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Country-Specific Notes

5.1 Status of International and Regional law

Since 1991, the legal system of the independent Ukrainian state has undergone major changes. Ukraine joined the Council of Europe (1995) and adopted the Constitution (June 28, 1996). In 1994, the Agreement on Partnership and Cooperation between Ukraine and the European Communities and their Member States was ratified, and in 2005 the Cabinet of Ministers of Ukraine and the Council on Cooperation between Ukraine and the European Union approved an action plan for advancing compatibility of legislative systems “Ukraine – European Union” (February 12, 2005). Ukraine has adopted a number of international legal standards in the domains of human rights and health care, has created conditions for integration of international norms into its national legislation. In 2008, Ukrainian Medical Society became a member of the World Medical Association at the General Assembly (October 15-18, 2008, Seoul). Consequently, the impact of legislative practices of the organization on the national health care legislation has been increasing.

According to Article 9 of the Constitution of Ukraine, current international treaties ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine. Ratification of international treaties that contravene the Constitution of Ukraine is possible only after relevant amendments to the Constitution of Ukraine had been made.

Having become a member of the European and World community, Ukraine simultaneously took a wide range of obligations, aimed at promoting integration into “world territory”. The mentioned obligations flow out from the ratified by Ukraine constituent documents of such important organizations as United Nations (UN) and its specialized bodies, in particular World Health Organization (WHO), Council of Europe (CE) etc. It’s a common knowledge that availability of an obligation entails responsibility for its non-fulfillment or improper fulfillment. Therefore, when analyzing legal status of international and regional standards, one should focus on responsibility that is applied in case of their non-fulfillment.

In case Ukraine does not observe obligations it took according to the ratified international treaties, of course, there can occur unfavorable consequences. According to article 5 of UN Statute, in case there had been taken preventive or compulsory measures to one of the UN members, the General Assembly, under the recommendation of UN Defense Council is empowered to suspend realization of rights and privileges, that belong to UN Member. More severe sanction can be imposed to the Member of the UN in case it systematically breaks the principles foreseen by the Statute, namely it can be excluded from the Organization by the General Assembly under the recommendation of Defense Council (article 6 of the UN Statute).

Very important is Ukraine’s membership in the WHO*, and as a result proper execution of all the decisions that are passed within the frameworks of this organization, and regulate health care issues more closely. To fulfill its tasks goals, WHO according to the Statute of this Organization is entitled to adopt the rules as regards sanitary and quarantine requirements and other measures, directed against international spread of diseases, the nomenclature of diseases, death reasons and practice of public health care, standards of diagnostic methods, etc. These rules are obligatory for state-members of the WHO. Another very important authority has WHO according to article 23 of the Statute, where it goes about the right of Assembly of WHO to give recommendations to members of the Organization, that fall within its competence. In case member of the Organization doesn’t fulfill its financial obligations before the organization or in case of other exclusive circumstances, an Assembly can under the conditions it finds appropriate, temporarily deprive the member of an organization of a vote and right to service. An Assembly is empowered to restore these rights under certain conditions. (Article 7 of the Statute).

Every member of the CE, including Ukraine, according to the Statute of CE, shall recognize the principles of supremacy of law and exercising of human rights

and fundamental freedoms, by all persons, that are under their jurisdiction and shall effectively cooperate to achieve the goals of CE. (Article 3 of the Statute). The Constituent documents of CE also foresee responsibility, in particular for gross violation of article 3, member of the CE can be temporarily deprived of right of representation, and the Committee of Ministers can ask this member to withdraw from the CE according to article 7 of the Statute. If this member doesn't fulfill this request, the Committee can pass a decision on termination of membership of this member, from the date that is defined by the Committee.

One of the key regional standards of the CE, as it has been mentioned, is a Convention on human rights and fundamental freedoms (1950), ratified by Ukraine in 1997. European Court of Human Rights is the body which promotes observance on the Convention and leads its activity by passing judgments, including ones concerning Ukraine.

To regulate the relations, that arise from the state obligation to fulfill the judgment of the European Court of Human Rights in cases against Ukraine, together with the necessity to exclude the reasons for breach of the Convention on human rights and fundamental freedoms and its protocols by the Ukraine, implementation into Ukrainian legal proceedings and administrative practice the European standards of human rights, creation of necessary prerequisites to decrease the number of complaints to the European Court against Ukraine there had been adopted the law of Ukraine "On Execution of the judgments and implementation of practice of the European Court of Human Rights" of February 2, 2006.

To secure observance of the conventional provisions by our State, that were determined in the judgment against Ukraine*, exclude the drawbacks of a systematic character, that form the basis of the established infringement, and to exclude the grounds for submitting complaints against Ukraine to the European Court, caused by the problem, that had already been a subject of consideration in Court, measures of general character are taken. They include: a) making amendments to the current legislation and practice of its application; b) making amendments to the administrative practice; c) provision of legal expertise of the draft laws.

In Ukraine there is conducted a constant and periodical verification of current laws and by-law acts, as regards their conformity to Convention and practice of the European Court of Human Rights and European Commission of Human Rights, namely in sphere that concern operation and functioning of law-enforcement bodies, criminal procedure, deprivation of liberty. Due to the results

* Judgment against Ukraine: a) final judgment of the European Court of Human Rights against Ukraine, which acknowledges a breach of a Convention on human rights and fundamental freedoms; b) final judgment of the European Court of Human Rights as regards fair satisfaction in case against Ukraine, c) judgment of the European Court of Human Rights concerning decision of a case in a friendly manner.

of such verifications, a body responsible for representation of Ukraine in the European Court of Human Rights and execution of its judgments (Ministry of Justice through Governmental authorized in the European Court), submits to the Cabinet of Ministers proposals as regards making amendments to current laws and by-law acts in order to make them in conformity with the requirements of the Convention and practice of the Court.

5.2 Status of Precedent

CASE LAW IN UKRAINE

A continental legal system does not recognize judicial practice as a source of law. Ukrainian scholars and practitioners discuss the expediency of establishing and consolidating different ways of achieving uniformity of jurisprudence. In particular, it appears promising to develop at the legislative level the concept of jurisprudence constant, recognized by many continental systems of law, which states that when a significant number of decisions have utilized a certain provision of the law, this provision becomes essential for all subsequent decisions. In some countries such “precedents” are set by higher courts that possess semi-legislative functions. In our country, the decisions and other documents of the plenum of higher courts are of great importance for law enforcement. In particular, this follows from the analysis of the norms of Articles 38 and 45 of the Law of Ukraine “On the Judicial System and the Status of Judges.” It should, in addition, be noted that the authority of higher specialized courts also includes providing methodological guidance to the courts of lower order to ensure a uniform application of the norms of the Constitution and the laws of Ukraine in legal practice on the basis of generalization and analysis of court statistics as well as recommendations and clarification of issues related to the application of legislation in settling cases within relevant jurisdictions.

With the adoption of the Law of Ukraine “On Implementing Decisions and Applying Procedures of the European Court of Human Rights” of February 23, 2006, which in Article 17 states that courts use in their practice the Convention on Human Rights and Fundamental Freedoms (hereafter the Convention) and Court practice, understood as a source of law, the situation started to change. The analysis of fundamental positions taken on this issue gives grounds to state that in Ukraine the stand on judicial practice as an official source of law is strengthening even though at this stage it applies only to the European Court of Human Rights.