Warsaw, on the 9th of November 2016

KRYSTYNA ZWIERZ v. POLAND

(Application no. 69950/14)

WRITTEN COMMENTS BY THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

Executive summary

- *Zwierz against Poland* is yet another recent case, in which the ECtHR has a chance to clarify the scope of the substantive and procedural positive obligations of the state under the right to life within the area of the health care.
- Traditionally "negative" right to life was separated from "positive" right to health. The former in principle protected only against the arbitrary deprivation of life and, unlike the latter, did not oblige the states to ensure adequate level of health care system.
- Contemporarily in the international law the right to life is usually interpreted more expansively. It is no longer a purely negative right, but is rather understood as a "right to dignified life", which imposes on the states also a wide scope of positive obligations aimed at the protection of their lives, also within the area of healthcare.
- In Poland the procedural obligations of the State under the right to life are realized *inter alia* in criminal proceedings and the proceedings before the voivodeship commissions for adjudication on medical events.
- The practice of criminal proceedings until now revealed a number of problematic issues, *e.g.* difficulties in accessing high quality expert opinions in a timely manner.
- The Ministry of Justice has introduced in 2016 certain organizational changes which are formally designed to improve the conduct and supervision of medical malpractice cases.
- The proceedings before the voivodeship commissions were designed to help interested parties avoid judicial proceedings, but practice shows that they often fail to do so.

I. Introduction

Pursuant to the letter of Ms Marialena Tsirli, the Section Registrar of the Fourth Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR"), dated 19th October 2016, granting leave to make written submissions to the High Court by the 9th of November 2016, and our letter of 28th of September 2016, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of *Krystyna Zwierz against Poland* (application no. 69950/14). Due to the nature of third-party intervention in the form of written comments, we do not include any comments on the facts or merits of the analysed case of *Krystyna Zwierz against Poland*.

In the first part of our opinion we present the contemporary interpretation of the right to life from the perspective of universal and regional human rights standards. In particular, we focus on the question

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of positive obligations of states in the area of health care and the relation between the right to life and the right to health. This opinion will also elaborate upon practical problems in the field of criminal proceedings concerning medical malpractice in Poland. We will also address some of the latest reforms introduced to the internal functioning of the general organizational units of public prosecution in Poland. These reforms provided for a possibility to create separate organizational sections responsible for the management and supervision of cases concerning medical malpractice at various hierarchical levels of public prosecution. In the last part of these written comments we would like to briefly describe the practice of functioning of the voivodeship commissions for adjudicating on medical events.

II. The positive obligations of the State in the area of healthcare

The HFHR would like to note that *Zwierz v. Poland* is yet another recent case, after *Lopes de Sousa Fernandes v. Portugal*,[1] *Elena Cojocaru v. Romania*[2] and *Aydoğdu v. Turkey*[3], in which the Court has the opportunity to clarify the scope of positive obligations of the State to protect lives of individuals within the health care system. In all abovementioned judgments the Court ruled that the Article 2 of the Convention, in its substantive limb, was violated due to serious dysfunctionalities of the public hospital services which led to the death of the applicants' relatives.

Interestingly, none of the judgments was issued unanimously. Judge A. Sajó, who delivered the dissenting opinion in *Lopes de Sousa Fernandes* (jointly with judge N. Tsotsoria) and concurring opinion in *Elena Cojocaru*, explained that the Article 2 of the Convention concerns primarily intentional deprivation of life: "The obligations of the State, in the absence of State action aimed at depriving life, are related to the proper operation of the existing legal system, with special emphasis on adequate legal recourse in matters of negligence".[4] The issue under Article 2 may also arise "where it is shown that the authorities of a Contracting State have put an individual's life at risk by denying healthcare which they have undertaken to make available to the population in general".[5] On the other hand, A. Sajó argues, it is not the role of the court "to remedy instances of alleged maladministration of health services"[6] or to "impose a duty to provide a specific level of healthcare service".[7]

In the HFHR opinion, this discussion between judges concerned the problem which is vital also for the present case. This problem refers to the question of the substantive scope of the right to life and its relation with right to health, not guaranteed in the Convention.

In this context, we would like to point out that in the recent times one can observe the significant evolution in the understanding of the right to life in the international human rights law. Originally, it was interpreted as imposing a primarily negative duty on the State to refrain from the intentional and arbitrary deprivation of life. Positive obligations were associated mostly with duty to protect lives of persons who were under the control of state officials (*i.e.* prisoners). However, recently many international bodies endorsed new interpretation in which the right to life imposes wider obligations on the state to effectively protect lives of all individuals, *inter alia* through establishment of effective health care systems.

In the UN human rights system the right to life is protected primarily by Article 6 of the International Covenant on Civil and Political Rights (ICCPR), according to which "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". Although the wording of this provisions suggests that it has mostly negative character (unlike positive "right of everyone to the enjoyment of the highest attainable standard of physical and mental health" guaranteed in the Article 12 of the International Covenant on Economic, Social and Cultural Rights), the Human Rights Committee already in 1982, in the General Comment No. 6,[8] argued that it cannot be interpreted too narrowly: "The expression «inherent right to life» cannot properly be

[1] Judgment of 15 December 2015, app. no. 56080/13.
[2] Judgment of 22 March 2016, app. no. 74114/12.
[3] Judgment of 30 August 2016, app. no. 40448/06.
[4] A. Sajó, N. Tsotsoria, joint dissenting opinion to *Lopes de Sousa Fernandes v. Portugal.*
[5] A. Sajó, concurring opinion to *Elena Cojocaru v. Romania.*
[6] A. Sajó, N. Tsotsoria, joint dissenting opinion to *Lopes de Sousa Fernandes v. Portugal.*
[7] A. Sajó, concurring opinion to *Elena Cojocaru v. Romania.*
[8] http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6630_E.doc (date access: 8 November 2016).

understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."[9]. Among such positive measures the Committee mentioned the reduction of infant mortality, increasing the life expectancy and the elimination of malnutrition and epidemics. Nevertheless, the emphasis in the Comment was definitely put on the negative obligations such as prevention of wars, acts of genocide and other acts of mass violence or the protection against arbitrary deprivation of life by state officials and third persons. In 1984 the Committee presented new General Comment (No. 14) on the right to life[10], which focused on the prevention of production, testing, possession, deployment and use of the weapons of mass destruction.

In 2015 the Committee started the procedure of adoption of new General Comment (No. 36), which would reflect the contemporary standards of the protection of the right to life. The draft General Comment published in September 2015[11] underlines the positive obligations of the states in respect of protection of health of individuals much stronger than previous standards. In particular, the Committee recommends that "When adopting long-term measures designed to ensure the enjoyment of the right to life, States parties should aim to facilitate and promote adequate conditions for a dignified existence for all individuals. Long-term measures required for ensuring the right to life may include facilitating access by individuals to basic goods and services such (...) health-care (...) and promoting the development of life-saving and life-extending drugs and treatments, and of effective emergency health services and emergency response operations (including fire-fighters, ambulances and police forces)."[12] Specifically, more strict obligations of States concern the protection of health of mothers or persons deprived of liberty.

Also in the regional human rights systems the right to life is recently more often interpreted extensively, as imposing on the States positive obligations to protect lives and health of individuals. Particularly interesting in this regard is the jurisprudence of the Inter-American Court of Human Rights ("IACHR"), which "(...) integrates the concepts of economic and social rights with civil and political rights within the context of the right to life".[13]

It is worth to note that in the American human rights system, similarly as in Europe, the right to life and the right to health are regulated by two separate treaties. The former is guaranteed in the Article 4 of the ACHR, while the latter in the Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Although the ACHR provides reference to the social rights in Article 26 ("The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."), the justiciability of this provision is rather questioned.[14]

However, despite this clear separation between classical, negative rights and social rights in the American human rights system, the IACHR in its recent jurisprudence "began enforcing the right to life, traditionally considered a «negative» right, in a way that closely resembles enforcement of the right to health, traditionally viewed as a «positive» right."[15] Already in 1999, in the judgment in the so

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[9] *Ibidem*, p. 1.

[10] http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_4723_E.doc (date of access: 8th November 2016).

[11] www.ohchr.org/Documents/.../CCPR/Draft_GC_115thsession.doc (date of access: 8th November 2016).

[12] *Ibidem*, p. 10.

[13] J. M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, "Hastings International and Comparative Law Review" 2008, Vol. 31, No. 1, p. 3.

[14] O. R. Ruiz-Chariboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties. Non-Enforceability Of Economic, Social And Cultural Rights In The Inter-American System*, "Netherlands Quarterly of Human Rights" 2013, Vol. 31, Issue 2, p. 162-163; J. Hohmann, *The Right to Housing: Law, Concepts, Possibilities*, Oxford 2013, p. 85.

[15] S. R. Keener, J. Vasquez, *A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in The Inter-American Court of Human Rights*, "Columbia Human Rights Law Review" 2009, Vol. 40, Issue 3, p. 597.

called "Street Children" case[16], the IACHR held, that "The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence".[17]

Such an interpretation of the Article 4 of the ACHR was reiterated in the subsequent cases of *Yakye Axa Indigenous Community v. Paraguay*[18] and *Sawhoyamaxa Indigenous Community v. Paraguay*,[19] where the Inter-American Court "used an expansive definition of the American Convention's Article 4 right to life, one that practically mimics the right to health".[20] In both of these cases the IACHR ruled that Paraguay violated human rights of indigenous communities by disrespecting their rights over ancestral lands. Among the violated rights was also the right to life as the IACHR noted that the state's actions and inactions "has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses".[21] In the *Sawhoyamaxa* case the ICHR paid particular attention to the lack of access of the members of the communities to adequate health care. The Court reiterated once again that the right to life involves not only negative duty to refrain from the arbitrary deprivation of lives, but also positive obligations. It noted, however, that "(...) a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities. In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk."[22] In that case those conditions were satisfied and so the state was held responsible for a violation of the Article 4.

Yet another case in which the IACHR clarified the scope of the State's positive obligations stemming from the right to life in the area of health care was *Ximenes-Lopes v. Brazil*[23] which concerned the death of a patient of private mental health care institution which resulted from the degrading treatment and poor conditions therein. The IACHR underlined that by the virtue of Article 2 and Article 4 of the ACHR, states are obliged to regulate and supervise all health care services provided to individuals both in public and private institutions: "The failure to regulate and supervise such activities gives rise to international liability, as the States are liable for the acts performed by both public and private entities which give medical assistance, since under the American Convention international liability comprises the acts performed by private entities acting in a State capacity, as well as the acts committed by third parties when the State fails to fulfill its duty to regulate and supervise them. Therefore, the duty of the States to regulate these acts is not limited to public hospitals, but includes any and all health care institutions."[24] In the case of public health care institutions positive duties of the States are even stronger, as they are obliged not only to regulation and supervision of them, but also have to "take care of the persons admitted to such institutions".[25]

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[16] Judgment of 9 November 1999 in the case of *Villagran-Morales et al. v. Guatemala*.
[17] *Ibidem*, para. 144.
[18] Judgment of 17 June 2005.
[19] Judgment of 29 March 2006.
[20] S. R. Keener, J. Vasquez, *A Life Worth Living...*, p. 606.
[21] *Yakye Axa*, para. 168.
[22] *Sawhoyamaxa*, para. 155.
[23] Judgment of 4 July 2006.
[24] *Ibidem*, paras. 89-90.
[25] *Ibidem*, para. 141.

Also in the African regional human rights regime, the right to life is interpreted expansively. In the General Comment No. 3 on the African Charter on Human and Peoples' Rights ("ACHPR"), the African Commission on Human and Peoples' Rights[26] underlined that the Article 4 of the ACHPR ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.") „envisages the protection not only of life in a narrow sense, but of dignified life. This requires a broad interpretation of States' responsibilities to protect life".[27] Such positive obligations include, among others, protection against "pervasive threats to life, for example with respect to preventable maternal mortality, by establishing functioning health systems and eliminating discriminatory laws and practices which impact on individuals' and groups' ability to seek healthcare."[28].

III. The Polish practice in relation to medical malpractice

These part of the HFHR's written submissions will turn from the interpretation of the positive obligations of the States in the area of healthcare to the analysis of the Polish practical problems in medical malpractice cases. The liability for medical malpractice can be sought in Poland by the use legal instruments from different fields of law, including the institution of civil lawsuits for compensation of damages. We believe that the analysis of the Polish practice might prove to be of use of the Court in determining the best solutions not only in the currently analyzed case, but in other communicated cases (e.g. *Barbara Klak against Poland*, application no. 49210/15) as well as prospective cases. Considering the specific of *Zwierz against Poland* case and the limited number of pages at our disposal, this part of the written comments will focus on the Polish practice in the area of criminal proceedings that are supposed to establish the responsibility for death or serious injury resulting from medical malpractice. Such malpractice may, *inter alia* lead to criminal liability if constitutive elements of crimes from articles 155, 156 and 160 of the Polish Criminal Code[29] are met. Under article 155 of the Polish Criminal Code, whoever unintentionally causes a death of a person, shall be subject to imprisonment from 3 months to 5 years. Under article 156, whoever causes grievous bodily harm[30] shall be subject to imprisonment from 1 to 10 years in case he acts intentionally. Article 156(2) stipulates that if the perpetrator causes said grievous bodily harm unintentionally, such deed is punishable by imprisonment for up to 3 years. Article 160 penalizes the putting of a person in an imminent danger of death or grievous bodily harm. The unintentional putting of a person in said danger can result in the punishment of the restriction of liberty or imprisonment to up to 1 year under article 160(3). The afore-mentioned crimes of unintentional causing of negative consequences for life or health are the most probable reasons for possible criminal responsibility of doctors. It is hard to conceive in practice for the doctors to have a direct or possible intention to cause negative consequences for life or health, although such a possibility cannot be *a priori* excluded[31].

a. *Statistical information on criminal proceeding concerning medical malpractice and recent reforms to the organization of Polish public prosecution offices*

The publically available statistical information on criminal proceedings concerning medical malpractice in Poland is scarce. According to the information provided by the National Prosecution Office (*Prokuratura Krajowa*), in the year 2015 there have been 3394 cases concerning crimes of putting of a person in imminent danger of death or grievous bodily harm by doctors or members of medical personnel who are guarantors of patient's safety, with the effect of death or serious bodily

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[26] www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf (date of access: 8th November 2016).

[27] *Ibidem*, p. 7.

[28] *Ibidem*, p. 17.

[29] Law of the 6th June 1997 – the Criminal code (Official Journal from 2016 pos. 1137).

[30] In the form of deprivation of sight, hearing, speech, the ability to procreate, other serious disability, serious illness or an incurable long term, life-threatening illness, permanent mental illness, the total or substantial permanent incapacity to work in an occupation or permanent, significant deformation or distortion of the body

[31] E. Zatyka, Doctor as a subject obliged to prevent certain consequences (*Lekarz jako podmiot zobowiązany do zapobiegnięcia skutkowi*) in: Doctor's duty to provide aid in light of the criminal law (*Lekarski obowiązek udzielania pomocy w świetle prawa karnego*). Oficyna 2011. Available in LEX database.

harm of a patient, conducted within the organizational units of public prosecution[32]. The National Prosecution Office does currently not possess corresponding statistical information from other years than 2015[33]. In the year 2015 alone, 1772 proceedings in the said category of cases had been initiated[34]. In that year 2872 cases concerning medical malpractice with the effect of death or serious bodily harm of a patient had been finalized[35]. In case of 117 of these proceeding an act of indictment had been directed to the court. In 4 cases a motion for conviction without trial from art. 335(1) of the Polish Criminal procedure code[36] had been directed to the court. The proceedings had been discontinued in 1293 cases. 1528 proceedings had been suspended due to the awaiting for the delivery of the opinion by experts in medical field. In 133 cases the court has repealed the prosecution's decisions to discontinue or not to initiate the proceedings. In 107 of the cases in 2015 has the superior organizational unit of public prosecution analyzed whether the final decision to discontinue or not to initiate the proceedings had been justified[37].

The HFHR has in its motion for public information also inquired about the statistical data on opinions of experts in medical fields (*e.g.* concerning the average length of the period of time required to prepare the opinion). The National Prosecution Office does not possess such statistical information. Nevertheless, information provided on the website of the National Prosecution Office suggests that the lengthiness of proceedings in medical malpractice cases often results from long periods of waiting for the preparation of expert opinions by single experts or departments of forensic medicine (*katedra i zakład medycyny sądowej*). In the majority of cases when the opinion of a department of forensic medicine is required, the prosecutor conducting the preparatory proceedings has to direct a relevant inquiry to all departments of forensic medicine in Poland[38]. As can be read in the information provided by the National Prosecution Office, the departments of forensic medicine often also decline to prepare the said opinions, *e.g.* due to a heavy case load and lack of experts in specialized medical fields of science[39].

The currently binding Regulation of the Minister of Justice on the statute describing the internal functioning of the general organizational units of public prosecutor's office[40] (hereinafter "the Regulation"), provides in § 27(2) for the possibility to establish dedicated organizational sections in regional prosecutor's offices (*prokuratury regionalne*):

> *§ 27 (...)2. In the regional prosecutor's office dedicated organizational sections can be instituted, competences of which shall include:*
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> *1) the conduct and supervision of cases concerning medical mistakes, which resulted in a death of a person;*
>
> *2) the conduct and supervision of collective cases concerning serious crimes committed using Internet or advance technologies and information systems (cybercrime).*

Pursuant to § 27(3) of the Regulation, if no such dedicated organizational section is created in the regional prosecutor's office, the regional prosecutor may entrust the management and supervision of the cases enumerated in § 27(2) of the Regulation to one or several prosecutors. According to § 29(2),

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[32] Information available at National Prosecution's Office webiste: https://pk.gov.pl/aktualnosci-prokuratury-krajowej/metodyka-prowadzenia-postepowan-w-sprawach-bledow-medycznych-szkolenie-prokuratorow.html#.WB21QfnhBPa (date of access: 5th November 2016).

[33] National Prosecution's Office's response from 4th November 2016 to HFHR's motion for access to public information.

[34] *Ibidem.*

[35] *Ibidem.*

[36] Law of 6th June 1997 – the Criminal procedure code (Official Journal from 1997 no. 89 poz. 555 with subsequent amendments).

[37] National Prosecution's Office's response from 4th November 2016...

[38] Information available at National Prosecution's Office webiste: https://pk.gov.pl/aktualnosci-prokuratury-krajowej/metodyka-prowadzenia-postepowan-w-sprawach-bledow-medycznych-szkolenie-prokuratorow.html#.WB21QfnhBPa (date of access: 5th November 2016).

[39] *Ibidem.*

[40] Regulation of the Minister of Justice of 7th April 2016 on the statute describing the internal functioning of the general organizational units of public prosecutor's office (Official Journal from 2016 pos. 508).

in the hierarchically inferior circuit prosecutor's offices (*prokuratury okręgowe*) one can now institute separate sections responsible, *inter alia* for the conduct and supervision of the proceedings in the cases concerning medical mistakes that resulted in grievous bodily harm. The circuit prosecutor can entrust the management and supervision of the cases concerning medical mistakes to one or several prosecutors, if the separate sections have not been established (see § 29[3] of the Regulation). The coordination of the preparatory proceedings concerning medical cases, conducted or supervised in subordinate organizational units of public prosecution, is one of the principal tasks of the Department for Preparatory Proceedings in the National Prosecution Office[41]. The methodic of conduct of the preparatory proceedings in medical malpractice cases has also been a subject of a training session for the prosecutors that has been held in Warsaw in June 2016[42].

In response to the described changes in the organization and functioning of the prosecutorial units, a dedicated workshop has been organized in Szczyrk (Poland) in October 2016 by the Regionals Agents for Professional Liability (these Agent are organs of the Medical Chambers in Poland)[43]. The doctors concurred that a number of issues can be amended in the sphere of the preparatory and judicial proceedings on medical malpractice, *e.g.* one should strive to improve the timely access to expert opinions. The members of medical profession also agreed that they will have to maintain contact with the newly created organizational units of public prosecution in order to ensure that, especially at the time of initiating of the proceedings, all relevant decisions are made based on facts and current state of medical knowledge. The doctors stated nevertheless that there has been no rational need to establish the new separate sections of the prosecution's organizational units solely for one professional group – such action is in their opinion detrimental to the trust relation between patients and doctors[44].

In the HFHR's opinion, the Polish practice of criminal proceedings in cases concerning medical malpractice has until now revealed a number of problematic issues. These issues include, *e.g.* the problems connected with obtaining in a timely manner of expert opinions (prepared by single experts or scientific institutions) of high meritorious value. Hence, we believe that certain systemic solutions could be fruitful. These solutions could, in our opinion include, for example the extension the practice of directing the motions for the preparation of expert opinions to renowned foreign scientific institutions. We also believe that all attempts to raise the specialization of public prosecution members (in this instance in the field of medical malpractice cases) should be welcomed with at least cautious optimism.

As of today, it is hard to assess the effectiveness of the organizational changes introduced to the public prosecutions units by the Regulation of the Minister of Justice of 7th April 2016. Such assessment will in our opinion be first possible when statistical data on criminal proceedings conducted and supervised by the public prosecution in 2016 will be made available. Nevertheless, HFHR believes that the until-now-available statistical information did not sufficiently justify the creation of dedicated units in regional and circuits prosecutor's offices. In our opinion, it is worth underlining that § 27(2) and § 29(2) of the Regulation provide for the possibility to create dedicated sections for the conduct and supervision of medical mistakes cases right next to the possibility to create separate sections for the coordination of "cybercrime" cases. This editorial choice is poorly conceived and creates the impression that cases of medical malpractice can be perceived in a similar fashion as willful "cybercrime". We also believe that the organizational changes introduced to the public prosecution units should not be in any way dictated by the intention to increase the number of acts of indictments, but should be based on rational and justifiable needs.

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[41] Information on the tasks of the Department for Preparatory Proceedings is available at: http://pk.gov.pl/departament-postepowania-przygotowawczego-692/departament-postepowania-przygotowawczego-639.html (date of access: 7th November 2016).

[42] Information available at National Prosecution's Office webiste: https://pk.gov.pl/aktualnosci-prokuratury-krajowej/metodyka-prowadzenia-postepowan-w-sprawach-bledow-medycznych-szkolenie-prokuratorow.html#.WB21QfnhBPa (date of access: 5th November 2016).

[43] See: Doctors want to be judged justly (*Lekarze chcą być oceniani sprawiedliwie*), available at: http://www.gazetalekarska.pl/?p=29751 (date of access: 7th November 2016).

[44] *Ibidem*.

b. *Practical remarks concerning criminal proceedings on medical malpractice, provided by practitioners of criminal law*

The HFHR has directed an inquiry towards criminal law practitioner (cooperating with the HFHR on *pro bono* basis) in order to receive practical remarks on the criminal proceedings in relation to medical malpractice. We inquired, *inter alia* about the average time of the criminal proceedings (both on preliminary and judicial level), on the prescription of criminal deeds, on the problems connected with expert opinions and the effectiveness of the complaints against excessive lengthiness of the proceedings. Certain remarks provided to the HFHR by criminal law practitioners, signalizing potential problems in this specific sphere of criminal proceedings, might prove to be interesting to the High Court.

Among the plausible practical problems connected with criminal proceedings in medical malpractice cases, *pro bono* lawyers raised the issue of a lack of immediate securing of the full medical documentation of the case and the issue of the lack of adequate financing of the process of acquiring of the expert opinions – this may often lead to choosing experts who may not be the most qualified experts in specific field of medical science. Certain practical problems might result from the fact that the victims of medical malpractice often notify the public prosecution or the police a long period of time after the event of medical malpractice happens. Among the arguments provided by the lawyers an opinion was raised that the authorities conducting the proceedings often unconditionally trust the contents of expert's opinion, even if the said expert opinions contain assessment of not medical but rather juridical nature (*e.g.* concerning the causal link or juridical qualification)[45]. The practical comments also concerned the fact that medical experts do not often appear in person in courts and the parties to the proceedings have thus limited possibilities to direct questions to them.

When it comes to the assessment of the recent changes in the organization of the public prosecution units, the *pro bono* lawyers also raised voices of skepticism. They mostly noted that the methodic of criminal proceedings in cases concerning medical malpractice has been indeed been in a need of reform. Some of them stated that the designation of separate organizational sections specifically for the cases of medical malpractice undermines the social trust for medical professions and may even suggest that the medical community is criminogenic. A concern was also raised that the prosecutors, hierarchically subordinate and dependent (*e.g.* in the sphere of promotion opportunities) might be more inclined to initiate criminal proceedings. The doctors, on the other hand, might feel as if they are under targeted enhanced "supervision" of criminal authorities. This might in turn impede their decisions in the medical treatment process.

c. *The voivodeship commissions for adjudicating on medical events*

The criminal law is not the only instrument by which the liability for medical malpractice can be sought, *e.g.* there is a possibility to institute civil lawsuits for the compensation for damages resulting from medical malpractice. The Law on the rights of patients and on the Patient's Rights Defender[46] (hereinafter also "r.o.p.") provides for yet another, special legal instrument to determine the responsibility for negative consequences of medical malpractice. The afore-mentioned law establishes the voivodeship commissions for adjudicating on medical events (*wojewódzkie komisje do spraw orzekania o zdarzeniach medycznych*; art. 67e[1] r.o.p. – hereinafter "the commissions"). The objective of the proceedings before the commissions is to establish, whether the material or non-material damage resulted from a medical event (art. 67i[1] r.o.p.). The purpose of the creation of these commissions was to provide the interested parties with non-judicial alternative that would allow them to receive in a timely manner certain financial remuneration for negative consequences of medical events. The proceedings before the commission are of *sui generis,* amicable character[47]. The

[45] For similar problems connected with expert opinions see, *e.g.* S. Pawelec, The flaws of expert opinions in the criminal proceedings as a derivative of the mistakes enshrined in the decisions to allow the said expert opinions (*Wadliwość opinii biegłego w procesie karnym jako pochodna błędów w zawartych w postanowieniu o jej dopuszczeniu*), Prokuratura i Prawo 2014.

[46] Law of the 6th November 2008 on the rights of patients and on the Patient's Rights Defender (Official Journal from 2009 pos. 417 with subsequent amendments).

[47] The written reasons for the governmental legislative proposal for the Law of 28th April 2011 amending the law on the rights of patients and the Patient's Rights Defender and the law on compulsory insurance,

proceedings before the voivodeship commissions are an addition to "traditional" criminal and civil law mechanisms – we thus believe it might be fruitful for the High Court to elaborate upon them.

Under the term "medical event" one should understand the infection of a patient with a biological disease agent (*biologiczny czynnik chorobotwórczy*), injury of the body, disorder of health or death of a patient, which are a consequence of diagnosis, medical treatment or application of medicinal products or medical device that was incompatible with the current state of medical knowledge (art. 67a r.o.p.).

The proceedings before the commission can be initiated by the patient or his legal representative. In the case of death, which is a result of action or inaction contrary to the current state of medical knowledge, the motion to initiate the proceedings before the commission can be introduced by the successors of the deceased patient (art. 67b(1) r.o.p.). The introduction of a motion to start the proceedings costs 200 PLN. The commission is supposed to issue a ruling no longer than 4 months after the day on which the motion is introduced (art. 67j[2] r.o.p.). The proceedings before the commission are suspended if disciplinary or criminal proceedings in relation to the same factual circumstances are simultaneously pending. The proceedings before the commission are also not initiated or are being discontinued if, in relation to the same event, a final judgment on damages has been issued or civil proceedings are pending (art. 67b[2] r.o.p.).

The commission includes 16 members, in equal numbers representing experts in the field of medical sciences and law. Members of the commission, in addition to other formal criteria, must possess knowledge in the field of patient's rights and enjoy full civil rights. The voivodeship commissions adjudicate in formations of 4 persons. The rulings of the commission require at least ¾ majority of votes. The person that introduced the motion starting the proceedings, the director of the medical entity operating a hospital and the insurer can within 14 days institute a reasoned motion to re-examine the case (art. 67j[7] r.o.p.). The claim is examined within 30 days after receiving it by the commission.

The insurer is bound by the by the commission's ruling (art. 67k[1] r.o.p.). After the ruling, the insurer proposes to the person that brought the motion to the commission an amount of compensation for material and non-material damage. The proposed amount cannot be higher than the amount specified by law, *i.e.* 100 000 PLN for the infection of a patient, injury of the body or disorder of health and 300 000 PLN for the death of the patient (art. 67k[7] r.o.p.). The Minister of Health has issued a regulation specifying how the amount of compensation should be determined in relation to a specified patient in the context of different kinds of medical events[48].

In 2012 there have been 432 motions directed to the voivodeship commissions for adjudicating on medical events. Until now, the highest number of motions to the commissions has been directed in 2013 – total of 1310 motions. There have been 1197 motions directed to the commissions in year 2014 and 1030 motions directed in 2015[49].

In 2015, around 15% of the total number of motions directed to the commissions have been returned to persons who introduced them. 61% of the motions have been considered. From that number, the commissions found in 33% of cases that a medical event occurred and in 58% the commission held that such event did not occur[50].

In the opinion of the Polish Patient's Rights Defender the functioning of the voivodeship commissions should up to this date be assessed negatively and does not prove to be a valid alternative for judicial

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Insurance Guarantee Fund and the Polish Chamber for Communications Insurers. Document available in LEX database.

[48] Currenty in force: Regulation of the Minister of Health of the 27th June 2013 on the detailed scope and conditions of determining of the amount of compensation in case of a medical event (Official Journal from 2013 pos. 750).

[49] Patient's Rights Defender Report from 2015 on the observance of patient's rights on the territory of the Republic of Poland, page 56. Document available at: https://www.bpp.gov.pl/sprawozdania-roczne/ (date of access: 4th of November 2016).

[50] *Ibidem*, p. 56.

proceedings[51]. In Patient's Rights Defender's report it can be read that the commissions are unable to meet the 4-month deadline resulting from article 67j r.o.p[52]. The practice also shows, among other issues, that the model for determining of the amount of compensation for negative consequences of medical events is sometimes failing – the insurers are not interested in proposing of an amount of compensation for medical events that would correspond with the damages sustained by patients[53].

IV. Conclusions

In the various contemporary human rights systems the right to life is interpreted broadly, as a "right to dignified life" which imposes on states certain positive obligations also with respect to protection of health of individuals. From such perspective, "the right to health" may be perceived as a positive duty stemming from the right to life.[54] Therefore, it cannot be excluded that when the State fails to ensure proper organization of public health care what threatens the lives of individuals, the right to life may be violated.

Having analyzed the Polish practice of criminal proceedings in medical malpractice cases, we believe that certain areas are in need of reforms. The State should in our opinion maximize the efforts, in the course of criminal proceedings (both at preparatory and judicial level), to improve the timely availability of high-quality expert medical opinions. Any reasonable improvements in this regard will, in HFHR's opinion, be welcomed by all parties to the criminal proceedings. We hope that these written comments will prove to be a valuable tool for the High Court to develop a more in-depth understanding of the specifics of the Polish practice in medical malpractice cases.

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On behalf of the Helsinki Foundation for Human Rights,

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[51] *Ibidem*, p. 54.
[52] *Ibidem*.
[53] *Ibidem*.
[54] P. Harpur, *The Evolving Nature of the Right to Life: The Impact of Positive Human Rights Obligations*, "University of Notre Dame Australia Law Review" 2007, Vol. 9, p. 101.