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Agnieszka Wedeł-Domaradzka 
Uniwersytet Kazimierza Wielkiego, Bydgoszcz

POSTMORTAL ISSUES OF SMOLENSK TRAGEDY AGAINST THE OBLIGATIONS OF ART. 2 OF EUROPEAN CONVENTION ON HUMAN RIGHTS

Key words: death, postmortal problems, responsibility, state obligations, death bodies, catastrophes, post mortem examination

Abstract

The main aim of the study is to analyze posthumous problems that concern the victims of the Smolensk disaster in the context of positive obligations of the state. The first element of the analysis will concern the standards of dealing with the bodies of disaster victims as soon as they occur. The second aspect will include the obligation to notify of death along with other obligations and information on victims. Then, issues related to the transport of corpses and the opening of coffins will be described, and finally the regulations regarding uninterrupted burial. The analysis of the above issue presented in the work will be carried out taking into account regional human rights protection standards and the ECtHR's judicial practice. Both soft and hard law standards will be included in the analysis.

Introduction

The law refers to the postmortal matters with high respect. It stems from the dignity that is natural to a human being. However, legal regulations entirely devoted to the issue of death do not include to many space in international legal acts. If they do regard the issue of death it is in the context of humanitarian law. Whereas on the ground of human rights the analyses are conducted regarding the protection of the right to life¹ and

possibly the right of the relatives next of kin to perform the funeral rituals. The last two aspects are protected on the ground of freedom from inhuman and degrading treatment² as well as (in their majority) the right to respect private and family life³. This multi-aspect analysis guarantees not only the broader perception on the

tional Documents, ed. B. Gronowska, T. Jasudowicz, C. Mik, Toruń 1993, p. 20, 39, 133.

² Freedom from tortures is guaranteed in: UDHR, art. 5; ICCPR, art. 7; ECHR, art. 3, *ibidem*.

³ The right for the protection of private and family life is determined in art. 12 UDHR, ICCPR, art. 17; ECHR art. 8, *ibidem*.

¹ The right to life is included for instance in: UDHR, art. 3; ICCPR, art. 6; ECHR, art. 2, (in:) *Human Rights. Interna-*

possible violations, but also allows to protect the interests of an individual against these violations. It ought to be remarked that undertaking the issue of death in the context of human rights regulations proves on the one hand the gravity this issue is considered with, and on the other the awareness of real threats that may result from the violation of these rights.

ECHR, the foundation of human rights protection in Europe, regards the respect towards the rights associated with the death analogically to universal regulations included in universal documents. The postmortem context of the pondering will thus embrace not only the independent analysis of obligations resulting from art. 2 of ECHR, but also connecting them with art. 3 and 8 of this Convention. It should be emphasized that the below presented analysis will regard the most fundamental aspects of the rights of an individual since both articles 2 and 3 of ECHR are considered to be the guarantees of fundamental democratic values of societies composing the Council of Europe. The significance of art. 2 is emphasized by case law implying that its content must be interpreted in such a manner to make the guarantee resulting from it practical and effective⁴, and the actions aiming at the determination of the causes of possible violation of the regulations conducted in the way that takes into account all relevant circumstances⁵. The circumstances may stem from the use of power by representatives of state, but also may refer to the positive obligation regarding the protection of lives of all subjects under the jurisdiction of this state⁶. They might also stem from the necessity to take care of the efficiency of investigation that aims at detect and persecute the guilty of violating an individual's rights.

Analyzing the postmortal problems of the Smolensk Catastrophe casualties in the context of human rights, and particularly the context of positive obligations of a state on the ground of the right to life, a number of questions are worth referring to. The first of them being standards of dealing with corpses of catastrophes casual-

ties immediately after the events, the next one regards the obligation of notifying about the death along with other informational obligations, then the issues concerning the transport of corpses and opening of coffins, and finally regulations of undisturbed burial. The analysis of the above mentioned questions presented in the work, will be conducted taking into account regional standards of protecting human rights and the case law practice of ECtHR.

The proceedings towards bodies of catastrophes casualties immediately after their occurrence

Respect towards human body is a fairly common practice nowadays, having its roots in the need of protecting the dignity of a human being continuity. We ought to remember, however, that it was not always like that. In the past desecration of human corpses was treated as an additional punishment, which a criminal (if the person was not punished enough while alive) or also (during wars) an enemy, killed in a struggle, was to experience. Inability to perform burial or the burial of desecrated corpses was to prove the superiority of a victor⁷.

Nowadays the actions of this kind are not common. They are also penalized, and corpses themselves are treated with respect⁸.

Actions towards corpses of catastrophes casualties are surely of significance from the perspective of positive obligations regarding an investigation. This also applies to the casualties of Smolensk Catastrophe. Aviation catastrophes are characterized with serious damage and difficulties of settling their cause in consequence. According to the standards of ECHR that were shaped in case law practice it is determined that the sole fact of notifying authorities on the death will bear obligations on the basis of art. 2 of the Convention regarding the conduct of an effective investigation on circumstances of the death, in such a manner to fulfill standards of the domestic regulations protecting the right to life⁹. For

⁴ McCann and others v. the United Kingdom, case no 18984/91, ECtHR decision from 27th September 1995, § 146–47.

⁵ Carabulea v. Romania, case no 45661/99, ECtHR decision from 13th July 2010, § 108.

⁶ Includes e.g. Arskaya v. Ukraine, case no 45076/05, ECtHR decision from 5th December 2013 § 62 and LCB v. Great Britain, case no 14/1997/798/1001, ECtHR decision from 9th June 1998, § 36 as well as Paul and Audrey Edwards v. the United Kingdom, case no 46477/99, ECtHR decision from 14th March 2002, § 54.

⁷ As an example of practices of that kind we may refer to the scene of desecrating the dead body of Hector by Achilles; similar examples were described also by S.M. Olyan; S.M. Olyan, *Theorizing Circumstantially Dependent Rites in and out of War Contexts*, in: *Warfare, Ritual, and Symbol in Biblical and Modern Contexts*, ed. B.E. Kelle, F. Ritchel Ames, J.L. Wright, Atlanta 2014, p. 19–20.

⁸ H. Conway, *The Law and the Dead*, Nowy Jork 2016, p. 2.

⁹ Railean v. Moldavia, case no 23401/04, ECtHR decision 5th January 2010, § 28 and following.

the investigation to be conducted properly there must be the guarantee of high preparatory standard. What is more, this standard must be sustained in each situation of life deprivation including the context of dangerous actions or natural disasters in which the shortage or lack of the state organs preventive measures is to be observed¹⁰. Furthermore, even in the case when a state was not directly responsible for a particular instance of death it is obliged to take necessary measures in order to protect the lives of individuals under its jurisdiction, by for example, introducing a particular criminal legislation that will discourage from committing crimes against life¹¹.

In this scope the organs of law control including ECtHR could base the interpretation on the directives regarding the management dead bodies prepared under the auspices of WHO¹². These directives have two aims. First of them is the promotion of the suitable and dignified treatment of dead bodies after a catastrophe, whereas the second one is to make it easier to identify them. Within the presented directives it was emphasized that only prompt involvement of appropriate organs and assisting units in collecting and identifying dead bodies protects the dignity of the dead. According to the presented standards the accurate level of fulfilling the standard comprises firstly, thorough identification of corpses and their fragments as well as attaching a unique code to each element that can be identified. The code ought to be unique, and consisting of letters and digits should prevent the multiplication and purposeful disorientation. Such a practice allows eventually faster and better reference of the information with the data concerning individuals being potential casualties. It is true that the list of individuals on board in case of aviation catastrophes is known due to previous preparations, however one may not exclude last minute alterations. Taking pictures of dismantled organs will also serve the reliability of the identification. Referring to the practice of taking photos, the WHO directives assume the need to take several photos of each corpse. These photographs ought

to show: whole body, frontal view of a face, lateral view of a face, distinguishing features as well as all the personal clothes or objects¹³. In case of objects, it is important to pay attention to distinguishing and individualizing elements, such as colour of clothes or jewellery.

The taken photographs ought to be associated with data and objects of individuals which could be collected, amongst them the information on: gender, approximate age, information on personal belongings that were collected (jewellery, clothes, identification documents, driving license). Also marks on skin like tattoos, scars, or moles ought to be taken into account. But only the visible ones since at this stage clothes are not removed. Additionally, all visible misshaping, height, colour and length of hair as well as the obvious features of teeth ought to be thoroughly archived.

The following stage within the expected standards of identification concerns the placing of a dead body in a sack that ought to be stored in appropriate, cold conditions. If possible, sacks or similar elements should be separate. The necessity of protection also involves protecting against the direct exposure to the sunlight. Due to the need of preserving dignity it is also necessary to protect dead bodies from the public exposure.

The directives regarding catastrophes casualties applied separate regulations towards large scale catastrophes that result in the death of many subjects. In this aspect, even a temporary reaction regarding the storing and putting dead bodies in order is considered to be extremely significant. No legal acts determine the minimum number of casualties leading to the statement that a catastrophe is the one of large scale. Therefore, it seems justified to assess the issue depending on individual circumstances, and take into consideration not only the number of casualties but also the resources of services delegated for an action as well as the area where the rescue action ought to be undertaken. If the area is difficult to reach, and human resources delegated to help limited so that the rescue action cannot be conducted smoothly and rapidly, the catastrophe ought to be considered as the one of significant scale. The directives regarding the temporary actions there is the demand concerning the necessity storing of bodies in the manner that will enable further identification. The main aim of storing ought to be preserving the dig-

¹⁰ Budayeva and others v. Russia complaint no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, ECtHR decision from 20th March 2008, § 142.

¹¹ Papapetrou and others v. Greece, case no 17380/09, ECtHR decision from 12th July 2011, § 50 on the subject also T. Jasudowicz in: *Legal Aspect of Smolensk Tragedy. Texts and Materials*, Toruń 2018, p. 198

¹² *Management of Dead Bodies after Disasters: A Field Manual for First Responders*, ed. S. Cordner, R. Coninx, H-J. Kim, D. van Alphen, M. Tidball-Binz, Geneva, 2016.

¹³ In particular cases these photographs may be even more detailed and include: the upper part of a body, the bottom part of a body, lateral views of a face as well as all personal belongings.

nity of bodies as well as their protection. The analogous obligation is set for storing unidentified organs. Such actions should be complemented with creation of the list of missing bodies or their elements in order to make it easier to match what has not been identified to the elements whose absence has been confirmed. The above steps will establish a proper foundation for the work of teams of forensic experts intending to identify the casualties in a formal way.

The required directives and standards also include the ones regarding the inclusion of a family in the whole process of investigation after a catastrophe. The necessity of proper communication with the next of kin was emphasized. This communication should meet particular standards of human rights, and most of all ought to allow the family members to feel that all actions are being conducted in system, reliable and efficient manner. The lack of communication that provides the sense of acting in accordance with the law leads to the anxiety and the fear of the next of kin regarding causes of death, which is an inhuman treatment¹⁴.

Informing public opinion is equally significant. Its reliability may affect not only the efficiency of identification of casualties, but also establishes a necessary level of public control over an investigation required by Strasbourg standards¹⁵. In case of Smolensk Catastrophe this aspect was of particular significance, since casualties were the people holding the most important state functions. Due to that the whole of the society took interest in both the conduct of the rescue action, as well as the process of identification and the conduct of postmortem procedures (PM, transport, burial). For many people apart from "human" aspect it was also the situation of endangered state security and stability of social life. Clear and up-to-date information is the guarantee of lessening stress, and also the best way to deny the gossip and rectify fake news.

The notification on the death of Smolensk Catastrophe participants was one of the necessary aspects of reliable information. Consular convention between the Polish Republic and Russian Federation requires in its art. 39 that, "Appropriate state organs of the recipient state would notify immediately a consular official on the death of a citizen of a sending State and would pass to it the copy of the death certificate without

a charge¹⁶". Yet, in case of the Smolensk Catastrophe, as pointed out by P. Czubik, "the Russian side did not have to pass any information of a strictly consular character, the information on the Smolensk casualties was forwarded directly to the Polish ambassador, and next to the representatives of the supreme authority who had arrived in Smolensk¹⁷". The fact of the catastrophe was indisputable, and the activities undertaken in presence of the ambassador were to result in determining its factual casualties, which eventually happened. The obligation to inform on the death by appropriate authorities is one of the guaranteed by art. 2 ECHR which is of significance, especially in the context of participation in an investigation at its early stage¹⁸.

Standard regarding the transportation of dead bodies and opening coffins

The question regarding transportation of the dead bodies of the Smolensk Catastrophe casualties has been the subject of numerous legal analyses conducted both by Paweł Czubik¹⁹ as well as Natalia Wojnarowska²⁰. In this context, however, it is worth completing what they determined with several aspects referring to the ECtHR practice associated with this matter. One of the controversial decisions applied towards Smolensk Catastrophe casualties was the prohibition to open coffins. From the perspective of the domestic regulation it is accepted that once coffins have been closed they ought not to be open, and the alike action ought to be applied to coffins that have been transported before²¹. When it comes to the transfrontier transport of dead bodies this matter might look different. The transport itself is regulated

¹⁶ Consular Convention between the Polish Republic and Russian Federation, compiled in Moscow on 22nd May 1992., Dz.U. 1995 nr 140 poz. 687.

¹⁷ P. Czubik, *Consulary Activity Regarding Transfrontier Transfer of Dead Bodies-Analysis of Basic Regulations Against Action Taken after the Smolensk Catastrophe Concerning the Prohibition of Opening Coffins* Polski Rocznik Praw Czlowieka i Prawa Humanitarnego nr 5, 119.

¹⁸ Çoşelav v. Turkey, complaint no 1413/07, ECtHR decision from 9th October 2012, § 78.

¹⁹ P. Czubik, *op.cit.*

²⁰ N. Wojtanowska, *Legal Aspects of Smolensk Catastrophe-Selected Issues*, Materials of III Smolensk Conference, konferencjasmolenska.pl/materialy3/19wojtanowska.pdf.

²¹ Ordinance of the Minister of Health on dealing with corpses and human remains from 7th December 2001, Dz. U. z 2001 r., Nr 153, poz. 1783, § 6 i § 11.

¹⁴ Imakayeva v. Russia, complaint no 7615/02, ECtHR decision from 9th November 2006, § 166.

¹⁵ Zubayrayev v. Russia, complaint no 67797/01, ECtHR decision from 10th January 2008, § 100.

by two legal acts: *International Agreement Concerning the Conveyance of Corpses*²² from 1938 (referred to as Berlin Convention) and *Agreement on the Transfer of Corpses*²³ from 1973. It ought to be emphasized that neither Poland nor Russian Federation are the sides of these agreements. The conventions themselves as well as their regulations are most of all to serve as tools to provide the facilitations applied in procedures preceding the transportation, mainly by the introduction of a certificate issued in the state of origin directly accepted in the state of destination. They do not, however, codify customary norms. According to the above mentioned P. Czubik, "due to this fact, even if we assume that such a prohibition is rooted in some custom accepted by the law, it is difficult to imagine that it could refer directly to the situation regarding the events on 10th April 2010". Something that is highly reasonable in the context of a lengthy transport from exotic countries, has no justification regarding the direct transport in entirely different climatic conditions and circumstances".

As a result one ought to agree with P. Czubik that, "taking into consideration consular instructions there are no direct imperative recommendations imposing any actions apart from the ones regarding the securing of the transportation of dead bodies, and particularly the actions bearing results in sending state that would determine formulating the prohibition of opening coffins before the burial in the home country"²⁴. Such an interpretation is also supported by the fact of the possibility of later exhumation, resulting from the need to guarantee reliable evidence proceedings. If this prohibition were of transfrontier character, we would have to agree that the state would never be able to meet the standards of reliable proceedings due to the fact that it would be incapable of examining evidence collected and secured abroad. The prohibition regarding opening coffins in the state law system aims at guaranteeing higher standards of the state procedures, which the state authorities have real influence upon. The awareness of the fact that after closing a coffin no activities will be possible favours the reliability of conducted procedures. Yet, in the transfrontier aspect, when procedure has not been conducted by the state organs such a guarantee of reliability of the whole procedure course cannot be granted.

The impossibility of opening coffins may also influence the feelings of the next of kin regarding the last offices. Taking care of the way a deceased looks like during his burial is one of the most significant obligations. Nowadays, it is getting more and more common to practice thanatopraxis, i.e. activities which apply suitable sanitary and hygienic procedure in order to delay or disguise postmortem changes. Whereas, tanatoplastics, a separate field, allows the reconstruction of a body deformed as a consequence of accidents²⁵. In case of catastrophes where significant deformations of bodies take place application of tanatoplastics may bring relief for the next of kin as well as provide the sense of taking proper care of a deceased person's body. One ought to remember, though, that all procedures can take place after forensic procedures have been completed, particularly due to the possibility of distorting the examination outcome as a result of substances used in these procedures²⁶.

Postmortem examination of Smolensk Catastrophe casualties in the context of the rights of a deceased and his next of kin

Post mortem examination is considered to be as an immensely interfering in the human body integrity. While the interference in a human body aiming at rescuing or sustain life does not convey negative connotations, for many people the PM is an example of unacceptable interference due to the fact that after the death human body is treated with cult, and taking care of its integrity is regarded as the responsibility of the next of kin. The conduct of PM is required in three situations. The first of them being the death within 12 hours of admitting to a health care institution. The second, the suspicion that it was a sudden death caused by the interference of the third parties, i.e. when there is he suspicions of committing a crime. Whereas the third situation regards determining the cause of death of an individual whose life

²² It was ratified by 6 states (France, Egypt, Italy, Germany, the Czech Republic, Slovakia).

²³ 23 states of the Council of Europe are the sides.

²⁴ P. Czubik, *op.cit.*

²⁵ R.W. Gryglewski, *Mummification of Human Body in History, Customs and Medical Science*, Kraków 2005, p. 205 and the following.

²⁶ M. Synowiec-Piłat, *Thanatopraxis in Poland as the Harbinger of a New Attitude towards Bodies of the Dead*, Prace Naukowe Akademii Ekonomicznej we Wrocławiu, nr 814, Nauki Humanistyczne 4, 1998, p. 258.

so far as well health do not imply the cause of death²⁷. Another case is the question regarding the death of an individual with confirmed or suspected infection or communicable disease²⁸. In case of Russian regulations the situation looks alike, including also unclear cause of death and court investigation²⁹. However, legal obligation of conducting PM does not guarantee that it will be performed in the appropriate manner. The required standard regarding PM was included in the directives of Committee of Ministers of the Council of Europe. Independence and impartiality of experts performing a PM is the first significant directive regarding its correctness. They ought to work without any pressure to be able to preset conclusions in an unbiased way. In order to conduct their tasks in appropriate manner they also are to be informed on all the significant circumstances that took place in connection with individuals that the PM examination is performed on. They should receive suitable material from subjects who have collected dead bodies, to be able to get acquainted with all circumstances associated with their death. Furthermore, they ought to acquire access to photos and information on the position of a dead body, the state of clothing as well as the degree of decomposition of body. It is also required that they pay attention to traces of blood on a body as well as the scene and other possible biological evidence. During an autopsy they are also supposed to estimate the time of death taking into account the stage and place of postmortal paresis. A specialist performing a PM is additionally obliged to act with due diligence towards a dead body when it comes to its suitable transport and storing in a safe and cooled place, in undisturbed manner³⁰.

The directives also determine the duty to guarantee the participation of at least two MDs, one of whom ought to be qualified in legal medicine³¹.

During a PM it also ought to be remembered that appropriate identification is to be conducted. In this respect, the rules adopted by INTERPOL General As-

sembly in 1997 on the process of identification are to be applied regarding the following criteria:

- visual recognition,
- personal belongings,
- physical features,
- dental examination,
- anthropological identification,
- fingerprints,
- genetic identification³².

It is also required that PM procedure is conducted in accordance with the rules of medical ethics and respecting the dignity of the deceased. Appropriate conduct requires the preparation of suitable documents before an autopsy begins. The following are to be recorded in writing: the date of autopsy, its time and place, surnames of individuals performing it like experts, assistants, and other possible participants. The documents should also include photography or video materials of all significant elements (jewellery, clothes) as well as of body itself. When necessary, also X-ray pictures are to be taken to identify a possible foreign object. Documents must include biological evidence collected from body orifices³³.

The directions also determine standards regarding clothes. This type of examination is of significance particularly when clothes, which is obvious in case of aviation accidents, is destroyed or soiled. Each of damage of clothes ought to be matched with an appropriate injury³⁴. Injuries and damage must be examined regarding their size and placement. It is also emphasized that large scale decomposition does not eliminate the need of conducting the autopsy. Also histopathology examination is to be performed in order to eliminate bone fractures, determining the presence of a foreign object (e.g. bullets) as well as toxicology examination (including the concentration of alcohol) which, however, must be interpreted in cautious way³⁵.

All undertaken activities must be reflected in the report. The Council of Europe emphasise the necessity of diligence in constructing the report, which is as important as the autopsy itself³⁶.

Standards adopted within the Committee of Ministers include the requirement of granting the obedience of the PM to standard which results from art. 2 of

²⁷ Act from 15th April 2011 on medical activity, art. 31, tj. Dz.U. 2018 poz. 2190.

²⁸ Act from 5th December 2008 on preventing and fighting against infections and communicable diseases at humans, art. 33, tj. Dz.U. 2018 poz. 151.

²⁹ S.V. Jargin, *Legal regulations of pathology in Russia*, "International Journal of Legal Medicine", nr 122, 2008, p. 535.

³⁰ Recommendation no. R (99) 3 of the Committee of Ministers to member states on the harmonization of medico-legal autopsy rules, rule 1.

³¹ *Ibidem*, rule 2.

³² *Ibidem*, rule 3.

³³ *Ibidem*, rule 4.

³⁴ *Ibidem*, rule 2.

³⁵ *Ibidem*, rule 2.

³⁶ *Ibidem*, rule 6.

ECHR. In its case law the Tribunal, like the directives of Council of Europe, pointed at the need to involve a specialist in legal medicine in the PM procedures and his absence was considered to be the breach of art. 2 of the Convention³⁷. Also, neglecting the completion of the whole autopsy procedure is considered to be the violation of this article³⁸. What is more, neglecting the conduct of autopsy when it is required by internal regulations and necessary, as well as the lack of appropriate documents also means breaching art. 2 of the Convention. Another situation when the violation is stated is the negligence during the investigation regarding the presentation of full and reliable information concerning the state of a dead body, which in consequence makes it impossible to determine the cause of death³⁹. The above is considered as evasion from fulfilling positive obligation by a state. Standards are also violated when the government of a state refrains from presenting any explanation on the reason of neglecting PM procedures at the initial stage of the investigation, and fulfilling them due to the exhumation procedures. As a result, one may assume that all the deficiency in the investigation which undermine the state's ability to determine the cause of death or a person/persons responsible for the death, may violate the standards of positive obligations stemming from art. 2 ECHR⁴⁰.

The protest against autopsy procedures forwarded by the next of kin may be considered as a significant factor from the perspective of admissibility of the autopsy. The protest may be determined with religious beliefs, or simply the knowledge on the last will of the deceased one, who excluded the possibility of applying such procedures towards his body. If, however, the autopsy was to be conducted due to the procedure aiming at the determination of the cause of death, it seems that neither the will of the next of kin nor the will of the deceased himself could be accepted since the directive imposing the necessity of explaining the cause of death has supremacy over them. In the aspect regarding the rights of family the Tribunal grants the protection only in case of long lasting and unjustified delay in the body

examination. In Pannullo and Forte⁴¹ case ECtHR dealt with the issue of reasonable time that may pass between the conduct of autopsy within the investigation and hand over the body for burial. According to the Tribunal a PM ought to be completed within reasonable time limits, and the body of a child⁴² should be handed over as soon as suitable collection has been accomplished⁴³. Summarising, it ought to be stated that PM itself is acceptable and required on the grounds of the obedience towards the standards of the state reliable proceedings regarding the question of determining the cause of death. However, the aspects of manner and time limit of performing it require a particular attitude, so that the lengthy procedures could not violate the right to family and private life of the next of kin who care to provide respectable burial.

Post mortem examination procedures

Neglecting the opening of the coffins along with the lack of identification procedures had to lead to mistakes, and further on to exhumation, when the exchange of bodies had been stated. Further it resulted in the change of the burial place. This issue requires the analysis of two aspects: firstly, the question of sanctity of a grave in the context of a family demands, and secondly, the necessity of granting reliable conduct aiming at the clarification of the cause of death. Taking the first aspect into consideration the Strasburg standard requires guaranteeing the stability of burial, i.e. granting the appropriate level of order and morality in the society as well as preventing the situation when graves are treated as a temporary repository containing temporal bodies, ashes or remains of the deceased. According to ECtHR the peace of the deceased is of bigger significance than the exhumation issues stemming from the needs of family members. Henceforth, actions limiting the change of burial site by the family, even when they aim at providing better cult of the deceased remembrance, cannot be considered to be violating the right to family and private life of the next of kin. It is so particularly when there are no premises regarding the site of burial against the will

³⁷ *Tepe v. Turkey*, complaint no 27244/95, ECtHR decision from 9th May 2003, § 181

³⁸ *Ibidem*.

³⁹ *Tangiyeva v. Russia*, complaint no 57935/00, ECtHR decision from 20th November 2007, § 92.

⁴⁰ *Trapeznikova v. Russia*, complaint no 21539/02, ECtHR decision from 11th December 2008, § 84.

⁴¹ *Pannullo and Forte v. France*, complaint no 37794/97, decision from 30th October 2001.

⁴² In its decision the Court emphasised the significance of the religious aspect of burial as well as the age of the child

⁴³ *Pannullo and Forte v. France*, § 38.

of a deceased one, or choosing a site a deceased person would not be connected with⁴⁴.

When it comes to providing appropriate standard of conduct in the explanation of the cause of death ECtHR had an opportunity to deal with the admissibility of exhumation in Smolensk cases in *Solska and Rybicka v. Poland* case⁴⁵. Like in the majority of cases regarding death⁴⁶ the applicants are the next of kin (spouses) of the deceased who were to be exhumed. While it was not the first court decision regarding exhumation, it ought to be remarked that the previous ones focused on the standards of the procedure. There was an accusation made in them that the exhumation had not been conducted and would not be conducted due to the time that passed between the date of burial and the date of the would-be exhumation⁴⁷. In the above mentioned case concerning Smolensk casualties, the applicants *Solska and Rybicka* accused of the breach of art. 3 and 8 of the Convention pointing out that exhumation procedures applied towards the casualties of the Smolensk catastrophe by the Polish authorities violate: respect due to the temporal remains of their husbands, the right to the cult of the deceased remembrance as well as the dignity of the deceased. The direct reason for forwarding the complaint stemmed from the procedural lack of possibility to initiate legal proceedings towards the prosecutor's decision on performing exhumation⁴⁸. Additionally, the exhumation decision is determined by art. 209 of Criminal Code, which points out that in the case of suspecting a crime the opening of a corpse is to be conducted, and art. 210, which allows taking a corpse out of grave in order to conduct

autopsy. In accordance with the accusations the applicants claimed that the right to cult is protected on the grounds of art. 8 of ECHR, and in case of ordering the exhumation there is no possibility of taking into account any opinion of the next of kin, which leads to suffering, trauma and negligence of their feelings. The government of the Polish Republic referred to the accusations in one way only by pointing at its positive procedural obligation resulting from art. 2 of ECHR, which concerns the reliability of procedure aiming at the clarification of the cause of death. In its decision ECtHR stated that there was the violation of art. 8 of ECHR, i.e. the right to family and private life. The Court, however, did not refer to art. 2 and the positive obligations of the state. Nevertheless, such an analysis ought to be conducted since it would require the number of studies on the collision of law orders, which was emphasized in a dissenting vote⁴⁹. Most of all, it should be stated that the standard of fulfilling positive obligations regards the whole of the investigation, i.e. it includes all the casualties of the Smolensk catastrophe not only the relatives of the plaintiff. Secondly, the investigation determines the means that are to be applied, and not the result, since at the stage of an investigation it is always uncertain. Limiting the possibility of conducting the evidence to the ones that will surely contribute to the case would breach the standards of reliable proceedings⁵⁰ as well as the rule regarding the independence of a judge in assessing evidence.

The analysis of case law leads to following conclusions. Firstly, exhumation cannot depend on an individual's will, even the next of kin's, since it generates too big a threat for an investigation, for instance in the context of concealing evidence. Secondly, a state is not capable of securing every situation in which an individual could experience suffering⁵¹, and there are and will be such situations in which suffering will appear, especially that it is a subjective matter. Thirdly, one may not consent with the plaintiff regarding an explicit separation between the right to family life and the right to privacy⁵². At this stage the collision of rights may take place. Not only the next of kin are entitled to the right

⁴⁴ *Elli Poluhas Dödsbo v. Sweden*, complaint no 61564/00, decision from 17th January 2006, § 26.

⁴⁵ *Solska and Rybicka v. Poland*, complaint no 30491/17 i 31083/17, ECtHR decision from 20th September 2018.

⁴⁶ W.A. Schabas, *The European Convention on Human Rights A Commentary*, Oxford 2015, p. 382

⁴⁷ The communicated case of *Parkitny v. Poland*, complaint no 3529/14.

⁴⁸ It ought to be emphasised that on the grounds of the Polish law, „Exhumation may be decided upon Only when particular reasons for protecting personal rights favour it. Since it is a rule that the rule of non-disturbing the peace of the deceased ought to prevail the lack of consent of an entitled individual for the burial of particular dead body. A special character of exhumation as the means of eliminating the violation of the right to grave is reflected in the fact that its application requires the existence of extraordinary circumstances”, III CSK 84/15, the decision of the Civil Chamber of the Supreme Court from 17th February 2016.

⁴⁹ A dissenting vote of Judge Eicke to the decision in *Solska and Rybicka v. Poland* case, p. 10.

⁵⁰ *Railean v. Moldavia*, case no 23401/04, ECtHR decision from 5th January 2010, § 28 and the following.

⁵¹ *Pretty v. the United Kingdom*, complaint no 2346/02, decision from 29th April 2002, § 55.

⁵² W.A. Schabas, *op.cit.*, p. 366.

to a cult but also to all relatives (also the ones not connected with the bonds of blood or law) and does not undergo gradation (one may not consider the suffering of a wife after the death of her husband to be more or less significant than the suffering of a mother after the death of her son). It is also worth mentioning that the fact of disturbing the peace of the deceased one by exhumation may be of less significance for the next of kin, than the fact that they can perform the cult (take care of a grave, pray) at the site where actually their relative has not been buried. In such a situation exhumation that results in burying a particular individual in the appropriate grave seems to be of great significance.

Referring to the discussed court decision, however, one must agree that a procedural element was breached, which may be important when it comes to cases regarding the death. So, the possibility of lodging the means of legal protection generates the need of its examination and taking the decision that ought to be justified. It is this justification that presents motifs, shows the suitability of the state organs actions, that may in matters that are extremely sensitive, like death and the cult of loved ones, be the best means of convincing the next of kin about the necessity of exhumation. It is also worth adding that ECtHR has not expressed in this case its opinion regarding material regulations, but only analysed its formal aspect. However, if there were the need to refer to the matter, it seems that ECtHR would sustain its case law direction stating that the question of the family's objection towards exhumation might not affect appropriate, effective and timely conduct of the investigation⁵³.

Conclusion

The standard of respecting human rights which may not be close for Russia, is close for many member states of the Council of Europe, and requires that all situations regarding death and what will be happening after it should be thoroughly checked taking into account all circumstances significant for the deprivation of life. The postmortem issues might not regard a casualty himself, but are important for his living next of kin, as an opportunity to perform the last office and take care of the appropriate realization of the rights, and for all the liv-

ing ones as the guarantee of securing the realization of our rights in the future.

The discussed postmortem issues: appropriate identification of casualties, conduct of autopsy procedures and finally, mechanisms connected with the conduct of exhumation construct the guarantee of the appropriate action of a state while clarifying the cause of death (the positive obligation from art. 2), secure the freedom from tortures and inhuman treatment, as well as punishing, since the next of kin are concerned about the knowledge regarding causes, conduct, motifs and reasons why particular individuals have died. Eventually, it assures the realization of the right to respect towards family and private life in the aspect of possibility to perform cult. One also needs to take into consideration, that the standard of realization of these rights is also affected with passing time. Only the procedure that is performed immediately will enable to collect evidence material of better quality. The longer the investigation procedure lasts, the more subjects are involved in it, the less chance there is to establish the responsible for the death. In this context it is worth remarking that, "the passage of time inevitably lowers the quantity as well as the quality of available evidence, and the lack of accuracy arises doubts regarding the bona fide towards the conducted action"⁵⁴. Reasonably and promptly conducted proceedings clarifying the cause of death and documenting the whole procedure are a significant guarantee allowing the avoidance of exhumation problems, repeated autopsies, or burials, which certainly are a painful experience for the next of kin.

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⁵³ Esmukhambetov and others v. Russia complaint no 23445/03, decision from 29th March 2011, § 124.

⁵⁴ Nencheva and others v. Bulgaria, complaint no 48609/06, ECtHR decision from 18th June 2013, § 130.

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