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CRIMINAL LIABILITY IN POLISH LAW FOR FAILURE TO TAKE ACTION TO PREVENT A SUICIDE

1. PRELIMINARY CONSIDERATIONS

Suicide is one of the most complex issues in today's world. There are probably few other questions which evoke as much reflection, debate, and controversy as suicide, which for a long time has been a subject of study not only for the social sciences, but also in the humanities and natural sciences. Nonetheless, it is still a topical problem. 10,207 attempted suicides were reported in Poland in 2014, of which 6,165 ended in death¹.

Naturally enough, the problem of suicide is addressed by the law and in the legal sciences as well. Directly or indirectly, it comes under various regulations of criminal law. In the context of suicide, the only legal consequences explicitly defined in the Polish Criminal Code (k.k.) is the liability of a perpetrator whose conduct induces a victim to attempt suicide. They are given in Art. 190 a § 3 k.k. relating to aggravated forms of stalking and appropriation of identity, Art. 207 § 3 k.k. on cruelty, and Art. 352 § 3 k.k. concerning abuse of power by military personnel. However, Art. 151 k.k. defines offences which consist in inducing another person to commit suicide either by encouraging or assisting

¹ Source: <http://statystyka.policja.pl/st/wybrane-statystyki/samobojstwa/110594,Samobojstwa-2014.html>.

them. Although these provisions relate directly to the criminal aspect of suicide, nevertheless they do not, nor can they be expected to exhaust a problem as complex as suicide.

The question of what the regulations in Polish material criminal law are on failure to hinder a would-be suicide may give rise to far more misgivings. One of the aspects of this issue prompting consideration is a suicide's declaration that he does not want his life saved should he survive his suicide attempt. How binding would such a statement be on third parties? Another interesting question is the determination of the status of the "guarantor" charged with the specific legal duty to prevent suicide, and the legal assessment of his conduct in such situations, as understood by Art. 2 of the Polish Criminal Code, which gives the following definition: Only a person who has a legal duty to prevent a specific consequence may be criminally liable for a material offence due to nonfeasance.

The aim of this paper is to present only a selection from the issues involved, such as the notion of failure to hinder suicide, a person's right to suicide, and the legal description of suicide.

2. THE NOTION OF FAILURE TO HINDER A SUICIDE

We must begin with an explanation of what we mean by "failure to take action to prevent a suicide." The point at issue are the time-limits for the period within which the "guarantor" is required to undertake appropriate measures to prevent a suicide. In other words, we have to determine when the guarantor's duty to hinder suicide starts, and when it ends. Andrzej Wąsek gives a broad interpretation. For him "failure to take action to prevent a suicide" means more than just failure to undertake rescue operations to save the life and health of the suicide *during, before and in the course of* the attempt; he also includes failure to remedy the consequences in the aftermath of an abortive suicide attempt, viz.

failure to undertake operations to save the would-be suicide's life and health *after* the abortive attempt to take his life².

We may have some reservations on this approach. First, the expressions "during" and "in the course of" are synonymous, they are merely a specific pleonasm. Secondly, a more precise definition is required to clarify "the duty to undertake rescue operations before the suicide attempt." We may not treat a suicide attempt as identical with a would-be suicide's *intention* of taking his life, which of course occurs prior to the actual attempt, and is often independent of such an attempt. Therefore it seems that we may speak of a duty only once the would-be suicide puts his intention to kill himself into effect, or at least makes the necessary preparations (that is he creates the conditions necessary to take his life); and definitely when the attempt to commit suicide actually occurs (when the would-be suicide undertakes an action with the specific intent to kill himself). We could hardly say that the guarantor is duty-bound to prevent suicide as soon as the would-be suicide has the intention to kill himself.

In this paper we shall assume that "failure to take action to prevent a suicide" means failure to undertake rescue operations while the suicide attempt is in progress and failure to remedy its consequences.

3. THE INDIVIDUAL'S RIGHT TO COMMIT SUICIDE

Human value undoubtedly holds the top place among the individual's legal goods. It represents the value which determines everything else. As M. Cieślak has aptly observed, mankind cannot exist without life, and without mankind all that is human loses its sense on the principle of *contradictio in adiecto*³. When an individual is deprived of his life he is also deprived of all his rights and duties. There can be no rights in the legal sense unless we respect the value that is human life. Hence

² A. WĄSEK, *Prawnokarna problematyka samobójstwa*, Warszawa 1982, p. 120.

³ M. CIEŚLAK, [in:] *System prawa karnego*, IV. 1: *O przestępstwach w szczególności*, eds. I. ANDREJEW, L. KUBICKI, J. WASZCZYŃSKI, Wrocław, Warszawa, Kraków, Gdańsk, Łódź, 1985, p. 288.

in the democratic state under the rule of law human life must be given special protection by the law⁴.

So we have the incontestable postulate that the system of values at the foundation of the Constitution of the Republic of Poland recognises human life as the most cherished good and stresses the imperative need to protect it. Article 38 of the Polish Constitution says that “The Republic of Poland shall ensure the legal protection of the life of every human being.” It is from this article that the right known as “the right to legal protection of the individual’s life” is derived. This human right makes the State duty-bound to engage in operations to reduce or eliminate risks to human life. Article 38 is also a directive addressed to the legislator to lay down provisions for the protection of human life⁵.

The doctrine of Polish criminal law stresses two aspects of the grounds for the protection of life. Life is the subject of protection as an objective value with a social significance independent of its bearer’s attitude to his own life; and it is the content of the given individual’s right to life. So the individual’s right to life is not all there is to grounds for the protection of life. An important aspect is the value of life as a social good, and the individual does not have the right freely to dispose of this social good⁶. The objective value of life justifies the institution of the imperative to save life without the need for the consent of the person enjoying that legal good. A special instance of the protection of

⁴ Cf. The Polish Constitutional Court’s ruling of 28 May 1997, K 26/96, «OTK» 2/1997, Item 19, p. 10.

⁵ R. GRABOWSKI, *Prawo do ochrony życia w polskim prawie konstytucyjnym*, Rzeszów 2006, p. 179-180; P. SARNECKI, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, III, Ed. L. GARLICKI, Warszawa 2003, p. 3-5. This commentary also presents an alternative view. According to B. Banaszak, in the Polish Constitution the individual’s right to the protection of his life is more of a freedom rather than a right. IDEM, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2009, p. 213. Cf. the Constitutional Court’s ruling of 28 May 1997, implying that the formulation of Art. 38 of the Polish Constitution does not unambiguously state that the right to the protection of life is an individual’s fundamental right (K 26/96, «OTK» 2/1997, Item 19).

⁶ A. ZOLL, [in:] *Kodeks karny. Część szczególna. Komentarz*, II: *Komentarz do art. 117-277 k.k.*, ed. A. ZOLL, Kraków, 2006, p. 231, p. 282 and 290.

human life is embodied in the penalisation of conduct directed against that good, even in situations when life is no longer a value for the most interested person – the victim. This applies to the situations defined in Art. 150 k.k and Art. 151 k.k.⁷

Often there will be a clash between the objective and subjective aspect of life, and the resolution of such a conflict will be problematic, unless the legislator provides a solution for a specific situation⁸. We shall have to fully agree with the view that without the legislator's specific decision we cannot assume that the objective aspect of life takes precedence over the individual's right to life⁹. The legal protection of life does not overrule the individual's autonomy in the sense of prohibiting him from making a decision to continue or to end his own life. As Marek Safjan has aptly observed, the law protects and respects the individual's autonomy, and therefore it does not oblige him to submit to medical treatment, nor to continue with medical treatment right to the very end of the terminal stage of his illness. Neither does it prohibit him from committing suicide or penalise him for attempting to kill himself¹⁰.

An example of a situation where the law admits the precedence of the individual's right to dispose of his life as he sees fit is provided by the fact that a therapeutic operation may not be carried out unless the patient gives his consent to it. If a doctor performs an operation which is necessary from the medical point of view to save the patient's life or protect his health, but without the patient's consent, he may be liable to criminal prosecution under Art. 192 k.k. In the event of a collision

⁷ B. MICHALSKI, [in:] *Kodeks karny. Część szczególna. Komentarz do art. 117-221*, I, eds. A. WĄSEK, R. ZAWŁOCKI, Warszawa, 2010, p. 153.

⁸ Cf. A. BARCZAK-OPLUSTIL, *Sprzeciw wobec podjęcia działań ratujących życie wyrażony względem gwaranta niebędącego lekarzem. Zarys problemu*, «Czasopismo Prawa Karnego i Nauk Penalnych» 4/2011, p. 69 and 73.

⁹ *Ibidem*, p. 73.

¹⁰ M. SAFJAN, *Granice autonomii człowieka w prawie współczesnym (Wykład wygłoszony 16 kwietnia 2002 r.)*, [in:] J. AXER, L. BALCEROWICZ, B. GEREMEK, J. HOŁÓWKA, L. KOŁAKOWSKI, A. MICHNIK, K. MODZELEWSKI, K. MYŚLIWIEC, M. SAFJAN, W. SIWIŃSKI, P. WĘGLEŃSKI, A. WOLSZCZAN, A.K. WRÓBLEWSKI, A. ZOLL, *Uniwersyteckie wykłady na koniec starego początek nowego tysiąclecia*, Warszawa, 2004, p. 234.

between life and the individual's right to decide, the legislator had ruled explicitly in favour of the patient's right to decide.

From another normative perspective it would seem reasonable to admit situations when the endangered individual does not refuse life-saving action to come within the scope in which Art. 162 k.k. (the offence of failing to administer life-saving assistance) is applicable. Such a refusal on the part of a person in a life-threatening situation would effectively rule out any attempt to save his life. There seem to be no grounds to assume that in the event of a clash between the social value of life and an individual's right to life, the former value should be prioritised. Compelling the endangered person to suffer assistance in a situation of this kind would mean a violation of his right to decide about his life or health. It should be pointed out that an endangered person's refusal to have life-saving assistance administered does not necessarily mean that he has issued his consent to die.

The right to life is an inherent human right; all that the legislator may do is to define the limits of that right, for instance he may impose a prohibition on suicide, or he may rule that the objective value of life must always take precedence over the individual's right. If no such prohibition has been imposed we must assume that on the grounds of the freedom to which citizens have a right the individual may embark on action to kill himself. The undertaking of such action is not unlawful¹¹, since we cannot assume that the objective aspect of life must take precedence over the individual's right to life – unless the legislator has laid down an absolute ruling to this effect. Such conduct would effectively mean the institution of the obligation to live. Yet the acknowledgement that such action – by a would-be suicide to kill himself – is not unlawful in itself does not mean that we may not try to prevent it.

The admission of these principles does not rule out criminal liability on the grounds of Art. 151 k.k. for instance for encouraging or helping

¹¹ There are also alternative views in the doctrine. A. Zoll argues on the grounds of Art. 38 of the Polish Constitution that suicide is unlawful. In this approach the treatment of a suicide attempt as unlawful means that the conduct of a person who tries to stop a suicide may be regarded as an act of necessary defence justifying the infringement of the suicide's freedom (Cf. A. Zoll, [in:] *Kodeks karny. Część szczególna...*, p. 291).

someone to commit suicide, because the prohibitions laid down by this provision do not apply to the enjoyer of this legal good, that is the would-be suicide, but to third parties.

But it would be hard to identify grounds for an individual's right to commit suicide and (under Polish law) to be legally assisted in doing so. It would stand in opposition to consideration for the supra-individual, collective (social) aspect of human life. Apart from that, death cannot be a right, since it is an inevitability for humans, whereas the holding of a right is based on the assumption that the person holding that right may decide not to use it¹².

If we were to concede that the individual has a "right to die" we would be obliged to ensure him of the conditions to put such a right into effect. It would mean making others duty-bound to assist such a person to die. Anyone who wanted to take his own life could legally ask the state for assistance in this¹³. Consequently we would also have to acknowledge that other people were duty-bound to refrain from stopping him from taking his life. Any conduct to curtail a would-be suicide's freedom, such as by trying to prevent him from killing himself or by trying to save his life, would thereby be violations of the suicide's right and would be subject to legal liability, but there are no such provisions in the existing Polish law.

Summing up: the individual's right to life, which is given legal protection under Polish law, should be accompanied by a corresponding duty on the part of society as a whole to protect life; in other words, the individual has a right to life, whereas everybody else has the duty to protect his life¹⁴. But the right to life does not mean the obligation to live. Neither the Polish Constitution nor any other general provision

¹² J. M. VARAUT, *Możliwe lecz zakazane. O powinnościach prawa*, Warszawa, 1996, p. 101.

¹³ This observation is aptly made by M. PŁACHTA, „Prawo do umierania”? Z problematyki regulacji autonomii jednostki w sprawach śmierci i umierania, «PiP» 54.3/1997, p. 55-56.

¹⁴ J. GIEZEK, R. KOKOT, *Granice ludzkiego życia a jego prawna ochrona*, [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, red. B. BANASZAK, A. PREISNER, Warszawa 2002, s. 103-104.

in Polish law has laid down such an obligation. Therefore there are no impediments to stop us from admitting that suicide is within the scope of the individual's freedoms – the individual is free to kill himself. This freedom is an idiosyncratic correlate of his right to live. His freedom to commit suicide is just as inalienable as his right to life. But his own empowerment to use this freedom in the sense of disposing of his own life cannot be effectively transferred to anyone else.

4. CRIMINAL LIABILITY OF THE PERSON ACTING AS GUARANTOR

Criminal liability for failure to intervene for the prevention of suicide depends on the status of the person who fails to hinder the suicide. The crucial factor is whether the properties of the guarantor as described in Art. 2 k.k. may be attributed to the person who fails to hinder the commission of suicide. So first of all we must examine the cases in which the person who failed to hinder the suicide had a specific legal duty to intervene for the prevention of the consequences as defined in the provision.

4.1. Principles governing liability for a material crime committed by nonfeasance (failure to act)

The guarantor's criminal liability for failing to take action to stop a suicide reflects the wider issue of liability for material crimes committed by nonfeasance. This implies the need to examine a series of issues connected with the duty to take action to prevent a specific consequence. In view of the limits on this article I shall only consider the most basic issues.

In this paper I shall assume that the provisions of the Polish Criminal Code, which follow the scheme *Kto powoduje śmierć drugiego człowieka, podlega...* ("Any person who causes the death of another person shall be liable...") define the liability not only for particular criminal actions, but also for particular instances of nonfeasance. Hence they may be used to derive a sanctioning norm alongside a prohibitive norm. The latter imposes a prohibition on the implementation of a consequence S, while

the former orders the prevention of S¹⁵. Furthermore, in consideration of the normative content of Art. 2 k.k., I have assumed that this article defines the set of addressees to whom the sanctioning provisions relating to material crimes committed by nonfeasance are applicable. According to this definition those to whom these provisions apply are only such persons who have a specific legal duty to prevent the occurrence of the given prohibited consequence.

The grounds for a person's liability for a material crime of nonfeasance is his failure to take action to prevent an objectionable consequence, but only if he has a special duty to make an effort for its prevention. The focus is on his special duty to take action, in other words on the normative aspect, not on the ontological component¹⁶. Moreover, normative aspects are subject to aspects pertaining to real conditions, which means that we must examine the given situation to determine whether the nonfeasance actually "brought on" the consequence. We shall have to acknowledge that liability for material crimes by nonfeasance is also determined by certain cause-and-effect relations, which means that a knowledge of the general principles governing the changes that take place in the world will also be a relevant factor in assessing and attributing a cause to the objectionable outcome¹⁷.

For a nonfeasance the grounds for the attribution of the consequence is the violation of the provision imposing action to prevent the occurrence of a condition which is the designate of the consequence defined in the provision, which is referred to as the provision laying down the guarantor's duty. An infringement of this provision gives sufficient grounds for the attribution of the consequence to it if and only if it has brought about the danger which under the provision the guarantor was duty-bound to take action to prevent¹⁸.

¹⁵ J. MAJEWSKI, *Prawnokarne przypisywanie skutku przy zaniechaniu. Zagadnienia węzłowe*, Kraków, 1997, p. 105 ff.

¹⁶ M. KRÓLIKOWSKI, [in:] *Kodeks karny. Część ogólna. Komentarz do artykułów 1-31, I*, eds. M. KRÓLIKOWSKI, R. ZAWŁOCKI, Warszawa, 2010, p. 223.

¹⁷ J. MAJEWSKI, *Prawnokarne przypisywanie skutku...*, p. 57-59.

¹⁸ *Ibidem*, p. 85 ff.

The guarantor's duty is not only to take action to prevent the occurrence of the specific danger to the given legal good, but also to embark on all operations whatsoever to reduce the threat from the particular danger to the good as soon as he becomes duty-bound.

A relevant aspect in the normative establishment of the guarantor's obligation, and in the determination of the content of the provision which imposes that obligation on him, is the drawing up of a catalogue of sources for his duty to hinder suicide¹⁹. Since the guarantor's status under the legal provision is established by means of a description of the features the perpetrator of such an offence must have, the fundamental source for the imposition of a person's duty to act as a guarantor must be a provision laid down at least in an act of legislation. At the same time, in view of the interpretative problems which crop up in the analysis of detailed regulations, we may put forward a postulate that the definition of a guarantor's duty should be drawn up with a sufficient degree of clarity and precision both as regards the person who assumes the duty as well as the scope of his duties.

Another type of provision which may serve as the source of a guarantor's duty to take action for the prevention of suicide are specific, individual provisions, and in particular an agreement on the grounds of which a person assumes the duty of safeguarding a specific legal good, as for example in the situation of a carer employed to look after a psychiatric patient.

On the other hand we must be sceptical about the possibility of identifying a duty to hinder suicide on the grounds of the perpetrator's previous activities. We should have to concur with the argument that if someone who took no action to prevent a particular suicide were treated as the guarantor for its prevention merely "on the grounds of his previous activities," we would be subverting the practical meaning of Art. 151 k.k. (Any person who, either by encouragement or by dispensing assistance, induces another person to take his own life, is liable to

¹⁹ For more on this see J. KOSONOĞA-ZYGMUNT, *Źródła prawnokarnego obowiązku przeszkodzenia samobójstwu. Część I*, «Ius Novum» 4/2014, p. 34-57; EADEM, *Źródła prawnokarnego obowiązku przeszkodzenia samobójstwu. Część II*, «Ius Novum» 1/2015, p. 36-49.

imprisonment from a term from 3 months to 5 years.) Moreover, such an interpretation would mean a significant increase in the stringency of criminal liability for nonfeasance²⁰.

4.2. Legal definition of a guarantor's nonfeasance

There should be no doubt that the perpetrator of wilful nonfeasance by failing to act for the prevention of suicide is liable to prosecution for the fundamental type of homicide as defined in Art. 148 § 1 k.k. (Any person who kills a human being is liable to imprisonment for a term of not less than 8 years, 25 years of imprisonment, or a life sentence.) The grounds are the perpetrator's passive conduct with respect to his duty to prevent the suicide's death.

In specific cases failure to act for the prevention of suicide may also carry properties classifying it as a particular type of aggravated homicide: particularly cruel homicide (Art. 148 § 2 pt. 1 k.k.), homicide for a particularly reprehensible motive (Art. 148 § 2 pt. 3 k.k.), the killing of more than one person in one act of homicide (Art. 148 § 3 sentence 1 k.k.), and the commission of homicide by a person previously convicted of homicide (Art. 148 § 3 clause 2 k.k.). Art. 148 § 2 pt. 2 k.k. may be applicable in connection with rape. For instance, if we had a case of a father committing incest by raping his daughter, as a result of which the victim tried to take her life while the father did not try to stop her, with the intention of allowing her to die.

On the other hand it seems unlikely that the provisions for other types of homicide, classified as homicide in connection with armed robbery (Art. 148 § 2 pt. 2 k.k.), or homicide with the use of explosives (Art. 148 § 2 pt. 4 k.k.) will be applicable here. It is hardly conceivable that a suicide attempt could be the outcome of a public officer carrying out his professional duties, which allows us to ignore Art. 148 § 3 clause 3 k.k. as applicable to the killing of a public officer.

These observations lead on to the following more detailed remarks.

In general, failure to take preventive action to stop a suicide may carry the properties of the aggravated crime of particularly cruel homicide

²⁰ A. WĄSEK, *Prawnokarna problematyka samobójstwa...*, p. 138-139.

(Art. 148 § 2 pt. 1 k.k.). The properties and qualities of the victim, both at the earlier and later stage of the perpetrator's failure to prevent the suicide, may be significant for the establishment that the crime was committed with particular cruelty. In view of Art. 148 § 2 pt. 1 k.k. in connection with Art. 2 k.k. this point seems to be all the more relevant if the perpetrator is the victim's guarantor, in other words the person associated with the victim in a special relationship justifying criminal liability for failing to prevent the latter's death. To establish that the nonfeasance was an aggravated crime the subjective aspect has to be considered.

The Polish Supreme Court has drawn attention to this question, pointing out that particular cruelty is an objective category, but to establish it the circumstances in which the crime was committed, such as a perpetrator's conduct with respect to a child, need to be taken into account. Moreover, a specific type of conduct may be considered particularly cruel if it is exercised with respect to a child, but not with respect to an adult. To determine whether particular cruelty was involved, the crime should be examined on two levels: first, of the manner in which the perpetrator performed the deed (with exceptional cruelty, and in circumstances which, when treated as a whole, showed that the victim was subjected to considerable suffering, far more than would have been necessary to break his resistance and kill him); and secondly, at the level of evidence of violence which in other circumstances would not justify an assumption that the perpetrator acted with particular cruelty in the sense of Art. 148 § 2 pt. 1 k.k., but could be considered such in the given case because of the young age of the victim²¹.

To establish that this legal category (viz. particular cruelty) holds, we must also consider its subjective aspect, which is shown in the perpetrator's specific attitude to his deed and to the victim. However, the assumption that the relationship between the perpetrator and the victim alone would be enough to determine particular cruelty seems to

²¹ Ruling of the Polish Supreme Court of 29 May 2003, III KK 74/03, «Legalis» No. 65238.

be an oversimplification of the problem, unless the way the homicide was committed were characterised by particular cruelty.

In the situations we are examining the perpetrator is confronted with an attempted suicide. For this reason the circumstances in which he leaves the dying victim to his fate may also be relevant, and they may also be considered a sign of the victim's additional distress. There can be no doubt that the suffering sustained by the victim may be both physical and psychological. The psychological suffering need not even be connected with the actual killing, it may be due to circumstances prior to it, moreover not even directly preceding the killing²². In addition it does not matter whether or not the victim actually *felt* the suffering. In the jurisdiction it has been observed on good grounds that conduct with respect to a person unable to feel psychological distress (e.g. one who is unconscious or in a deep state of alcoholic or narcotic intoxication) may still be considered particularly cruel if the perpetrator uses language which humiliates the victim. The same may apply in a situation where the victim could not feel physical suffering, if the perpetrator administered it wilfully²³.

A legal definition on the grounds of Art. 148 § 3 clause 3 k.k., the killing of more than one person in a single act of homicide, may apply in cases of joint (collective) suicide, situations when two or more persons acting jointly and in agreement with each other commit suicide. The scope of this notion may, for example, cover cases where each of the persons takes their life in the presence of the others (e.g. by an injection of poison), or they kill themselves by a method which brings about the death of all of them at the same time (e.g. by turning on a gas tap)²⁴.

²² Verdict of the Gdańsk Court of Appeal of 8 November 2000., II AKa 290/00, «OSAG» 1/2001, Item 11.

²³ Ruling of the Polish Supreme Court of 31 May 2007, III KK 31/07, «OSNKW» 7-8/2007, Item 59.

²⁴ Cf. A. WĄSEK, *Prawnokarna problematyka samobójstwa...*, p. 99-100. One of the earliest reports of a collective suicide occurs in the Old Testament, Saul, the first King of Israel, and his squire, who had been defeated in battle, did not want to be killed by the Philistines, so they committed suicide by simultaneously stabbing themselves with their swords (1 Sm 31, 1-5).

Sometimes the category of joint (collective) suicide is treated as belonging to extended suicide, which does not seem correct²⁵. These terms should not be regarded as synonymous. "Extended suicide" occurs when the person committing suicide brings others without their knowledge into his own suicide. In practice this means that the suicide first kills another person, and then takes his own life²⁶.

The legal situation defined in Art. 148 § 3 clause 3 k.k. may be applicable in cases such as the situation when the suicides take their lives together by administering such substances or using methods which have the property of putting more than one person to death at the same time, e.g. gas-poisoning. Theoretically we cannot rule out the applicability of this article if in the given situation there is a guarantor duty-bound in the same way²⁷.

The condition for Art. 148 § 3 clause 3 k.k. to apply is the perpetrator's intention that more than one person should die. This crime may be committed either if his intention is direct or presumptive, or a combination of the two, when his intention differs with respect to the various persons involved²⁸.

²⁵ Cf. A. GROSS, *Samobójstwa wspólne*, «Archiwum Medycyny Sądowej i Kryminologii» 3-4/1990, p. 178. In Gross' opinion the scope of extended suicide includes cases of suicide by persons who have committed homicide, as well as the simultaneous suicide of two or more persons.

²⁶ For more on this subjects see J. JANICA, M. RYDZEWSKA, *Samobójstwa rozszerzone w materiale Zakładu Medycyny Sądowej w Białymstoku (1955-1988)*, «Archiwum Medycyny Sądowej i Kryminologii» 2/1990, p. 118 ff. These authors show that the most common causes of extended suicides were serious and prolonged conflict with the suicides' immediate social environment, personal problems, or psychotic condition. The victims were usually family members or friends and close acquaintances. Some of these suicides were preceded by preparations, and some were sudden. In most both the perpetrator and the victims were sober.

²⁷ For instance, the guarantor learns that two of his own children have decided to kill themselves by gas-poisoning. The parent finds his children unconscious and needing emergency medical assistance but acting with intent to kill fails to turn off the gas tap and does not call an ambulance. In such a case the parent, who is the legal guarantor, was duty-bound to take steps to save his children's lives.

²⁸ Cf. B. MICHAŁSKI, [in:] *Kodeks karny. Część szczególna*. I..., p. 232; A. ZOLL [in:] *Kodeks karny. Część szczególna...*, p. 261.

There are no formal reservations to rule out a guarantor's criminal liability for failing to taking action to prevent a suicide on the grounds of Art. 148 § 3 clause 2 k.k., that is when he already has a prior conviction for homicide²⁹. It does not matter whether he was previously convicted of homicide as a guarantor or in some other character. Neither is it relevant whether the previous homicide was committed by direct action or by nonfeasance. The identification of the "prior deed" as a "homicide" denotes his commission of the deed in the broad sense of the term. It does not matter whether the crime was committed in separate stages or whether it was inchoate, with the participation of others³⁰. The only matter relevant from the legal point of view is the establishment whether the perpetrator has already been convicted of homicide, which means that an inquiry has to be conducted for a potential expungement (spent conviction).

Despite the lack of a legal definition of homicide in Polish law we may assume that from the linguistic point of view "homicide" is any deliberate act of taking a human life, and its normative determinant is

²⁹ As regards this provision the scope of the meaning of the term *zabójstwo* (homicide) is controversial, as used by the legislator in Art. 148 § 3 clause 2 k.k. In the opinion of some authors, from the linguistic point of view *zabójstwo* means any wilful taking of a human life. Hence the expression "prior crime" of which the perpetrator has been convicted may mean not only the basic type of homicide but also its aggravated and privileged forms as well. (Cf. K. DĄSKIEWICZ, *Przestępstwa przeciwko życiu i zdrowiu. Rozdział XIX Kodeksu karnego. Komentarz*, Warszawa, 2000, p. 84-86; B. MICHAŁSKI, [in:] *Kodeks karny. Część szczególna*. I..., p. 234-235; R. KOKOT, *Zabójstwo kwalifikowane*, Prawo CCLXXV, Wrocław 2001, p. 229-232). Others hold a different opinion, referring to a systemic interpretation of Art. 148 § 3 clause 2 k.k., according to which "prior crime" means a conviction for the basic or aggravated type of homicide, but does not apply to convictions for privileged types of homicide (see L. K. PAPRZYCKI, *Granice ochrony życia i zdrowia*, «Rzeczpospolita» 20 February 1998, p. 18; A. ZOLL, [in:] *Kodeks karny. Część szczególna...*, p. 270-271). This was also the position the Supreme Court took in its decision of 22 November 2002, Uchw. SN z dnia 22 listopada 2002 r., I KZP 41/02, «OSNKW» 1-2/2003, Item 4; cf. J. WYREMBAK, *Glosa do uchwały SN z dnia 22 listopada 2002 r., I KZP 41/02*, «Wojskowy Przegląd Prawniczy» 4/2006, p. 121; Cf. the Supreme Court ruling of 19 November 2008, V KK 74/08, «OSNKW» 3/2009, Item 21).

³⁰ B. MICHAŁSKI, [in:] *Kodeks karny. Część szczególna*. I..., p. 235.

the characteristic feature, the verb “to kill” in its conjugated form in (*Kto zabija*, “Anyone who kills”), which appears in the opening main clause of Arts. 148 § 1-4, 150 § 1 and in a modification in Art.149, k.k., showing that in Polish criminal law *zabójstwo* (“homicide”) means the deeds defined in these provisions. R.A. Stefański aptly points out that the teleological interpretation of these provisions suggests that when considering Art. 148 § 3 k.k. we should omit from its scope those perpetrators who have a prior conviction for homicide of the privileged type; nonetheless, due regard for the precise wording of the legislative act does not allow us to do this, and the linguistic interpretation takes precedence over all other interpretive rules³¹.

Art. 148 § 3 clause 3 k.k. does not seem to be applicable in situations involving failure to take action to prevent suicide. The condition for its legal applicability, with respect to a victim who was a public officer and at the same time a professional guarantor of public order, would be – first, for the perpetrator to be the public officer’s guarantor; and secondly – for the perpetrator to have desisted from carrying out his duty with respect to the public officer during or in connection with the performance of his (the public officer’s) duties to protect the safety of persons, or public safety or public order; and thirdly – the public officer would have had to attempt to commit suicide “while” or “in connection with” carrying out his duties.

In the doctrine it has been pointed out that if a public officer at his place of work and during his working hours were not carrying out his professional duties but conducting his own private matters, and an incident occurred in this connection in which his bodily inviolability were infringed, we could hardly say that such a situation met the criterion of “while performing his professional duties”³². This opinion should be referred directly to the case under examination. Moreover, we can

³¹ R. A. STEFAŃSKI, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2002 r.*, «Wojskowy Przegląd Prawniczy» 1/2003, p. 80 ff.

³² J. WOJCIECHOWSKI, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa, 1997, p. 393.

hardly admit that a suicide attempt may be counted as conducting one's professional duties. So relations of this type are ruled out.

We shall concur with the majority opinion that a crime by nonfeasance may also satisfy the characteristics of Art. 148 § 4 k.k. (homicide under severe mental or emotional disturbance), and at the same time we shall observe that theoretical arguments in this case are no impediment to the prosecution on criminal charges of a perpetrator accused of failing to take action to prevent suicide. The condition for this provision to apply will be the establishment that the guarantor who failed to take action to prevent a suicide was "under severe mental or emotional disturbance justified in the circumstances." We have to agree with A. Wąsek that such conditions are usually associated with an action, but from the psychological point of view we cannot rule out their occurrence by nonfeasance³³. Apart from the fact that the perpetrator was the victim's guarantor, we must also consider the fact that the perpetrator's psychological experiences have a crucial significance for the determination of the characteristics of Art. 148 § 4 k.k., while whether his conduct in the given situation took an active form or whether it was by failure to act is of secondary importance.

We cannot rule out with absolute certainty that an individual's strong reaction when faced with a suicide attempt by a person whose guarantor he is will be regarded as emotional behaviour. For example, we can imagine a situation in which the causes of such a condition are associated with the victim's reprehensible behaviour: for instance situations where the perpetrator does not try to rescue the suicidal person, which he has an obligation to do, due to his severe distress because he has been cruelly treated by the suicidal person.

In jurisdictional practice the circumstances which are the most common causes of a perpetrator's severe mental or emotional disturbance due to a grievance are rejection by a loved person, a partner's infidelity or desertion, a severe insult or defamation, the victim's cruelty to the

³³ A. WĄSEK, *Prawnokarna problematyka samobójstwa...*, p. 140.

perpetrator, or provocation on the victim's part³⁴. Strong emotions may be excited in the perpetrator by the victim's reactions, such as his calling for help or his threats, or by the sight of the victim's severe injuries, great loss of blood, or of his extreme suffering³⁵.

In specific cases the behaviour of a guarantor intentionally not stopping a suicide may be classified as fulfilling the characteristics of Art. 150 § 1 k.k. in connection with Art. 2 k.k. For the death to be considered a euthanasic homicide two further conditions must be satisfied (apart from the self-evident condition of the perpetrator being the victim's guarantor). The prospective victim must demand to be put to death, and the perpetrator must feel sympathy for the victim.

There are no theoretical impediments for a person who holds the status of guarantor to be liable in Polish criminal law for unintentional failure to prevent suicide (Art. 155 k.k. in connection with Art. 2 k.k.).

In the situations discussed above the perpetrator may also be criminally liable on the grounds of Art. 160 § 2 and 3 k.k. (concerning the crime of putting another person's life or health directly at risk). For the attribution of this consequence, it does not matter whether the person duty-bound to take action did not prevent the occurrence of the danger, or whether due to his nonfeasance there was an increase in the danger, the prior emergence of which cannot be attributed to the duty-bound person. The case becomes particularly problematic if there is a need to establish the consequence, a specific risk of loss of life or serious impairment of the victim's health, if the dangerous situation was extant already at an earlier time (e.g. in connection with a suicide attempt).

In situations when the guarantor failed to take the required action to prevent the consequence, viz. putting the victim at risk of loss of life or serious impairment of his health, the consequence will include both the guarantor causing a condition of increased risk, as well as his

³⁴ R. KOKOT, [in:] *Kodeks karny. Komentarz*, ed. R.A. STEFAŃSKI, Warszawa, 2015, p. 848.

³⁵ K. DASZKIEWICZ, *Przestępstwa przeciwko życiu...*, p. 159.

maintenance of the danger at the level of risk already extant when his duty to take action started³⁶.

The Polish Supreme Court has pointed out in its jurisdiction that from the point of view of liability under Art. 160 k.k. it does not matter whether a doctor acting as a patient's guarantor *caused* a situation of direct jeopardy to the patient's life or health by his failure to administer medical treatment, or whether the doctor only *speeded up* the progress of the patient's disease and worsening of the patient's condition by his inaction, thereby putting the patient in a situation where his life or health was directly threatened³⁷. The Supreme Court has observed that "the consequence of the prohibited act defined in Art. 160 § 2 and 3 k.k. may be achieved also by an increase in the level of risk to a person's life, where the danger of loss of life existed already at a prior time, but if the charge against the accused is that he unintentionally failed to prevent the consequence, he is liable under Art. 160 § 2 and 3 k.k. provided the consequence may be attributed to him"³⁸.

Furthermore, we have to agree with the opinion that to attribute the consequence, viz. putting the victim at risk, to the guarantor, it would be sufficient to prove that if the guarantor had embarked on an alternative course of action, which it was his duty to do, the risk to the legal good would have been significantly reduced. However, if the risk would have been reduced only to an insignificant extent by the guarantor embarking on the alternative course of action, then there are no grounds for an indictment³⁹.

A separate area of the issues under discussion is the question of the guarantor's criminal liability for his failure to assist a person already in

³⁶ M. BIELSKI, *Prawnokarne przypisanie skutku w postaci konkretnego narażenia na niebezpieczeństwo*, «Przegląd Sądowy» 4/2005, p. 125.

³⁷ Cf. the verdict of 28 April 2000, V KKN 318/99 (unpublished); the verdict of 26 September 2001, IV KKN 395/2000, (unpublished); the Supreme Court verdict of 5 November 2002, IV KKN 347/99, «Legalis» No. 60365.

³⁸ The Supreme Court decision of 3 June 2004, V KK 37/04, «OSNKW» 7-8/2004, Item 73.

³⁹ J. GIEZEK, *Glosa do post. SN z 3 czerwca 2004 r.*, V KK 37/04, «Palestra» 50.1-2/2005, p. 262.

a dangerous situation (Art. 162 § 1 k.k.). In view of the absence of any restrictions whatsoever to the catalogue of sources of danger, we shall have to assume that the scope of the provision stipulating penalisation under Art. 162 § 1 k.k. also covers cases where the person in danger has himself brought about the dangerous situation posing a threat to his life or health, including by attempting to commit suicide.

A relevant aspect in the interpretation of the characteristics of the crime of failure to assist is the establishment of the fact that what is to be afforded protection is not only the life and health of the person directly endangered by the loss of these legal goods, but also the principle of social solidarity⁴⁰. The contents of Art. 162 § 1 k.k. indicate that the legislator has stressed the guarantor's conduct rather than its consequence, hence we will be right to deduce that the rendering of assistance is a wider concept than the elimination of a danger. Moreover, in view of the broad range of methods and measures for the dispensing of assistance, we shall assume that the duty to assist involves not only an effort to save the life or protect the health of the endangered person, but may also mean the alleviation of suffering for a person who has sustained a fatal injury. The guarantor is not discharged from his obligation to help by the fact that the victim's condition offers no prospects for improvement. Even if it is impossible to dispense effective help to the endangered person, it may be possible to alleviate his suffering⁴¹.

If, in spite of his specific legal duty to prevent the endangered person's death, the guarantor leaves him with no assistance in a situation when the death cannot be prevented by the commission of any act, his inaction may still meet the characteristics of the act prohibited under Art. 162 § 1 k.k. There is no need to examine the consequences of the failure to take action, due to the formal character of the type of offence described

⁴⁰ This is the opinion of A. ZOLL, [in:] *Kodeks karny. Część szczególna...*, p. 394; and likewise B. MICHAŁSKI, [in:] *Kodeks karny. Część szczególna. I...*, p. 490; M. BUDYN-KULIK, [in:] *Kodeks karny. Praktyczny komentarz*, ed. M. MOZGAWA, Kraków, 2006, p. 316; J. KULEZA, *Przestępstwo nieudzielenia pomocy w niebezpieczeństwie. Art. 162 k.k. na tle uwag dotyczących § 323c niemieckiego kodeksu karnego*, Łódź, 2008, p. 51.

⁴¹ Cf. the Supreme Court decision of 31 January 1949, Zb. O. I/49; the Supreme Court verdict of 3 February 1986, I KR 446/86, «OSNPG» 5/1987, Item 55.

in this provision. As regards liability it is immaterial whether or not there was a chance for the danger to be removed, since the guarantor is duty-bound also when there are no prospects for the endangered person's recovery and all that can be done to help him is to alleviate his suffering. The duty defined in Art. 162 k.k. still holds when there is no chance for the elimination of the danger. Therefore we cannot make the guarantor's culpability depend on whether or not the assistance he could have rendered would have had any chance to avert or lessen the danger.

So it seems that we cannot rule out the occurrence of a situation in which the guarantor will not be liable for the death of one who has survived a suicide attempt but died because his condition following the suicide attempt gave no prospects of recovery. However, the guarantor may still be liable for the crime of not dispensing any assistance to lessen the victim's suffering, to which he is still duty-bound.

5. THE CRIMINAL LIABILITY OF A PERSON WHO DOES NOT HAVE THE STATUS OF A GUARANTOR

If the person who fails to take action to stop a suicide does not hold the status of a guarantor, he can only be liable under Art. 162 § 1 k.k., which defines the wilful, general constructive (formal) crime of failing to render assistance to a person in a life-threatening or serious health-threatening situation. Unlike a guarantor, a person who is not a guarantor and who fails to carry out the duty to help in such a situation can only be liable for the fact of failing to help, regardless of the consequences ensuing from the inaction⁴².

⁴² The opinion that the consequence is not the condition for liability is presented in K. BUCHAŁA, *Przestępne zaniechanie udzielenia pomocy w niebezpieczeństwie grożącym życiu człowieka*, «PiP» 15.12/1960, p. 1000; J. ŚLIWOWSKI, *Prawo karne*, Warszawa, 1979, p. 379; W. GUTEKUNST w: O. CHYBIŃSKI, W. GUTEKUNST, W. ŚWIDA, *Prawo karne. Część szczególna*, Wrocław, 1980, p. 189; I. ANDREJEW, *Polskie prawo karne w zarysie*, Warszawa, 1978, p. 369; A. ZOLL, [in:] *Kodeks karny. Część szczególna...*, p. 396; B. MI-CHALSKI, *Kodeks karny. Część szczególna. I...*, p. 491.

In the literature on the subject some authors say that the scope of Art. 162 k.k. covers situations in which the direct threat to a person's life or health is due to the actions of the victim himself⁴³, including the actions of a suicide⁴⁴. Such an opinion is correct, since Art. 162 k.k. makes no distinction between a danger due to causes which do not depend on the will of the endangered person, and those which he brings upon himself voluntarily, as in a suicide attempt.

For an attempted suicide to be considered a source of danger, we must identify the moment in time when a bystander's duty to undertake rescue operations comes into effect. Pursuant to Art. 162 § 1 k.k., the duty to provide assistance arises at the moment a situation emerges in which there is a direct life-threatening danger, or a risk of serious loss of health for the victim, and this also applies when the victim is a suicide. We may agree with and approve of the opinion that what is harmful from the social point of view and treated as criminally liable is only the inaction with respect to the immediate threat to another person's life, but not the threat in itself. So it is not a question of stopping would-be suicides from attempting to commit suicide⁴⁵.

On the grounds of Art. 162 k.k. doubts have been raised concerning the significance of the opposition of the enjoyer of the legal good, here meaning the person who has attempted suicide, to the rescue operation. So, too, is the effect of his opposition on the assessment of the criminal

⁴³ Cf. J. SAWICKI, *Przymus leczenia, eksperyment, udzielanie pomocy i przeszczerp w świetle prawa*, Warszawa, 1966, p. 25; A. WĄSEK, *Prawnokarna problematyka...*, p. 124; J. MAŁCZEWSKI, *Problemy z prawną kwalifikacją pomocy lekarskiej do samobójstwa*, «Prokuratura i Prawo» 11/2008, p. 23-24; J. KULEZA, *Przestępstwo nieudzielenia pomocy w niebezpieczeństwie (art. 162 k.k.)*, «CzPKiNP» 2/2008, p. 169.

⁴⁴ R. KOKOT, *O przestępnym i nieprzestępnym zaniechaniu udzielenia pomocy w niebezpieczeństwie w ujęciu kodeksu karnego z 1997 r. Część I*, [in:] *Nowa kodyfikacja prawa karnego*, XXIX, Wrocław, 2013, p. 68; J. KULEZA, *Nieudzielenie pomocy samobójcy w świetle art. 162 kodeksu karnego*, [in:] *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga Jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, eds. A. MICHAŁSKA-WARIAS, I. NOWIKOWSKI, J. PIÓRKOWSKA-FLIEGER, Lublin, 2011, p. 400.

⁴⁵ J. MAŁCZEWSKI, *Problemy z prawną kwalifikacją...*, p. 24; J. KULEZA, *Nieudzielenie pomocy samobójcy...*, p. 400-401.

liability of a person who refrained from helping to rescue him. However, this issue goes beyond the scope of this paper and I have addressed it in a separate study⁴⁶.

The duty to dispense help is not an absolute duty in the sense that it is binding on the dispenser regardless of the circumstances. In Art. 162 § 1 k.k. the legislator has defined the limit to which the rescuer is expected to go in sacrificing his own goods to save the endangered goods of another person. He is not required to carry out the duty to help if there is a risk of loss of his own or another person's life, or of serious impairment to his own or another person's health. Moreover, under Art. 162 § 2 k.k. no offence is committed by anyone who refrains from offering help which would require professional medical treatment, or does not offer it in conditions requiring urgent assistance from a person or institution specially appointed to dispense such assistance.

A provision which may be relevant in situations involving rescue operations to save a suicide is the clause pertaining to the rescuer's own safety, formulated in Art. 162 § 1 k.k. *in fine*. It often happens that a person intent on suicide puts up resistance to rescue operations, which may mean a risk of loss of the rescuer's life or serious impairment to his health. But a rescuer may be exempted from the duty of dispensing assistance to the victim only if his own or another person's life or health could be at risk if he tried to help the victim by a specific method (dangerous to himself or another person) where there are a number of possibilities⁴⁷.

Incidentally, we should also note that the standard of the assistance laid down by the law should be determined by the particular circumstances pertaining to the given case. Conduct falling short of the established standard is tantamount to failure to dispense the required assistance and is therefore to be regarded as fulfilling the characteristics of the act prohibited under Art. 162 § 1 k.k.⁴⁸ The manner in which a person

⁴⁶ For more on this, see J. KOSONOĞA-ZYGMUNT, *Obowiązek udzielenia pomocy w przypadku sprzeciwu osoby zagrożonej w świetle art. 162 Kodeksu karnego*, «Zeszyty Prawnicze» 15.1/2015, p. 137 ff.

⁴⁷ B. MICHAŁSKI, *Kodeks karny. Część szczególna. I...*, p. 496.

⁴⁸ A. ZOLL, *Kodeks karny. Część szczególna...*, p. 396-397.

who has survived a suicide attempt is to be helped is determined by the circumstances pertaining to the specific incident, such as the time, place, and manner in which the suicide attempt was made, the surviving suicide's condition (*viz.* the degree of the threat to his life or health, whether he is conscious or unconscious etc.), and his willingness to accept help. Other relevant factors include the skills, qualifications, knowledge, and measures available at the time to the person confronted with the suicide attempt.

6. FINAL REMARKS

The issues associated with failure to take action to prevent suicide are interdisciplinary and complex. Within the limits of this article I have been able to present only a selection of detailed matters.

In the light of these observations, Polish law lays down a range of criminal liability for failure to take action for the prevention of a suicide, understood in a broad sense as failure to embark on rescue operations once the suicide attempt is already in progress, as well as failure to take action for the reversal of the consequences of an attempted (abortive) suicide. The extent of liability depends on the status of the person responsible for the omission.

If the properties of a guarantor described in Art. 2 k.k. may be attributed to him, then there are grounds to consider him liable for the material crime against life and health, as defined, for instance, under Art. 148 k.k., 155 k.k., or 160 k.k., in connection with Art. 2 k.k. In this respect the criminal liability for failure to take action for the prevention of suicide constitutes part of a wider issue, liability for material crimes of nonfeasance.

A person who leaves a survivor of a suicide attempt without any help in contravention of the general legal obligation to prevent death in a situation when he could not have prevented the death by carrying out the duty to take action, may also be liable on the grounds of fulfilling the characteristics of the prohibited act defined in Art. 162 § 1 k.k. This is the conclusion which must be reached if we accept the opinion that the

scope of Art. 162 k.k. also covers situations in which there is no chance of removing the danger, and all that can be done in the way of assistance is to alleviate the victim's suffering. The legal definition in Art. 162 § 1 k.k. also applies to a person who is not a guarantor. A person in this situation who fails to carry out the duty to help the victim will be liable only for his failure to render assistance, regardless of the consequences caused by his inaction.

ODPOWIEDZIALNOŚĆ KARNA ZA NIEPRZESZKODZENIE SAMOBÓJSTWU
W POLSKIM PRAWIE KARNYM

Streszczenie

Artykuł został poświęcony problematyce nieprzeszkodzenia samobójstwu w polskim prawie karnym. Zagadnienie to ma charakter interdyscyplinarny i bardzo złożony. Ramy niniejszego opracowania pozwoliły na prezentację jedynie wybranych kwestii szczegółowych, takich jak: pojęcie nieprzeszkodzenia samobójstwu, prawo podmiotowe do samobójstwa oraz kwalifikacja prawna nieprzeszkodzenia samobójstwu. W świetle zaprezentowanych rozważań przyjęto, że zagadnienie odpowiedzialności karnej za nieprzeszkodzenie samobójstwu, rozumiane szeroko, jako niepodjęcie akcji ratowniczej w trakcie realizowanego już zamiaru pozbawienia się życia, jak i nieodwrócenie skutków takiego zamachu, kształtuje się odmiennie w zależności od statusu podmiotu dopuszczającego się zaniechania. Chronionemu z perspektywy jednostki prawo do życia odpowiada po stronie ogółu obowiązek ochrony życia, tj. jednostka ma prawo do życia, wszyscy inni mają natomiast obowiązek, by je chronić.

Słowa kluczowe: samobójstwo; gwarant; nieprzeszkodzenie samobójstwu; odpowiedzialność za przestępstwa skutkowe z zaniechania; przestępstwo niedzielenia pomocy.

Keywords: suicide; the guarantor; failure to take action to prevent a suicide; liability for material crimes of nonfeasance; criminal withdrawal of assistance.

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