

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.

Nevertheless, in the process of law enforcement and law realization there can appear problems, in case position of the European Court on Human Rights differs from the one of Ukrainian lawmaker in the context of certain kind of legal relations regulation. For instance, the Court in its judgement “Religious Community of Jehovah’s Witnesses of the City of Moscow v. Russian Federation” (June 10, 2010) substantiated its position as regards realization of one’s right to personal inviolability in the context of approval of or refusal from medical interference, namely concerning mechanisms of law realization and conditions under which medical aid is to be provided urgently, the scope of rights of medical relations subjects and securement of a state obligation, based on protection of patient’s health and life*. In this very context Ukrainian lawmaker has another legal position, foreseen in part 5 of article 284 of the Civil Code of Ukraine and in part 2 of Article 43 of the Law Ukraine “Principles of Ukrainian Health Care Legislation”.**

Taking into account literal interpretation of the norm of article 13, 19 of the law of Ukraine “On Execution of judgements and application of practice of the European Court on Human Rights” one can notice the necessity of taking one of the general measures, namely making changes in the current legislation and practice of its implementation, that is, in the above mentioned example, to part 5 of Article 284 of Civil Code of Ukraine and part 2 of article 45 of the law Of Ukraine “Principles of Ukrainian Health Care Legislation” in part of regulation the procedure of providing medical care in emergency situations, in order to observe human right as they are foreseen in the Convention. Therefore we come to a conclusion, that in case positions of the European Court on Human Rights and norms of the legal act of Ukraine are in conflict, primary force have the norms of legal acts, until appropriate amendments are made into the legislation.

* The essence of The European Convention lies in respect to human dignity and freedom, and the definition of self-determination and personal autonomy are considered to be important principles, that form the basis of interpretation of the guarantees of their observation (see paragraphs 61 and 65 of the European Court on Human Rights judgement “Pretti v. The United Kingdom”. Possibility to lead the way of life, which citizen has chosen at his own discretion, means the possibility to carry out an activity that is considered as harmful and dangerous to health of this citizen. In case of refusal from medical care, even if such refusal can cause lethal consequences, a compulsory treatment, without a consent of an adult and capable patient is treated as interference into his personal inviolability and infringement upon the rights foreseen in article 8 of the European Convention (see paragraphs 62 and 63 of the European Court on Human Rights on Human Rights judgment “Pretti v. The United Kingdom” and decision of the European Commission of December 10 1984 in case “Akmani and Others v. Belgium” [paragraph 135 of the European Court on Human Rights judgement “Religious Community of Jehovah’s Witnesses of the City of Moscow v. Russian Federation” (June 6, 2010)].

** In urgent situations, when the life of a patient is really endangered, his/his relatives’ consent for medical interference is unnecessary. (part 5 article 284 of Civil Code of Ukraine, part 2 article 43 of the law of Ukraine “On Principles of Ukrainian Health Care Legislation)