapies related to the disease of the departed AB and AD at the Institute for Mother and Child in Belgrade, as well as other institutions where they are treated, and the deaths of AB and AD. Expert evidence

was found that both AB and AD were probably infected with HIV through contaminated factor VIII products, which are given for the treatment of hemophilia, but the infection occurred long before the introduction of legal obligations for testing of blood and blood products for contamination by HIV in August 1987.

2. In a Second Municipal Court in Belgrade in 2007 a lawsuit was filed by the patient PF, a student of a grammar school and the insured with the National Health Insurance Fund (hereinafter: NHIF), suffering from hepatitis C, which, according to consultative opinion of the doctors, needed treatment with drug Pegasys. NHIF classified this drug in the group of drugs that are dispensed under a special regime, so that for patients cited by the clinical doctors as needing the treatment, therapy could be included in the cost of health insurance on the basis of the approval of a special Commission of the NHIF. A request from clinicians to approve the patient's treatment with this drug, stating that the treatment is necessary and that there is no adequate replacement, was rejected by the physicians - members of the Commission of the NHIF. The treatment was carried out because the parents of the patient purchased the drug alone. Later they turned to NHIF in demand for compensation of the sum of money that they spent on the purchase of the drug. Since their request was refused, the patient turned for Court protection. The Court heard evidence, with the President of the NHIF Commission as a witness, to determine the reasons of members of the Commission when they made the decision not to accept the opinions and suggestions of clinical doctors who had complete insight into the health and therapeutic needs of the patient, as they are participats in the patient's treatment. The Court also examined specialists doctors as witnesses. The Court gave full credence to the testimony of clinical doctors, and their medical opinions, so the Commission's decision was not assessed as relevant. The verdict in the court case states that NHIF has an obligation to pay the medical costs of its insured, because that is one of the main purposes of insurance. In the final verdict, the Court found that there is a responsibility of NHIF for a compensation of material damage.
3. In a similar dispute for the compensation of a material damage, filed before the Second Municipal Court in Belgrade, by a 2005 lawsuit of MJ, a patient suffering from metastatic prostate cancer, which according to consultative opinion of urology specialist doctors needed treatment with drug Taxol. The lawsuit concluded and NHIF was ordered to pay to the plaintiff the amount of money spent to purchase the drug, together with the statutory default interest starting from the date of filing of the complaint until the final payment. According to the consultative opinion of the clinical physician, treating a patient who has begun medicines on the so-called „positive list“ covered by health insurance did not produce the expected results, and for this reason it was necessary to continue treatment in combination therapy with other drugs including the drug Taxol, which at that time was not on the „positive list“. The treatment was carried out due to the fact that the patient acquired the drug. The Court heard evidence as from all doctors, as witnesses, who participated in the work of the Commission of NHIF who refused the patient's request for a refund. The Court also examined the detection of clinical physicians who participated in the work of the Council and gave the opinion that in the therapy it was necessary to include the controversial drug. Court testimony of doctors/ members of the Commission of NHIF (that there are many drugs that the patient could be treated with and which are at the expense of health insurance) was assessed as unfounded and the Court completely gave credence to the testimony of clinical physicians (that is the determination of therapy guided by the latest doctrinal positions adopted by the World Asso-

ciation of Urologists and the European Association of Urologists, which was preceded by extensive research studies). After the completion of the examination procedure, the Court found that the disputed drug treatment was necessary for the patient, especially because the illness was a form of metastatic disease (with metastases in the lymph nodes) and the patient, as the insured person, is entitled to the best available drug treatment, regardless of what is in applicable regulations in Serbia; such a drug is not on the list of medicines prescribed and issued at the expense of health insurance. In deciding on the merits of the lawsuit, the Court found that there is a responsibility of the defendant NHIF for compensation of material damage.

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.2. OBLIGATION TO CONDUCT MEDICAL EXAMINATION

a. Medical examination is a medical measure which is required when providing health care services, treatment of the illness or injury, or in connection with family planning.

b. Right as Stated in the Country Constitution / Legislation

Health Insurance Law

Medical examination is a form of providing health care service and in its essential meaning is also a medical measure to be undertaken for the patient. The right to health care, as one part of the compulsory health insurance under the provisions of the **Health Insurance Law**¹²¹ (**Article 34**), includes measures of prevention, different types of examinations, therapeutic measures and medical rehabilitation. In relation to the medical field, examinations are grouped under the provisions of the Law that specifies the following:

- 1) examination and treatment of women regarding family planning, during pregnancy, childbirth and maternity until 12 months after childbirth;
- 2) examination and treatment in cases of illness or injury;
- 3) examination and treatment of diseases of the mouth and teeth.

The obligation to perform a medical examination of the patient is a part of the wider obligation of medical treatment as a professional obligation, and the Law prescribes it when it is necessary to emphasize this obligation. For example, a physician who meets the requirements prescribed by the Law for the chosen doctor, is obliged to accept every insured person who chose him, unless this chosen physician has the number of insured persons in excess of the established standards of the number of insured persons per chosen doctor (**Article 148**).

¹²¹ Official Gazette RS 107/2005, 109/2005- corr., 57/2011, 110/2012- decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014- decision of the Constitutional Court

Law on Transfusion

The Law on Transfusion¹²² (**Article 19**) provides that prior to each administration of blood or blood components, the competent medical doctor is obliged to examine the person who approached to give blood or blood components, whereby the scope of review and the criteria for selection of blood donors or blood components is prescribed by the Minister.

Law on Occupational Safety and Health

There are regulations on examination characteristics for specific forms of medical practice. Thus, occupational health services, by the **Law on Occupational Safety and Health**¹²³ (**Articles 41 and 43**), are performed as preventive activities before occurrence of any disease and periodically of employees in workplaces with increased risk, with issued statements by the doctors in accordance with the regulations on safety and health at work. Previous and periodical medical examinations of employees in workplaces with increased risk are to be made in the manner following the procedures and time limits specified by the regulations on health and safety at work set by the Minister of Labour, Employment, Veteran and Social Affairs and Minister of Health.

c. Supporting Regulations/Bylaws/Orders

Rulebook on the content and scope of the right to health care from the compulsory health insurance on participation of 2014

Every year, a Rulebook is issued as an accompanying regulation concerning medical examinations covered by the National Health Insurance Fund.

Article 8 of this **Rulebook on the content and scope of the right to health care from the compulsory health insurance on the participation of 2014**¹²⁴ provides: examinations and treatment of women with regard to family planning, during pregnancy, childbirth and maternity until 12 months after childbirth; examinations and treatment for illness and injury; examination and treatment of diseases of the mouth and teeth;

(Article 9) includes other preventive examinations:

- of children under the age of 18, or until the end of the prescribed secondary or higher education, but not later than age of 26,
- women in connection with pregnancy and adults in accordance with the national program of prevention and early detection of diseases of major socio-medical importance, or screening programs;
- examinations and treatment by gynecologists and midwives related to family planning, pregnancy (including prenatal period, childbirth and the postnatal period), conditions that can cause complications of pregnancy and abortion for medical reasons.

The right and duty of conducting examinations for the treatment of infertility is limited, where the resources are limited and the applicable regulation, two attempts are allowed for *in vitro* fertilization in women under the age of 40, in accordance with the criteria stipulated by the National Expert Committee formed by the Minister of Health (**Article 10**).

122 Official Gazette RS 72/2009.

123 Official Gazette RS 101/2005.

124 Official Gazette RS 3/2014.

d. Providers' Codes of Ethics

Regarding the obligation of the medical examination, the **Code of Professional Ethics of the Medical Chamber of Serbia**¹²⁵ (Article 44), states that it is anticipated that the physician is obliged to act rationally and economically with the patient, avoiding unnecessary examinations and treatment, regardless of who bears the cost of treatment.

e. Practice examples

Example(s) of Compliance

With the introduction of the payment system based on provided health care services (capitation) at the level of primary health care, preventive examinations are regularly provided to all users, according to the calendar of preventive examinations, which is published by the National Health Insurance Fund.

Example(s) of Violation

There are examples of distortion or violation in terms of demands by doctors and other health care professionals for payment for those services covered by compulsory health insurance funds, also in the case of providing „out of turn“ examinations for patients in line or on the list for specialist medical examination and/or performing some diagnostic services disrespectful on waiting lists, etc.

Actual Case(s)

According to the first instance verdict of the court, the defendant doctor was found guilty of having committed the criminal offense of accepting a bribe since, as a physician, he demanded money from father, the damaged/injured party, whose son needed medical treatment to perform a service that should be his obligation; after the examination of the son, the doctor said that the person's son needed knee ligaments surgery, that he would make a referral, and that after that he would perform the operation „out of turn“. After receiving the son to the hospital, in a telephone conversation, the defendant doctor requested the sum of 1,250 euros for the surgery, explaining that otherwise, if he does not get the money, he would release the patient/son from the hospital. The father, after the son's surgery, came to the cabinet of the defendant and handed him the money. The penalty was imprisonment.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.3. RESPONSIBILITY TO PROVIDE EMERGENCY MEDICAL ASSISTANCE AND WORKING IN EXCEPTIONAL CONDITIONS

a. A health care provider has an obligation to provide emergency medical assistance in case of patients vital threat, within means and expertise whether on duty or not.

125 Official Gazette RS 121/2007.

b. Right as Stated in the Country Constitution / Legislation

Criminal Code of The Republic Of Serbia

Article 253 of the Criminal Code¹²⁶ is entitled *The refusal of medical assistance*. It states the following:

- (1) A physician who, contrary to his/her duty, refuses to provide medical assistance to a person in need of such assistance, who is in immediate danger to his/her life, risk of serious bodily injury, or serious damage to health, shall be punished by a fine or imprisonment up to two years;
- (2) If in the course of the offense referred to in paragraph 1 of this Article, a person who does not receive medical help is physically injured or his health is severely damaged because of the failure or refusal of a physician to provide medical assistance, the perpetrator shall be punished by imprisonment from three months up to four years;
- (3) If the offense referred to in paragraph 1 of this Article, results in the death of the person who did not receive medical help, the perpetrator shall be punished by imprisonment from one up to eight years.

The physician is in all circumstances obliged to examine the person, to be sure about the person's current health status, and if the examination establishes the existence of an immediate threat to life or a risk of serious bodily injury or serious damage to health, the physician is obligated to provide medical assistance in accordance with the opportunities which are currently available in the particular situation. In practice, the physician may be in a situation where at the same time he/she should take care of a number of injured or diseased persons, then the threat to life is the basic criteria by which the physician should diagnose in order to provide the assistance. In other words, a physician may leave the patient only if the life of the patient is not in danger and that the treatment of the patient's illness or injury may be delayed.

In the framework of this criminal offenses we cannot include those cases when the doctor examined the patient in the best way possible, but due to certain circumstances (atypical clinical presentation, diagnostic inaccessibility of the necessary technical resources), the examination did not reveal the existence of danger to life. By their nature, these situations can be classified into the framework of medical errors (in the medical sense of the term).

The Criminal Code does not specify physicians concerning this criminal offense, which theoretically means that it punishes every doctor regardless of what type of activities he/she performs, or to his current qualifications to provide adequate medical care. The practical question is whether a doctor who has been working in research laboratories, completely out of medical practice, would be able to provide such assistance as required in this section of the Criminal Code. Therefore, in the legal literature and practice, an opinion prevails that this offense should refer only to doctors who perform medical practice in health care organizations, because aid should be realistically feasible in relation to a specific case.

The existence of the basic form of this criminal offense (referred to in Article 253, paragraph 1) it is not needed to occur in patients' deaths or deterioration of health because of denying medical help. So, unlike a criminal offense of medical malpractice, in this case it is not necessary to have a harmful consequence. In other words, the perpetrator shall be punished by Law even if a person who has been denied medical help survives without any adverse health effect. In paragraph 2 and 3 of Article

126 Official Gazette RS 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

253 of the same Criminal Code it is stipulated, however, that if due to denying medical aid adverse effects result in the form of serious bodily injury, severe deterioration of health or death of the person who did not receive any help, the doctor will be punished more seriously. It is interesting to compare Article 253 to Article 127.

Article 127 and Article 253 of the Criminal Code: Comparison

Whoever fails to provide medical aid to a person who is in immediate danger, although he could have done it without any danger to himself or another, shall be punished by a fine or imprisonment up to one year. The **Article 127** defines the criminal liability of other persons who are not doctors, for failure to assist a person who is in imminent danger of death. For these persons („*non doctors*”), the Law stipulates the obligation to provide assistance only if it could be done without danger to themselves or others. In contrast, in **Article 253**, which refers to the doctors, there is no limit, resulting in the conclusion that the doctor is legally obliged to provide assistance to a person who is in imminent danger, even when putting himself in danger. In practice, the criminal judicial review of such situations usually refers to cases where the doctor refuses to help a person suffering from serious infectious diseases (AIDS, hepatitis B and C) because of the fear that while performing these interventions alone the doctor could become infected.

Law on Public Health

The obligation to provide emergency medical assistance and work in extraordinary circumstances is mentioned in the **Law on Public Health**¹²⁷ that was published in the „Official Gazette of RS”, No. 72/2009 September 3, 2009.

c. Supporting Regulations/Bylaws/Orders

In the **Special collective agreement for health care institutions founded by the Republic of Serbia**¹²⁸, the term **readiness** is described as a special form of overtime for which the employed health care provider does not have to be present in a medical institution, but must be constantly available to provide emergency medical assistance in health care institutions.

Regulation on minimum work process during a strike in health care institutions¹²⁹, **Article 1, Paragraph 1-3** determines the minimum work process during a strike in health care institutions founded by the Government of the Republic of Serbia comprises:

1. providing emergency medical services, including ambulance transportation to the nearest adequate medical institution;
2. providing health care and receiving emergency patients and those with urgent diseases, conditions and injuries into the hospital;
3. providing complete health care for children, youth and pregnant women, as well as diagnostics (clinical, laboratory, X-ray and other) and therapy (prescribed medications, surgical and other) for acute diseases, conditions and injuries in other population groups and persons, in outpatient and hospital setting.

127 Official Gazette RS 72/2009.

128 Official Gazette RS 36/2010, 46/2013 - Agreement, 74/2013 - Agreement and 97/2013 - Agreement

129 Official Gazette RS 25/1997.

The obligation to provide emergency medical assistance and work in extraordinary circumstances is also mentioned in the **Regulation on the scope and content of health care**¹³⁰, as well as in the **Regulation on health care providers**¹³¹.

d. Providers' Codes of Ethics

The most detailed act is the **Code of Professional Ethics of the Medical Chamber of Serbia**.¹³²

Article 6 provides that, in the case of a patient's life-threatening situation, the physician will, within the limits of his/her capabilities and expertise, without delay, provide emergency medical assistance. A physician cannot refuse to provide emergency medical assistance that corresponds to his/her professional qualifications, regardless of whether on duty or not and regardless of whether he/she is explicitly asked for help.

In accordance with the principles of cooperation and solidarity, regardless of their workplace and work competence, physicians must be prepared to work in extraordinary circumstances, aware of their moral and human responsibility. Working in exceptional circumstances further obliges physicians: the physician must know contemporary doctrinal principles to work in exceptional circumstances, where medical staff have special position and responsibility.

Article 9 describes restrictions in an emergency situation. The physician has no right to start the application of procedures for which he/she has no adequate experience. Exceptions are only for emergency interventions when injuries and illnesses directly threaten the patient's life.

But new diagnostic procedures and therapeutic interventions that could cause reduced physical or psychological resilience of a patient are allowed only in cases of emergency measures during treatment, and solely in the interest of healing or to mitigate the suffering of a patient (**Article 25**).

In the cases of hunger strike or when the patient is unconscious and this may threaten his/her life, a physician must intervene without seeking patient consent. Also, the physician may refuse to perform abortions or sterilization which are not in accordance with his belief and conscience, except when it comes to the need for emergency medical assistance. In that case (if a non-emergency), the physician is obliged to refer a patient to another qualified physician, or to ensure the execution of these operations in accordance with the Law.

The Code of Ethics of the Serbian Chamber of Nurses and Medical Technicians describes same obligations¹³³.

e. Practice examples

Example(s) of Compliance

1. A large number of health care providers reported and volunteered in providing health care services to vulnerable population during floods in May 2014, which is recognized by the World Health Organisation praising their motivation and work.

130 Official Gazette RS 43/1993.

131 Official Gazette RS 4/2000.

132 Official Gazette RS 121/2007.

133 Official Gazette RS 67/2007.

2. Health care providers in Serbia are providing timely and free health care services during situations of the increased entry of migrants from Syria, Afghanistan, Pakistan and other countries in 2015 (the average is at least 1000 migrants per day).

Examples of Violation

1. The physician on the street sees that a person has been injured in a car accident but leaves the scene without trying to assist the injured. The perpetrator (subject) of this crime is solely **the physician**, the one who **refuses** to provide medical help, either by directly refusing to do so, or by concealing his/her identity as a physician.
2. The physician refuses to examine and receive a person in a health care institution with the explanation that this institution is not on duty or competent to receive patients. The press echoed the case where a lower leg injury of blood vessels led to instances of patients bleeding to death because in several Belgrade health care institutions medical staff refused to examine and receive the patient and at the end, the surgical procedure was performed too late.

Actual Case(s)

AA from Vlasotince filed a complaint to the Protector of Citizens because in the primary health care institution in Vlasotince, in the Department of dental care, his 11 year old daughter was denied the right to provide with health care services. The daughter had severe pain in the tooth, but the father did not have a health insurance card with him at the moment. Health care provider had refused to examine the girl without prior assessment of the emergency situation to provide her with suitable health care service. After the examination, the Protector of Citizens has recommended the primary health care institution in Vlasotince that, in the future, their work and actions must comply with regulations that guarantee the right of citizens to health care and special protection of children.¹³⁴

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.4. RESPONSIBILITY FOR EQUAL TREATMENT AND NON-DISCRIMINATION

a. Health care providers have the responsibility to provide equal access to patients regardless of their race, gender, age, nationality, social background, religion, political belief, economic status, culture, language, type of illness, mental or physical disability.

b. Right as Stated in the Country Constitution / Legislation

In respecting patients' rights to equal access to health care and treatment in the provision of medical services, all health care providers must participate actively. This commitment is achieved in several ways as a general principle defined in national legislation.

¹³⁴ Protector of Citizens, Subject 17-2277/11, 12.09.2011. <http://www.ombudsman.rs> (accessed August 28, 2015)

The Constitution of the Republic of Serbia¹³⁵ (Article 68) stipulates that everyone has the right to protection of his/her physical and mental health.

Law on Health Care

This principle is clearly stated in the **Law on Health Care¹³⁶ in Article 20**, which regulates the principle of equity in health care. In order to exercise this right to its full capacity, it must be obligation for health care providers because they are in charge of providing health care services. This means that the respect for equal treatment in the first place is the responsibility of Directors of health care institutions who organize the work process. The second level is represented by doctors, nurses and technicians who have direct contact with patients, or who directly provide health care services. They are required to respect the patient regardless of race, gender, age, ethnicity, social background, religion, political belief, economic status, culture, language, type of illness, mental or physical disability.

Law on Protection of Patients' Rights

In accordance with the Constitution and the Law on Health Care, the **Law on Protection of Patients' Rights¹³⁷ (Article 9)** requires that the right to health care access without discrimination must be respected.

Law on Prohibition of Discrimination

As a *lex specialis*, the **Law on the Prohibition of Discrimination¹³⁸** prohibits discrimination on multiple grounds, but in accordance with the Constitution, the Law on Health Care and the Law on Protection of Patients' Rights. The Law divides discrimination on the basis of personal characteristics with consequent failure to provide medical services and discrimination with regard to health status. Both forms of discrimination can be made by health care providers. They must respect the norms that regulate the prohibition of discrimination; and under **Article 60**, if they violate this, they will be fined by the Misdemeanor Court. In the same article amounts of fines are defined. Accountability can be established for the legal entity, the responsible person, and the health care worker as an individual.

c. Practice examples

Example(s) of Compliance

1. In recent years, a number of health care institutions improved their infrastructures so the buildings are more accessible to people with disabilities. They also improved therapeutic options for people with different forms of disability.
2. In order to improve access to health care for persons belonging to the Roma population, the occupation of „Roma mediators“ was introduced. Mediators originate from the same population and facilitate the initial contact of the Roma population with health care institutions, including the provision of health cards.

Example(s) of Violation

Although the authorized persons of the Protector of Citizens received the requested information from doctors and health care workers in Gynecology and Obstetrics about the potential case of Roma discrimination, they obtained it in a tense and unpleasant conversation in which:

135 Official Gazette RS 98/2006.

136 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – State Law and 93/2014.

137 Official Gazette RS 45/2013.

138 Official Gazette RS 22/2009.s

- they talked about „gypsies who have all the rights, while a woman who is their colleague’s wife has not, she had to pay for childbirth because she was not our citizen“ (employee who identified herself as a midwife);
- gave comments that „gypsies are hard and always cause problems, not only this family“ (health care provider JV who introduced herself as a midwife);
- asked questions such as „Who will protect us from these patients“ (employee who identified herself as a midwife).

(Authors’ note: Discriminatory speech (hate speech) in relation to the citizens of the Roma minority requires immediate and effective treatment of health care institutions in order to sanction such behavior and by taking other measures prescribed by the Law in order to protect the integrity of health care institutions and the medical profession. In this case, measures must include not only punishment for violation of duty and violation of the Law, but also preventive action by sending messages to other employees, patients and citizens that health care institutions and the health care system do not tolerate hate speech and discriminatory behavior and attitudes.)

Actual case(s)

1. Clinical - Hospital Center XY, after the receipt and providing health care service to a patient without a health card and member of the Roma population, tried to make a payment for that service issuing bill to the patient that is not in accordance with the Law, established the Protector of Citizens. Clinical - Hospital Center XY made an omission in the work by trying to make a payment for that service from a patient belonging to particularly sensitive group, who does not have a health card, and to execute it in a manner not in accordance with the Law, using the dependent position of the patient in that situation. The patient and her family members were denied timely and complete information on the rights of health care insurance and the procedures for the exercise of those rights, as well as information on the names and professional status of health care workers who participated in the patient’s treatment. Health care workers in the Clinical - Hospital Center XY in official talks with authorized persons of the Protector of Citizens expressed discriminatory attitudes against the Roma minority which is in direct violation of the prohibition against discrimination prescribed by the Law. The Clinical – Hospital Center obtained written warning by the Protector of Citizens.
2. The Protector of Citizens – the Ombudsman of Serbia received a complaint from representatives of associations of persons with disabilities which points to the need to amend the existing Regulation on Medical - Technical Tools which are provided by the compulsory health insurance. The complaints alleged that the Regulation contains discriminatory provisions, there is no providing of new medical technical aids, there is no defined standards of quality in the process of checking the functionality of the technical aids, those aids are not preserved and are in inadequate storage, and there is no two- instance procedure provided for the complaints. The Protector of Citizens, acting upon received complaints, found that the relevant statutory requirements for the initiation of the control of legality and regularity of the work of the National Health Insurance Fund have been made.

d. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

Vulnerable groups are most exposed to discrimination and unequal treatment. These include groups such as the Roma population, people with physical and/or mental disabilities, deaf and hard of hearing people, blind and partially-sighted people, persons with HIV infection or other infectious diseases, victims of human trafficking, victims of family violence and others. In order to improve their position in the health care system and the receipt of health care services, the Law has given an extra protection for these groups, but also easier conditions for the exercise of their rights. According to these laws regarding individuals in the enumerated categories, health care providers must treat those persons with special care, but it is necessary for the health care provider to have enough knowledge to:

- establish a relationship of trust with each patient,
- adjust the way of giving information about the disease,
- explain the use of the therapy in a comprehensible manner respectful of each patient's personality,
- provide support for further treatment.

7.2.5. RESPONSIBILITY TO RESPECT THE PATIENTS' PERSONALITY AND HUMAN DIGNITY

a. Health care providers are obliged to respect the patient's personality and his dignity, to treat the patient humanely and respect his right to privacy.

b. Right as Stated in the Country Constitution / Legislation

The Constitution of the Republic of Serbia¹³⁹ stipulates that the dignity and the free development of the personality of each individual are part of the constitutional guarantee of the Republic of Serbia, which states that human dignity is inviolable and that everybody has a duty to respect and protect it.

- Everyone has the right to free development of his/her personality if this does not violate the rights of others (**Article 23**).
- Human dignity within the meaning of constitutional provisions is protected and through other fundamental rights of every individual. Thus, the right to live is protected with the provision that human life is inviolable, there is no death penalty, and the cloning of human beings is banned (**Article 24**).
- The inviolability of physical and psychological integrity is protected because no one can be subjected to torture, inhuman or degrading treatment, punishment, or to medical or scientific experiments without his/her free consent (**Article 25**).
- There is a prohibition against slavery, servitude and forced labor which states that no one could be held in slavery or servitude, and that every form of human trafficking is prohibited (**Article 26**).
- Regarding the right to liberty and security, the treatment of persons deprived of liberty should be performed humanely and with respect of the dignity of the person, forbidding any violence or extortion of confession (**Articles 27 and 28**).

Criminal Code of the Republic of Serbia

Protection of human dignity is also a subject of the Criminal Law. **The Criminal Code**¹⁴⁰ provides the offense of abuse and torture as a criminal behavior of anyone who abuses or tortures another or treats another in a manner that offends human dignity (**Article 137**).

139 Official Gazette RS 98/2006.

140 Official Gazette RS 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

Law on Protection of Patients' Rights

The dignity of the individual as patients has full protection by observing the provisions of the **Law on Protection of Patients' Rights**¹⁴¹ (**Articles 3 and 9**) that prohibit discrimination on any grounds; a human relationship to the patient who is seeking the provision of health care services means and requires respect of human dignity.

Law on Protection of Persons with Mental Disabilities

Protection of human dignity is included in other special health care Laws. For example, any persons with mental disabilities have the right to humane treatment, with full respect for their dignity, according to the **Law on Protection of Persons with Mental Disabilities**¹⁴² (**Article 5**).

Law on Infertility Treatment with Assisted Reproductive Technologies¹⁴³

Article 10 provides for the principle of protection of human dignity which is achieved with the implementation process of infertility treatment by applying BMAF with the preservation of human dignity, the right to privacy, and protection of health, welfare and rights of the future child.

Law on Cell and Tissue Transplantation/Law on Organ Transplantation

The principle of protecting the interests and human dignity of the donor and the recipient of cells or tissues is implemented through the transplant procedure in a way that ensures that the interests and welfare of the individual will be above the interests of science and society and that guarantees respect for the dignity and interests of the individual and his legal rights without discrimination in accordance with the **Law on Cell and Tissue Transplantation / Law on Organ Transplantation**¹⁴⁴ (**Article 6**).

Law on Medicines and Medical Devices

There is also the protection of patients in the clinical trials of drugs in accordance with the **Law on Medicines and Medical Devices**¹⁴⁵ (**Article 60**) which provides that the rights, safety and interest of the respondents must be a priority to the interests of science and society as a whole.

c. Providers' Codes of Ethics

Code of Professional Ethics of the Medical Chamber of Serbia¹⁴⁶ (**Article 21**) provides that a public screening of patients for scientific and educational purposes is only possible with their consent. Respect for his personal dignity should be ensured.

By general formulations, a physician will respect the dignity and rights of each patient and will behave in accordance with the fundamental principles of medical ethics, which is especially important for physicians who work in institutions where the patient is placed under the Law and are bound to personally protect the rights of patients, their physical integrity and human dignity (**Articles 31 and 47**).

141 Official Gazette RS 45/2013.

142 Official Gazette RS 45/2013.

143 Official Gazette RS 72/2009.

144 Official Gazette RS 72/2009.

145 Official Gazette RS 30/2010 and 107/2012.

146 Official Gazette RS 121/2007.

d. Practical examples

Example(s) of Compliance

Primary health care institution in Ada, from its own resources, has built an aslope access for a smooth entry of persons with disabilities in the building. The Law on Protection of Patients' Rights (Article 3 and 9) is respected with this action.

Example(s) of Violation

A patient with physical disabilities, DR, was in a Special hospital for a month, but he had no access to the premises within the hospital (training rooms, rooms, swimming pool) and an elevator, which represented discrimination against DR on the basis of his physical disabilities. During the proceedings, it was established that the Special hospital is not accessible to persons with disabilities. Special hospital was recommended to take all necessary measures for implementing the work and ensuring adequate access to all areas in the hospital that are shared facilities and provide that people with disabilities can equally use them.

Actual Case(s)

In the proceedings on the complaint of DT 1, filed by her guardian DT 2, against the Clinic of Gynecology and Obstetrics, Clinical Center of Serbia, for refusing to schedule an examination solely because of her disability, the opinion was issued. The complaint stated that on July 22, 2014, DT 2 tried to schedule an examination for DT 1 which has a physical disability, but that he was repeatedly refused, despite addressing the Councilor for protection of patients' rights. DT 2 then addressed the Commissioner for protection of equality. After considering all the facts, the Commissioner has given the opinion that such treatment at the Clinic for Gynecology and Obstetrics was a breach of the regulations on the prohibition of discrimination. Clinic for Gynecology and Obstetrics was recommended to schedule an examination of the patient as soon as possible; to give a written notice to DT 1 and her guardian about the date of examination, necessary medical documentation and other conditions that should be met; to review internal procedures of the Clinic for handling non standard health care services for persons with disabilities and that that procedures comply with anti-discrimination laws; to send a written apology to the DT 1 and her guardian, as well as to act in accordance with anti-discrimination legislation in the future, while performing tasks from its jurisdiction.¹⁴⁷

Please also look for specific cases in subsection 7.2.4. Responsibility for equal treatment and non-discrimination.

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

¹⁴⁷ Commissioner for protection of equality, Subject 07-00-437/2014-02, 29. 12. 2014. <http://www.ravnopravnost.gov.rs> (accessed August 28, 2015)

7.2.6. RESPONSIBILITY TO PROVIDE QUALITY MEDICAL CARE

a. Health care providers are required to provide quality health care in accordance with quality standards and to promote health care quality by monitoring modern developments in the field of health care.

b. Right as Stated in the Country Constitution / Legislation

The Law on Health Care¹⁴⁸

Article 23 provides the principle of continuous improvement of health care quality with the measures and activities that are in line with modern achievements of medical science and practice, which increase the possibility of a favorable outcome and reduce risks and other adverse effects on human health and the health of an individual and the community at large.

Health care providers are obliged to carry out health care activities in accordance with current medical doctrine and in accordance with the Code of professional ethics and for its work, health care providers are taking the professional, ethical, financial and criminal responsibility (**Article 169**).

Every health care institution is obliged to establish a Commission for the quality improvement as a professional body that takes care of the continuous improvement of quality of health care that is conducted in a health care institution. Commission for quality improvement of work makes the annual program and checks the quality of professional work in a health care institution. Number of members, composition and functioning of the Commission for for the quality improvement is regulated by health care institutions (**Article 149**).

Health Insurance Law

The principle of continuous quality improvement by monitoring the modern achievements and implementation of measures and activities that are in line with the development of the health insurance system increases the possibility of a favorable exercise of rights under the compulsory health insurance for each insured person in accordance with the **Health Insurance Law¹⁴⁹ (Article 14)**.

Law on Protection of Patients' Rights

Law on Protection of Patients' Rights¹⁵⁰ (Article 9) provides that the quality of health care services means the appropriate level of provision of health care services in accordance with the condition of the patient and the established professional standards.

Law on Cell and Tissue Transplantation

Standard quality is particularly acute in relation to specific legislation, such as the **Law on Cell and Tissue Transplantation¹⁵¹ (Article 75)**, which provides that every cell and tissue bank has a person

148 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – State Law and 93/2014.

149 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

150 Official Gazette RS 45/2013.

151 Official Gazette RS 72/2009.

responsible for quality management system that meets the legal requirements and to introduce quality updates based on principles of good practice. The quality management system of cell and tissue bank will provide at least the following documents:

- 1) standard operating procedures;
- 2) guidelines;
- 3) training manuals and reference manuals,
- 4) forms for reporting;
- 5) records of donors;
- 6) information about the final destination of tissues or cells;
- 7) other data, to ensure the quality management system. To ensure system quality and traceability of cell and tissue, the bank is obliged to keep data within the time prescribed by the Law.

Law on Medicines and Medical Devices

In the field related to the production and sales of pharmaceuticals, the **Law on Medicines and Medical Devices**¹⁵² (**Article 111**) also establishes the obligation to respect the standards of quality. The manufacturer of the drug, which carries out the production of the drug is responsible for the manufacturing process; and if the manufacturer releases a series of medicinal products, it is responsible for the quality, safety and efficacy. The license holder of the drug also is responsible for the quality, safety and efficacy. A legal entity who performs the wholesale of drugs is required to have a copy of the certificate of analysis for each batch of the drug for which it is licensed for wholesale by the competent Ministry of Health as well as the accompanying documentation for drug information indicating that a series of an imported drug has been issued a certificate of the analysis of the Agency, as well as the number of the certificate of the analysis (**Article 133**).

c. Supporting Regulations/Bylaws/Orders

According to the **Regulation on indicators of health care quality**¹⁵³ (**Article 39**), indicators of the quality of work of the Commission for the Quality Improvement are:

- 1) the existence of an integrated plan for continuous quality improvement of the health care institution that includes:
 - activities planned in order to improve the results of quality indicators that the health care institution collects and monitors;
 - activities planned in order to improve user satisfaction, based on analysis of customer satisfaction surveys;
 - activities planned in order to improve employee satisfaction, based on analysis of employee satisfaction in health care institutions;
 - external recommendations and proposed measures for assessing the quality of professional work carried out by the Ministry of Health (if there were any external reporting for assessing the quality of professional work);
 - recommendations of the Agency for Accreditation of Health Care Institutions of Serbia (if the medical institution is accredited by that agency)

152 Official Gazette RS 30/2010 and 107/2012.

153 Official Gazette RS 49/2010.

- 2) the existence of an integrated report of the Commission for improving the quality improvement, according to the above-defined content
- 3) the existence of the updated website of the institution.

In the **Regulations on the detailed requirements, standards and measures for the establishment of a system of quality in the performance of transfusion activities, or certain transfusion activities**¹⁵⁴ (**Article 1**) lays down the detailed conditions, standards and measures for the establishment of a system of quality in the performance of blood transfusion, or certain other transfusion activities.

d. Providers' Codes of Ethics

The life duty of the physician is to permanently (continuously), theoretically and practically improve himself/herself with professional training and to apply diagnostic methods and therapeutic procedures of modern medicine. Maintaining the level of knowledge and skills necessary to provide high quality health care is a moral duty of a physician in accordance with the **Code of Professional Ethics of the Medical Chamber of Serbia**¹⁵⁵ (**Article 8**).

e. Practice examples

Example(s) of Compliance

A large number of health care institutions in Serbia are currently passing through the procedure of accreditation or reaccreditation which carefully analyzes and improves the quality of health care services by paying attention to the structural, process and outcome variables of the quality.

Example(s) of Violation

1. The physician is responsible for health care quality and for damages resulting from use of a method of treatment which is not recognized by modern medical science. The plaintiff addressed the defendant, a general physician, to remove tattoos from the plaintiff's upper arm and abdomen. The defendant in her private practice of general medicine in L, attempted to remove the tattoos applying certain methods. Having completed the intervention and applied the therapy, the plaintiff has burns of second and third degrees, which caused damage to his skin in the proportion of 5% of the total body surface and a small degree of disfigurement. It has been found that the applied method of treatment was abandoned several years ago in medicine because of the pain and the consequences that may occur, especially because of hypertrophic and ugly scars. In the framework of modern medical science, this method of treatment is not applied, except in paramedical treatments.
2. Discharge of GS and her child was planned, based upon because the practice of the Clinical - Hospital Center to test every newborn with metabolic screening, which cannot be done before the expiry of at least 48 hours after birth. However, GS asked that she and the child leave the facility the day before. Physicians who were on duty, primarily the pediatrician, gave their expert opinions that metabolic screening of the child is necessary and it is in the child's best interest. They, however, did not have information about what they can and should do when their professional opinions oppose decisions and demands of parents. Talk with health care professionals revealed that they have no information on procedures in the health care institution for the protection of children from abuse and neglect;

154 Official Gazette RS 119/2012.

155 Official Gazette RS 121/2007.

responsibilities, powers and duties of the applicable guardianship authority (Centre for Social Work); duty and authority of health care institutions and health care providers to engage the guardianship authority when they suspect the neglect of the health needs of the child; and other information that health care providers need so they can properly apply the standards and rules to protect the child from violence.

Actual case(s)

A 16-year-old student of the first grade of high school did not smoke or drink. As a child he underwent surgery because of the curve of the spine (scoliosis). His mother denied other possible diseases. During the previous day he had no problems; he played football, and on August 31, 1998 about 2 hours after midnight, after the celebration of his birthday, he complained to his mother of suffocation, pain behind the sternum and vomiting. He was taken to the Emergency Department of a hospital and was examined by internists and a thoracic surgeon, who performed an X-ray of the chest. Results showed that apparently everything was normal. He was given an injection of a painkiller, and his parents were told that he is healthy and that he is „faking“. He returned home with his parents around 5:30; the pain weakened and he lay down in bed. A short time later he complained that he could not stand up, and he looked very ill. His parents called an ambulance that arrived after 20 minutes and by that time the doctor could only declare time of death. ApPostmortem examination revealed layering (dissection) of the thoracic aortic wall, as a result of pathological changes caused by cystic degeneration of the muscular layer of the aorta in the innate developmental disorders of connective tissue (Marfan syndrome). The end result was a split delamination of the aortic wall with consequent lethal estuary of more than 2000 cc of blood in the chest cavity, so that the autopsy diagnosed internal bleeding as the cause of natural death.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.7. RESPONSIBILITY TO INFORM AND TO OBTAIN INFORMED CONSENT

a. The health care provider is required to inform the patient about his/her health status as well as all relevant facts for the decision on giving consent for a proposed medical measure, including possible consequences, in order to obtain informed consent of the patient.

b. Right as Stated in the Country Constitution / Legislation

Health Insurance Law

There are different responsibilities and duties of doctors and other health care providers regarding the procedures for informing patients and they are correlative to rights of patients arising from the principle of openness and transparency in health care under the provisions of the **Health Insurance Law**¹⁵⁶ (Articles 12 and 57).

156 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

Law on Protection of Patients' Rights

However, it is considered that the most important part of the information process is the duty to obtain consent from the patient. It is not about the general obligation to inform, rather than on the specific and individual notification, which meets the requirements of time, coverage and adequacy and sometimes forms in which it is administered. The **Law on Protection of Patients' Rights**¹⁵⁷ (**Article 16**) expressly provides that the patient is not bound by consent that was not preceded by a notice in accordance with the Law, from a competent health care provider who undertakes a medical measure on the patient and in that case bears the risk for adverse effects. In order to obtain the patient's consent, a competent health care provider has to notify the patient and to communicate orally and in a way that is understandable to the patient, taking into account his age, education and emotional state. If the competent health care provider believes that the patient, for any reason, does not understand the given notice, the notice may be given to the patient's family members. If the patient does not understand the language in official use in the territory of the health care institution, a translator will be provided' and if the patient is a deaf-mute, an interpreter is required (**Article 11**).

Law on Medicines and Medical Devices

The provisions of the **Law on Medicines and Medical Devices**¹⁵⁸ (**Article 61**) relating to the duty of informing the patient in the process of obtaining consent, in accordance with the principle of *informed consent*, are more general and are equally applied to any other medical treatment as well as the procedures related to clinical trials or pharmaceutical care.

c. Supporting Regulations/Bylaws/Orders

The Rulebook on the method of prescribing and dispensing of medicines¹⁵⁹ (**Article 21**) provides that if the health care institution does not have the prescribed medication, the authorized person at the institution may issue a drug of the same composition that is under a different name in the market if, with the explanation, the person to whom the medication is prescribed gives consent.

d. Providers' Codes of Ethics

Certain duties in obtaining the patient's consent are required by the rules and medical stocks, because consent is closely linked with the entire treatment of the patient, starting from the patient's arrival to the physician until a series of announcements in the direction of specific medical measures in accordance with the **Code of Ethics of the Serbian Medical Chamber**¹⁶⁰ (**Articles 41 to 45**). Thus, the physician shall respect the right of a mentally capable and conscious patient to freedom to choose his/her physician or recommended medical advice. The physician is obliged, after the receipt of a patient in a medical institution, to ensure that the patient is informed of the routine procedures and on the technical possibilities which the medical health care institution has relating to his/her treatment. In the manner of treating, the physician should obtain the consent of the patient, after explaining the importance of the process for the identification, treatment and monitoring of his/her illness.

157 Official Gazette RS 45/2013.

158 Official Gazette RS 30/2010 and 107/2012.

159 Official Gazette SRJ 16/1994, 22/1997 and 52/2002 and Official Gazette SCG 1/2003 - Constitutional Charter

160 Official Gazette RS 121/2007.

e. Practice examples

Example(s) of Compliance

The patient BM has breast cancer. The surgeon had suggested surgical intervention, anticancer drugs and radiation with an explanation of all the possible consequences of the therapy, especially cytostatics and radiation. He also gave her written instructions on these procedures. After studying the instructions, BM had accepted the proposed medical measures and had signed the informed consent.

Example(s) of Violation

Dr SM failed to explain to the patient all possible consequences of the chemical treatment of skin lesions, as well as the possibility of scars when exposed them to sunlight. It also did not seek the informed consent of the patient ZS. After therapy, which led to unsightly facial scars ZS addressed the Councilor for protection of patients' rights.

Actual Case(s)

1. The Municipal Court in GM in 2008 heard the lawsuit of the patient PV who, due to the application of thermocauter during her surgery for hemorrhoids, suffered third-degree burns to her right lower leg. The Court, based on the evidence presented, including expert testimony and hearing as a witness a physician who participated in the treatment of the patient, found that there is a legal responsibility of the health care institution in which the patient was treated, because the surgeon failed to alert the patient of the possibility of burns, in accordance with the norms of the Law on Health Care. The patient, before making a decision to accept or reject the operation, has to be informed of the risks of operations; but the notification in this case did not include information on the possible risk of the occurrence of burns. The probability of occurrence of this risk is only 1%, so the physician decided to moderate the information on the risks and to exclude those that rarely occurred in order to prevent the patient from being intimidated or discouraged or to abandon the proposed operation. The Court did not accept the reasons for the denial of notification and found that the health care institution is required to compensate the plaintiff non-material damage.
2. Clinical - Hospital Center XY, after the receipt and providing health care service to the patient without a health card and member of the Roma population, tried to make a payment for that service (delivery) that is not in accordance with the Law, established the Protector of Citizens. Clinical - Hospital Center XY made an omission in the work after the receipt and the provision of the health care service for the patient, by trying to make a payment for that service from a patient belonging to particularly sensitive group, who doesn't not have a health card and execute it in a manner not in accordance with the Law, using the depending position of the patient in that situation. The patient and her family members were denied timely and complete information on the rights of health care insurance and the procedures for the exercise of those rights, as well as information on the names and professional status of health care providers who participated in its treatment. Health care providers in the Clinical - Hospital Center XY, in official talks with authorized persons of the Protector of Citizens, expressed discriminatory attitudes against the Roma minority and that is in direct violation of the prohibition of discrimination prescribed by the Law.

3. According to the established facts, the defendant doctor performed reconstructive surgery of the gluteus for the plaintiff. It was found that before the operation the plaintiff signed a document of the defendant, entitled „Consent for surgery under general anesthesia“, thus confirming that the patient completely read the document, received a copy of it, had the opportunity to ask any questions related to this surgical intervention and received all the answers, and that she confirmed her full understanding of the document. The Court found that the surgery of augmentative gluteo plastic was made under the applicable rules of the profession, but that with the plaintiff, after surgery, arose some complications concerning the visibility of the implant, which is the most common complication of this procedure and also the most common indication for re-intervention, which is necessary in order to eliminate it. Complementary diagnostics proved deterioration of the situation of the plaintiff. The Court rejected the plaintiff's claim, saying that the surgery was performed according to the rules of proper exercise of the medical profession and that in the implementation of the procedure there was no medical error found.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.8. RESPONSIBILITY TO MAINTAIN CONFIDENTIALITY AND PROFESSIONAL SECRETS

a. Information about the health condition of the patient constitutes particularly sensitive information and health care providers have a duty to maintain that information as confidential and a professional secret.

b. Right as Stated in the Country Constitution / Legislation

The Law on personal Data protection¹⁶¹ governs processing of data, but for especially sensitive data requires a written patient consent.

Law on Protection of Patients' Rights

According to **Article 18** of the **Law on Protection of Patients' Rights**,¹⁶² health care providers are forbidden to share information on the health status of patients. The obligation of confidentiality of data is directed towards other employees within the same health care institution. If the patient chose their doctor in a health center or a specialist, they must not share information about a patient without its consent. However, other health care professionals may attend the examination of the patient, unless the patient refuses it. In situations where there are more physicians or more students attending, the physician should inform the patient of its rights. The ignorance about the patient's right to refuse the presence of other medical workers can not be misused. On the contrary, the Law provides that the request of the patient, which is opposed to the presence of other health care providers must be explicit, which would mean in writing. It would be best if the physician has written document which means that the patient is informed that it could oppose the presence of others and to accept or oppose their presence.

¹⁶¹ Official Gazette RS 97/2008 and 107/2012.

¹⁶² Official Gazette RS 45/2013.

Article 22 states that specific data on the personality of the patient are considered data on human substances that may reveal the identity of the person from which they originate. Disclosure of such of data is forbidden. Health care providers can only be exempted from liability if they have the written consent of the patient, his legal representative or a court decision. On the other hand, the physician can announce the immediate family health information when assessing the risk to their health and without the patient's consent. Significantly, in these situations, the physician has a dual responsibility, it must use good judgment to establish with certainty that there will be a causal link between the health of the patient and his family and the level of endangering the health of family members .

Article 24 requires the physician to keep all the data from medical records as a professional secret when it comes to a child of age 15. It is important that the child is capable of reasoning. However, the health care provider should inform the child's legal representative if it estimates that the health and life of the child are threatened.

c. Providers' Codes of Ethics

The obligation to keep information from the medical records of the patient is governed by codes of Ethics of various Chambers in the field of medicine. In the **Code of Ethics of the Serbian Medical Chamber**¹⁶³, **Articles 19 and 20**, in the part entitled „The physician and professional secrecy“ govern the requirement of professional secrecy. The physician may be released from keeping medical information secret in two ways: with the consent of the patient and by the decision of the Court. When the physician is released from this obligation with the consent of the patient, the physician can keep confidential any information which he/she estimates will harm the patient. The physician may use the data in scientific research purposes, but only in a way that preserves the anonymity of the patient. If the patient has given his/her consent for public display, the respect of the patients dignity must be ensured (**Article 21**).

The Code of Ethics of the Serbian Chamber of Nurses and Medical Technicians¹⁶⁴ in **Principle Number IV** defines the obligation to keep personal data of the patient secret, and it lists what is meant by professional secrecy. According to this document, nurses and medical technicians are required to protect medical history, diagnostic procedures, results of laboratory tests, prescription drugs, or medical devices.

The **Code of Ethics of Pharmacists of Serbia**,¹⁶⁵ along with the general provisions on professional secrecy, reinforces the responsibility of a pharmacist in a care institution to respond for other persons who have access to data. Thus, in situations when this responsibility is breached, the pharmacist who is responsible for storing data can be held liable if it is proven that he/she did not take all necessary measures (**paragraph 4.2**).

Laboratory data can be stored in two ways: archived in hard copy or in a computer program (system). Only professional personnel of the laboratory have access to written documents , while the data stored in the computer can be accessed only by any authorized persons. Like other codes of ethics,

163 Official Gazette RS 121/2007.

164 Official Gazette RS 67/2007.

165 Official Gazette RS 6/2007.

the **Code of Ethics of Biochemists**¹⁶⁶ contains a general definition of the duty of professional secrecy (**Articles 24, 51 and 52**).

d. Practice examples

Example(s) of Compliance

The obligation of confidentiality and professional secrecy in recent years is in focus in Serbia. In addition to the described regulations, it is insisted that this area is further detailed by Laws and by-laws. Thus, the Commissioner for Information of Public Importance and Personal Data Protection publishes its practices and recommendations in order to contribute to a better understanding of this problem by relying on the Law on personal data protection.¹⁶⁷

Example(s) of Violation

The Commissioner for Information of Public Importance and Personal Data Protection sent a letter to the Ministry of Health which indicates the responsibilities of the Ministry in connection with the implementation of the Law on exercising of rights to health care of children and women during pregnancy, delivery and postnatal period¹⁶⁸. The Constitutional Court submitted a proposal for establishing the unconstitutionality of Article 5 of this Law because it does not guarantee protection of personal data, does not specify the purpose of collecting data on pregnancy, termination of pregnancy, stillborn children, or child mortality in the first year of life and because the way of keeping and processing data is not regulated in the National Health Insurance Fund (NHIF). In this way, it can cause irreparable consequences both for the individuals whose personal data will be on-hand in NHIF, as it is uncertain how it will be used and collected, as well as for physicians and medical institutions that may be asked (Article 44 and 46 of the Law on Protection of Patients' Rights) if the data from medical records is available. The Constitutional Court rejected the proposal for a finding of of unconstitutionality, although one judge dissented based on the grounds of the claim.¹⁶⁹

Actual Case(s)

MM addressed the Municipal Court in Zajecar with a lawsuit for compensation for non-material damages for emotional harm, due to unauthorized disclosure of her medical records. After examining the case, the Court decided in favor of the plaintiff because the health care providers of the Health care center in Zajecar discovered the information about the blood tests of the plaintiff in which they have discovered the HIV virus. Subsequent analysis showed that the plaintiff does not have HIV, but health care providers had expanded the information on the HIV virus through the place where the plaintiff lives. This has led to the isolation of the plaintiff, her family, her child has been rejected from the kindergarten and her husband had problems in the workplace. The Court granted compensation that the Health care center should provide to MM.¹⁷⁰

166 Official Gazette RS 106/2006.

167 Official Gazette 97/2008 and 104/2009.

168 Official Gazette RS 104/2013.

169 Official Gazette RS 73/2014.

170 The verdict of the Supreme Court of Serbia, Belgrade, Rev. 392/03.

e. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

A specific problem may arise in practice when a physician has a prostitute for a patient who is infected with HIV, but who nevertheless continue to engage in this occupation without warning people who come into contact with about her HIV positivity. Such a behavior could be considered as a potential criminal offense specified in paragraph 2 of the Article 250 of the Criminal Code („Whoever, knowing that he/she was infected with HIV, knowingly transmits the infection to another shall be punished with imprisonment from two to twelve years“). Due to the fact that this offense is punishable by imprisonment of two to twelve years, the reporting is mandatory, and failure to report is also punishable under paragraph 2 of Article 332 of the Criminal Code. On the other hand, according to paragraph 3 of the same Article of the Criminal Code, the physician of the perpetrator (who in this particular case is the patient of that physician) will not be punished for failing to report. The question is how a physician is to act in this situation. Given the fact that the patient is required to perform on proposed measures and procedures in the treatment by physicians for protection of the environment, if the patient does not follow the advice of physicians, he/she violates the unwritten contract between himself/herself and the physician; and the physician is thus, relieved of further liability for failure to keep secrecy and shall report this behavior of his/her patient in order to protect other potentially vulnerable individuals.

7.2.9. RESPONSIBILITY FOR KEEPING HEALTH RECORDS AND COMPULSORY NOTIFICATION

a. Keeping health records and the preparation and submission of prescribed reports are integral parts of the work of health care institutions

Health care institutions must keep records and prepare and submit prescribed reports by implementation of uniform methodological principles and statistical standards for keeping records prescribed by the legislation. A health care provider is legally obligated to report the existence of infectious disease or suspected infectious disease and to report preparation of crime, performance of the crime or its executive.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care Records

Article 2 of the **Law on Health Care Records**¹⁷¹ determines that the records in the field of health care (hereinafter: the records) are used for monitoring and studying of the health status of the population, for the planning and programming of health care, and for monitoring and evaluating of the implementation of plans and health care programs for statistical and scientific research in the field of health care and other purposes.

Health care institutions, private practice, institutions of social welfare, prisons, colleges for health professionals who perform certain duties regarding health care services, as well as other legal entities that perform particular tasks of health care services in accordance with the Law, are required to keep

171 Official Gazette SR 14/1981 and Official Gazette RS 44/1991.

medical records and evidence and to submit them within the prescribed deadlines for individual, collective and periodic reports to the competent institution or the Institute of Public Health, as well as other organizations in the manner prescribed by special Law. Confidentiality of these data is required and guaranteed by the health care institution, with the obligation to protect medical records from unauthorized access, copying, and abuse, regardless of the form in which the data from medical records is preserved.

Keeping health records and entering data into the medical record are exclusively performed by authorized persons only, in accordance with the Law.

The Law on Health Care Records regulates:

- the type and content of medical documentation and records,
- the manner and method of documenting and recording ,
- the persons authorized to conduct medical documentation and data entry,
- deadlines for submission and processing of data
- methods of data retrieval from patient medical records used for data processing,
- other issues of importance for medical documentation and record-keeping is.

According to the Law on Health Care Records, **Article 7**, the basic medical documentation includes:

1. health record,
2. patient protocol,
3. a protocol for recording the results of medical work, of the operated patients and patients who died,
4. register of persons accommodated in inpatient health care department, medical history,
5. temperature-therapeutical-dietetic list,
6. discharge list with epicrisis,
7. list of anesthesia,
8. log book,
9. list of medicines (drugs) spent for treatment.

Aids for keeping records include:

1. registry of records,
2. daily records of visits and work,
3. current records of diagnosed illnesses and conditions,
4. daily records of the movement of patients in the hospital - inpatient health care department.

In records of general information of interest to the whole country on the examined, diseased, injured, treated and other persons who were provided with health care services, the following general information is entered for every person:

1. First name and surname of the person from which derived the right to health care,
2. The name of one of the parents,
3. The personal identification number.

Special records are kept in cases of temporary incapacity or inability to work. From the first day of temporary incapacity, particular attention is due to: diseases and injuries (other than occupational injury), occupational injury, pregnancy, childbirth and care of the sick family member.

Criminal Code of the Republic of Serbia

The **Criminal Code**¹⁷² in **Article 251** (concept of crime of *Negligent provision of medical assistance*) stipulates as one of the possible forms of malpractice the inadequate management of medical records, which also happens in practice.

Other Laws Mentioning Medical Records

Laws that also mention medical records are as follows: **Health Insurance Law**¹⁷³, the **Law on Protection of Patients' Rights**¹⁷⁴ and the **Law on Occupational Safety and Health**.¹⁷⁵ In general, these Laws state that medical record has to contain all necessary data for proper diagnostic and therapeutic treatment.

Legislation Containing Requirements for Physician or Health Care Institution Reporting

There is also obligation of reporting in the legislation in Serbia, namely: the existence of an infectious disease or suspected infectious disease, preparing/ planning the criminal act, executing the criminal actor reporting about offender. In performing his/her daily activities, the physician is exposed to various interests which may arise from questions about his responsibilities.

- According to **Article 332 of the Criminal Code**, if the physician knows that a person has committed a criminal offense for which the Law may impose imprisonment of thirty to forty years or if the physician knows that such offense was committed and fails to report it before the offense and/or the offender are discovered, the physician shall be punished by imprisonment of up to two years. The punishment referred to in **paragraph 1** of this Article shall also apply to an official or responsible person who knowingly fails to report a criminal offense which it discovered while performing his/her duties, if the offense is punishable under Law by imprisonment of five years or more of severe punishment. **Paragraph 3** states that the law will not punish the attorney, physician or religious confessor of the perpetrator of the crime.
- **The Criminal Code, (Article 194)** defines the obligation of reporting in cases of the following; serious bodily injury; injuries that are caused by projectiles from firearms or similar means that can cause severe body injury; sexual crime (rape, sodomy, etc.); and domestic abuse.
- **the Law on Protection of Population against Infectious Diseases**¹⁷⁶ (**Article 14**) requires reporting, in accordance with this Law, in the following cases:
 1. illness or death from infectious diseases;
 2. death from infectious disease that is not listed in Article 2 of this Law;

172 Official Gazette RS 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

173 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

174 Official Gazette RS 45/2013.

175 Official Gazette RS 101/2005.

176 Official Gazette RS 125/2004 i 36/2015

3. suspicion of cases of cholera, plague, smallpox, yellow fever, viral hemorrhagic fever, poliomyelitis, diphtheria, measles, botulism;
 4. epidemics of infectious diseases;
 5. secretion that causes typhoid fever, paratyphoid, salmonella, shigella, yersinia, campylobacter infection, as well as carriers of antigens of viral hepatitis B, the presence of antibodies to viral hepatitis C, antibodies to HIV, and carriers of parasites - the cause of malaria;
 6. the possibility of rabies virus infection;
 7. infections within health care institutions (hospital infections);
 8. bacterial resistance to antimicrobial drugs;
 9. laboratory- identified agents of infectious diseases;
 10. acute flaccid paralysis;
 11. suspected use of biological agents.
- **Article 15** of the same Law provides a similar obligation for infectious disease of zoonosis or death of a person caused by this contagious disease.

c. Supporting Regulations/Bylaws/Orders

There are numerous accompanying regulations governing the area of health records, including electronic forms (electronic health records and electronic patient records). These include the following:

- Regulation on voluntary health insurance¹⁷⁷;
- Regulation on the manner of exercising the right to health insurance of military insured and members of their families¹⁷⁸;
- Regulation on the national program of health care for women, children and youth¹⁷⁹;
- Regulation on the national program of prevention, treatment and control of cardiovascular diseases in the Republic of Serbia until 2020¹⁸⁰;
- Regulation on the national program for prevention and early detection of type 2 diabetes¹⁸¹;
- Regulation on the national program of prevention, treatment, improvement and control of the development of renal failure and dialysis in the Republic of Serbia until 2020¹⁸²;
- Regulation on medical documentation, records and reports on personnel, equipment, facilities and medicines in health care institutions¹⁸³;
- Rules on data provided in the special register kept by health care institutions and deadlines for submission of data and information¹⁸⁴;
- Rules on the content of technological and functional requirements for the establishment of an integrated health care information system¹⁸⁵;

177 Official Gazette RS 108/2008 and 49/2009.

178 Official Gazette SRJ 36/1994.

179 Official Gazette RS 28/2009.

180 Official Gazette RS 11/2010.

181 Official Gazette RS 17/2009.

182 Official Gazette RS 11/2011.

183 Official Gazette RS 29/2000.

184 Official Gazette SFRJ 64/1991 and Official Gazette SCG 1/2003 - Constitutional Charter

185 Official Gazette RS 95/2009.

- Regulation on the procedure for issuing registration of birth of the child and the application form for the birth of a child in a health care institution 186.

The Statute of the National Health Insurance Fund¹⁸⁷ also regulates the issue of keeping medical records.

d. Providers' Codes of Ethics

The Code of Ethics of the Serbian Medical Chamber¹⁸⁸ in **Articles 49 and 75** requires regular and up- to- date health records.

e. Practice examples

Example(s) of Compliance

KM was admitted as an emergency case, accompanied by police officers, on suspicion that he swallowed a packet of drugs. Since the KM refused to give a written consent to the intervention of removing packets of drugs by inducing vomiting, doctor BM did not perform the intervention but he entered all necessary data into medical records. Despite the initiation of the criminal procedure by the Ministry of Internal Affairs, after examining the facts, doctor BM was acquitted. It was found that the doctor BM acted lawfully and properly because following the entire procedure, entering a note in the medical record of the patients' refusal to provide informed consent for the medical intervention, which, for this reason, was not carried out.

Example(s) of Violation

1. The medical record of anesthesia is not up to date in surgical interventions in general anesthesia, which creates problems in later forensic expertise, if a patient dies during general anesthesia.
2. In the medical history of the patient, who died after several days or even weeks of the medical treatment, there is entered only findings on admission to the health care institution and conclusions on the cause of death, without any information on the progress of the disease or the condition of the patient during treatment.

Actual Case(s)

1. In a criminal case, brought by state prosecutor against physician as defendant for malpractice to the Supreme Court, the clinical picture of the patient after a tonsillectomy clearly indicated the presence of sepsis, without any signs and symptoms of shigellosis. However, a physician indicated in the patient's medical records at the time that most likely it was case of shigellosis and that the patient should not be given antibiotics. A few days later the patient died. Using blood cultures taken during the patient's life and autopsy, findings demonstrated a streptococcal sepsis as a cause of death. During expertise two opposing arguments emerged on the state of the patient's health at discharge from the hospital after completion of the surgery. The doctor argued that the patient was discharged in good general condition and afebrile; the family of the patient stated that he then had hyperthermia. In the reported medical documentation, the patient's condition at discharge is not stated and a temperature chart on the treatment of the patient after tonsillectomy was completely empty, ie

186 Official Gazette RS 25/2001.

187 Official Gazette RS 81/2011, 57/2012, 89/2012, 1/2013 and 32/2013.

188 Official Gazette RS 121/2007.

without any data on postoperative movement of the body temperature. The outcome of the case was imprisonment of the physician.

2. In one autopsy case processed at the Supreme Court through the criminal procedure, a 55-year-old female patient received otorinolaryngology intervention of removal of polyps from the nasal cavity (*polypectomia endonasalis bilat. et ethmoidectomy anterior bilat*). The records about the surgery included the following: „In general anesthesia the cleanse of both nasal polyps hallway from the front and the cells ethmoidal sinuses is done. Front tamponade.“ After this intervention, the patient did not wake up from general anesthesia. The next day the patient died. An autopsy revealed that during surgery a breach occurred to the skull base from a surgical instrument and its penetration through the right frontal lobe of the cerebrum in the front horn of right lateral ventricle, which led to fatal bleeding in the brain ventricles and the subarachnoid space. The outcome of the case was imprisonment of the physician.
3. AP died at a gynecology clinic after childbirth. The patient, unaccompanied by doctors, was directed to this clinic from the Health Centre because of high blood pressure, although according to the findings of the health inspection, the patient had a headache and occasionally lost consciousness. Doubt is expressed publicly that the supporting medical documentation was not sent from the city of the patient, which further aggravated the work of doctors at birth. Nevertheless, despite the orders of the Commissioner for Information and Personal Data Protection to the Health Centre to hand over copies of the documents to her husband, the Health Center refuses, referring to the incompetent, and inaccessible opinion of the Ministry of Health or the inspection of the Ministry of Health.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.10. RESPONSIBILITY FOR LICENSING, CONTINUING MEDICAL EDUCATION AND RE-LICENSING

a. Health care providers must constantly improve their professional skills

Serbian law requires that in constantly improving their professional skills, health care providers also must apply diagnostic methods and therapeutic procedures of contemporary medicine.

The requirement for licensing and re-licensing is tied to the regulated professions, which include health care providers.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care

The issuance, renewal and revocation of the license for independent work is regulated by the **Law on Health Care**¹⁸⁹, with a part which relates to the obligation of licensing and re-licensing, **Articles 190 to 198.b.**

189 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law

The issuance of the license

Article 194 of the Law on Health Care regulates the issuance of the license to work as a health care provider. It states once a future health care provider successfully completes the professional exam, the competent Chamber (Director of the Chamber) will issue a decision and a license for a period of seven years.

According to **Article 195** of Law, the license is issued when a health care provider candidate:

- meets the educational requirements of the health profession;
- has successfully completed an internship;
- has passed the exam;
- is registered in the directory of the Chamber;
- proves that there is no court decision of a criminal offense that makes him/her unworthy of performing health care activities, and that there is no court decision to sentence him/her to imprisonment for a serious crime against the public health.

The renewal of the license

This is regulated by **Article 196** of the Law on Health Care. This states that a health care provider should submit the request for renewal of the license to the competent Chamber, 60 days before the expiration of the period for which the current license was issued, together with evidence of the completion of required continuing education, as well as evidence of competences to continue work in his/her profession. The certificate of continuing medical education with specific number of accredited points by Health Council of Serbia is proven evidence of competences. The renewal of the license is done every seven years.

Failure to Receive or Renew a License

If a health care provider does not receive, or does not renew his/her license, he/she cannot perform independent work in any health care institution or private practice (**Article 191 of the Law on Health Care**). **Article 192** states that a health care provider to whom the competent Chamber has not renewed the license, or whose license is revoked, under the conditions stipulated by this Law, shall, within eight days of the receipt of the decision, to submit the previously issued license to the relevant Chamber.

Temporary revocation of the license

Temporary revocation is regulated by **Article 197** of the Law on Health Care. It provides that the Chamber of health care providers under certain conditions, can temporarily (from six months to five years) revoke the license of health professionals if:

- they do not renew the license;
- they perform an activity for which their license was not granted;
- they make a professional error which distorted or deteriorated the health condition of a patient;
- they were sentenced to one of the measures of temporary prohibition of independent work by the competent authority of the Chamber, due to a serious breach of professional duty and reputation of the Chamber, in accordance with the Law and the Statute of Chamber;

- a final court decision convicted them of a criminal offense that makes them unworthy to perform the profession of health care providers;
- in the provision of medical services they misused health insurance funds and
- in other cases prescribed by the Law.

A professional error for purposes of this Article shall be determined in a disciplinary procedure before the competent authority of the Chamber, or in the process of ordinary and extraordinary external quality checks of professional work of health care providers. In this Article, professional error means „malpractice or neglect of professional duties in providing health care or non-compliance with or lack of established rules and professional skills in the provision of health care, which leads to a distortion, deterioration, injury, loss or damage to health or parts of the body of the patient.“

Permanent revocation of the license

Permanent revocation is regulated by **Article 198** of the Law on Health Care, which states that the Chamber of health care providers can permanently revoke a license if the health care provider is sentenced to imprisonment for a serious crime against public health with a final court verdict. Also, in **paragraph 2** of this Article, it is stated that a health care provider whose license was permanently revoked can still perform certain duties of health care services under the supervision of a health care professional who holds a current license, and who is appointed by the Director of a health care institution or the founder of a private practice in which health care provider performs certain tasks of health care services.

Continuing medical education

The obligation of continuing medical education of health care providers is associated with licensing procedures. Continuing medical education is governed by **Article 187** of the Law on Health Care. It includes participation in professional and scientific meetings, and participation in seminars, courses and other programs of continuing education. The Minister of Health prescribes the types, programs, methods, procedures and duration of continuing education in paragraph 1 of this Article, the institutions and associations that can implement the process of continuing education, the criteria on which to perform the accreditation of programs of continuing education, as well as other issues of importance for continuing education. Accreditation of continuing medical education is done by the Health Council.

Paid absences

Each health care institution or private practice is required to provide paid absence for continuing medical education and for renewal of the license to employed health care providers, in accordance with **Article 182** of the Law on Health Care.

c. Supporting Regulations/Bylaws/Orders

The Rulebook on detailed conditions for the issuance, renewal or revocation of the license of members of the Medical Chambers¹⁹⁰ determines specific requirements for the issuance, renewal or revocation of the license, the form and content of the issued, renewed or revoked license, as well

190 Official Gazette RS 119/2007, 23/2009 and 40/2010.

as other conditions related to the license (**Article 1**). These procedures are conducted by a competent Chamber to determine the professional competence of a health care professional to work independently. The license is an official document proving the professional competence of a health care provider to independently carry out health care activities in the Republic of Serbia, and shall be issued for a period of seven years.

Article 2 states that the chamber of health care providers is responsible for issuing a licence to a health care provider, who is a member of the specific health provider's chamber in the Republic of Serbia, and performs health care activities, in accordance with the Law.

Professional training of health care providers is a condition for obtaining or renewing the license. Health care providers have the right and duty, while working constantly, to monitor the development of medical, dental, pharmaceutical as well as other relevant sciences and to maintain and improve the quality of their work.

The Rulebook on detailed conditions for the implementation of continuing medical education for health care providers¹⁹¹ determines types, programs, methods, procedures and duration of continuing medical education, institutions and associations that can implement the process of continuing medical education, the criteria for the accreditation of continuing medical education, as well as other issues of importance for the implementation of continuing medical education for health care providers.

d. Providers' Codes of Ethics

In the **Code of Ethics of the Serbian Medical Chamber**¹⁹², **Article 8** is directly related to continuous professional training of doctors, where it is stated that „the vital duty of the doctor is to permanently (continuously), theoretically and practically, professionally train and apply diagnostic methods and therapeutic procedures of modern medicine. Maintaining the level of knowledge and skills necessary to provide high quality health care is the moral duty of the doctor. Also, in this Article it is stated that „medical schools, hospitals and professional medical associations have the responsibility for developing and making available the participation in continuous professional development to all physicians. The doctor is obliged to transfer all of his/her acquired expertise to peers and other health care professionals. The doctor takes care of improving his/her personal awareness and increasing the knowledge in the field of humanities, natural and social sciences.“

e. Practice examples

Example(s) of Compliance

1. According to the Chamber of health care providers, there is compliance by those seeking professional licenses to practice medicine with requirements concerning licensing, continuing medical education and re-licensing.
2. Thanks to the efforts of the NGO „From the Circle“ and collaboration with community health centers and local governments, in eight health centers the equipment was purchased that provides gynecological examinations for women with disabilities. Purchase of the equipment was performed together

191 Official Gazette RS 2/2011.

192 Official Gazette RS 121/2007.

with the training of doctors to work with women with disabilities, especially regarding the terminology and treatment of the patients. At the moment, such equipment and trained health care personnel is available in Novi Sad, Kragujevac, Uzice, Nis, Backa Topola, Sombor, Novi Pazar, and in Belgrade, and in health centers in the municipalities of Vracar, Savski venac, Palilula, Stari grad and Novi Beograd.

Example(s) of Violation

VO from Novi Sad filed a complaint to the Protector of Citizens because of the failure to get the decision on entry into the directory of the Serbian Chamber of Nurses and Medical Technicians and the failure to get a license. According to the VO, she had submitted all the necessary documents for registration and the issuance of a license. After considering all the facts, the Protector of Citizens concluded that the Serbian Chamber of Nurses and Medical Technicians violated the right on the written explanation of the decision and a timely decision on her request. In this case, he recommended the Chamber to reconsider the request of the VO and make a proper decision in writing, along with an apology for the previous incorrect procedure.

Actual Case(s)

1. The Constitutional Court has considered the new Law on Health Care., In relation to the Article 198, which explains the licencing procedure, the Constitutional Court has found that the disputed provision of Article 198, Paragraph 1 of the Law on Health Care¹⁹³ stipulates that the Chamber will permanently revoke the license of a health care provider if he/she has been convicted of a serious criminal offense against public health by a final court verdict.
2. The Protector of Citizens¹⁹⁴ found that the Clinical - Hospital Center XY has not provided adequate information and training of health care providers on:
 - powers and responsibilities in the case when the professional attitude and perception of the health care provider about the best interests of the child is in conflict with the decisions and demands of parents;
 - obligations of health care institutions and health care providers to patients belonging to particularly vulnerable groups of the population, especially when they do not have health documents;
 - competences and obligations of the Protector of Citizens and employees in the bodies that are subject to the control of the Protector of Citizens.

After the legal procedure completed by the Protector of Citizens, Clinical-Hospital Center XY has followed all recommendations given by the Protector of Citizens: to educate health care providers in mentioned fields. . This is in concordance with the legal weight of the Protector of Citizens, who makes recommendations for eliminating work defects. If the Clinical-Hospital Cener XY fails to comply with the recommendation, the Protector of Citizens may inform the public, the Parliament and the Government, but also recommend establishing the responsibility of the director of this health institution (Article 31, paragraph 5 of the Law on the Protector of Citizens).

3. A civil procedure for compensation of material damages was launched before the Higher Court in Belgrade, 2010 based on the complaint filed by the patient VR, whose femoral artery splashed after an angiography was performed. Because angiography represents an invasive diagnostic procedure, the

193 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law.

194 The Protector of Citizens. <http://www.ombudsman.rs/>

expertise should be entrusted to specialist physician cardiologists who specialized in interventional cardiology. However, in the register of experts of the medical profession that was in effect at that time (on November 15, 2011), of the four expert witnesses for whom the Ministry of Justice approved the expertise of the specialist areas of cardiology, only two had completed specialist studies in cardiology and had the necessary expertise; but they had to be excluded because they worked in a health care institution that was in question. The remaining two experts from the list did not specialize in Cardiology: Dr. VD is a specialist pathologist, who had no opportunity even to attend a performance of cardiac catheterization and who was not working in an institution that deals with interventional cardiology. The second physician, Dr. RP, who specialized in Rheumatology, also never performed any cardiac catheterization or worked on interventional cardiology. In the absence of an expert-specialist in cardiology, the Court arranged for the expertise of a specialist in vascular surgery; but he refused, referring to his expertise and license, which in his opinion was inadequate for the expertise needed. The Higher Court respected his decision.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

The obligation of physicians (specialists) is to practice only in the fields of medicine for which they have been issued a current license. This applies to all physicians, including experts. When there is a question of medical error and medical expertise is therefore needed, it is necessary that the physician-expert has at least the same, preferably a higher degree of expertise in relation to a physician whose work is in question. Expertise is acquired as education in medical school, as well as in practical work in jobs that are the same or similar to that of the doctor stated in the complaint.

7.2.11. RESPONSIBILITIES AND DUTIES OF HEALTH CARE PROVIDERS IN HEALTH CARE OF PERSONS WHO ARE DETAINED OR IMPRISONED

a. Persons who are in detention centers and prisons are a very sensitive group to whom it is necessary to provide adequate health care. Special responsibility of health care providers is needed since health care services are provided in specific circumstances.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care

The framework **Law on Health Care**¹⁹⁵ in **Article 18** defines and lists areas in which the general interest of the state is exercised in terms of health care policy. Thus, **Section 8** states that it is important that the person who is serving a prison sentence be provided with health care outside the health care institution.

Health care providers working in prisons are controlled by the Ministry of Justice, not the Ministry of Health. Their position is much more difficult; and because of the environment in which they work, the

¹⁹⁵ Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 State Law

duties and responsibilities are more complex. A consequence of this, there is shortage of health care providers interested to work in prisons. Also, the difficulties and shortages of health workers reflected in the quality of health care services in prisons and detention centers.

Law on Enforcement of Criminal Sanctions

In addition to general laws, health care of the population in prisons and detention centers is governed by regulations such as the **Law on Enforcement of Criminal Sanctions**¹⁹⁶.

The health care service in the prison must have one physician and one nurse, as well as the service of a psychiatrist. This kind of health care service provision is equal to the treatments that are available in health care centers as well as in outpatient departments. If the prison has the capacity to organize hospitalization, then it is necessary to engage health care providers of certain specialties.

Upon the admission to prison, it is required that the convicted person be examined by a health care provider within 24 hours, to have a medical record opened, and to determine the identification number. The physician must perform a thorough physical examination of all convicted person. Upon the approval of a physician, prisoners may retain orthopedic services and necessary medication. A doctor may conduct medical examinations only with the consent of the prisoner. As in the examination of patients outside the prison, doctors are required to provide the prisoner with detailed information about the illness, treatment and prognosis. However, the physician cannot force prisoners to nourish and heal. In these situations, the health care provider can determine the specific measures if he/she finds that the prisoner's life is at risk.

The obligations that the physician has related to prison administration are mostly about the submission of reports on the health status of prisoners. Reports are submitted periodically and always when there is a need to provide better health care for the prisoner. The second type of report contains records, suggestions and recommendations regarding food, hygiene, lighting, heating and ventilation of the premises where prisoners live.

If there was a coercion, a medical examination is required and must contain information on coercive measures, injuries and the physician's opinion about the causal and consequential relation of the coercive measure and the injury. This report is submitted to the Warden (Director of the prison). Medical examination is repeated between the twelfth and twenty-fourth hour.

A physician's opinion is mandatory when applying accommodation in a specially-secured room with no dangers for isolation. The physician has to visit the prisoner who is in solitary confinement every week. Respecting the prisoner's privacy during examination and storing and protecting data from medical records is an obligation and responsibility of every physician. According to the Law on Enforcement of Criminal Sanctions the examination is attended only by a physician, but this may be different if the physician requests it. When prisoners are tested for infectious diseases or psychoactive substances, records of blood and urine are kept by the physician because they represent confidential information.

The special role of physicians is reflected in giving information to prisoners on infectious diseases such as HIV and hepatitis.

196 Official Gazette RS 55/2014.

c. Supporting Regulations/Bylaws/Orders

Among the most important accompanying regulations for persons who are detained or imprisoned are: **Regulation on measures for maintaining order and security in institutions for the enforcement of criminal sanctions**¹⁹⁷ and **Regulation on house rules for the application of measures of detention**¹⁹⁸.

d. Providers' Codes of Ethics

The work of the physicians in closed institutions in general terms is determined by the **Code of Ethics of the Serbian Medical Chamber**¹⁹⁹ in **Article 31**.

e. Practice examples

Example(s) of Compliance

BI had submitted a letter of commendation to the warden of the District Prison in Belgrade, citing extremely gratifying services that he received every week by health care providers in the prison hospital on his request. At the same time, he emphasized the friendliness of the staff of the prison hospital with all the prisoners.

Example(s) of Violation

In providing health care services, there were some omissions by the doctor at the District Prison in Novi Sad, at the expense of the prisoner AA, who had filed a complaint to the Protector of Citizens. After analyzing the facts, the Protector of Citizens found that the doctor did not take timely medical examinations, but despite the scheduled time for the provision of health care to prisoner AA, doctor repeatedly delayed the specialist examination in inappropriately long duration. He also did not follow medical procedure to make a decision about the medical intervention on the hand of the patient AA.

Actual Case(s)

In the control process of the legality and regularity of the Directorate for the Execution of Criminal Sanctions of the Ministry of Justice, acting on its own initiative, the Protector of Citizens established the existence of irregularities. In the work of District prisons and correctional institutes there is an irregularity which is reflected in the fact that the examination of persons deprived of liberty is carried out in the presence of non-medical staff even when a health care provider does not require it, which is diminishing their right to confidentiality. The Protector of Citizens had sent a written recommendation to the Ministry of Justice which requires the following: medical examination of persons deprived of liberty shall be carried out only in the presence of health care providers to ensure their privacy and protecting the right to confidentiality of the health information. Exceptionally, when requested by a health care provider, non-medical staff will attend the medical examination of persons deprived of their liberty, in which case their presence will be noted in the medical documentation, as well as the reason why it is required. Directorate for the Execution of Criminal Sanctions of the Ministry of Justice shall inform the Protector of Citizens within 60 days of the receipt of this recommendation, on acting upon it.²⁰⁰

197 Official Gazette RS 105/2006.

198 Official Gazette RS 35/1999.

199 Official Gazette RS 121/2007.

200 Protector of Citizens, Subject 12 – 3695 / 11, 29.12.2011. <http://www.ombudsman.rs/> (accessed August 31, 2015)

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

7.2.12. RESPONSIBILITIES AND DUTIES TO COLLEAGUES AND PROFESSION

a. Health care providers perform their profession in accordance with the applicable health doctrine and code of professional ethics by adhering to the principles listed in The Hippocratic Oath. they are obliged to respect patient's dignity, colleagues and the profession.

b. Right as Stated in the Country Constitution / Legislation

Law on Health Care

According to the **Law on Health Care**²⁰¹ (**Article 169**), health care providers perform health care activities in accordance with current medical doctrine and in accordance with the code of professional ethics. For their work, health care providers are taking professional, ethical, criminal and financial responsibility. Health care providers with higher education are bound, after receiving a diploma of graduation and signing a statement - an oath, that they will obey principles laid down in the Hippocratic oath, as well as the principles of professional ethics. They are also required, before their employment, to sign a statement - an oath, that they will obey principles laid down in the Hippocratic oath, as well as the principles of professional ethics.

Law on Protection of Patients' Rights

Law on protection of patients' rights²⁰² (**Article 13**) envisaged the right of a patient to ask a physician or dentist who is not directly involved in the provision of the patient's health care services for a second opinion on the status of his/her health. This patient achieves this by his/her own personal request, and a health care institution shall update the list of physicians or dentists who provide health care services in that organizational unit, regularly and in a visible place.

Law on Chamber of Medical Workers

Health care providers who work in health care institutions as professionals in health care services are required to enroll in the appropriate Chamber under the provisions of the **Law on Chamber of Medical Workers**²⁰³ (**Article 4**). A member of the Chamber violates his/her professional duties and reputation if his/her behavior towards patients, other members of the Chamber, or any third party infringe upon the reputation of the profession.

c. Supporting Regulations/Bylaws/Orders

Obligations and responsibilities to colleagues and the profession are further regulated by the **Rulebook on internship and professional exam of health care providers**²⁰⁴.

201 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law

202 Official Gazette RS 45/2013.

203 Official Gazette RS 107/2005 and 99/2010.

204 Official Gazette RS 50/2006, 112/2009 and 50/2010.

d. Providers' Codes of Ethics

Under the provisions of **Code of Ethics of the Serbian Medical Chamber**²⁰⁵ physicians have a special personal responsibility and duty to provide appropriate services with full respect for the dignity of a person and the rights of patients, colleagues and other health care providers. With ethical behavior towards patients, their relatives and other persons, physicians are required to keep the noble traditions of the medical profession. Physicians, in their professional and private activities, guard and defend the reputation and dignity of the medical profession as well as their own and treat their colleagues with respect (**Article 5**). When the tests and treatment for a patient is beyond the professional potentials of a physician, he/she must call another physician who possesses the necessary skills (**Article 9**). Stating a negative opinion about another physician in the presence of the patient, medical staff or member of the lay public is unacceptable (**Article 71**). When the physician asks for expert advice or assistance, other colleague will give it unselfishly, to the best of his/her knowledge, for the benefit of the patient (**Article 72**).

e. Practice examples

Example(s) of Compliance

At the Departments of the Faculty of Medicine, University of Belgrade, all the employees will replace their colleagues in their responsibilities in the classroom, during their absence for advanced training abroad, through international projects or during the conduct of international functions, without restriction and compensation for extra work.

Example(s) of Violation

The interview with MR, a specialist physician in general surgery and subspecialist in cardiac and vascular surgery, was published in the daily newspaper "Politics" on February 12, 2015. When journalists asked: "What is the knowledge and expertise of our physicians?" The physician answered: "Poor, and I can see that when friends call me and ask me to provide them an appointment with an urologist or a specialist with whom I have collaborated. We have 101 cardiologists, but when it happens that physicians that I know, are on vacation or at some Congress or Convention, I call from the beginning ... and when I "pass" the first ten and come to the eleventh, believe me, I do not have the confidence in any of the others left! It is not conceit, it's true."

Actual Case(s)

No cases involving violation of this right have been reported or otherwise known to the working group responsible for the preparation of this Guide.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this right; all procedures are described in details in Chapter 8 of this Guide.

205 Official Gazette RS 121/2007.

7.2.13. RESPONSIBILITY TO SPREAD THE SCIENTIFIC AND MEDICAL KNOWLEDGE IN POPULATION, TO PROMOTE HEALTHY LIFESTYLES, INCLUDING USE OF PERSONAL EXAMPLE

a. Health care providers are obliged to spread the scientific and medical knowledge to promote healthy lifestyle, at their workplace but also in public and personal life.

b. Right as Stated in the Country Constitution / Legislation

The **Constitution of the Republic of Serbia**²⁰⁶ (**Article 68**) stipulates that the Republic of Serbia supports the development of health and physical education.

Law on Health Care

In the context of social care for the health of the population, the **Law on Health Care**²⁰⁷ (**Article 8**) provides health care which includes the preservation and improvement of health, detection and control of risk factors for disease, and knowledge and habits of a healthy lifestyle. Health care providers have the right and duty, while working, to constantly monitor the development of medical, dental, pharmaceutical, and other competent sciences, as well as capacity building in order to maintain and improve the quality of their work (**Article 182**).

Law on Protection of Population from Exposure to Tobacco

In order to provide the conditions for implementation of the social care for the health of the population in the Republic of Serbia, the Institute of Public Health, established in the territory of the Republic of Serbia, implements measures and activities for the conservation and improvement of health, detection and control of risk factors for disease, knowledge and habits of a healthy lifestyle, and the prevention and control of smoking in accordance with the **Article 16** of the **Law on Protection of Population from Exposure to Tobacco**²⁰⁸.

Law on Protection of Population against Infectious Diseases

Health care institutions, other forms of performing health care activities, and health care providers are obliged to promote health to ill persons and other persons from their immediate surroundings and to teach them about how to protect themselves against infectious diseases, in accordance with the **Law on Protection of Population against Infectious Diseases**²⁰⁹ (**Article 17**).

c. Supporting Regulations/Bylaws/Orders

Public Health Strategy of the Republic of Serbia²¹⁰ stipulates (**Article 4, paragraph 3**) promotion and support of a healthy lifestyle through the development and promotion of information, education and counseling regarding health and reducing the risk factors, the reorientation of health care services to develop models that support health promotion, and creation and development of the environment that supports health and healthy choices.

206 Official Gazette 98/2006.

207 Official Gazette RS 107/2005, 72/2009 – State Law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – State Law

208 Official Gazette RS 30/2010.

209 Official Gazette RS 125/2004.

210 Official Gazette RS 22/2009.

A number of other sectoral strategies deal with these obligations, such as:

- Strategy on Development of Mental Care Protection²¹¹
- Strategy on Tobacco Control²¹²
- Strategy on Improving Handicapped Persons positions in the Republic of Serbia²¹³
- Birth Promotion Strategy²¹⁴
- Strategy on Permanent Quality Improvement of the Health protection and patients safety²¹⁵
- Strategy for the fight against drugs in the Republic of Serbia for the period 2014-2021 year.²¹⁶

d. Providers' Codes of Ethics

Under the provisions of the **Code of Ethics of the Serbian Medical Chamber**, physicians and other health care providers develop health education acting on their workplace and in public life and thus help people to improve their quality of life. They take care of health education and health culture and the people involved in preventing all threats to human health and in combating backwardness, superstition, prejudice and quackery (**Article 7**).

e. Practice examples

Example(s) of Compliance

In recent years in Serbia, health care providers significantly are involved in actions that promote healthy lifestyles in the organization of health care institutions and non-governmental organizations. For example, the Public Health Association of Serbia often organizes health promotions associated with the celebration of specific days of the health calendar and with voluntary participation of health care professionals. They mark the World Health Day, Cervical Cancer Prevention week, National and International Day Against Tobacco Smoke, World Cancer Day, Day of children with malignant diseases, immunization week, Day of Persons with Disabilities, World Day Against AIDS, Day of the older people and many other days where in volunteer activities many health care providers are involved.

Example(s) of Violation

1. There are examples of breaches of the obligations in terms of the lack of counseling of patients, especially healthy users of the health care service, about the need for keeping a healthy lifestyle, which generally arises, according to information from health care professionals, because of the lack of time²¹⁷.
2. In one year, the Health Inspection has collected 84 fines of 5.000 Serbian dinars due to smoking in health care institutions. Smoking is not allowed inside a health care institution for physicians or for patients or in front of the institution. It still happens, despite regulations, that health care providers violate this obligation consuming cigarettes in direct violation of the provisions of the Law on protec-

211 Official Gazette RS 08/2007.

212 Official Gazette RS 08/2007.

213 Official Gazette RS 01/2007 .

214 Official Gazette RS 13/2008.

215 Official Gazette RS 15/2009.

216 Official Gazette RS 1/2015.

217 Institute of Public Health of Serbia "Dr Milan Jovanović Batut". Report on improving the quality of work in health care institutions of the Republic of Serbia. Belgrade: IZJS 2015.

tion of population from exposure to tobacco²¹⁸. Before the introduction of this Law, within one year, 36 requests for the Misdemeanor procedure were submitted and 43 decisions issued on the punishment of health care providers and directors.

Actual Case(s)

Dr. DjB - Director of health care institution, filed a disciplinary procedure against Dr. VV - a specialist in radiology, to determine whether there was a violation of labor discipline, as Dr. VV physically attacked his immediate superior, the Head of the Department, Dr. DS, in the labor room where they worked together. The Police Department for the City of Belgrade and the Police Station for Savski Venac were notified and made official records of the notifications received from the citizens. During the procedure, the disciplinary authority collected statements from witnesses (employees) who were present at the time and from the parties to the disputed event and obtained the official report of the Police Administration and the medical records and discharge papers of the injured Dr. DS. In the course of the disciplinary procedure between Dr. VV and Dr. DS, it was established that on May 16, 2011, there first happened a verbal conflict; after a while Dr. VV physically assaulted Dr. DS and hit him in the head, causing him bodily injury. Upon the completion of the evidentiary procedure, the Disciplinary Board determined that Dr. VV committed a breach of duties established by a special collective agreement for health care institutions founded by the Republic of Serbia²¹⁹ and the Labour Law²²⁰ (Article 179, paragraphs 2 and 3); the Board canceled its contract of employment with Dr VV.

f. Practice Notes for Lawyers

Administrative, civil and criminal procedure may be opened in response to violations of this responsibility; all procedures are described in details in Chapter 8 of this Guide.

218 Official Gazette RS 30/2010.

219 Official Gazette RS 36/2010, 46/2013 - Agreement, 74/2013 Agreement and 97/2013 – Agreement and 37/2014 – Agreement. (Article 113, paragraph 2 of the special collective agreement for health care institutions founded by the Republic of Serbia)

220 Official Gazette RS 24/2005, 61/2005, 54/2009, 32/2013.

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- 8.1. MECHANISMS TO PROTECT/ENFORCE RIGHTS AND RESPONSIBILITIES IN COURT**
 - 8.2. ADMINISTRATIVE PROCEDURE**
 - 8.3. MISDEMEANOR PROCEDURE**
 - 8.4. CIVIL PROCEDURE**
 - 8.5. CRIMINAL PROCEDURE**
 - 8.6. ALTERNATIVE MECHANISMS TO PROTECT/ENFORCE RIGHTS AND RESPONSIBILITIES**

8

National Procedures and Appendixes

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

In accordance with the legislation of the Republic of Serbia, the following mechanisms are provided for the protection of patients' rights in the health care delivery process: various legal procedures such as administrative procedure, misdemeanor, civil and criminal procedure, together with other alternative mechanisms of protection.

8.2. Administrative Procedure

The general principle of legality for all administrative procedures is guaranteed by the Constitution of the Republic of Serbia²²¹, that specifies two rules: first, all individual acts and actions of state bodies, organizations exercising public powers of the autonomous province and bodies of local self-government must be based on the Law; and second, judicial protection of legality of legal acts must be provided in deciding on rights, obligations or lawful interests (or other judicial protection required by the Law, like in administrative dispute)(Article 198).

The process of exercising human rights and all other rights guaranteed by the Constitution, through the process of solving the rights and duties of citizens – Health care users, is defined, inter alia, by the

221 Official Gazette RS 98/2006.

rules of administrative procedure. It is explicitly provided in paragraph 2 of Article 173 of the Health Insurance Law²²², which says: "In the process of exercising the rights established by this Law, the provisions of the Law on Administrative Procedure are applied, unless this Law provides otherwise."

The rules of administrative procedure are prescribed by the Law on Administrative Procedure²²³ (hereinafter: LAP).

8.2.1. INITIATION OF THE ADMINISTRATIVE PROCEDURE:

Administrative procedure is initiated by the competent authority at the request of a party or *ex officio*, if that is provided in the regulations or justified as the public interest. For a party to initiate such a process, following conditions must be fulfilled: that it has the capacity to represent a party; that it has an active identification card; that the subject of the procedure is an administrative matter that has not already been legally determined; that the request is initiated to the competent authority. If none of these conditions is met, the request for an administrative procedure will be rejected with a conclusion.

Course of the administrative procedure:

After the initiation of an administrative procedure, the authority will convene an oral public hearing if it decides it is useful to clarify matters. The public hearing is, however, an obligatory part in the procedure when there are two or more parties, or it is required to complete the investigation, to hear witnesses or experts. After presentation of evidence, conducted for the purpose of establishing the facts, means of proof can be used as: documents, witness statements, findings and opinions of expert witnesses, statements of parties and investigation. If there is reason to doubt that an evidence can not be performed later, or that its presentation can be endangered, it can be determined to establish the relevant facts by providing some of the evidence before the ordinary course of things.

Completion of the first instance administrative procedure:

The first instance administrative procedure is completed upon adopting a decision. It must be in writing and has to contain: an introduction; disposition (proverb); explanation and instruction on legal remedy; the name of the authority that issued the decision; place and date of its issuance; register number; signature of authorized official and stamp of the authority. The explanation may be omitted or shortened, but only if the decision is made in order to undertake urgent measures to ensure public order and safety, or in order to eliminate an immediate hazard to life and health of people or property. Reduced or simplified decision is also allowed when only one party is participating in the procedure, whose request then a decision adopts, or when there are multiple parties, but they do not object to the request that this decision had positively resolved.

It is possible that the administrative procedure gets terminated for reasons of procedural nature, for example, when a party withdraws the request; when the parties conclude settlement; when the process is interrupted, *ex officio*. In these cases, the authority that decides, render an appropriate decision in the form of conclusion.

222 Official Gazette RS 107/2005, 109/2005 - corr., 57/2011, 110/2012 decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court

223 Official Gazette SRJ 33/1997 i 31/1997 and Official Gazette RS 30/2010.

8.2.2. SECOND INSTANCE ADMINISTRATIVE PROCEDURE – APPEAL PROCEDURE:

Article 12 of the Law on Administrative Procedure proclaims the principle of two instances of this procedure and the rule of Article 213 of the Law provides that “... against the decision rendered in the first instance, the party has the right to appeal.” An appeal is a regular legal remedy to conduct the administrative control of the state administration, because the administrative authority will also decide on the appeal.

When the first instance authority does not resolve request by the parties’ within the statutory deadline - so called case of “silence of the administration”, it is possible to file an appeal if it is permitted in this procedure, since there is a legal presumption that the demand is negatively resolved (Article 236 of the LAP).

Who has the right to file an administrative appeal?

The right to file an administrative appeal have:

- ▶ the active party (the person who has requested the initiation of the procedure or against whom the procedure has been initiated),
- ▶ the indirect party (a person who is not involved in the procedure but has the right to protect its interest, because the decision may affect his rights or duties),
- ▶ public prosecutor,
- ▶ public attorney,
- ▶ other state authority when a decision may affect public interest.

Content of the appeal:

As any other submission, an appeal should contain exact information on which the authority to which it is addressed may act. This primarily means that it must clearly state the decision that is being contested, an indication of the authority that issued the decision and the decision number. The appellant is not required to separately discuss the appeal (although it is in his interest), since the authority that decides in the second instance, takes the legality and / or the expediency of the decision *ex officio*. New facts and new evidence can also be placed in the appeal, with stating the reasons why it was not done during the first instance procedure.

When is the appeal excluded?

In certain administrative matters LAP expressly exclude the right to appeal:

- ▶ against the first instance decisions of the Government, that are final, and can only be contested within an administrative dispute,
- ▶ against the decisions of Ministries and other state administrative bodies, provided that it is not permitted by any other Law and not by the LAP, in which case the appeal is decided by the Government,
- ▶ against the individual decision of the National Assembly and the President of the Republic, although this is not explicitly stated by the Law, but stems from the status of independence of these bodies and the fact that there is no higher administrative authority in relation to them.

Submission of appeal and deadline:

The appeal is filed with to the competent higher instance, which should be indicated in the instructions on the legal remedy in the decision contested by the appeal. It is, however, handed through the first instance authority, handing a written submission to the receiving department, by mail (ordinary or registered mail), by fax or electronically. If the appeal is submitted or sent directly to the second instance authority, he immediately sends it to the first instance authority to enable it to implement it on the basis of self-control. In this case, the date of delivery of the appeal to the second instance authority is considered as the date of delivery of the first instance (Article 223 of LAP).

The time period to file the appeal is within 15 days from the date of the original decision delivery, unless different duration is required by the Law. This deadline is preclusive and with its omission appellant loses the right to appeal.

First instance authority on appeal - a process of the administration self-control:

The appeal is, as already mentioned, submitted to the competent, second instance authority, through the authority that issued the first instance decision. When the appeal is received, the first instance authority will examine whether it is permissible, timely appeal and whether it has been filed by an authorized person. If at least one of these conditions is not met, then second instance authority rejects the appeal as inadmissible with a conclusion.

Otherwise, when there is no basis, then the first instance authority begins the process of self-control with the ultimate aim to correct the issued decision, if they have met the prescribed conditions. Thus, if the first instance authority finds that the appeal is well founded, and it is not necessary to obtain another investigation procedure, then he can solve the matter differently and replace it with a new decision (Article 225 of the LAP). The first instance authority may amend the investigation procedure under the conditions stipulated by the Law, or conduct a special investigation procedure if the trial was shortened and an appellant expressly requires. Based on this, the first instance authority may also issue a new decision (Article 226-227 LAP).

When there was no basis for such action, then the first instance authority shall, without delay, and not later than 15 days, submit the appeal with all the records of the case to the competent authority in the second instance.

Second instance authority on appeal:

After checking their jurisdiction, second instance authority also examines whether the appeal is admissible, timely, or filed by an authorized person and rejects if it finds that some of these conditions are not met. If this is not the case, then the appeal is taken into consideration and a decision is rendered. When the appeal is dismissed as unfounded, the Court annuls the contested decision in whole or in part, or its decision changes the first instance decision (Article 229-235 LAP).

The deadline for the treatment of second instance authority on appeal and having one of the stated solutions is two months from the submission of the appeal, unless the Law provides a shorter period. This time limit is important because of the possibility of initiating an administrative dispute in the case of "silence of the administration", which is expressly provided in Article 24 of the Law on Administrative disputes.

The authority that issued the decision on appeal, takes back the decision with the whole case to the first instance authority, who shall deliver it to the parties within 8 days of the receipt.

The effect of the appeal:

An appeal has devolutive effect, which means that the decision is made by another authority and not the one that had resolved it in the first instance. It also has suspensive effect. For the duration of the deadline for the submission of appeal, and until the second instance decision is issued, which decides on the appeal, the first instance decision can not be performed. There are some possible deviations from this rule, but only in cases prescribed by the Law, and they are: when the Law stipulates that the appeal period and the appeal itself do not affect the enforceability of a decision; and in the case of urgent measures, if the party would have irreparable damage due to delay.

8.2.3. EXTRAORDINARY LEGAL REMEDIES:

Administrative Procedure of the Republic of Serbia also provides an opportunity to review the decision by the second instance authority by extraordinary legal remedies. Their purpose is to control the legality of the conducted procedure, but not the expediency of adopted decisions. In that way, in cases prescribed by the Law, additional protection of the public interest and the protection of citizens' rights is provided in the administrative procedure.

Renewal of the administrative procedure:

Initiation of the procedure: Renewal of the administrative procedure may be initiated by one of the parties or by the public prosecutor. Also, it can be initiated *ex officio*, by the authority that issued the final decision (mainly by the second instance authority).

Criteria for the procedure: This legal remedy can challenge the decision only if the following criteria is met, stipulated in the Law (Article 239 LAP):

- ▶ new facts are brought to the Court, or the Court discovered new evidence that can be used and possibly could lead to a different decision;
- ▶ the decision is based on a false identification card, false testimony of an eyewitness or expert witness, or the decision was issued as a result of a criminal activity;
- ▶ the decision was based on a verdict in criminal or economic violation, that was already legally overturned;
- ▶ the decision was based on a misleading testimony of a party involved and led the authority to fallacy;
- ▶ the decision was based on a issue that was later resolved by the same administrative authority in a different manner;
- ▶ the procedure was led by an official who had to recuse himself from the case;
- ▶ the decision is issued by an oficial who was not authorized for that (so called: functional competence);
- ▶ the composition of a committee of the relevant administrative body that issued the decision failed to meet the required standards, or the decision was issued without a quorum;

- ▶ one of the parties involved was not allowed to participate in the procedure;
- ▶ one of the parties involved lacked legal representation, which is required by the Law;
- ▶ one of the parties involved was not been given the opportunity to use their native language and alphabet, stipulated by the Law.

Deadline for the initiation of the renewal procedure and submission: The renewal can be initiated within one month from the relevant circumstance, depending on the criteria for the renewal procedure (subjective deadline), and at the latest, within five years from the day of the final decision was issued (objective deadline). The request for the initiation of the procedure is submitted to either the body that issued the original decision in the first instance, or the body that issued the final decision, in the second instance. The request itself has no suspensive effect and does not bring into question the execution of the decision.

Deciding on the request: The competent authority will first examine whether the request is submitted by the authorized person within the deadline and whether it has been made probable circumstance on which it is based. If it finds that at least one of these preconditions is not fulfilled, the request will be rejected with a conclusion. When this is not the case, then the request is considered and rejected as unfounded if it is determined that a circumstance which is listed as a reason for renewal could not lead to different solutions even if it has been taken into consideration when deciding.

If the competent authority determines that it is necessary to repeat the procedure as a whole, or in one part, then he issues the conclusion that permits the renewal of a procedure. This conclusion has suspensive effect because it postpones the execution of the decision against which the renewal was allowed. Special appeal is allowed against this conclusion, if the decision is issued by the first instance authority. If the conclusion is issued by the second instance authority, then it will directly initiate an administrative dispute against him.

Special cases od revocation, repeal and the reversal of a decision:

1. *Reversal and revocation of the decision in the administrative dispute* (Article 251 LAP): In this case, the authority that issued the decision that is the subject of an administrative dispute, on account of complaint by the damaged party may in the course of this procedure (until its final completion), issue a new decision that cancels or changes the decision challenged in this dispute, on its own initiative.
2. *Request for the protection of lawfulness* (Article 252 LAP): In this case, Public prosecutor has the right to challenge the final decision, but only if other legal remedy in the administrative procedure was not possible, and that decision may violate the Law. Request for the protection of lawfulness may be initiated within one month of the submission of the decision to the Public prosecutor's office, or within six months of the delivery of the decision to the party involved.

The jurisdiction for deciding on this request is entrusted to the authority of the second instance with respect to the authority that issued the decision, and if there is no such authority, then the Government decides on the request. The outcome of this procedure may result in the decision that takes into account the request for legal protection and repeal the challenged decision, or the decision that the request is dismissed as unfounded. Against both decisions, taken in the form of final solution, appeals can not be filed.

3. *Revocation and repeal by the right of supervision* (Articles 253-254 LAP): The right to challenge the final solution in the administrative procedure belongs to the authority of the second instance with respect to the authority that issued the decision, or authority that supervises the authority that issued the decision if the second instance body is not provided. The subject of the revocation and repeal are final administrative decisions, that can not be challenged with regular legal remedy in the procedure. The aim is to remove the decisions that contain certain legal errors, that Law specifies, by their revocation or repeal. The request for this actions can be submitted by a Public prosecutor or the competent authority *ex officio*. In addition to them, the party involved can also request the revocation of the decision (but does not have the right to request a repeal).

The criteria when the decision can be revoked are expressly listed in the Law on Administrative Procedure: when the decision is issued by the authority that does not have the jurisdiction; when there are two different decisions that resolve the same subject in different manner; when the decision was issued without the agreement, confirmation, approval or positive opinion of another authority; when the decision was issued by the authority that has no territorial jurisdiction; and when the decision was issued as a result of coercion, extortion, blackmail, pressure or other illegal activities.

The decision on revocation of the challenged decision must be made within five years from the date it is issued, unless the reason for the revocation is the violation of territorial jurisdiction, when the deadline is one year. In the decision was issued as a result of coercion, extortion, blackmail, pressure or other illegal activities, revocation can be requested without a time limit.

With revocation of the decision, all legal effects of the revoked decision cease, not only for the future, but for all the legal actions that it possibly produced from the date the decision was issued, until the date of revocation (*ex tunc*).

The decision is repealed when it produced obvious violation of the Law. In contrast to the revocation, in this case it prevents the legal effects of the challenged decision for the future (*ex nunc*), so all the legal actions that had already produced remain in effect.

This outcome can occur either *ex officio* or at the request of the Public prosecutor, while the parties are not authorized to address directly with such a request to the competent authority (this does not prevent the party to take the initiative for this kind of extraordinary remedy, but the authority is not obliged to respond to it).

Deadline for the repeal of the decision is within one year since the date when the decision was issued as a final solution. Against these decisions, taken in the form of a final solution, appeals can not be filed. The decision may only be challenged in an administrative dispute.

4. *Repeal and amendment of an effective decision by mutual agreement or upon the request of a party* (Article 255 LAP): The subject of this control in this case is a final decision that implies certain rights of the party, prescribes an obligation, or the decision for the party is unfavorable. The subject of control, in this case, represents a final solution where a party acquired a right, or prescribed an obligation, or a solution for it unfavorably. This type of control is done at the request of the party and it will be decided by the authority that issued the final decision that resolved the matter. The specificity of this control lies in the fact that the competent authority is not obliged to act on the request of a party, but only if it considers that it should do so on the basis of discretion. When the authority decides to consider the request of the party and adopt it, the new decision has legal

effect only for the future, because it does not revoke the challenged decision, but it just repeals or reverses it.

5. *Extraordinary repeal* (Article 256 LAP): This way decisions issued in administrative procedures can be repealed if they have met the prescribed conditions. This is an extraordinary legal remedy, which can be used only in emergency situations, for example: to remove serious and immediate threat to human life and health of the people, public safety, public peace and order, or in order to eliminate disturbances in the economy. The procedure for the extraordinary repeal is requested exclusively *ex officio*, by the competent authority that issued the decision, authority of the second instance with respect to the authority that issued the decision, or authority that supervises the authority that issued the decision if the second instance body is not provided.
6. *Invalidation of the decision* (Articles 257-258 LAP): When the decision contains legal errors listed in the Law, then it is possible to revoke and repeal it from the legal order without a time limit. This procedure is initiated *ex officio*, at the request of the parties or the Public prosecutor and in the following cases: when the decision is issued in an administrative procedure and it can not be resolved in an administrative procedure, but only with the Court jurisdiction; when the execution of the decision may result in a criminal offense; when the execution of the decision is not possible; when the decision was issued without the request of the parties; when the decision contains an irregularity which the law defines as a reason for invalidation. The decision for invalidation or a rejected request for invalidation by the authorized persons, can be challenged by filing an appeal. In case the appeal is not permissible, then it can be challenged in an administrative dispute.

8.2.4. ADMINISTRATIVE DISPUTE:

Administrative dispute is a form of direct judicial control of the Administration, which regulates the Law on Administrative Disputes²²⁴. In this procedure, the Court reviews the lawfulness of administrative acts or issues an appropriate decision in the case of the "silence of the administration". Essentially, an administrative dispute is a dispute in which the lawfulness of state administration is in question.

Administrative dispute can be conducted due to improper compliance with the Law, the decision of an incompetent authority, as well as violations of the rules of the procedure.

Initiation of the administrative dispute:

An administrative dispute is initiated with the lawsuit to the specialist, Administrative court. This lawsuit has no suspensive effect and does not postpone the execution of the decision in question, although it is possible to obtain that, at the request of the prosecutor, and under prescribed conditions. The lawsuit is submitted to the competent Court directly, by mail, or by submitting an electronic document, and can be filed for record with the Court.

The time period in which the lawsuit can be filed is within 30 days from the delivery of the administrative act to the relevant party. In the case of the "silence of the administration" it's after the expiration of the time period for issuing a decision on the request of a party, stipulated by the Law, and after the expiration of an subsequent unsuccessful period of seven days following the repeated request of the party.

224 Official Gazette RS 111/2009.

Content of the lawsuit:

The lawsuit must contain: name and address of the habitation, i.e. name and registered office of the Prosecutor; details of the act that is under review; the grounds for the claim and the arguments for the revocation of the administrative act; request for a direction of the revocation; signature of the plaintiff and the power of attorney (if the lawsuit is conducted through proxy).

The lawsuit must include the original or a copy of the act against which the action is brought. If the lawsuit is submitted because of the “silence of the administration”, then a copy of the request or appeal must be submitted, copy of repeated request, as well as evidence of the registration of those submissions to the competent authority.

Admissibility of the administrative dispute:

An administrative dispute is allowed against any final administrative act, except when the Law prohibits that explicitly (negative enumeration). Thus, an administrative dispute may not be conducted against acts adopted in the following matters: where judicial protection is provided outside of an administrative dispute; when it is prohibited by the Law of administrative disputes; or when it is directly based on the constitutional authority for the National Assembly or the President of the Republic to decide.

Parties in the administrative dispute:

Parties in the administrative dispute are: the plaintiff, the defendant and the person concerned. A plaintiff may be a party from the administrative procedure, union organizations, the public prosecutor and the public attorney. On the side of the defendant is always the authority that issued the disputed, final decision in the administrative procedure. In the administrative dispute the person concerned may also participate, or any person to whom the revocation of the decision which is the subject of the dispute could go in favor.

Types of administrative disputes:

Besides the right to revoke the administrative act, the Court may conduct an administrative dispute of full jurisdiction and solve not only a judicial matter (examination of the lawfulness of the challenged administrative act), but also an administrative matter. Full jurisdiction dispute can be conducted only if it is permitted by the nature of things, and if the facts provide a reliable basis for solving the administrative matter.

When the lawsuit is submitted for an administrative action, the Court conducts preliminary procedure in which examines the formal requirements for its conduct. If the Court finds that the requirements are not met, the lawsuit is dismissed. It is allowed to file a complaint within 8 days of delivery. Under the preliminary procedure, the Court may revoke the administrative decision that is in question, if it finds that it has shortcomings that prevent the assessment of its lawfulness, i.e., which prevent the conduct of a regular court procedure.

Upon completion of the preliminary procedure, the Court has a regular court procedure, where it decides on the facts established at the oral public hearing, invoking the Law. The Court settles the dispute with a verdict, that the lawsuit is accepted or rejected. In case that the facts provide a reliable basis, the verdict can decide on the request of the prosecutor for the return of objects or compensa-

tion, if any of these requirements is set by the lawsuit. If this is not the case, then the Court will direct the Prosecutor to request a separate, civil lawsuit before the competent Court.

Legal remedies against the verdict in the administrative dispute:

The verdict of the Court in the administrative dispute can not be disputed with regular, but only with extraordinary legal remedies such as: a request for review of the court decision and repeating the procedure.

A request for review of the court decision: This request is filed against a final verdict of the Administrative court. It should be delivered to the Supreme Court of Cassation, as the competent Court, within 30 days of the delivery of the decision to the party or the public prosecutor.

Repeating the procedure: The request for repeating the procedure is submitted by the party in the form of a lawsuit, to the authority that made the decision that is being challenged. The lawsuit, in this case, can be filed only on the grounds that the Law expressly provides: if there are new evidence, there is an opportunity to use them, and the dispute would have been settled more favorable to the party if the evidence had been used in previous court procedure; if the verdict of the Court was based on a criminal act of a judge or court employee, or the decision stemmed from the fraudulent action of participants in the procedure; if the court verdict was based on a verdict issued in a criminal or civil matter and that verdict was later repealed; if the document on which the court verdict was based on is false or fraudulently amended, or the witness, expert witness or a party gave false testimony during a court hearing and the verdict is based on that testimony; if the party finds or obtains the opportunity to use an earlier court verdict for the same dispute; if the party concerned is not allowed to participate in the administrative dispute; if the attitude of the subsequent declaration of the European Court of Human Rights on the same matter may affect the lawfulness of the completed court procedure.

Deadline for filing a lawsuit for repeating the procedure: 30 days from the date when the party discovers the reason for repetition or 6 months from the date of publication of the declaration of the European Court of Human Rights in the "Official Gazette of the Republic of Serbia". If the party is aware of the grounds for reopening the procedure before the procedure in the Administrative court is concluded, then it can request a retrial within 30 days from the delivery of the verdict. In any case, the request may not be filed after the expiration of five years from the date of the court verdict.

The content of the lawsuit that seeks to repeat the procedure: This lawsuit must contain the reference to the court verdict whose repetition is required; reason on which the lawsuit is based; evidence supporting what the lawsuit states; circumstances which show that the lawsuit was filed within the time limit; declaration in what direction the proposed amendment should go, for the court verdict from the procedure which seeks to repeat.

When the lawsuit is delivered to the Court, it examines whether it meets the procedural requirements for initiation of the required procedure. If the Court finds that they are not (that a lawsuit is filed by an unauthorized person, is delayed or the party did not make the existence of grounds for the retrial) the decision is rejected. If these conditions are met and the procedure is running, then the lawsuit is submitted to the opposing party and interested parties to respond. When the deadline for response passes (15 days from the date of delivery), the Court then issues a decision that decides whether it will

allow the repetition of the procedure or not. If the repetition is allowed, then the Court terminates the verdict, which can remain in force, be repealed or reversed. Against this verdict may file a request for review of the court decision, which has already been discussed.

8.3. Misdemeanor Procedure

The duty of Health inspectors is to submit a request without delay for initiating misdemeanor procedure when the action or inaction of the Health care institution or private practice, that is under the supervision, committed the violation. That is provided by the Law on Health Care (Article 248).

The Articles 256 - 262 provide penalties that refer to the Health care and Health care institutions, or other legal entity that performs Health care activities and the Health care providers, if the medical activity was not carried out in accordance with the provisions of the Law. Violation penalties for Health care institution are from 300,000 RSD to 1,000,000 RSD and for Health care providers from 30,000 RSD to 50,000 RSD (Article 256 of the Law on Health Care).

Law on protection of patients' rights provides offenses in the Articles 44 - 47 related to the Health care institutions, or other legal entity that performs Health care activity, Health care providers, Health care entrepreneurs, patients counselors, in case of violation of the rights of patients. Violation penalties for Health care institution are from 300,000 RSD to 1,000,000 RSD, for Health care entrepreneurs from 500,000 - 1,000,000 RSD, for Health care providers from 10,000 - 50,000 RSD and for a patient counselor from 20,000 - 50,000 RSD.

Law on Labour provides for the employers with legal entities and entrepreneurs, in Articles 273 - 276 that concern the violations of employees' rights, including the rights of Health care providers. Violation penalties for the employer as a legal entity goes from the amount of 100 thousand to two million serbian dinars and for entrepreneurs from 50,000 - 300,000 RSD. The competent authority for initiating misdemeanor procedure is a labor inspector, in accordance with the **Misdemeanor Law**²²⁵.

Law on occupational safety and Health provides in the Articles 69 - 73 offenses which are related to the employer as a legal entity and the entrepreneur, if the employer does not comply with provisions which provide measures of Health and safety of employees, including Health care providers in Health care institutions. Misdemeanor penalties for employers are in range from 100,000 - 1,000,000 RSD. Labor inspector is the competent authority to initiate the misdemeanor procedure.

Misdemeanors for the employer, in protecting employees' rights, is stipulated in the Law on the Prevention of harassment at work, Law on Protection of population from exposure to tobacco and the **Law on strike**²²⁶.

Misdemeanor Courts started to work as the new authorities who act in misdemeanor procedure from 1.1.2010. when the delayed implementation of the Misdemeanor Law began. That introduced qualitatively new solutions in misdemeanor procedures and the new network of courts began to operate. In fact, by that time the procedure was led by the authorities for misdemeanors (in the first instance) and

225 Official Gazette RS 101/2005, 116/2008 and 111/2009

226 Official Gazette SRJ, No. 29/96

Council for misdemeanors (in the second instance), whose status was not defined because these *sui generis* bodies could not be considered nor as administrative bodies nor the judicial authorities. The main disadvantage of this solution, by theorists and the relevant institutions of the European Union, was unconstitutional practice to sanction - high penalties and imprisonment, in particular, that could only be imposed by an appropriate court procedure.²²⁷

The new Misdemeanor Law²²⁸ was adopted in the year 2013 and entered into force on March 1st, 2014.

The concept of misdemeanor:

Misdemeanor is an unlawful act which the Law or other regulations from the competent authority designated as a misdemeanor, for which the sanctions are prescribed.

The authorities responsible for conducting the procedure:

Misdemeanor procedure, in the first instance, is conducted by Misdemeanor courts. In the first instance misdemeanor procedure, a single judge leads the trial and makes the decision. In the second instance misdemeanor court, decision is made by a Judicial Panel composed out of three judges.

Parties in the procedure:

The defendant is the person against whom the misdemeanor procedure is conducted. He has the right to submit evidence, make proposals and use the remedies provided by this Law. For a defendant who is not legally competent, actions in the procedure are undertaken by a legal representative. The defendant has the right to defend himself in person or with the assistance of counsel. When the accused is legal entity, his representative will participate in the misdemeanor procedure, who is authorized to take all actions that can be undertaken by the defendant.

Damaged party, in terms of this Law, is a person whose personal right or property right had been violated or threatened. By person, or through its legal representative, the damaged party has the right to:

- 1) submit and represent a request for the misdemeanor procedure;
- 2) submit evidence, make proposals and highlights the indemnification claim for damages or restitution of things;
- 3) declares an appeal against the verdict or decision issued on the occasion of his request for initiating misdemeanor procedure;
- 4) submit evidence on which the Court may order the defendant that, in the course of the misdemeanor procedure, must not approach the victim, premises or place where misdemeanor took place.

The request for initiating misdemeanor procedure is filed by the damaged party and the competent authority.

Competent authorities are administrative bodies, authorized inspectors, public prosecutors and other agencies and organizations exercising public authority in charge of direct enforcement or control over the enforcement of rules regulating misdemeanor.

227 Petovar K., Grujić N. "Towards a more effective treatment of misdemeanor courts and labor inspection to protect workers' rights" Foundation of the Center for Democracy

228 Official Gazette 65/2013

8.3.1. INITIATION OF THE MISDEMEANOR PROCEDURE:

The request for initiating misdemeanor procedure is submitted in writing and should contain:

- 1) name and residence of the person making the request;
- 2) name of the Court to whom the request is submitted;
- 3) basic data on an individual, entrepreneur or responsible person against whom the request is submitted: name, personal identification number, occupation, place of residence and address, place of employment, address and citizenship; or the name and seat of the legal entity, as well as tax identification number (hereinafter referred to as TIN), identification number; for entrepreneur the name, seat and the function of the responsible person in that legal entity;
- 4) description of the facts and actions arising from legal characteristic of the misdemeanor, time and place of commission of the misdemeanor and other circumstances necessary to determine misdemeanor as accurately as possible;
- 5) the regulation for misdemeanor that should be applied;
- 6) the proposal which evidence should be presented, along with an indication of personal names and addresses of witnesses, documents to be read and objects that serve as evidence;
- 7) information about whether the criminal procedure or procedure for economic offense is initiated for action that includes characteristics of a misdemeanor which is the subject of the request;
- 8) signature of a damaged party as the applicant and the seal of the authorized person from the legal entity making the request.

If available, the request will indicate the following information about the person against whom a request is made: the place and date of birth, telephone number, e-mail address, telephone number, workplace, bank account number of legal entities and entrepreneurs.

The request may contain a proposal for the imposition of procedural measures to prohibit access in Article 126, Paragraph 3, Item 4 of the Law.

It is not obligatory that the request for initiating misdemeanor procedure includes a proposal for the imposition of procedural measures or unique personal identification number of the person against whom the application is filed.

The request for misdemeanor procedure submitted by a person as the damaged party against the legal entity and responsible person in a legal entity and entrepreneur, must contain the name and seat of a legal entity, the name and function of the responsible person in the legal entity or the name, surname and seat of entrepreneurs.

The request for misdemeanor procedure submitted by a person as the damaged party against the responsible person in the state body, body of the territorial autonomy, local government unit or other public authority holders should contain the personal name of the defendant, the name and residence of the authority and function that person performs.

A person as the damaged party may file a request for initiating misdemeanor procedure to the competent Misdemeanor court and orally on the record.

If there is other procedure concerning the same action, criminal procedure or economic offense, against the defendant, the applicant should immediately inform the Misdemeanor court.

If the court does not reject the request for initiating misdemeanor procedure, it will issue a **decision for initiation of the misdemeanor procedure**.

The decision referred to in paragraph 1 of the Article should contain a reference to a person against whom the misdemeanor procedure is initiated and legal qualification of the action.

If the request is filed against several persons or more misdemeanors, all persons and legal qualifications for all violations must be indicated in the decision. Decision for initiation of the misdemeanor procedure does not need to be submitted to the applicant nor to the defendant.

Appeal can not be filed against the decision for initiation of the misdemeanor procedure.

Procedure will be conducted against the defendant only for the misdemeanor that the decision refers to, except in the case listed in the Article 247, paragraph 4 of the Law.

The Court is not bound by the legal qualification given in the request for initiating of the misdemeanor procedure or in the decision for the initiation of the misdemeanor procedure.

8.3.2. THE COURSE OF THE MISDEMEANOR PROCEDURE:

The hearing of the defendant shall be conducted orally, by the rule. The defendant may be interrogated in the absence of counsel only in the cases when the counsel is absent, although informed of the hearing, or if the defendant did not provide counsel for the first hearing and declares that he will do the hearing without one.

The statements of the defendant on the grounds of absence of counsel shall be entered in the record.

The decision can not be based on the statement of the accused who was not advised of the right to retain counsel of his choice or to be heard in the presence of counsel.

At the first hearing, the defendant will be asked for a name, nickname, personal name of one parent, place and date of birth, personal identification number, nationality, occupation, residence and employment, email address, family status, degree of qualification, property, number of account, both in serbian dinars and foreign currencies, whether is convicted in misdemeanor procedure and for what action, whether in ongoing criminal procedure or misdemeanor procedure and for what action, and if it is the defendant is a minor, who is his legal representative.

After taking a statement, the defendant will be notified why the request is made, on what cause, and he would be asked to present everything he has in his defense.

At the hearing, the defendant will be allowed to explain all the circumstances and to present all facts supporting his defense, without interruption.

If the defendant refuses to answer the questions, he will be informed that he is disrupting the collection of evidence for his defense.

When the defendant has completed his statement, he will be asked more questions, if it is necessary to fill in gaps or remove contradictions and ambiguities in his presentation.

The same provisions on the examination of the defendant will be applied at the hearing of the responsible person in the legal entity and entrepreneur.

At the hearing of the representative of the accused legal entity, he will be asked for the name and residence of the legal entity, the personal name and the function of the representative, or tasks performed in the legal entity, numbers of bank accounts of the legal entities, tax identification number and registration number and whether a legal entity convicted of a criminal offense, economic offense or a misdemeanor.

Persons who are likely to be able to give notice of the violation, the perpetrator and other relevant circumstances are invited as **witnesses**.

The damaged party may be examined as a witness.

Surveying is determined by the motion of the parties when establishing or evaluating some important facts necessary to obtain an expert opinion, which the court does not have.

Agreement on the admission:

When the misdemeanor procedure is conducted for a violation or more offenses in concurrence, the authorized applicant, orally or in writing, may propose to the defendant and his counsel to conclude an agreement on the admission of the offense. Also, the defendant and his counsel may propose it to the authorized applicant.

The agreement on the admission must include:

- 1) description of the misdemeanor that the defendant is charged for;
- 2) recognition of the defendant that he has committed an offense referred to in item 1 of this paragraph;
- 3) agreement on type and amount of penalty, and the other misdemeanor sanctions that will be imposed on the defendant;
- 4) a statement of the authorized applicant of the cancellation of misdemeanor procedure for offenses that are not covered by the agreement;
- 5) agreement on the costs of misdemeanor procedure, on confiscation and the return of objects and on the indemnification claim, if submitted;
- 6) a statement from parties and their counsels on disclaiming the right to appeal against the court decision issued on the basis of accepting admission agreements;
- 7) signature of the parties and counsels.

In the admission agreement, parties may agree to a penalty for the defendant, that can not be below the legal minimum for the misdemeanor that the defendant is charged for.

The hearing will be determined when the court finds it necessary for the proper and complete determination of the facts.

Defendant, his counsel, the damaged party, the applicant for initiation of the procedure and other participants in the procedure are invited for the hearing. If the defendant is a legal entity, a representative is invited for the hearing.

In the invitation, the defendant will be warned that in case of failure to appear, his apprehension will be ordered.

If the duly summoned defendant does not appear at the hearing and do not justify his absence, the Court will postpone the search and issue an order for apprehension, if there are no conditions to hold the hearing without the presence of the defendant.

8.3.3. COMPLETION OF THE PROCEDURE:

The misdemeanor procedure is completed with a **verdict** (a conviction or an acquittal), a **decision** when the procedure is suspended or a decision that impose corrective measures for a juvenile offender.

A written copy of the verdict or the decision will be made within eight days of the completion of all actions in the misdemeanor procedure.

The verdict or the decision is based on all the evidence and the facts presented in the procedure.

8.3.4. REGULAR LEGAL REMEDIES:

Against the verdict and decisions of the Misdemeanor court, **appeal** can be filed, to the second instance Misdemeanor court. The appeal is filed to the Court that issued the first instance decision.

The appeal must be filed within eight days from the date of delivery of the verdict or decision.

An appeal can be filed by the defendant, defense counsel and the applicant.

An appeal may be filed against any verdict, but against decisions issued in the misdemeanor procedure only if the right to appeal is not excluded by the Law.

The second instance Misdemeanor court decides in the form of a verdict or a decision.

The verdict confirms or modifies the decision from the first instance Misdemeanor court.

The decision is issued: to reject the appeal filed against the verdict or a decision; to decide on the appeal against the verdict or a decision and to repeal the verdict or a decision of the Misdemeanor court.

Decision revises the verdict or a decision for the reasons stipulated in Article 248 of the Law.

8.3.5. EXTRAORDINARY LEGAL REMEDIES

1. Renewal of the misdemeanor procedure is conducted if:

- 1) the decision is based on a false identification card, false testimony of an eyewitness or expert witness;
- 2) decision was issued as a result of a criminal activity of the judge or any other relevant body that participated in the procedure;

- 3) the defendant was already convicted for the same action for misdemeanor, criminal or economic violation;
- 4) new facts are brought to the court, or the court discovered new evidence that can be used and possibly could lead to a different decision;
- 5) the defendant gain the opportunity to use the declaration of the European Court of Human Rights about the violation in same matter, that can be related to this procedure and can issue more favorable for the defendant;
- 6) the Constitutional Court, in the procedure on the appeal, found a violation or denial of human or minority rights and other rights guaranteed by the Constitution in misdemeanor procedure, and that could be of influence on more favorable decision for the defendant.

2. Request for the protection of lawfulness can be submitted if:

- 1) violation of the Law or any other regulation concerning misdemeanor occurred;
- 2) the Law that was applied was found not to be in conformity with the Constitution, generally accepted rules of international law and ratified international treaties.

Request for the protection of lawfulness can be submitted by the public prosecutor within three months from the date of the delivery of the verdict.

8.4. Civil Procedure

Civil procedure may be contentious, non-contentious and executive. Negligent and unprofessional treatment of patients by Health care providers can lead to physical damage, damage to the Health of the patient and also to his death. That situation also represents a crime of negligent provision of medical aid and violation of Health care regulations and Ethics Codes. Damages suffered in this way, the patient can compensate in criminal procedure or in separate civil procedure.

Types of damages:

Law on protection of patients' rights stipulates the right of the patient for compensating for damages caused by professional Health care providers or associates during the process of providing Health care. The damage may consist of injuries (physical damage) or deterioration of the Health status of the patient (Article 31 of the Law).²²⁹ The Law further indicates the general rules on liability for damages pursuant to the provisions of the Law of Contract and Torts.²³⁰

A person who had suffered the damage due to malpractice has the right to seek compensation for both material and non-material damage.

Material damage may be in damaging or destructing of personal belongings in the Hospital, the loss of future earnings, subverting the benefit of missed work, extraordinary costs of treatment due to medical error, death or disability of the caretaker person, funeral expenses. The aim of the material

229 Official Gazette RS, 45/2013.

230 Official Gazette SFRJ, 29/1978, 39/1985, 45/1989 - decision of the Constitutional Court of Yugoslavia and 57/1989, Official Gazette SRJ 31/1993 and Official Gazette SCG 1/2003 - Constitutional Charter.

compensation is establishing conditions that existed prior to the occurrence of adverse events. When it is not possible, the responsible person is obliged to monetarily compensation. The damaged party is entitled to compensation for ordinary damages and for the lost profit, which could be expected in the ordinary course of events and circumstances. If the damaged party is losing profits due to temporary or permanent incapacity for work or the possibility of its further development and advancement is reduced or impossible, the responsible person will have to pay the appropriate amount as a form of compensation for that damage.

The Law of Contract and Torts contains specific rules on compensation for material damage in the event of death, physical damage or damage to Health. A person who causes another's death, must reimburse the costs of the funeral. Furthermore, he must reimburse the costs of treatment of the injuries and other necessary expenses in connection with the treatment, as well as earnings due to inability to work. As a rule, then the reimbursement is determined in the form of money rent for life or for a specified time (Article 188).

Consequential damage is mental or physical pain that the person had suffered, for example, due to disfigurement and reduction of life activities, family death, injury to reputation, the caused fear. Even if the compensation for the material damage does not occur, the damaged party is entitled to compensation for consequential damage if it is justified by the circumstances of the case, intensity of the pain and fear and their duration. In the case of death or serious disability of a person, members of his family are entitled to compensation for mental anguish. If it is certain that the damage will continue for the future period, the court may award compensation for future damages (Articles 190 to 202 of the Law of Contract and Torts).

Who can file a lawsuit for compensation of the damage?

A lawsuit may be filed by the damaged party, but if the patient died or suffered a severe degree of disability, compensation may be claimed by members of his family, brothers and sisters who lived with him in the same household, along with the person who were depending on the help of that patient. In addition to these persons, compensation may be claimed by the employer of the injured patient, because of the costs of treatment within the compulsory Health insurance.

The lawsuit for damages, in this case, is filed against Health care institution where the patient has suffered the damage. Health care provider, as an individual, may be sued only if it had intentionally harmed the patient.

This is a lawsuit that seeks condemnation of certain performance (giving, committing, omitting or suffering) - conviction or so-called condemnatory lawsuit (Article 46 of the Law of Contract and Torts). The prosecutor declares a claim of substantive law and that is why the defendant should be obliged on certain performance.

Competent Court:

The lawsuit is submitted directly to the Court by mail or by a person registered for performing delivery, persons employed by the Court, other state agencies or entities with public authorities. Immediately upon the receipt of the lawsuit the Court decides whether it's in his jurisdiction.

In a civil procedure an individual judge leads the trial, or a Judicial Panel; whereby in the first instance, as a rule, there is an individual judge, unless the Law provides otherwise. Immediately upon receipt of the lawsuit, the Court, *ex officio*, assess whether an individual judge will judge or a Judicial Panel. Law on Civil Procedure provides the possibility that the parties may agree that their dispute, instead of individual judges, can be lead by the a Judicial Panel (Article 36, paragraph 1 of the Law).²³¹

The Court with *territorial jurisdiction* is the one where is the domicile of the defendant. If the defendant is not domiciled in the Republic of Serbia nor in another state, territorial jurisdiction has the Court of his residence. In case of a legal entity, the Court with territorial jurisdiction is the one on whose territory the legal entity is located.

In addition to the general territorial jurisdiction, there is a special territorial jurisdiction in certain cases. Thus, for the trial of disputes due to non-contractual liability for damages, the competent is the Court in whose territory the harmful action was performed or in whose territory the harmful consequence occurred. Furthermore, if the damage was due to the death or serious physical damage, in addition to the above-mentioned Courts, the competent is the Court in whose territory the plaintiff has permanent or temporary residence (Article 44 of the Law on Civil Procedure).

The *subject-matter jurisdiction* of Courts is distributed according to the type of dispute, whether the basic or higher Court will act as a Court of first instance. The criteria of demarcation in Serbian law is the value of the dispute. When it comes to the rights of patients and their demands for compensation, in the first instance, in most cases, it will be the subject-matter jurisdiction of the basic Court. Exceptionally, when the value of the dispute is over 100,000 RSD, the higher Court will have subject-matter jurisdiction in the first instance.

Regulations on *functional jurisdiction* determine which Court will be competent to decide in the second instance, or in the process of extraordinary legal remedies in the same matter. So, the rules of subject-matter jurisdiction define which Court will be competent in the first instance and the rules of functional jurisdiction define which Court will be competent in higher authority. Given that in the first instance for damages to patients basic Court is competent, in the second instance the higher Court is competent.

Content of the lawsuit:

The lawsuit, counterclaim, the answer to the lawsuit and the legal remedies must be:

- ▶ in writing,
- ▶ comprehensible,
- ▶ must contain all the required elements:
 - indication of the Court,
 - name, legal name of the company or other legal entity,
 - permanent or temporary residence or seat of the parties, their legal representatives or power of attorney,
 - the subject of the dispute,
 - content of the statement and
 - the signature of the applicant.

²³¹ Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

If the statement contains a request, it is necessary to brief the facts and evidence on which the statement is based.

In particular, lawsuit must contain: same data as any other submission, the claim regarding the merits and incidental claims, the facts supporting the claim, suggestion of evidence to establish this fact, the label of the value of the dispute and the plaintiff's proposal (Article 192 of the Law on Civil Procedure).

The Court can not decide on something that the parties did not request in the course of the procedure (Article 3, paragraph 1 of the Law on Civil Procedure). On the other hand, the Court is not tied to the mentioned legal basis of the lawsuit. The legal basis of the claim relates to the choice of substantive norms under which the prosecutor subsumes its factual allegations in the lawsuit.

In addition to the legal basis, the lawsuit may also contain the following optional ingredients: a request for exemption from payment of costs of the procedure, the request for providing evidence, the request that the defendant submits personal identification to the Court, the proposal for the determination of provisional measures.

In case that the submitted lawsuit is not understandable or does not contain the required information listed, the court will return it to the party for correction, specifying a period of eight days in which the correction must be made. If the correction submission is not returned, it will imply the withdrawal, and if the uncorrected submission is returned, it will lead to his dismissal.

If the submission is incomprehensible or incomplete, and in the name of the party it was filed by his attorney, the public prosecutor or public attorney, the submission will be rejected.

Procedural rights and procedural obligations of the parties in civil procedure

Persons who participate in the procedure are entitled to become familiar with the materials from the procedure and have a copy of them, present evidence and to participate in their checking, ask questions, provide explanations during the procedure, give arguments in favor of their demands and to exercise other rights provided by the Law on Civil Procedure. Modern procedural law does not recognize the obligations in terms of the substantive rights that could be made compulsory. In accordance with the fundamental principles of the civil procedure and principles of litigation, they are only demanded to take certain procedural actions because, otherwise, there will be negative consequences. The party can actively participate in the procedure by suggesting evidence, coming to hearing, but it is not obliged to do so.

However, in addition to this, there are procedural obligations of the parties to to speak the truth, to conscientiously use their procedural rights and do not abuse them. There are different cases that constitute an abuse of procedural rights. For example, creating false facts to produce certain procedural consequences, which otherwise would not arise; behaving contrary to what has been agreed with the other party; undertaking procedural actions with the aim of delaying the litigation.

In the case of litigation malpractice, the legislator provides appropriate sanctions: from the reimbursement of expenses to the opponent, imposing fines for both parties, agents, attorneys, interventionists and experts.

8.4.1. THE COURSE OF THE PROCEDURE:

The course of the procedure is stipulated in detail in the Articles from 289 to 335 of the Law on Civil Procedure.

Litigation begins by submitting the lawsuit to the defendant. The Court prepares the hearing upon receipt of the lawsuit, that includes: preliminary examination of the lawsuit, submission of the lawsuit to the defendant for a response, scheduling a preliminary hearing and the trial. After preliminary examination the Court can issue a decision rejecting the lawsuit as: request is not within its jurisdiction; the request is untimely, incomplete or incomprehensible; there is an ongoing litigation for the same claim or has been already concluded; or because there is no legal interest in filing a lawsuit.

If none of these obstacles is present, for further discussing the lawsuit, it is delivered to the defendant for response. Within 30 days of submitting the lawsuit to the defendant to reply, the preliminary hearing will be held, where lawsuit and the response to the lawsuit are exposed, with discussing about the proposals, claims and factual allegations of the parties. In a further period of 30 days the Court shall schedule the main hearing, at which participants (familiarised with the course and results of the preliminary hearing) and the parties continue to discuss proposals and their factual allegations to substantiate their claims. The parties can discuss their own legal conceptions and perceptions of the dispute. Until the conclusion of the hearing, the parties may present new facts and propose new evidence.

When the case is sufficiently discussed, the Court states that the trial was concluded. During deliberations, the court may determine that the subject is not sufficiently discussed, so that it can come to the reopening of the trial.

Upon conclusion of the hearing, the Court issues a verdict. If the trial was held before a Judicial Panel, judge and panel members who participated in the main hearing gives the ruling. Verdict shall be adopted and published. Written verdict must contain an introduction, statement and explanation.

8.4.2. COURT SETTLEMENT:

During the procedure, the Court will inform the parties with the possibility of settlement before the Court during the procedure and until its completion (Articles 336 to 341 of the Law on Civil Procedure). The settlement comes mainly by the prosecutor, withdrawing from the part of the claim or agreeing to pay the penalty.

The court settlement that is concluded in that case, has the effect of the substantive contract, but leads to the completion of the litigation and the record of the court settlement has the effect of an enforceable document. The enforceable document means that if the party listed as the debtor in the court settlement does not fulfill its obligation voluntarily, the creditor does not have to re-file lawsuit against him, but may immediately require compulsory execution of settlement.

8.4.3. REGULAR LEGAL REMEDIES:

An appeal against the verdict is a regular legal remedy against all verdicts issued in the first instance and the right to appeal is guaranteed by the Constitution (Article 26, paragraph 1, of the Constitution of the Republic of Serbia).²³² The appellant can not, in any way, be deprived of this right. The process of the litigation represents a continuation of the first instance procedure. Appeal against the verdict challenges the lawfulness and accuracy of the verdict in the first instance.

The appeal must be filed in writing, within 15 days of the delivery of a copy of the verdict. It will not be allowed if submitted by a person who does not have a legal interest or procedural identification, which renounced the right to appeal or an appeal has already been withdrawn (Article 378, paragraph 3 of the Law on Civil Procedure).²³³

In the appeal, it must be noted: the challenged verdict, and whether it has been challenged in its entirety or only in a certain part, the reason for the appeal and the signature of the applicant. The lack of some of these elements does not impose the rejection. It is sufficient that the appeal contains indication of the verdict that is challenged and a signature of the applicant, and that the Court takes it into consideration.

Optional elements of the verdict is the appeal proposal to amend the contents of the verdict by the competent Court of the first instance.

The reasons for contesting the verdict are (Article 373, paragraph 1 of the Law on Civil Procedure):

- ▶ essential violation of the civil procedure,
- ▶ incorrectly or incompletely established facts,
- ▶ wrongful application of the relevant substantive law.

Appeal procedure has two stages. First, in front of the Court that issued the contested verdict and second, the second instance Court which decides on the appeal.

The appeal is always submitted to the first instance Court and he decides on the admissibility of the appeal and may be reject if it is untimely, incomplete or prohibited (Article 378, paragraph 1 of the Law on Civil Procedure). If it is permitted, the Court sends the response to the opposing party, which has 15 days to respond to the appeal.

After receiving the response to the appeal or, perhaps, when the deadline for response to an appeal had expired, the first instance Court submits entire case file to the second instance Court.

The course begins with the second instance court judge's report, in which he briefly introduces the course and the outcome of the current legal procedure. Judge may obtain a notice of the Court of first instance, if the reason for the appeal are essential violations of civil procedure. About the information and explanations which a first instance Court provides for the second instance Court, parties are not informed and are not familiar with their contents.

²³² Official Gazette RS 98/2006.

²³³ Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

Furthermore, the second instance Court may decide on the appeal in closed session, already at the hearing, or through discussion before a panel of this Court. The discussion can be mandatory or optional. As a rule, the the second instance Court decides on the merits of the appeal without a hearing and then decides within 9 months from the date of delivery of the case file from the first instance Court.

Optional oral hearing is held on the grounds of expediency, or if the second instance Court finds that the discussion could eliminate procedural flaws related to errors in the execution of certain evidence or in their wrong assessment. The same rule applies when it is necessary to fully and accurately establish the facts. Also, the Court can find that the facts were incorrectly identified as the first instance Court rejected evidence from both parties that were of importance in determining the essential facts.

It is the duty of the court to schedule an oral hearing and decide on all applications of the parties if there is already a verdict repealed on appeal and if the new first instance court decision is revoked for errors or incomplete facts. Also, the second instance Court must decide when the lawsuit is modified in the procedure, with a new claim together with the existing one on the same facts, or the claim is increased.

When deciding on a hearing, the second instance Court decides on the merits of the appeal and of all the requirements of the party, if it determines that the appeal is well founded, that substantial violations of civil procedure are committed or that the facts were incompletely or incorrectly determined. The hearing takes place before the second instance Court, according to the rules of the first instance procedure.

The second instance Court supervises the lawfulness and regularity of the first instance verdict, the part on that the party appeals, only if it is the authorized person. The second instance Court examines the reasons for the appeal concerning incorrect or incomplete facts only if that is stated in the appeal. Then the Court will examine the factual part of the reasoning. If it comes to other reasons for the appeal, the second instance Court will not examine the facts and is related with the facts that is already established by the first instance Court. New facts and new evidence can not be presented in the appeal, unless the appellant was unable to present them, without his fault. *Ex officio*, the Court always takes into account whether there are significant violations of the provisions of the civil procedure that makes the verdict of the first instance Court invalid and if there is a correct application of the substantive law.

The second instance Court issues a decision or a verdict.

With the *decision*, the Court rejects the lawsuit as inadmissible; repeals the verdict and returns it to the first instance Court for retrial; repeals the verdict and dismiss the charges. Also, the decision of the second instance Court will suspend civil procedure if the parties have renounced the lawsuit, acknowledged the lawsuit, concluded a court settlement or the appellant withdrew the appeal during the second instance procedure.

With the *verdict*, the second instance Court can modify the verdict of the first instance Court and decide on the request of the parties; it can dismiss the appeal as unfounded and confirm the first instance verdict; it can adopt the appeal and decide on all the requirements of the parties.

The verdict must be issued in writing, within 8 days from the date of publication.

8.4.4. EXTRAORDINARY LEGAL REMEDIES:

In addition to the appeal as a regular legal remedy, it is possible to declare and extraordinary legal remedies against the verdict in Serbian Civil procedural law: revision, the request for review of the verdict and the request for a renewal of a procedure (Articles 403 to 433 of the Law on Civil Procedure).²³⁴

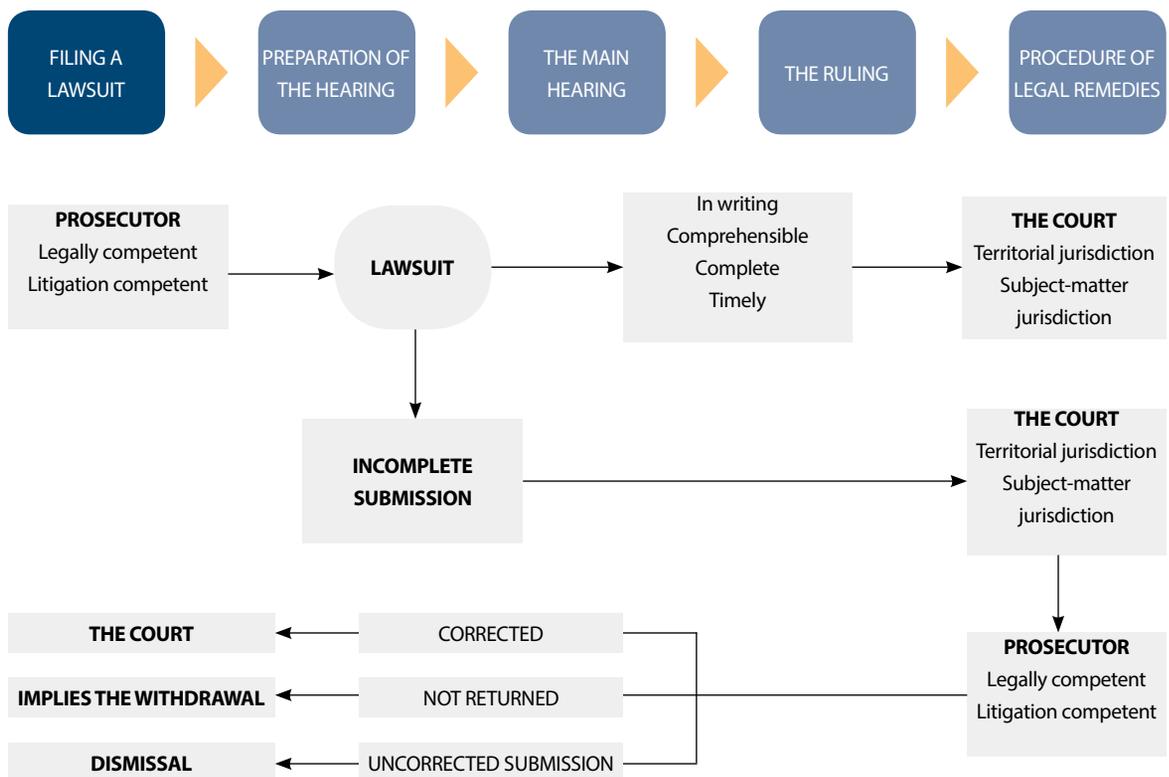
Revision may be declared against the final verdict issued in the second instance, because of essential violations of the civil procedure (Article 374, paragraphs 1, 2, Clause 2, 6, 8, 10, 11 of the Law on Civil Procedure), wrongful application of substantive law, transgression of the appeal only if the violation occurred in the second instance procedure.

The request for review of the verdict may be declared against the final verdict of the second instance Court. The request is declared by the Republic Public Prosecutor to the Supreme Court of Cassation if the violation of the law is of the public interest.

Renewal of a procedure: At the suggestion of the parties, procedure may be repeated because of a large number of reasons listed in the Law on Civil Procedure (Article 426). The request for retrial represents the most important extraordinary legal remedy because bases for its declaration are widely set, together with longer time limits in comparison to other remedies.

The course of the civil procedure is shown in the Diagrams 8.1, 8.2, 8.3, 8.4 and 8.5.

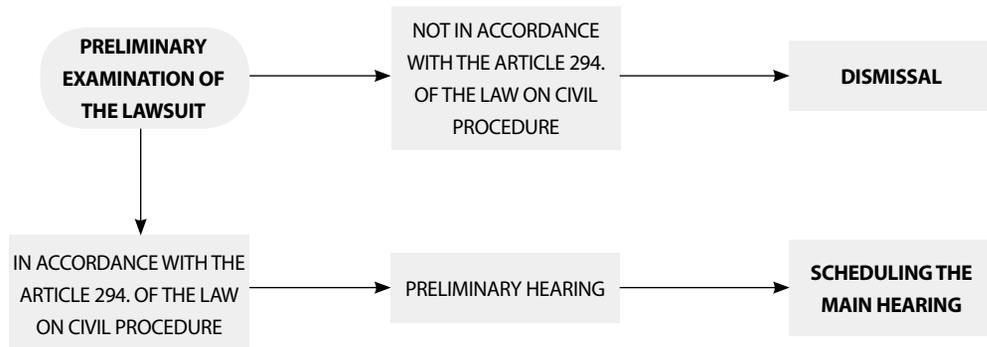
DIAGRAM 8.1. THE COURSE OF THE CIVIL PROCEDURE: FILING A LAWSUIT



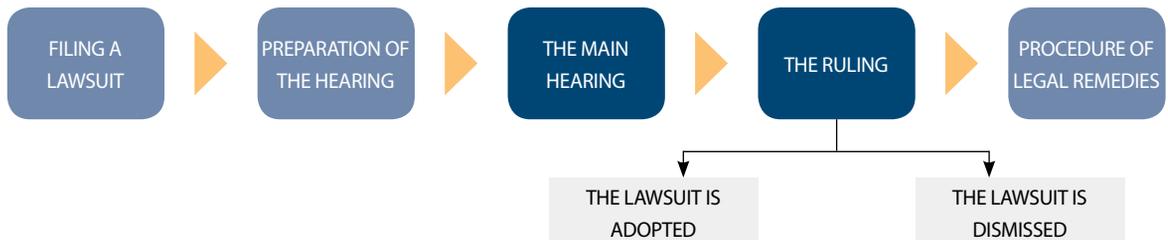
The source: Law on Civil Procedure, Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

Comment: According to the Article 101, paragraph 1 of the Law on Civil Procedure there is a possibility of returning submission only for the persons with no power of attorney. If they have one and the submission is incomprehensible and incomplete, the Court will dismiss it.

²³⁴ Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

DIAGRAM 8.2. THE COURSE OF THE CIVIL PROCEDURE: PREPARATION OF THE MAIN HEARING

The source: Law on Civil Procedure, Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

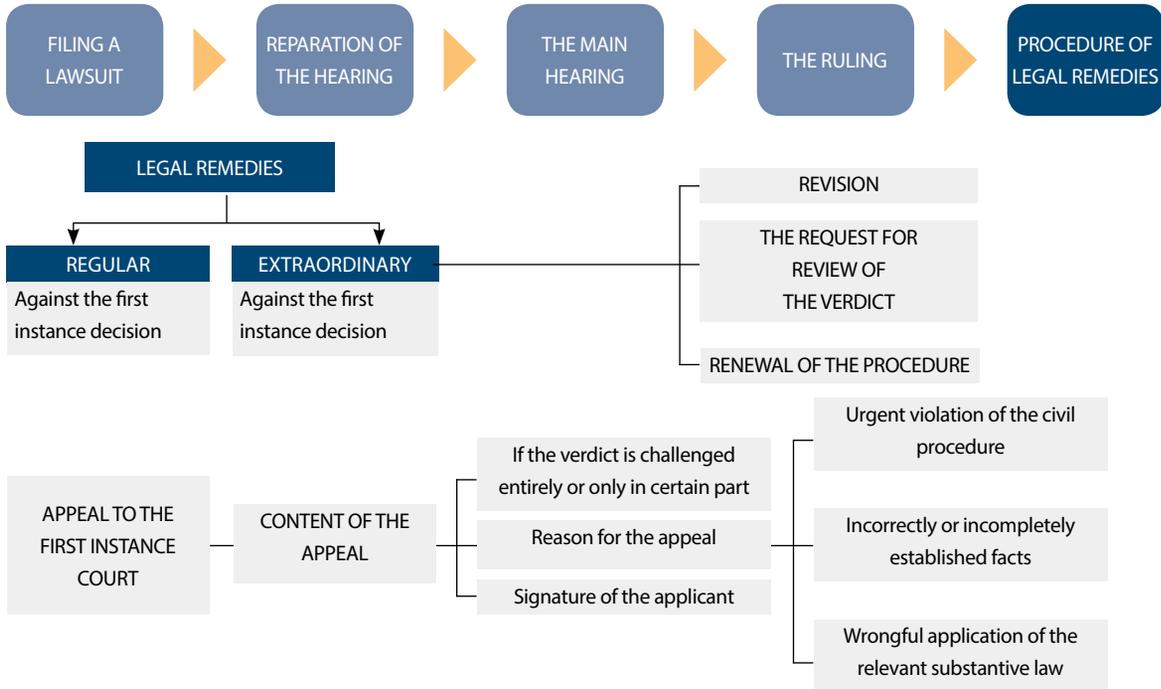
DIAGRAM 8.3. THE COURSE OF THE CIVIL PROCEDURE: THE MAIN HEARING AND THE RULING

THE AIM OF THE MAIN HEARING
Discussing about the proposals of both parties and the factual allegations that the parties use to explain their proposals or refute the opponents
Providing evidence and their presentation for decision making (investigation, witnesses, expert testimony, documents, hearing of the parties)

PARTS OF THE VERDICT
<p>Introduction</p> <ul style="list-style-type: none"> • Indication that the verdict is issued and published on behalf of the people • Name of the Court • Data on both parties, their legal representatives and public attorneys • Value of the dispute • Brief description of the subject of dispute • The date of conclusion of the main hearing and the issuing of the verdict
<p>Statement:</p> <ul style="list-style-type: none"> • Court decision to adopt or dismiss the requests concerning the subject of the dispute and supporting claims • Decision on the existence or non existence of prominent claims to be refuted
<p>Explanation:</p> <ul style="list-style-type: none"> • Requests of the parties • Facts on which the requests are based on • Factual situation • Regulations on which the verdict is based on

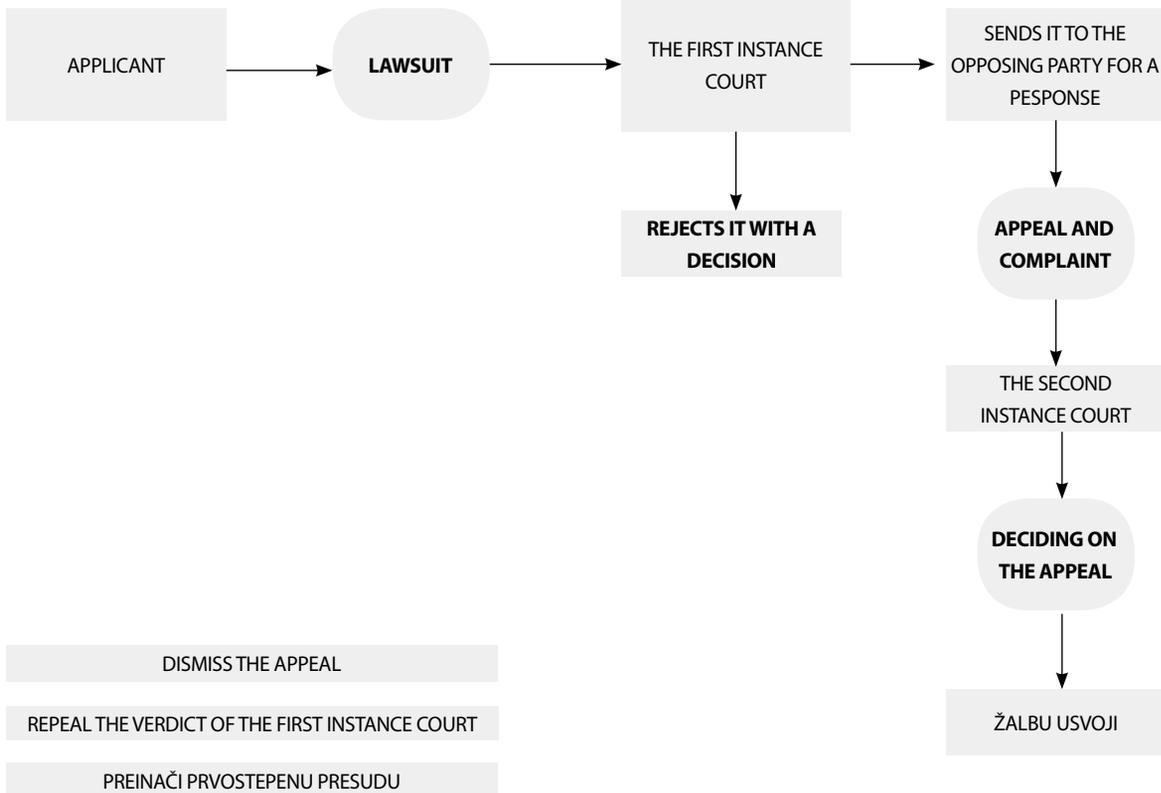
The source: Law on Civil Procedure, Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

DIAGRAM 8.4. THE COURSE OF THE CIVIL PROCEDURE: PROCEDURE OF LEGAL REMEDIES



The source: Law on Civil Procedure, Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

DIAGRAM 8.5. THE COURSE OF THE CIVIL PROCEDURE: PROCEDURE ON THE APPEAL



The source: Law on Civil Procedure, Official Gazette RS 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014.

8.5. Criminal Procedure

8.5.1 THE NEW CRIMINAL PROCEDURE CODE:

When we speak of Criminal Procedure, it should be noted that in recent years the entire Criminal justice system in Serbia experienced a few significant changes. The first one was in 2005, with the adoption of the new Criminal Code²³⁵ (CC Serbia), which is then followed by amendments first in 2009 and then in 2012. It is also important that, since October 2013, new Criminal Procedure Code²³⁶ (CPC) is in use, which in a significantly different manner regulates the matters of the criminal procedure. The Code introduced an adversarial criminal procedure in Serbia and the concept of prosecutorial investigation, which made many things different.

The period since the new Code is in use is still too short so that we could talk about his experiences in the practical application. In the following lines, the legal text will be shown, but not the practice that has yet to be built and where it will be a lot of wandering and confusion.

8.5.2 LAW ON ORGANISATION OF COURTS:

The Law on Organisation of Courts²³⁷ regulates not only the issues of the organization, but also the issues of the subject-matter jurisdiction of the Courts in Serbia. In this sense, in Serbia there are basic and higher Courts, as well as four Courts of Appeal and a Supreme Court of Cassation of Serbia. Basic Court, which includes one or more municipalities (in Belgrade, one Court includes more than one municipality) has the jurisdiction in the first instance for criminal offenses for which the law provides a prison sentence of up to ten years in prison. Higher Court covers the territory of several basic Courts and has the jurisdiction in the first instance for criminal offenses for which the law provides a prison sentence more than ten years in prison (in Serbia, prison sentence can not be shorter than 30 days, or longer than 20 years, but exceptionally, for the most severe criminal offenses, prison sentence can be imposed for a period between 30 and 40 years).

Also, the Higher Court has the jurisdiction in the second instance, for deciding on appeals from the basic Courts. The Court of Appeal has jurisdiction to decide on appeals against verdicts of Higher Courts, or in some exceptional cases, the Court of Appeal (in Serbia there are four - in Belgrade, Novi Sad, Kragujevac and Nis) decides also on appeals against decisions of basic Courts. The Supreme Court of Cassation, based in Belgrade, decides on extraordinary legal remedies, as well as a possible conflict of jurisdiction of the basic Courts. Moreover, the Supreme Court of Cassation deals with the case law, ie. provides an uniform application of the law. Basic Court decides in a Judicial panel composed out of three judges. One judge, professional lawyer, is the President of the panel and two lay judges. Higher Court decides in a panel composed out of five judges. Two of them are professional lawyers, one of them is the President of the panel, and three judges are appointed from among the laity. In the appeal procedure before the Courts of Appeals, it is decided by the panel composed out of five professional judges, the same as in the case of the Supreme Court of Cassation.

235 Official Gazette RS 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

236 Official Gazette RS 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

237 Official Gazette RS 116/2008, 104/2009, 101/2010, 31/2011 - Law, 78/2011 - Law, 101/2011 and 101/2013.

When it comes to the territorial jurisdiction of the Courts, as a rule, it is in whose territory the crime was committed, and generally it is interpreted as the place where the consequence of the crime had occurred. If, however, it can not be determined where the crime was committed, or where the consequences of the crime had occurred, the subject-matter jurisdiction is in the Court of residence or domicile of the defendant.

8.5.3 CRIMINAL CHARGES (REPORTING CRIMINAL OFFENCES):

Serbian Criminal Code defines in which cases not reporting a crime is considered a separate crime. This means that the state authorities, legal entities and persons are obliged to apply to the competent public prosecutor that there was an execution of a crime, otherwise they themselves may be responsible for not reporting the crime. Applicant of the criminal charge, of course, can be an individual and will often be the person who considers himself as a damaged party with the criminal offense that was committed. For example, if someone was robbed, then he/she will have the knowledge of the respective criminal offense and he/she will file a criminal charge to the public prosecutor. Or, when it comes to the Health care service, a patient who has damaged by some doctor's criminal act (for example, failure to provide medical aid, or medical malpractice, etc.). Usually, it will be the case that the victim reports the execution of a crime. If the person was damaged, he/she can not be responsible for the eventual not reporting the crime, but may be held liable if falsely reports someone or falsely accuse someone. In the Criminal Code, there is a separate criminal offense of "false reporting". This, however, does not mean that it will always be an offense and that the applicant will be responsible for "false reporting". It is necessary to prove that the applicant was malicious, with the intention to falsely report someone and expose him/her to discomfort. The crime of "false reporting" (Article 334 of the Criminal Code) reads: "Whoever reports that a certain person had committed a criminal offense which is prosecuted for, *ex officio*, and knows that the person is not the perpetrator of the offense, shall be punished with prison sentence from three months to three years." Practically, when someone submits criminal charges against someone else, and nothing happened, the person can always say that he thought ... that he did not know that the person is not a perpetrator, and the prosecution is then proving that the applicant knew that the reported person did not commit the crime, but the applicant still reported it (maliciously).

In the application, which can be filed verbally and in writing, it is necessary to specify the relevant evidence, and then the prosecutor can collect the evidence himself, summon citizens to give him adequate information, or to submit a request to the appropriate state authorities to provide him with the necessary data and information. In certain situations, the prosecutor, in the case of offenses for which a prison sentence is up to five years, may delay prosecution, if the defendant: removes the damage; pays the amount of the benefit to the humanitarian organization; performs certain socially useful or humanitarian work; meets the obligations when due, etc. The prosecutor may dismiss the criminal charges, if the reported offense is not an offense for which it is prosecuted *ex officio*; if the obsolescence occurred, or prosecution determines that there is insufficient evidence to initiate criminal procedure.

8.5.4. INITIATION OF THE CRIMINAL PROCEDURE:

The prosecutor will issue the order to conduct an investigation if he finds that there is sufficient evidence to initiate the criminal procedure. The order will be delivered to the Police and the defendant, ie. his counsel, who will be invited to attend certain actions during the investigation. The defense counsel, especially, has the right to attend the examination of the defendant, ie. his client. The Prosecutor will inform the damaged party about when and where certain investigative activities will be taken. The investigation may be terminated or suspended, or completed with the single issuing of the order. The investigation will be terminated, in any case if: the suspect suffers from mental illness, there is no proposal of the damaged party, ie. permission of the competent state authority, when such permission is required and if the residence of the suspect is not known, or if the suspect is on the run. The termination of the investigation will occur if the prosecutor finds that the offense which is the subject of the investigation is not a criminal offense; if the prosecution is obsolete; if there is not enough evidence for criminal charges. However, if it finds that there is sufficient evidence, the prosecutor may initiate the process of concluding a plea agreement with the defendant, (*"plea bargaining"*) which is a relatively new concept in our law. If that does not occur, the conclusion of the plea agreement, the criminal procedure continues with an indictment, which was filed to the competent Court in as many copies as the number of defendants and their attorneys, plus one copy for the Court itself. In the indictment, the Prosecutor may submit a motion for custody, and if the defendant is already in custody, the Court will proceed as though the prosecutor put that proposal.

The defendant has the right to file a response to the indictment within 8 days from the date of the delivery of the indictment, and on that response, the Judicial panel will decide within 15 days after the delivery of the response. The panel of judges may eventually suspend the procedure if the act is not a criminal offense, if the prosecution is obsolete, or there is sufficient evidence of the guilt. The panel of judges can issue a decision rejecting the indictment in the same situations like the suspension of the indictment, but the rejection occurs only when the indictment was filed directly without an investigation. However, if the court does not decide to either suspend or reject the indictment, he issues a decision on the confirmation of charges and then preliminary hearing begins, in which both parties, themselves, give an explanation on the subject of the indictment and the proper evidence. Preliminary hearing will be held within 30 days, if the defendant is in custody, or within 60 days, if there is no custody. The President of the panel will invite the parties, plaintiff, defendant, his counsel and the damaged party to explain the evidence they intend to carry out. The president decides of the day, time and venue of the main with issuing the order.

8.5.5. THE PROSECUTORIAL INVESTIGATION:

The most important novelty in the recently adopted Serbian Criminal Procedure Code is the introduction of adversarial criminal procedure, or the concept of prosecutorial investigation. This means that the investigative judge, that was established so far, is repealed, making the court passive during the procedure to the fullest extent possible. That also means that the court will not work on gathering the evidence. The investigation will be conducted, ie. evidence will be collected by the prosecutor, but it will also be enabled to the opposite side, the defendant and his lawyers, to propose the individual evidence and present them in the main hearing. This includes the ability to propose experts. For now

it is still too early to talk about experiences, but it is likely that this novelty, in the psychological sense, will lead to important improvements, both socially and politically.

8.5.6. THE DAMAGED PARTY IN THE CRIMINAL PROCEDURE:

The damaged party has the right to file a criminal charge; to propose the evidence for the exercising its property rights; to point out the facts and propose evidence; to hire an attorney from the rank of lawyers; has access to the files and evidence; to be notified that the prosecutor dismissed the criminal charges, ie. that the prosecutor dropped the prosecution; may appeal against the decision of the prosecutor to reject criminal charges; to be informed about its rights and opportunities; can attend the preliminary hearing, the main hearing and participate in the presentation of the evidence; may appeal against a decision on costs and requests on property rights; can be informed of the outcome of the procedure and to have the verdict delivered, and to take other actions prescribed by the Law (Article 50 of the Criminal Procedure Code).

If the Public prosecutor rejects criminal charges for the offense prosecuted *ex officio*, and before the indictment is filed, the damaged party may file a complaint to the Senior public prosecutor. Senior prosecutor will review the complaint and within 15 days after the delivery and reject or adopt the complaint. (Article 51 of the Criminal Procedure Code). This is a novelty, but we would say a negative one in relation to the provisions of the former CPC. According to the former CPC, someone who has been damaged by a criminal offense, had the right and the possibility that when the prosecutor rejects a criminal complaint, the damaged party then had the right and the possibility to prosecute it on its own. Today, according to the new Criminal Procedure Code, there are no such possibilities for the damaged party, but only to file a complaint to the Senior prosecutor. This is, *de facto*, a deterioration of the status of the damaged party.

If the indictment is confirmed, entered into force and the prosecutor then withdraw from the further prosecution, the Court will ask the damaged party if it wanted to prosecute the defendant on its own. The damaged party has eight days to comment on whether it takes over the prosecution. Thus, the damaged party can occur as a prosecutor only after indictment already entered into force, and before that can only object to the prosecutor.

8.5.7. THE MAIN HEARING:

The main hearing is public and it is a general rule of which there are some exceptions: when it comes to national security interests; the interests of public order and moral; the interests of minors as well as the privacy of the participants in the procedure; and the other legitimate interests in a democratic society (Article 363). The rule without exceptions is that the exclusion does not apply to the parties in the procedure, the prosecutor, the defendant, his counsel, the damaged party and his representative (Article 364). The main hearing is conducted by the President of the Judicial Panel.

After completion of the main hearing, the Court will issue a verdict. The statement and main reasons for the verdict are always read in a public session. The Court is required to submit a verdict in writing, to the parties, within 15 days from the date of publication, or in the case of particularly complicated matters, within 30 days. The verdict must include instruction for both parties on their rights, especially

the right to appeal. The verdict may be **dismissive**, if the prosecutor withdrew from further prosecution; if it was established at the main hearing that the defendant was previously convicted of the same criminal offense; or if the defendant was acquitted by the Court with the act of amnesty or pardon. The verdict may also be **liberating**, and it will be if the Court determines that the offense for that is prosecuted is not a crime, there is no conditions for the implementation of security measures, or simply when the Court comes to the conclusion that there was insufficient evidence that the defendant committed the criminal offense which he is charged for. Finally, the verdict may be **guilty** verdict, when the Court finds the defendant guilty and sentence him to an appropriate sentence.

8.5.8. THE APPEAL PROCEDURE:

Once they obtain a written explanation of the verdict, the prosecutor, the defendant and his council have the right to appeal. An appeal may be filed within 15 days, and the parties may seek an extension of the deadline for another 15 days immediately after the verdict, for a total of 30 days (Article 432). The appeal may be filed by the public prosecutor, both against and in favor of the defendant. The appeal may be filed by the defendant (who was convicted in the first instance) his lawyer, but also the spouse and certain relatives, legal representatives, etc., but the most common, it is filed by his lawyer. An appeal may also be filed by the damaged party, but only because of the decision of the costs of the procedure, as well as the decision on the amount of the property rights request. The defendant may renounce the right to appeal only after the verdict has been delivered, and before that, if the prosecutor and the damaged party previously renounced their right to appeal, on the verdict that the defendant is found guilty, but without the prison sentence, for example suspended sentence, fine, or other milder alternative sanction.

The appeal shall contain a reference to the verdict in question; grounds for an appeal; the explanation of the appeal; suggestion that the contested verdict should be revoked in whole or partially, or to be modified; signature of the person filing the appeal (Article 435). Grounds for an appeal can be: essential violations of criminal procedure; violation of the criminal law; incorrectly or incompletely established factual situation; due to a decision on criminal sanctions (Article 437). Translated into the language of everyday life, it may mean that the person may appeal because the Court was without jurisdiction, obsolescence occurred, if the judge ought to be excluded (for example, a close relative of the prosecutor or the damaged party), if the accusation is exceeded by the verdict, etc.; then because some provision of the Criminal Code was misinterpreted and wrongly implemented (the offense does not exist in law or the wrong law is applied, etc.); then because some facts were wrongly established, or because there is no error, but the decision on the sanction, which the Court has issued, was wrong. For example, the Court was too strict on the sentence. In our Courts practice, so far, as the basis for the appeal lawyers cite all the above: procedural reasons, errors in the interpretation of the criminal code, wrongly determined factual situation and decision on punishment.

The appeal should be submitted to the first instance Court that issued the verdict, in a sufficient number of copies for the Court, the opposite side, the defense counsel and the damaged party. The Court may find that the appeal is untimely, or that is unauthorized (filed by persons who are not authorized to file an appeal), or may find that the appeal is not properly written and it usually means that the written illegible. In each of these cases, the Court will issue a decision rejecting the appeal. When this

is not the case, the Court will forward the appeal to the opposite side for a response and it has eight days to submit its response to the appeal. After that, all the documents are submitted to the competent Court of the second instance. The second instance Court determines the judge who reports to the second instance Judicial panel, then the judicial panel decides whether only one session of the panel should be held, that will decide on the appeal, or, which is less common, the panel will open a new main hearing before the second instance Court. All those who were informed may attend the main hearing, and some of the participants could be asked to provide certain clarifications. The hearing before the second instance Court will take place primarily when in the first instance facts were established incorrectly and incompletely, or some evidence was not presented (Articles 442 to 454).

The second instance Court will issue an appropriate decision on the appeal. This decision may be a decision on rejecting the appeal, if the appeal is unauthorized (filed by those who are not authorized to file an appeal), if the appeal is untimely, or not properly written. It is a formal decision. However, if the Court does not issue such a decision, it can issue a verdict rejecting the appeal, and it will be when he finds that the appeal is unfounded and, in fact, he confirms the first instance verdict. On the other hand, the second instance Court may decide positively on the appeal. In this case there are two options. The Court can issue a decision on the adoption of the appeal and then return the case to the first instance Court for a retrial, where, in some cases, the judicial panel can decide to repeat the hearing before the first instance panel but in different composition. The second instance Court may issue a decision for the acceptance of the appeal. When it finds that the legal and factual situation is already well enough established in the second instance, it may issue a verdict on the matter. However, this case is less common than the fact that the second instance Court gives it back for retrial.

Appeal can also be filed against the second instance verdict, but only if in the first instance the defendant was acquitted, and then in the second instance, the court reversed the verdict and issued the verdict finding the defendant guilty. Then we actually have the procedure in the third instance, where the Court of Appeals decides, and apply the rules same as for the second instance procedure.

8.5.9. EXTRAORDINARY LEGAL REMEDIES:

Extraordinary legal remedies should also be listed here, which can be filed even if the verdict is final. It is, for example, the *renewal of a procedure*. This request may be filed after the convicted person had served its sentence, and even after its death, by the public prosecutor. Reasons for the renewal of a procedure are: if the verdict was based on a false identification or false testimony of a witness, expert witness, or someone else. Also, if the verdict was issued as a result of a criminal activity of the judge, public prosecutor or any other relevant body that participated in the procedure; if new facts are brought to the Court, or the Court discovered new evidence that can be used and possibly could lead to a different verdict; if the defendant was already convicted for the same offense, or more persons have been convicted of an offense that could have been done by only one person, and so on. Judicial panel, that decided in the first instance, will decide on the request for the renewal of a procedure. The rules of the procedure are similar to the procedure for the ordinary appeal.

Another extraordinary legal remedy is the *request for the protection of lawfulness*. It is filed against the verdict that has become final. This request may be filed by the Public Prosecutor of the Republic, or the convicted, but only through its counsel. This request is filed because of the violation of the law;

because the law applied by the Constitutional Court is declared unconstitutional; because of a violation of a human right and freedom of the defendant, which are guaranteed by the Constitution or the Republic of Serbia²³⁸, or the European Convention on Human Rights²³⁹. The Supreme Court of Cassation decides on the request, in a regulated procedure.

All in all, we should have in mind: in this area, Serbia is in the process of significant systemic reform. There is not enough time to be able to answer the question of whether and how the system works, how participants are managed in the procedure, above all, prosecutors and lawyers. That should be taken into account when considering the current Criminal procedural system in Serbia.

8.6. Alternative Mechanisms to Protect/Enforce Rights and Responsibilities

In addition to criminal charges and request for compensation for damages in the civil procedure, patients are entitled to several methods for the protection and the realization of their rights.

The right to object:

Law on protection of Patients' Rights established the basic right of patients to object, if they consider that they were denied medical care in a Health care institution or any other legal entity that provides Health care services, or they were denied medical care by some of the Health care providers. Patient may object under Article 30 of the Law on protection of Patients' Rights²⁴⁰:

- ▶ Health care worker who manages the work process,
- ▶ Director of the Health care institution,
- ▶ Counselor for protection of patients' rights.

Competent for deciding on the patients' objection is the Counselor for protection of patients' rights who is named by the Local government units.

8.6.1. COUNCELOR FOR PROTECTION OF PATIENTS' RIGHTS:

The objection to the Counselor for protection of patients' rights (hereinafter: Patients' counselor) is submitted by the patient itself or its legal representative, in writing or orally on the record.

About the objection for denied medical care decides the relevant Minister concerning Rule book for objection, the form and content of the request, and on the records and reports of the Patients' counselor²⁴¹.

Patients' counselor acts on the territory of the Local government units, and may be responsible for several units. He gives advice and provides necessary information about patients' rights, and to successfully perform this function, the Law expressly provides that Health care institutions and all other

238 Official Gazette 98/2006.

239 European Convention on Human Rights, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed January 11, 2015)

240 Official Gazette RS 45/2013.

241 Official Gazette RS 45/2013.

Health care providers will, at the request of Patients' councilor acting on the objection of the patient, no later than five working days, have to submit all required information, data and opinions.

By this objection, Patients' councilor immediately, but no later than five working days, determines all the relevant facts and circumstances related to the allegations in the objection and makes the record. Based on the record and findings of the relevant facts and circumstances relating to the objection of the patient, Patients' councilor constitutes an appropriate report. Immediately or not later than three working days, the report is delivered to the patient, the Head of the organizational unit and the director of the Health care institution or the founder of a private practice. Within five days, they should inform the Patients' councilor about the patients treatment and measures undertaken in connection with the objection.

If the patient is not satisfied with the report of the Patients' councilor or there is no reply, then the patient may address to the Health Council, Health Inspection and the competent organ of the organization of its Health insurance.

8.6.2. HEALTH COUNCIL:

Health Councils are established in local government units and they consist of Representatives of the local government units, representatives of associations of citizens from among patients, Health care institutions and competent branch of the National Health Insurance Fund. In the Law on protection of Patients' Rights (in Articles 42 and 43) the Council has entrusted some of the powers relating to the protection of patients' rights, such as the handling of complaints about the violation of individual rights of patients; making recommendations to the directors of Health care institutions or the founders of private practice; considering the reports of the Councilor for protection of patients' rights; monitoring the exercise of the rights of patients in the territory of the local government unit.

8.6.3. COUNCELOR FOR PROTECTION OF INSURED PERSONS' RIGHTS:

Patients who believe that their rights of Health insurance have been damaged or violated, can contact the employee in the National Health Insurance Fond, so called Councilor for protection of Insured persons' rights, pursuant to Article 4 of the Regulations on the procedure for the protection of the rights of the insured persons of the National Health Insurance Fund.²⁴² Patients' rights councilors are appointed by the National Health Insurance Fund and allocated to the Health care institutions. Councilor for protection of Insured persons' rights allows communication between the insured and the organizational units of the Health Insurance compiling the necessary reports and informing them about the perceived irregularities in service provision.

Every insured person who believes that have been violated any of the rights under the insurance, has the right to submit an application to the Councilor for protection of Insured persons' rights, which will further request the necessary information from the responsible person or the Head of the organizational units of the Health care services to which the application is related. In a further period of five working days, the Councilor for protection of Insured persons' rights, will notify, in writing, the applicant of the measures that have been taken. The Councilor puts forward the submitted application and the National Health Insurance Fond for an appropriate action toward Health care provider.

²⁴² Official Gazette RS 68/2013.

If unsatisfied with the responses, the patient may contact directly the organizational unit of the National Health Insurance Fond.

8.6.4. PROTECTION BY THE BRANCH OF THE NATIONAL HEALTH INSURANCE FOND:

Regulations on the procedure for the protection of Insured persons' rights of more precisely list the obligations of the Fund and its duties with respect to the rights of the insured persons. One of the tasks of the National Health Insurance Fond, among other things, is to control whether the Health care institutions, with which it has concluded contracts, properly and successfully carry out their contractual obligations related to the provision of Health care services. In case that the Health care institution denies or limits some of the rights for a patient from its Health insurance, the patient can address with the National Health Insurance Fond (Article 213 of the Health Insurance Law).²⁴³

If a patient in his application indicates that he was denied or prevented a right to Health insurance in a Health care institution, the relevant branch or the Fund, as well as the Provincial Fund will give the patient advice and guidance on the next steps and concerning Health care institution, it has the authority to undertake certain measures.

Security supervisor in the exercise of control can (under Article 190 of the Health Insurance Law):

- ▶ order Health care institution to correct defects and to return wrongfully charged money from the patient,
- ▶ propose the termination of the contract with the Health care institution,
- ▶ propose to reduce the amount that the Fund provides for the Health care institution for the cost of services that are not provided to the patient or
- ▶ propose a misdemeanor charge against the Health care institution.

If the parent branch of the National Health Insurance Fund in acting on presumption of the patient, finds that everything was in accordance with the regulations, or that Health care institutions and Health care providers acted in accordance with the Laws, the patient has no right to appeal.

On the other hand, if the branch notes that Health care service was not covered by the Health insurance to which denial of a patient complains, the patient remains with a possibility to appeal to the decision rejecting the application.

8.6.5. QUALITY CONTROL OF HEALTH CARE INSTITUTIONS AND PRIVATE PRACTICE WORK:

Law on Health Care (Article 205)²⁴⁴ provides the possibility of external and internal quality control of Health Care institutions, private practice and Health care providers. Internal control of the quality of professional work in a Health Care institution shall be conducted on the basis of the annual program checks that should improve the quality of professional work of the Health care institution.

243 Official Gazette RS 107/2005, 109/2005 – corr. 57/2011, 110/2012 - decision of the Constitutional Court, 119/2012, 99/2014, 123/2014 and 126/2014 - decision of the Constitutional Court.

244 Official Gazette RS 107/2005, 72/2009 - Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – Law and 93/2014.

External control of the quality of professional work is conducted by the Ministry of Health at the request of citizens, institutions, organizations, Health insurance organs and state authority, and is performed by the supervisors appointed by the Ministry of Health. Upon completion of the quality control, supervisors make a report in which they identify gaps and deficiencies in professional work, as well as expert opinion about the possible consequences of such work in Health care institutions. Completed report the supervisor submits to the Ministry, Health care institution, private practice, as well as competent Chamber if the control is performed of the work of a Health care provider (Article 210 of the Law on Health Care). Along with the report, the supervisor proposes appropriate measures that should be taken. Based on the report and the measures proposed by the supervisor, the Minister will issue a decision that may (Article 211 of the same Law):

- ▶ temporarily prohibit, in whole or in part, the performance of certain tasks of a Health Care institution or private practice;
- ▶ temporarily prohibit, in whole or in part, the work of the organizational work of the Health care institution or private practice;
- ▶ temporarily prohibit the operation of the Health Care institution or private practice;
- ▶ propose to a competent Chamber to suspend the license of a Health care provider, under the conditions stipulated by this Law.

8.6.6. HEALTH INSPECTION:

The official name of the Health inspection is the Department of Health Inspection, which is a part of the Department for the Inspection of the Ministry of Health.

Patients' right to address to the Health inspection is provided by the Law on protection of Patients' Rights²⁴⁵ (Article 41) and by the Law on Health Care²⁴⁶ (Article 243).

The purpose of conducting supervision over the work of Health care institutions and private practices is in the establishing of the lawfulness of their work. In order to achieve this, Health care institutions are obliged to provide Health inspectors with access to their documents, inspection of premises and to take other actions to be able to carry out supervision.

Upon completion of the control, the Health inspector makes a report on factual findings, which is then delivered to the Health care institution or private practice over which he exercised supervision. Then, a Health inspector will issue a decision ordering the measures, actions and deadlines that must be performed. Over this decision, an appeal can be filed to the Minister.

The Health inspector, upon completion of the control, issues a decision that may (Article 249 of the Law on Health Care):

- ▶ order the removal of shortcomings in the work of Health care institution immediately or within a period which shall not be less than 15 days nor more than six months; this may mean, for example, that the outpatient Department of the Health center, to be ordered to make a ramp at the entrance to make Health care more accessible to persons with disabilities;

²⁴⁵ Official Gazette RS 45/2013.

²⁴⁶ Official Gazette RS 107/2005, 72/2009 - Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – Law and 93/2014.

- ▶ temporarily prohibit work or perform certain tasks in a Health care institution for at least 60 days and a maximum of six months;
- ▶ temporarily prohibit work or performance of certain tasks to a Health care provider for a period of 30 days to six months;
- ▶ prohibit the independent work of Health care provider who is not licensed;
- ▶ propose a competent Medical chamber to revoke the license of a Health care provider.

Independently of these measures, the inspector may file charges against institutions and Health care providers for every violation of the rights of patients like a misdemeanour procedure.

A person who is not satisfied with the outcome of addressing the Health inspection, can always turn to the Ombudsman (Protector of Citizens).

8.6.7. PROTECTOR OF CITIZENS:

The Ombudsman (hereinafter: Protector of Citizens) is established as an independent state body that protects the rights of citizens and controls the work of state bodies and organs, enterprises and institutions entrusted with public authority.

Article 24 of the Law on the Protector of Citizens²⁴⁷ provides that the Protector of Citizens may initiate a procedure on citizens' complaints or on its own initiative. Any person or legal entity, domestic or foreign, who consider that an act of the state administration violated its rights may file a complaint to the Protector of Citizens (Article 25 of the same Law). Before submitting a complaint to the Protector of Citizens, a person must try to exercise their rights in an appropriate legal procedure, that will also be the first instruction of the Protector. The deadline for filing a complaint is one year from the day of the violation of persons rights. About the initiation and the completion of the procedure, the Protector of Citizens informs the complainant and the state body against which the complaint was filed, which must respond to the demands of the Protector of Citizens.

The state body can remove these deficiencies and inform the Protector of Citizens, who will then finish the procedure. Otherwise, the Protector of Citizens makes recommendations for eliminating work defects of that body. If the state body fails to comply with the recommendation, the Protector of Citizens may inform the public, the Parliament and the Government, but also recommend establishing the responsibility of the official in charge of that state body (Article 31, paragraph 5 of the Law on the Protector of Citizens).

Furthermore, the Protector of Citizens has the right to propose laws within its jurisdiction, giving opinions on the proposals and drafts of these laws. According to the Law on protection of Patients' Rights²⁴⁸ the Health Council is obliged to submit an annual report to the Protector of Citizens on its activities and measures taken to protect patients' rights (Article 42, paragraph 2).

247 Official Gazette RS 79/2005 and 54/2007.

248 Official Gazette RS 45/2013.

8.6.8. COMMISSIONER FOR PROTECTION OF EQUALITY

The Commissioner for Protection of Equality is an independent, autonomous and specialized state authority established on the basis of the Law on Prohibition of Discrimination from 2009. The task of this state authority is to prevent all forms, types and cases of discrimination, to protect the equality of natural persons and legal entities in all spheres of social relations, to oversee the enforcement of antidiscrimination regulations, and to improve realization and protection of equality.

The Commissioner for Protection of Equality is competent to carry out the procedure based on complaints in cases of discrimination against persons or groups of persons connected by the same personal characteristic. The Commissioner is competent to receive and consider complaints of discrimination, to issue opinions and recommendations in concrete discrimination cases, and to stipulate measures defined by the Law.

In addition, the Commissioner is obliged to inform the complainant about his or her rights and possibilities to initiate a court procedure or another protection measure, including the reconciliation procedure. The Commissioner is also authorized to file complaints for protection from discrimination, with approval of the discriminated person.

The Commissioner is also competent to file offence reports against discrimination acts prohibited by the antidiscrimination regulations.

The Commissioner is authorized to warn the public about the most common, typical and severe cases of discrimination, to monitor the enforcement of laws and other regulations, to initiate adoption or amendments of regulations with the aim of making them more enforceable and improving protection from discrimination, and to recommend measures for achieving equality to public authorities and other parties concerned.

8.6.9. MEDICAL CHAMBERS:

Any Health care worker must be a member of the Chamber of medical workers. There are 5 types of chambers of Health care professionals: medical, dental, pharmaceutical, chamber of biochemists and the chamber of nurses and medical technicians (Article 2 of the Law on Chamber of medical workers).²⁴⁹

Chambers with their ethical codes govern the rules of professional conduct of medical workers (including the rules of conduct towards patients) and issue to its members work permits (licenses) (Article 7 of the Law on Chamber of medical workers). Code of Professional Ethics of each chamber determines relationships of its members, as well as rules for treating patients. Ethical rules are different in certain respects, but all codes stipulate that the medical worker is obligated to responsibly and professionally perform its job, respect the dignity and equal rights of every patient and reject any request that might be unethical or harmful to the patient.

Addressing to the competent Medical Chamber

If the damaged patient decides to address the competent Chamber, it has two possibilities: to address the Court of Honour of the competent Chamber and to seek initiation of disciplinary procedure against a medical worker (Articles 39, 40 and 41 of the Law on Chamber of medical workers),

²⁴⁹ Official Gazette RS 107/2005 and 99/2010.

to ask the Commission for mediation in the Medical chamber to initiate and conduct the mediation, if the other party agrees to the procedure (Articles 37 and 38 of the Law on Chamber of medical workers).

Mediation procedure

Mediation procedure is conducted only in the medical chamber by the Commission for mediation, while other chambers only appoint the mediator who will lead the procedure. The deadline for the completion of the mediation procedure is 30 days. The outcome of the mediation is the settlement of the parties that has the character of extrajudicial settlement.

Possible outcomes of the mediation settlements are: obligation of the medical worker to publicly apologize to the person who has suffered the damage caused by his negligent or improper treatment or to provide adequate compensation for the damage. If the mediation procedure fails, the patient may initiate a disciplinary or judicial procedure.

Disciplinary procedure before the Court of Honour

If in the mediation procedure on the basis of complaints from citizens, Chamber suspects that a member committed misconduct or damaged its reputation, the Chamber will initiate a disciplinary procedure against a member before the Court of Honour, which is organized as a Court of the first and the second instance (Article 42 Law on Chamber of medical workers). Also, the patient can address the Court of Honour directly.

The Court of Honour can issue a public reprimand to the medical worker, a fine, a temporary prohibition of independent work or performing certain tasks or activities in general. When the Court of Honour determines that the medical worker does not abide the law, it can be punished with a fine, and he may, temporarily or permanently, be revoked of its license.

If a person is not satisfied with the decision of the Court of Honour of the first degree, it can appeal to the Court of Honor of the second degree, which is located at the headquarters of the Chamber (Article 42 of the Law on Chamber of medical workers).

Revocation of the license

The Chamber is obliged to *temporarily revoke* the license of the medical worker if: it made a professional error which distorts or deteriorates the Health status of a patient; if it was sentenced to one of the measures of temporary prohibition of independent work by the Court of Honour; if it is convicted of a criminal offense that makes it unworthy to perform the profession of medical workers; if in the provision of medical services it misused the funds of Health insurance.

The chamber will *permanently revoke* the license of a medical worker who has been convicted by final verdict to imprisonment for a serious crime against human health, therefore, if as a result of these acts (including the malpractice and failure to provide medical assistance) someone is seriously injured, its Health is severely damaged or it dies (Article 198, Paragraph 1 of the Law on Health Care).²⁵⁰

Permanent revocation of the license does not mean that the medical worker can never work in Health care again. It can perform certain tasks, but only under the supervision of a Health care professional who is licensed and who is like a "tutor" appointed by the Director of the Health care institution, or founder of private practice (Article 198, paragraph 2 of the Law on Health Care).

250 Official Gazette RS 107/2005, 72/2009 - Law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 - Law and 93/2014.

8.6.10. THE OFFICE FOR PATIENTS' RIGHTS PROTECTION:

The office for Patients' Rights Protection was organized as a separate organizational unit of the Belgrade City Administration. Its main tasks are to inform patients about their rights and how they can exercise it, and may also act on written and oral complaints of patients. Its jurisdiction is limited to the territory of Belgrade.

The complaint of the patient may refer to a Health care institution, Health care services, private practice or any other legal entity that provides Health care services.

Advisors who work in the Office will immediately act on the complaint, examine the accuracy of the statements and then make a report which is sent to the patient and the person in charge of the institution. If the advisor determines that the patient's rights have been violated, the responsible person is obliged to inform the advisor about the measures taken in relation to the complaint. If the patient is not satisfied with the outcome of the complaint procedure, it may address the Health Council and the Health Inspection.



International Glossary

A

Acceptability

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest attainable standard of health. **Acceptability:** means that all health facilities, goods and services must be respectful of medical ethics, culturally appropriate, sensitive to gender and life-cycle requirements, as well as designed to respect confidentiality and improve the health status of those concerned (Committee on Economic, Social and Cultural Rights, General Comment 14). *See also "Accessibility," "Availability," and "Quality."*

Accessibility

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest attainable standard of health. **Accessibility:** means that health facilities, goods and services have to be accessible to everyone without discrimination. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic feasibility (affordability), and information accessibility (Committee on Economic, Social and Cultural Rights, General Comment 14). *See also "Acceptability," "Availability," and "Quality."*

Accession

The act whereby a state that has not signed a treaty expresses its consent to become a party to that treaty by depositing an "instrument of accession." Accession has the same legal effect as ratification. Accession is generally employed by States wishing to express their consent to be bound by a treaty where the deadline for signature has passed. However, many modern multilateral treaties provide for accession even during the period that the treaty is open for signature.

Actio Popularis (public action)

A legal action brought by any member of a community in vindication of a public interest.

Adoption

The formal act by which negotiating parties establish the form and content of a treaty. The treaty is adopted through a specific act expressing the will of the States and the international organizations participating in the negotiation of that treaty, e.g., by voting on the text, initialing, signing, etc. Adoption may also be the mechanism used to establish the form and content of amendments to a treaty, or regulations under a treaty. Treaties that are negotiated within an international organization are usually adopted by resolution of the representative organ of that organization. For example, treaties negotiated under the auspices of the United Nations, or any of its bodies, are adopted by a resolution of the General Assembly of the United Nations

Adoption Theory

A theory maintaining that international law becomes an automatic part of domestic law following treaty accession or ratification, without further domestication.

Amicus Curiae (Friend of the court)

A legal document filed with the court by a neutral party generally advocating a particular legal position or interpretation. The plural form is amici curiae.

Ambulatory Care

Medical care including diagnosis, observation, treatment and rehabilitation provided on an outpatient basis.

Availability

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest attainable standard of health. Availability: means that functioning public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantity. This should include the underlying determinants of health, such as safe drinking water, adequate sanitation facilities, clinics and health-related buildings, trained medical personnel, and essential drugs (Committee on Economic, Social and Cultural Rights, General Comment 14). *See also* "Acceptability," "Accessibility," and "Quality."

B**Basic needs**

Used largely in the development of community to refer to basic health services, education, housing, and other goods necessary for a person to live.

Bioethics

Refers to "the broad terrain of the moral problems of the life sciences, ordinarily taken to encompass medicine, biology, and some important aspects of the environmental, population and social sciences. The traditional domain of medical ethics would be included in this array, accompanied now by many other topics and problems." (Encyclopedia of Bioethics, Warren T. Reich, editor-in-chief, New York: Simon & Schuster Macmillan, 1995, page 250)

Biomedicine

The term unifies fields of clinical medicine and research for health purposes. Broadly it is also defined as the application of the principles of the natural sciences, especially biology and physiology, to clinical medicine.

C

Concluding Observations

Recommendations by a treaty's enforcement mechanism on the actions a state should take in ensuring compliance with the treaty's obligations. This generally follows both submission of a state's country report and a constructive dialogue with state representatives.

Country Report

A state's report to the enforcement mechanism of a particular treaty on the progress it has made in implementing it.

Convention

This term is used interchangeably with treaty, but it can also have a specific meaning as a treaty binding a broad number of nations. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually instruments negotiated under the auspices of an international organization are entitled conventions. The same holds true for instruments adopted by an organ of an international organization.

Customary International Law

One of the sources of international law. It consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way. It follows that customary international law can be discerned by a widespread repetition by States of similar international acts over time (State practice). Acts must occur out of a sense of obligation and must be taken by a significant number of States and not be rejected by a significant number of States. A particular category of customary international law, *jus cogens* refers to a principle of international law so fundamental that no state may opt out by way of treaty or otherwise. Examples might include prohibitions against slavery, genocide, torture and crimes against humanity. Other examples of customary international law include the principle of non-refoulement and, debatably, the right to humanitarian intervention.

D

De Facto (In fact, in reality)

Existing in fact.

De Jure (By right, lawful)

A situation or condition that is based on a matter of law, such as those detailed in ratified treaties.

Declaration

An interpretative declaration is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a State's position and do not purport to exclude or modify the legal effect of a treaty.

Dignity

The quality of being worthy, honored, or esteemed. Human rights are based on inherent human dignity and aim to protect and promote it.

Discrimination

Distinction between persons in similar cases on the basis of race, sex, religion, political opinions, national or social origin, associations with a national minority or personal antipathy (World Health Organization- WHO).

Domestication

The process by which an international treaty is incorporated into domestic legislation.

Dual Loyalty

Role conflict between professional duties to a patient and obligations—express or implied, real or perceived—to the interests of a third party such as an employer, insurer, or the state.

E**Entry into Force**

The moment in time when a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine the moment of its entry into force. This may be a date specified in the treaty or a date on which a specified number of ratifications, approvals, acceptances or accessions have been deposited with the depositary.

Essential Medicines

Medicines that satisfy the priority health-care needs of the population. Essential medicines are intended to be available at all times in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and the community can afford.

Exhaustion of Domestic Remedies

Refers to the process required before submitting a complaint on behalf of a victim to any regional or international tribunal. All available procedures must first be used to seek protection from future human rights violations and to obtain justice for past abuses. There are limited exceptions to the requirement that domestic remedies be exhausted: remedies may be unavailable, ineffective (i.e. a sham proceeding) or unreasonably delayed.

G**General Comments/Recommendations**

Interpretive texts issued by a treaty's enforcement mechanism on the content of particular rights. Although these are not legally binding, they are widely regarded as authoritative and have significant legal weight.

H**Health**

A state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity (WHO).

Health Care

1. The prevention, treatment, and management of illness and the preservation of mental and physical well-being through the services offered by the medical, nursing, and allied health professions. This definition and similar ones sometimes are given for "patient care" as well. The World Health Organization states that this embraces all the goods and services designed to promote health, including preventive, curative, and palliative interventions, whether directed to individuals or populations.

2. Any type of services provided by professionals or paraprofessionals with an impact on health status (Online Glossary, European Observatory on Health Systems and Policy).

3. Medical, nursing or allied services dispensed by health care providers and health care establishments (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994). *See also "Patient Care."*

Health Care Establishment

Any health care facility such as a hospital, nursing home, or establishment for disabled persons (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994).

Health Care Providers

Physicians, nurses, dentists, or other health professionals (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994).

Health Care System

The organized provision of health care services.

Human Rights

Entitlements, freedoms, and privileges which adhere to all human beings regardless of jurisdiction or other factors such as ethnicity, nationality, religion, or sex. Human Rights are universal legal guarantees protecting individuals and groups from interference with fundamental freedoms and human dignity. Some of the most important characteristics of human rights are that they are:

- guaranteed by international standards
- legally protected
- focus on the dignity of the human being
- oblige states and state actors
- cannot be waived or taken away
- interdependent and interrelated; and
- universal

(The United Nations System and Human Rights: Guidelines and Information for the Resident Coordinator System, Geneva, March 2000).

Human Rights Indicators

Criteria used to measure compliance with international human rights standards.

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. It is complementary to bioethics but provides a set of universally accepted norms and procedures for making conclusions about abuses within health care settings and providing remedies. It uses standards contained in the international human rights framework, which are often mirrored in regional treaties and national constitutions. It differs from patients' rights, which codify particular rights that are relevant only to patients rather than applying general human rights standards to all stakeholders in health care service delivery, including providers. It draws on concepts such as dual loyalty, which attributes much human rights abuse in health settings to health care providers simultaneous and often conflicting obligations to their patients and to the State. *See also "Dual Loyalty."*

Interdependent/Indivisible

The term used to describe the relationship between civil and political rights and economic and social rights. Interdependence and indivisibility mean that one set of rights does not take precedence over the other, and that guaranteeing each set of rights is contingent upon guaranteeing the other.

Indirect Discrimination

Descriptive term for a situation in which the effect of certain imposed requirements, conditions or practices has a disproportionately adverse impact on one group or other. It generally occurs when a rule or condition applying to everyone is met by a considerably smaller proportion of people from a particular group, the rule is to their disadvantage, and it cannot be justified on other grounds.

Individual Rights in Patient Care

More readily expressed in absolute terms than are social rights in health care. When made operational, can be made enforceable on behalf of an individual patient (Declaration on the Promotion of Patients' Rights in Europe, WHO Amsterdam, 1994, Guiding Principles). *See also* "Social Rights in Health Care" and "Patient's Rights."

Informed Consent

A legal condition in which a person can be said to agree to a course of action based upon an appreciation and understanding of the facts and implications. The individual needs to be in possession of relevant facts and the ability to reason.

Informed Consent in the Health Care Context

A process in which a patient participates in health care choices. A patient must be provided with adequate and understandable information on matters such as the treatment's purpose, alternative treatments, risks, and side-effects.

In-patient

A patient whose care requires a stay in hospital or hospice facility for at least one night.

International Human Rights Law

Codifies legal provisions governing human rights in various international and regional human rights instruments.

International Law

The set of rules and legal instruments regarded and accepted as binding agreements between nations. International law is typically divided into public international law and private international law. Sources are (a) custom; (b) treaties; (c) general principles of law and (d) judicial decisions and juristic writings (Article 38(1)(d) of the Statute of the International Court of Justice).

J

Jus Cogens

Peremptory principle of international law (e.g., prohibition on torture) from which no derogation by treaty is permitted.

M

Maximum Available Resources

Key provision in Article 2 of International Covenant on Economic, Social and Cultural Rights obliging governments to devote the maximum of available government resources to realizing economic, social and cultural rights.

Medical Intervention

Any examination, treatment, or other act having preventive, diagnostic, therapeutic or rehabilitative aims and which is carried out by a physician or other health care provider (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994).

Monitoring/Fact Finding/Investigation

Terms often used interchangeably, generally intended to mean the tracking and/or gathering of information about government practices and actions related to human rights.

N**Negative Rights**

Rights under which a State is obliged to refrain from unjustly interfering with a person and/or their attempt to do something.

Neglected Diseases

Diseases affecting almost exclusively poor and powerless people in rural parts of low-income countries that receive less attention and resources.

O**Out-patient**

Patient receiving treatment without spending any nights at a health care institution.

P**Party**

A State or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the State is bound by the treaty under international law (Article 2(1)(g) of the Vienna Convention, 1969).

Patient

1. User(s) of health care services, whether healthy or sick (Declaration on the Promotion of Patients' Rights in Europe ,WHO, Amsterdam 1994). 2. A person in contact with the health system seeking attention for a health condition (Online Glossary, European Observatory on Health Systems and Policies).

Patient Autonomy

The right of patients to make decisions about their medical care. Providers can educate and inform patients, but cannot make decisions for them.

Patient Care

The services rendered by members of the health professions or non-professionals under their supervision for the benefit of the patient. *See also* "Health Care."

Patient-Centered Care

Doctrine recognizing the provision of health care services as a partnership among health care providers and patients and their families. Decisions about medical treatments must respect patients' wants, needs, preferences, and values.

Patient Confidentiality

Doctrine that holds that the physician has the duty to maintain patient confidences. This is to allow patients to make full and frank disclosure to their physician, enabling appropriate treatment and diagnosis.

Patient Mobility

Concept describing patient movement beyond their catchment area or area of residence to access health care; mobility can take place within the same country or between countries.

Patient Responsibility

Doctrine recognizing the doctor/patient relationship as a partnership with each side assuming certain obligations. Patient responsibilities include communicating openly with the physician or provider, participating in decisions about diagnostic and treatment recommendations, and complying with the agreed-upon treatment program.

Patients' Rights

1. A set of rights calling for government and health care provider accountability in the provision of quality health services. Associated with a movement that has emerged out of increasing concern about human rights abuses in health care settings, particularly in countries where patients are assuming a greater share of health care costs and thus expect to have their rights as "consumers" respected.
2. A set of rights, responsibilities and duties under which individuals seek and receive health care services (Online Glossary, European Observatory on Health Systems and Policies).
3. What is owed to the patient as a human being by physicians and the State.

Patient Safety

Freedom from accidental injury due to medical care or medical errors (Institute of Medicine).

Positive Rights

Rights under which a State is obliged to do something for someone.

Primary Health Care

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

The requirement in Article 2 of the International Covenant on Economic, Social and Cultural Rights that governments move as expeditiously and effectively as possible toward the goal of realizing economic, social and cultural rights, and to ensure there are no regressive developments.

Protocol

Refers to a section in a treaty that clarifies terms, adds additional text as amendments, or establishes new obligations. These new obligations can be quantitative targets for nations to achieve.

Public Health

Collective actions of a society to ensure conditions in which people can be healthy (Institute of Medicine).

Public International Law

Establishes the framework and the criteria for identifying states as the principal actors in the international legal system. Deals with the acquisition of territory, state immunity and the legal responsibility of states in their conduct with each other. Also concerned with the treatment of individuals within state boundaries including human rights, the treatment of aliens, the rights of refugees, international crimes and nationality. It further includes the maintenance of international peace and security, arms control, the pacific settlement of disputes and the regulation of the use of force in international relations. Branches, therefore, include international human rights law, international humanitarian law, refugee law and international criminal law.

Q

Quality

One of four criteria set out by the Committee on Economic, Social, and Cultural Rights by which to evaluate the right to the highest attainable standard of health. Quality: means that health facilities, goods, and services must be scientifically and medically appropriate and of good quality. This requires skilled medical personnel, scientifically-approved and unexpired drugs, and hospital equipment (Committee on Economic, Social and Cultural Rights, General Comment 14). *See also "Acceptability," "Accountability," and "Availability."*

R

Ratification

The formal acceptance of the rights and obligations of a treaty. If the treaty has entered into force, the treaty thereafter becomes legally binding to parties that have ratified the treaty. Requires two steps: (a) the execution of an instrument of ratification, acceptance or approval by the Head of State, Head of Government or Minister for Foreign Affairs, expressing the intent of the State to be bound by the relevant treaty; and (b) for multilateral treaties, the deposit of the instrument with the depositary; and for bilateral treaties, the exchange of the instruments between parties.

Reservation

A statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. A reservation may enable a State to participate in a multilateral treaty that it would otherwise be unable or unwilling to participate in. States can make reservations to a treaty when they sign, ratify, accept, approve or accede to it. When a State makes a reservation upon signing, it must confirm the reservation upon ratification, acceptance or approval. Since a reservation purports to modify the legal obligations of a State, it must be signed by the Head of State, Head of Government or Minister for Foreign Affairs. Reservations cannot be contrary to the object and purpose of the treaty. Some treaties prohibit reservations or only permit specified reservations.

Respect, Protect and Fulfill

Governments' obligations with respect to rights. Respect: Government must not act directly counter to the human rights standard. Protect: Government must act to stop others from violating the human rights standard. Fulfill: Government has an affirmative duty to take appropriate measures to ensure that the human rights standard is attained.

Right to Health

Right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of physical and mental health (Committee on Economic, Social and Cultural Rights, General Comment 14).

S

Secondary Health Care

General health services available in hospitals

Social Rights in Health Care

Category of rights that relate to the societal obligation undertaken or otherwise enforced by government and other public or private bodies to make reasonable provision of health care for the whole population. They also relate to equal access to health care for all those living in a country or other geopolitical area and the elimination of unjustified discriminatory barriers, whether financial, geographical, cultural or social and psychological. They are enjoyed collectively (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994, Guiding Principles). See also "Individual Rights in Patient Care."

Self-Executing Treaty

A treaty that does not require implementing legislation for its provisions to have effect in domestic law.

Shadow Report

An independent NGO submission to a treaty enforcement mechanism to help it assess a state's compliance with that treaty.

Signatory

A party that has signed an agreement. In regards to a treaty, a signatory is not yet legally bound by the treaty. Instead, a signatory agrees to an obligation not to defeat the object and purpose of a signed treaty. *See also* "Ratification."

Special Rapporteurs

Individuals appointed by the Human Rights Council to investigate human rights violations and present an annual report with recommendations for action. There are both country-specific and thematic special rapporteurs, including one on the right to the highest attainable standard of health.

T

Terminal Care

Care given to a patient when it is no longer possible to improve the fatal prognosis of his or her illness/condition with available treatment methods, as well as care at the approach of death (Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam, 1994).

Tertiary Health Care

Specialized health services available in hospitals.

Transformation Theory

A theory maintaining that international law only becomes part of domestic law after domestication and the incorporation of treaty provisions into domestic legislation.

Treaty

A formal agreement entered into by two or more nations which is binding upon them. A bilateral treaty is a treaty between two parties. A multilateral treaty is a treaty between more than two parties.

W

Working Groups

Small committees appointed by the Human Rights Council on a particular human rights issue. Working groups write governments about urgent cases and help prevent future violations by developing clarifying criteria on what constitutes a violation

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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 forms for resolving claims, such as ombudspersons and ethics review committees. *The Practitioner Guide* is a useful reference for lawyers and other professionals working in a region where the legal landscape is often in flux. The full series is available at www.health-rights.org.



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