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ON THE SUBJECT OF TESTAMENTARY BURDEN AGAINST THE BACKGROUND OF GERMAN LAW

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ABSTRACT

The making of a last will and testament by a testator is an act in law. The testator is entitled to make specific dispositions to execute their last will, such as identifying an heir, making ordinary or vindication legacies, or appointing an executor of the will. At the same time, the number of potential aims intended to be achieved by the testator corresponds to the number of possible life situations that cannot be resolved through the testator's dispositions regarding their estate. It is therefore necessary to equip the testator with such legal means that will allow them to achieve both material and non-material objectives. This is the role of the institution of testamentary burden. It has been regulated in the Polish legal system only superficially; therefore, the author refers to the legacy of German legislation to offer a better understanding of the solution.

Keywords: testamentary burden, Polish law, German law

1. INTRODUCTION

Effective planning of succession under the testator's last will is a major challenge. Given an often-complicated family background, the legal context, and adverse economic conditions, for a testator to achieve their aims

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regarding the future of their property after death is an extremely difficult process. This is particularly relevant when the testator's intentions go beyond the mere question of what should happen to their estate. There are certain instruments available to the testator under succession law that offer several ways to decide the future of one's estate mortis causa, a testament being the most popular choice.

The content of a testament (will) covers, as provided in Book IV of the polish Civil Code[1], typical testamentary provisions, such as appointing an heir (Article 959 CC), establishing an ordinary legacy (Article 968 CC), vindication legacy (Article 981[1] CC), or identifying an executor of the will (Article 986 CC), but it may also contain other testator's instructions, the legal effect of which, however, is often constrained[2]. Yet, not all of the testator's expectations can be met by means of classically understood property-related instructions in the event of their death[3]. This is because some of them refer to aims that cannot be achieved through standard testamentary dispositions, especially by the mere appointing of an heir or establishing a legacy. However, such aims can be secured by means of a testamentary burden. What this instrument gives the testator is the capacity to exert a legally binding influence on the behavior of some designated individuals, thus achieving the desired aims.

The origin of the institution of testamentary burden goes back to Roman times when it was understood as an additional reservation made in a legal transaction but limited only to gratuitous increments (i.e. gifts or

[1] Act of 23 April 1964 Civil Code (consolidated text: Journal of Laws of 2020, item 1740 as amended, hereinafter "CC").

[2] This mainly applies to non-legal dispositions, such as pieces of advice, wishes or recommendations (*nudum praeceptum*), especially of a moral and emotional nature, for example, an instruction to the heirs to live an honest life or act loyally towards other family members. See Bronisław Walaszek, "Polecenie testamentowe w polskim prawie spadkowym," *Studia Cywilistyczne*, vol. 1 (1961): 156; Michał Niedośpiał, "Zasadnicze rozrządzenia testamentowe," *Studia Prawnicze*, no. 2 (1997): 75.

[3] Sylwester Wójcik, "Treść testamentu," in *System Prawa Cywilnego. Prawo spadkowe*, ed. Józef Stanisław Piątowski (Wrocław-Warszawa-Kraków-Gdańsk-Łódź: Wydawnictwo Polskiej Akademii Nauk, 1964), 187.

testamentary dispositions)[4] or to the act of liberation of a slave[5]. The Roman *modus* was a legal situation in which the beneficiary of a gratuitous pecuniary benefit was instructed to allocate it (its value or part thereof) to specific purposes[6]. Besides, they were obliged to perform what the testator instructed them to do[7]. Although the understanding of this kind of instruction evolved towards producing a legal effect[8], which ultimately led to the instrument being equated with *fideicommissum* and then a legacy (*legatum*)[9]; yet, it was the original idea of burden that underlay the formation in many contemporary legal systems of similar solutions separate from a legacy[10].

The Polish legal system also offers such regulations. They were originally embedded in the Decree on the Law of Succession[11] (Articles 135–136), and later, in a somewhat modified form, in the Civil Code. Still, the existing normative regulation of testamentary burden is rather cursory (Articles 893–895 CC, Articles 982–985 CC). Likewise, the literature[12] and

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[4] Wacław Osuchowski, *Zarys rzymskiego prawa prywatnego* (Warszawa PWN: 1971), 265.

[5] Rudolf Sohm, *Instytucje, historja i system rzymskiego prawa prywatnego. Część pierwsza. Źródła i nauki ogólne* (Warszawa: Instytut Wydawniczy Bibljoteka Polska, 1925), 231.

[6] Rudolf Sohm, *The Institutes of Roman Law* (Oxford: Clarendon Press, 1892), 140. In other words, a burden was any performance binding on a person who obtained any benefit from a testator (donor). Ferdynand Źródłowski, *Instytucye i historya prywatnego prawa rzymskiego* (Lwów: Księgarnia Pawła Starzyka, 1889), 334.

[7] Leonard Piętak, *Prawo spadkowe rzymskie. Vol. 1* (Lwów: self-publ., 1882), 325.

[8] Franciszek Longchamps de Berier, *O elastyczności prawa spadkowego: fideikomis uniwersalny w klasycznym prawie rzymskim* (Warszawa: Liber, 2006), 6.

[9] Grzegorz Gorczyński, "Istota polecenia testamentowego i jego zaskarżalność," in *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, eds. Jacek Gołaczyński, Jacek Mazurkiewicz, Jarosław Turłukowski, and Daniel Karkut (Wrocław: Oficyna Prawnicza, 2015), 287–292.

[10] Despite certain terminological differences, as well as different legal effects that a testamentary burden can produce, the legal systems of several countries provide for a similar or related solution, for example, Austria, the Czech Republic, Estonia, France, the Netherlands, Kazakhstan, Moldova, Germany, Russia, Slovakia, Slovenia, Switzerland, Ukraine, Hungary, or Italy.

[11] Decree of the Council of Ministers of 8 October 1946 on the Law of Succession (Journal of Law No. 60, item 328).

[12] The most important publications addressing this problem, apart from commentaries, are: Sylwester Wójcik, "Rozrządzenia testamentowe," in *System Prawa Cywilnego*,

case-law[13] are scarce in this regard. At the same time, the legal nature of this institution remains vague and raises many theoretical doubts and, by extension, practical challenges. The limited contribution from the doctrine and case-law requires jurists to resort to comparative studies and seek answers in the legal acquis of other countries. Due to the generous reception of Roman law by the Germanic legal system, the solution of testamentary burden (*Auflage*) is particularly well-established in the legacy of German civil law, thus making it a useful source of inspiration. Reference to specific German regulations and case-law will certainly help characterize the construct of testamentary burden. Conclusions drawn can provide guidelines for a better understanding of the Polish regulation

ed. Józef St. Piątowski (Wrocław-Warszawa-Kraków-Gdańsk-Łódź: Wydawnictwo PAN, 1986), 263ff; Sylwester Wójcik and Fryderyk Zoll, "Rozrządzenia testamentowe," in *System Prawa Prywatnego. Tom 10, Prawo spadkowe*, ed. Bogudar Kordasiewicz (Warszawa: C.H. Beck, 2015), 461ff; Fryderyk Zoll, "Polecenie obciążające osobę odnoszącą korzyść z czynności pod tytułem darmym," *Przegląd Notarialny*, no. 5 (1946): 387–393; Bronisław Walaszek, "Polecenie testamentowe w polskim prawie spadkowym," *Studia Cywilistyczne*, vol. 1 (1961): 153–193; Paweł Księżak, "Żądanie wykonania polecenia," *Przegląd Sądowy*, no. 4 (2006): 49–61; Krzysztof Piotr Sokołowski, "Darowizna z poleceniem a negotium mixtum cum donatione w praktyce notarialnej," *Rejent*, no. 4 (2011): 51–75; Magdalena Wilejczyk, "Darowizna obciążona poleceniem," *Państwo i Prawo*, no. 5 (2013): 67–78; Katarzyna Eger, "Polecenie a świadczenie na rzecz osoby trzeciej w umowie darowizny," *Krytyka prawa* 8, no. 1 (2016): 36–54; Paweł Księżak, "Polecenie," in *Prawo spadkowe* (Warszawa: Wolters Kluwer, 2017), 279–284; Grzegorz Gorczyński, "Istota polecenia testamentowego i jego zaskarżalność," in *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, eds. Jacek Gołaczyński, Jacek Mazurkiewicz, Jarosław Turłukowski, and Daniel Karkut (Wrocław: Oficyna Prawnicza, 2015), 281–297; Jarosław Turłukowski, "Instytucja polecenia testamentowego w prawie krajów Wspólnoty Niepodległych Państw na tle prawa polskiego," in *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, eds. Jacek Gołaczyński, Jacek Mazurkiewicz, Jarosław Turłukowski, and Daniel Karkut (Wrocław: Oficyna Prawnicza, 2015), 793–810.

[13] The lack of uniformity of the scarce case-law is seen in several examples: Decision of the Supreme Court of 19 April 2002, file ref. III CZP 19/02, *Lex*, no. 74583; Judgement of the Supreme Court of 20 October 2006, file ref. IV CSK 172/06, *Lex,* no. 564478; Judgement of the Supreme Court of 27 January 2016, file ref. II CSK 153/15, *Lex*, no. 1996828; Judgement of the Supreme Court of 22 February 2018, file ref. I CSK 361/17, *Lex*, no. 2482576; Judgement of the Supreme Court of 13 September 2019, file ref. II CSK 364/18, *Lex*, no. 3177368.

and show directions of potential legislative changes with a low legal risk of erroneous interpretation.

Given the limited size of this work, the weight of problems related to the institution of burden cannot be addressed exhaustively. Consequently, the discussion will be confined to outlining the general framework of testamentary burden[14]. At the same time, an analysis of the potential subject of testamentary burden as a legal relationship will be carried out along with an analysis of the basic problems and framed arguments.

2. THE BINDING FORCE OF TESTAMENTARY BURDEN IN POLISH AND GERMAN LAW

Building on the legacy of Roman law and the experience of some European legislation, the Polish legislator has also established the institution of testamentary burden. As in ancient Rome, it falls within the category of *accidentalia negotii*, next to the condition and time limit for the effectiveness of acts in law[15].

The content of the notion of testamentary burden seems clear on the surface. It entails the imposition by the testator upon an heir or a legatee (i.e. entities benefiting from a gratuitous increment) of a duty to perform a specific act or omission without making anyone a creditor (Article 982 CC)[16].

However, in the face of doubts as to the admissibility of enforcement of the aforesaid duty at court, the legal nature of the institution remains a controversy in the doctrine. In Roman law, in the original construct of the burden, the fulfilment of the duties imposed by the testator through informal requests was not subject to complaint[17]; yet, as a result of linking the testamentary burden with the construct of legacy, the right to

[14] Due to considerable similarities, many of the observations herein also apply to the notion of burden related to gift.

[15] Ewa Jurczak, "Polecenie w polskim prawie cywilnym," in *Prace z prawa cywilnego*, ed. Elżbieta Skowrońska-Bocian (Warszawa: C.H. Beck, 2010), 76.

[16] The legislator has significantly reviewed its position.

[17] Władysław Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł* (Poznań: Ars Boni et Aequi, 1992), 109.

complain was granted in all these cases[18]. In the history of Polish law, there was no standard (pure) construct of testamentary burden; instead, it was merged with the institution of order (legacy), yet subject to compulsory enforcement[19]. Apart from the regulations of the powers occupying Poland after the 18th-century Partitions, which acted as the vehicle for the regulation of testamentary burden (§1940 and §§2192–2196 BGB[20]) or related institutions (Articles 709–711 ABGB[21]), for the first time, Polish civil law provided for the institution of testamentary burden in the Decree on the Law of Succession[22]. The decree read that in their last will the testator was able to oblige a heir or legatee to perform a specific act without making anyone a creditor (Article 135§1). Any heir or executor of the will was entitled to request the performance of this act (Article 135§2), and where the performance was in the public interest, any competent authority was in a position to demand it (Article 135§3). In principle, the duty resulting from the testamentary burden was also subject to complaint[23] (by entities that failed to benefit from its performance)[24].

[18] Grzegorz Gorczyński, "Istota polecenia…," 287–288 and the literature referred therein.

[19] Przemysław Dąbkowski, *Prawo prywatne polskie, t. II* (Lwów: Towarzystwo dla Popierania Nauki Polskiej, 1911), 80; Bolesław Śląski, *Materjały do polskiego słownika prawniczego* (Kępno: Drukarnia Spółkowa w Kępnie. 1931), 18; Bronisław Walaszek, "Polecenie testamentowe…," 154.

[20] Act of 18 August 1986 (German) Civil Code (*Bürgerliches Gesetzbuch*; BGBl. I S. 42, 2029; 2003 I, 738 as amended), hereinafter "BGB."

[21] Act of 1 June 1811 (Austrian) Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; JGS No. 946/1811 as amended), hereinafter "ABGB."

[22] The term "burden" was first used by Fryderyk Zoll (the younger) in his coursebook on the law of obligations: Fryderyk Zoll, *Zobowiązania w zarysie* (Warszawa: Gebethner i Wolff, 1945), 36; in his post mortem publication, *Polecenie obciążające osobę odnoszącą korzyść z czynności pod tytułem darmym*, s. 389, the term was regarded as a neologism.

[23] Similarly, Krzysztof P. Sokołowski, "Darowizna z poleceniem…," 56. The exception to this was when the legatee encumbered with a sublegacy or the obligation to fulfil a burden was not obliged to provide such a sublegacy or burden before the obliged has complied with the legacy (Article 113§3).

[24] Undoubtedly, the obligation of specific performance imposed by a donor on a donee under a contract of donation concluded under Article 354§2 of the Regulation of the President of the Republic of Poland of 7 October 1933 Code of Obligations (Journal of Laws No. 82, item 598).

When introducing the concept of testamentary burden into the Civil Code, the contemporary legislator significantly altered its definition, pointing out (in Article 982 CC) that, in their last will, the testator may impose upon an heir or legatee a duty to perform a specified act or omission without making them creditors. With regard to the possibility of enforcing the compulsory performance of a duty arising from a burden, the legislator retained the very gist of the construct used in the decree (both with regard to the list of right holders the exclusion provided for in Article 113§3 of the Decree on the Law of Succession; today, maintained in Article 983 CC); however, it reserved that each of the heirs, as well as the executor of a will, may demand the performance of the burden, unless the burden is aimed exclusively to benefit the person obliged to comply with the burden (Article 985 CC).

Doubts regarding the legal nature of a testamentary burden have not been removed by the Supreme Court and its decision concerning an instruction related to gift, which the court found essentially similar to a testamentary burden. In the court's view, the imposition of a burden, including a material one, on a donee or heir does not entail an obligation relationship similar to that resulting from other acts of law. Therefore, anyone who benefits from the burden is not a creditor but a beneficiary. Such a conclusion is derived from the legal nature of burden which, when imposed on a specific person (donee, heir) leads to the emergence of a natural (incomplete) obligation. Consequently, a group of entities may demand from the person obliged to perform as provided for in the burden; still, these entities cannot resort to the authority of the state to force that person to behave so[25].

This position has been rightly criticized in the literature[26] as formulated contrary to the applicable regulations and entrenched doctrinal legal constructs. After all, the legal relationship of a natural obligation envisages the existence of both a debtor and a creditor, and, in consequence, also debts and claims. Only the option of legal enforcement of a claim is not

[25] Decision of the Supreme Court of 19 April 2002, file ref. III CZP 19.02, *Lex*, no. 74583.

[26] Among others: Paweł Księżak, "Żądanie wykonania polecenia," *Przegląd Sądowy*, no. 4 (2006): 55ff; Sylwester Wójcik, Fryderyk Zoll, "Rozrządzenia testamentowe…," 461–462. A different view in: Ewa Jurczyk, "Polecenie…," 136; Magdalena Wilejczyk, "Darowizna…," 73.

open to complaint. The incomplete nature of the obligation manifests itself in the debtor's non-liability for the existing debt, which means that state coercion cannot be applied to recover the debt.

The discussed position of the Supreme Court is clearly not aligned with explicit legislative solutions. Article 982 CC reads directly that the testator may impose upon certain entities a duty to perform or not to perform in a specific way without making them creditors (and creditors are a party to a natural obligation)[27]. Moreover, the position of the court is also in conflict with the legislator's wording, "may demand the performance," i.e. a statutory confirmation of the binding nature of the demand of performance of the burden[28]. The duty to act in accordance with the testamentary burden has therefore a legal and not moral nature. It is binding and its performance is subject to judicial protection. There are exceptions to this rule provided for by the legislator, namely when the performance of a burden cannot be enforced if it has in view solely a benefit of the person obliged to comply with the burden (Article 985 sentence 1 CC), as well as when a legatee obliged to comply with a burden may withhold its performance until the legacy is executed by the heir (Article 983 CC)[29].

[27] There is a deeper meaning of the legislative change in the Civil Code of the substance of burden from "obligation to perform" to "a duty to perform a specified act or omission" in accordance with the rules of legislative drafting (see §6 and 10 of the Regulation of the Prime Minister of 20 June 2002 on the Principles of Legislative Drafting, consolidated text: Journal of Laws of 2016, item 283, as amended, requiring that legislative statements be precise and prohibiting the use of identical terms for various concepts). It is doubtful whether such a significant modification was guided only by the need to make a stylistic modification in the wording. An opposite view, despite a clear legislative shift recognizing the performance *sensu largo* as the subject of testamentary burden, in Konrad Osajda, "Komentarz do art. 982 k.c.," in *Kodeks cywilny. Komentarz*, ed. Konrad Osajda (Warszawa: Legalis C.H. Beck, 2021), 53–54.

[28] For example, Article 985 CC establishes a group of entities entitled to demand the performance of a burden, Article 922§3 CC mentions the duty to perform burdens among inherited debts, or Article 1033 CC which says that the liability of co-heirs resulting from ordinary legacies and burdens is limited to the value of the assets of the estate (which means that the entity obliged to comply with a burden is liable for its performance as in the case of liability for a legacy). See Paweł Księżak, "Żądanie…," 61.

[29] For more arguments, including those related to the historical and systemic interpretation, as well as that concerning the purpose, against the position of the judicature, see Krzysztof P. Sokołowski, "Darowizna z poleceniem…," 55–57.

The legislative expression "without making anyone a creditor" (Article 982 CC) also requires clarification. As rightly emphasized in the doctrine, it should be regarded as the basis for the designation of a group of entities other than in a standard obligation relationship. Despite the unquestionable legal obligation to perform a burden, no creditor exists in the burden-related legal relationship[30]. This is justified as burdens are solely linked to the interests of the deceased, so there is no physical entity that could demand their performance before court[31].

This way of understanding the legal construct of testamentary burdens, i.e. based on whose interest is in fact to be safeguarded, allows them to be distinguished from legacies (which are binding but related to the legatees' interest) or other instructions (wishes) of the legislator (related to the testator's interest and binding the beneficiaries of the estate only morally). In the case of a testamentary burden, legal protection is always afforded to the testator's interest[32].

The option of disposing of one's property *mortis causa* are much broader in German law than in Polish law. They cover both a will itself, including a joint will of the spouses, and a contract of succession (estate contract), under which the testator makes binding dispositions regarding the future estate while still alive. In this way, the German legislator responded to the expectation of regulating legal succession in the event of death with a binding effect[33]. Importantly, each of these dispositions creates potential grounds for the testator to frame a testamentary burden[34].

German succession law, and the Polish legal system alike, approaches the burden as a separate and autonomous testamentary disposition. Still, the legal construct of testamentary burden is set in a more extensive legal

[30] Sylwester Wójcik, Fryderyk Zoll, "Rozrządzenia testamentowe…," 462.

[31] Grzegorz Gorczyński, "Istota polecenia…," 294.

[32] This interest may be related, for example, to the maintenance of the testator's tomb, the duty to take care of their pets or to transfer certain benefits to yet unidentified entities (as in the case of charity burdens).

[33] Anna Duda, "Umowa dziedziczenia w prawie niemieckim – pojęcie i moc wiążąca," *Rejent*, no. 3–4 (2004): 116.

[34] The legal grounds for the admissibility of framing testamentary burdens are: § 1940 BGB for a will, § 2270 BGB for a joint will – *gemeinschaftliches testament*, § 1941 and § 2278 BGB for a contract of succession – *erbvertrag*. The institution of burden is addressed in detail particularly in §§2192–2196 BGB.

framework in the German Civil Code. Division I of Book V of BGB contains the general section, § 1940, which reads that the testator may in their will oblige the heir or legatee to perform an act without granting another person a right to benefit from the performance. The literature on the subject emphasizes the second part of this provision. The lack of the demand of the beneficiary of a burden for the performance of the duty imposed by the burden is regarded as the main attribute of the construct of this institution[35].

It is important to note that the institution of burden in German succession law is shaped in opposition to a legacy that produces obligation effects (*Vermächtnis* – §2147ff BGB)[36]. The core idea of such a legacy is to oblige a heir or legatee to give a specific benefit to the legatee, who then becomes a creditor of this benefit[37]. In both German and Polish law, a burden differs from a legacy in that the beneficiary of the burden is not entitled to demand its performance[38]; in other words, they do not become a creditor[39]. This helps distinguish burdens from other legal in-

[35] Among the many authors covering the subject, see Franz Linnartz, in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2192 BGB, note 1; Florian Dietz, in *Beck'sches Notar-Handbuch*, Heribert Heckschen, Sebastian Herrler, Christof Münch, Günter Brambring, Hans-Ulrich Jerschke (München: C.H. Beck, 2019), no. 7, note 166.

[36] The Polish legislator has regulated this category of testamentary burdens as ordinary legacies (Article 968§1 CC).

[37] This legal character of legacy results from the provisions of: § 1939 BGB (the testator may by will give a material benefit to another person without appointing the other person as heir) in conjunction with § 2147 BGB (the heir or a legatee may be charged with a legacy. Unless the testator provides otherwise, the heir is charged) in conjunction with § 2174 BGB (A legacy creates a right for the beneficiary to demand delivery of the bequeathed object from the person charged) in conjunction with § 2176 BGB (the legatee's claim arises upon the opening of the inheritance, notwithstanding the right to disclaim the legacy).

[38] Jan Lieder in *Erman BGB*, Harm Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (Köln: OttoSchmidt, 2020), no. 16 (2020), § 1940 BGB, note 1.

[39] The term *verplichten* used in § 1940 BGB must therefore be understood in this context as a legal obligation to perform and not as a source of an obligation relationship. Therefore, the heir or a legatee does not acquire a right to claim for damages for non-performance of a burden (RG WarnRsp no. 133 (1937)).

stitutions. If the beneficiary is entitled to a benefit, this is an ordinary legacy (§ 1939 BGB)[40], if not, it is a burden (§ 1940 BGB)[41]. However, this distinction, as shown in the case-law, is a matter of interpretation of the content of the testator's disposition, in which the individual context of a specific case is always critical[42].

The provisions of the German Civil Code also enumerate entities entitled to perform duties imposed along with a testamentary burden. This is confirmed by the binding nature of performance resulting from the duty imposed by a testamentary burden. Pursuant to § 2194 BGB, the fulfilment of a testamentary burden may be demanded by an heir, a co-heir and any person who would directly benefit from the end of the involvement of the person initially charged with the testamentary burden (i.e. one entitled to demand the fulfilment of the burden)[43]. If the ful-

[40] Contrary to a legacy, the burden does not need to be of a material (pecuniary) nature. See Dietmar Weidlich in *Bürgerliches Gesetzbuch: BGB*, ed. Otto Palandt (München: C.H. Beck, 2021), no. 80, § 2192 BGB, note 3.

[41] Bernd Müller-Christmann in *Bürgerliches Gesetzbuch: BGB*, Heinz Georg Bamberger, Herbert Roth, Wolfgang Hau, Roman Poseck (C.H. Beck, 2017), no. 4, § 1940 BGB note 2f.

[42] A burden is a construct separate from testamentary dispositions in which the testator indicated a specific performance as a condition precedent or subsequent (*accidentale negotii*) of obtaining benefits from the inheritance (§ 158 BGB). See Manuela Schmidt in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 1940 BGB, note 6. At the same time, they should be distinguished from the testator's last wishes, pieces of advice, and recommendations which are binding only morally but not legally. See Mathis Rudy in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB*, Sibylle Kessal-Wulf (München: C.H. Beck, 2020), no. 8, § 2192 BGB, note 5. The very wording used by the testator is not conclusive. The assessment of a disposition so made is a question of interpretation that aims to determine whether the testator merely expressed a wish or recommendation, or created a burden. See Dieter Leipold in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Sibylle Kessal-Wulf (München: C.H. Beck, 2020), no. 8, § 1940 BGB, note 3.

[43] Therefore, it is any person who would inherit in the event of resignation of the person initially "charged" with the capacity of pursuing the fulfilment of the burden, e.g. a substitute heir or a legal heir not holding the title to inherit in the testator's will. See Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), §2194 BGB, note 3.

filment is in the public interest, it may also be demanded by a competent public authority[44].

Besides the individuals named in § 2194 BGB, it is generally accepted that the executor of the will is also entitled to fulfil a testamentary burden[45]. This executor's entitlement does not deny the right of the other parties listed in § 2194 BGB to demand such fulfilment[46].

Importantly, the testator may also independently point to an entity of their choice as entitled to demand the fulfilment of a burden. If they do it in their testamentary dispositions, according to the doctrine, appointing a person authorized to demand the burden and not included in the statutory list is out of the question. However, the executor of the will is appointed, but their capacity is limited: they can only demand that the burden be performed[47]. However, the testator cannot oblige such an entity to act in accordance with the testator's will[48]. Whether the entity will exercise this right is at their sole discretion[49].

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[44] A list of these entities, depending on the federal state, is provided in: Franz Linnartz in *JurisPraxisKommentar BGB…,* §2194 BGB, note 8; Gerhard Otte in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 5: Erbrecht: §§ 2064–2196 (Testament 1)*, ed. Christian Baldus (Berlin: Sellier/DeGruyter, 2019), § 2194 BGB, note 11.

[45] This entitlement is provided for in §§ 2203, 2208(2) and 2223 BGB. See Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), §2194 BGB, note 5.

[46] Reinhard Zimmermann in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB*, Sibylle Kessal-Wulf (München: C.H. Beck, 2020), no. 8, § 2212 BGB, note 9.

[47] Gerhard Otte in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 5: Erbrecht: §§ 2064–2196 (Testament 1)*, ed. Christian Baldus (Berlin: Sellier/DeGruyter, 2019), § 2194, note 6.

[48] What is more, as provided for in the regulations, by creating a burden and determining its aim, the testator may leave the determination of a person who will benefit from the performance to the discretion of the charged or a third party.

[49] Hanspeter Daragan in *Praxiskommentar Erbrecht*, eds. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, §2194 BGB, note 22; Gerhard Otte in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 5: Erbrecht: §§ 2064–2196 (Testament 1)*, ed. Christian Baldus (Berling: Sellier/DeGruyter, 2019), § 2194, note 13.

The German legislator, unlike the Polish one, also directly envisaged the legal effects of both the ineffectiveness of a burden and the inability to perform it.

Under § 2195 BGB, the ineffectiveness of a testamentary burden results in the ineffectiveness of a gift made under the burden only if it is to be presumed that the testator would not have made the gift without the testamentary burden[50]. This regulation applies to situations where a burden has been ineffective from the very beginning as well as when it becomes ineffective at a later stage[51].

On the other hand, § 2196 BGB addresses the question of impossibility of fulfilment of a burden. It reads that where the fulfilment of a testamentary burden becomes impossible as a result of a circumstance for which the person charged is responsible, the person who would benefit directly if the person initially charged ceases to be involved may, in accordance with the provisions on the return of unjust enrichment, demand the delivery of the gift to the extent that this gift should have been used to fulfil the testamentary burden (para. 1). The same applies if the person charged has been ordered by a final and absolute judgment to fulfil a testamentary burden which cannot be executed by a third person and the admissible enforcement measures have been applied to him without success (para. 2). Therefore, if the fulfilment of a burden becomes impossible due to circumstances for which the person charged is not responsible, they are released from the obligation to perform (fulfil) the burden (§ 275 BGB). But if the charged person is responsible for the impossibility of fulfilment,

[50] This provision supplements § 2085 BGB which provides that the ineffectiveness of one of several testamentary dispositions entails the ineffectiveness of the rest of them only if it is assumed that without this ineffective disposition the testator would not have provided the others.

[51] Steffi Nobis in *Erman BGB*, Harm Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (Köln: OttoSchmidt, 2020), no. 16, § 2195, note 1. This is possible when the aim of a burden has already been achieved. For example, under a burden, the testator provided funds for the maintenance of their burial site, and the site no longer exists. See Dietmar Weidlich in *Bürgerliches Gesetzbuch: BGB*, ed. Otto Palandt (München: C.H. Beck, 2021), no. 80, § 2195 BGB, note 1.

they lose the gift to the extent that they should have used it to perform the burden[52].

Evidently, besides resting the core of the regulations of testamentary burden on the Roman legal construct, the German legislator, unlike its Polish vis-a-vis, supplemented them with provisions of a great practical value. The regulations adopted in this respect also affect the material scope of the duties imposed. As mentioned elsewhere, the subject of the legal relationship of testamentary burden may work as a criterion that makes it stand out against the subjects of other testamentary dispositions, in particular legacies[53].

3. THE SUBJECT OF TESTAMENTARY BURDEN IN POLISH AND GERMAN LAW

Both the legal regulations and the legacy of the doctrine of Polish succession law regarding the potential subject of the legal relationship

[52] The person who would directly benefit from the end of involvement of the person originally charged with the burden has the right to demand the return of the gift. Therefore, it is not vested with the executor of the will (Heinrich Lange, Kurt Kuchinke in *Erbrecht. Ein Lehrbuch* (München: C.H. Beck, 2001), no. 5, § 30 III 5d Fn 83) or public authorities. However, all claims expire if the burden was not of a material (pecuniary) nature. Since § 2196 BGB is of dispositive character, the testator is free to sanction non-fulfilment that goes beyond the legal effects of §§ 2195, 2196 (Steffi Nobis in *Erman BGB*, Harm Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (Köln: OttoSchmidt, 2020), no. 16, § 2196, note 2.

[53] The German doctrine shows that if the benefits from performance are to be conferred on specific or identifiable legal entities (i.e. the achievement of the so-called subjective goal, *subjektiver zweck*), and the performance is pecuniary, it should be assumed that a legacy has been established. If the testator aimed to achieve an objective goal (*objektiver zweck*), for example if a pecuniary or non-pecuniary benefit falls to an indefinite and unidentifiable group of people, or when the achievement of the goal indicated by the testator is to serve some permanent purpose, for example, a foundation, or if the duty arising from the burden involves care for a living being without legal capacity (the heir is obliged, for example, to raise an animal or to pay incur expenses associated with it), such a disposition should be assumed to be a testamentary burden. See Hanspeter Daragan in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 2192, notes 3–4.

of a testamentary burden are scarce. Isolated and cursory opinions in the literature that touch upon this problem mainly focus on how to distinguish it from other testamentary dispositions[54] or how to determine its beneficiary[55].

In genere the subject of testamentary burden seems to span a very broad perspective. It imposes a duty on the charged party to act or not to act. It can be both of a pecuniary and non-pecuniary nature; it can provide for a one-time, periodic, or even continuous involvement[56]. Some examples are when a party is charged with a duty to organize the burial ceremony of the deceased (even to follow specific instructions to the ceremony); when the beneficiary of the estate is obliged to enter an educational facility; when care must be provided to a specific person or domestic animals; or when a donation of a certain amount must be made to charity, yet without identifying the actual donee.

The boundaries of the permitted subject of testamentary burden are drawn *expressis verbis* by the legislator. As an autonomous testamentary disposition (and therefore an element of an act in law), the burden should meet the requirements of validity in terms of legal transactions. In this sense, it cannot be illegal, contrary to the principles of social coexistence or contribute to circumvention of the law (Article 58§1 and 2 CC), and it cannot violate the provisions of Book IV CC[57].

The relatively limited research material regarding the potential scope of the subject of testamentary burden, in the absence of transparent case-law and the doctrine that could support the resolution of practical problems, justifies reference to the legacy of German succession law as a source of experience and guidelines for possible legislative changes.

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[54] So in Paweł Księżak, *Prawo spadkowe* (Warszawa: WoltersKluwer, 2017), 280–281.

[55] So in Sylwester Wójcik, Fryderyk Zoll, "Rozrządzenia testamentowe," in *System Prawa Prywatnego. Tom 10, Prawo spadkowe*, ed. Bogudar Kordasiewicz (Warszawa: C.H. Beck, 2015), 463–464.

[56] Konrad Osajda, "Komentarz do art. 982 k.c…," 57.

[57] For example, given the precise wording of the provisions, a testamentary burden may not violate the rights of the testator's spouse and other persons related to the testator who lived with them until the day of their death to use, during three months from the opening of the inheritance, the living accommodation and its household equipment as before (Article 923§1 CC).

First, it should be noted that § 2193 BGB allows the testator only to identify the purpose of the legacy. It is enough for them to specify the purpose of the burden and outline its character[58]. What follows, when determining the purpose of the burden, the testator does not need to indicate the person to whom the performance is to be rendered[59]. It is therefore sufficient, for example, to donate a certain amount of money to charity by its distribution among institutions or people in need[60] or to transfer a share in the estate, if need be, to less affluent family members, religious associations, or animal protection campaigns[61].

The literature on German succession law also highlights that the content of a testamentary burden can be any act[62] or omission[63]. It is not necessary for performance being the subject of a burden to benefit another

[58] Gerhard Otte in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 5: Erbrecht: §§ 2064–2196 (Testament 1)*, ed. Christian Baldus (Berlin: Sellier/DeGruyter, 2019), § 2193, note 2.

[59] The other paragraphs of § 2193 establish the procedure for demanding from the entity indicated by the testator the fulfilment of the duty to identify a beneficiary of the burden.

[60] Testamentary burden is subject to interpretation like any other testamentary disposition. The German legislator provides special guidance as to such interpretation in the general provisions on the last will and testament. As follows from §2072 BGB, it the testator has made provision by will, without more precise identification, for the poor, then in case of doubt it is to be assumed that provision is made to the public poor relief fund of the community in whose district the testator had their last residence, subject to the testamentary burden that it must distribute the gift among poor persons.

[61] Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2193 BGB, note 6 and the case-law referred therein.

[62] Ursula Seiler-Schopp in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 1940, note 5.

[63] From the viewpoint of interpretation of a testamentary burden, § 2075 BGB is particularly noteworthy as it provides that where the testator has made a testamentary gift subject to the condition that the person provided for refrains from doing or continues to do something for an indefinite period, then, if the ceasing or continuing is purely at the discretion of the person provided for, in case of doubt it is to be assumed that the gift is to be dependent on the condition subsequent that the person provided for undertakes the action or refrains from it.

person, nor does it have to be of a pecuniary nature[64]. Also, the person charged with the fulfilment of a burden can benefit from it[65].

Its scope may cover services that are beneficiary to the general public or serve a purpose named by the testator. The subject of a testamentary burden may be, for example, a duty to erect a bust, build a tomb, maintain a garden, or provide free access to a private library or collections to anyone interested[66]. A burden can also concern a requirement to make arrangements regarding the special treatment of items belonging to the estate (prohibition of selling such items or selling them only to designated persons[67]) or a duty to seek advice or consent of a third party before their disposal[68]. Moreover, a testamentary burden may entail the establishing of benefits in kind intended for a specific group of people or for specific purposes; a duty to erect or maintain a tomb, a duty to manage the body of the deceased in a specific manner (e.g. organ donation, provision for anatomical research purposes); a duty to erect a bust or attach a specific photo on the tomb; instructions concerning the maintenance of buildings and parks; the lending of items of the estate to museums or exhibitions; a duty to publish the testator's letters or publications; or a duty to invest the remaining funds until a certain amount of interest has been earned[69].

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[64] A non-pecuniary benefit is also allowed, e.g. an instruction to maintain the testator's tomb. See Steffi Nobis in *Erman BGB*, Harm Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (Köln: OttoSchmidt, 2020), no. 16, § 2192, note 1.

[65] Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2193 BGB, note 7.

[66] Jan Lieder in *Erman BGB*, Harm Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (Köln: OttoSchmidt, 2020), no. 16 (2020), § 1940 BGB, note 2.

[67] If, by way of a testamentary burden, the testator requires that certain items should not be sold or may only be disposed of to a limited extent, this burden has only an obliging effect. See Ursula Seiler-Schopp in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 1940, note 9.

[68] Rolf Stürner in *Bürgerliches Gesetzbuch: BGB*, ed. Othmar Jauernig (München: C.H. Beck, 2021), no. 18, § 2192, note 3.

[69] Ursula Seiler-Schopp in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 1940, note 8 and the case-law referred therein.

Based on the provisions of succession law, a burden may not impose a duty to make or not to make a will (§ 2302 BGB)[70].

Importantly, as regards the nature of the potential subject of a burden, § 2192 BGB is relevant as it lists the provisions that govern the institution. It applies even if a burden does not qualify as a material (pecuniary) benefit. As shown in the doctrine, this list of provisions is not exhaustive; therefore, other provisions of succession law may also be applied accordingly to testamentary burdens[71].

The requirement to apply the proper provisions has a direct impact on the classification of general constructs of testamentary burden in legal practice. By reference to the provisions on testamentary burden, it is possible to identify some of its forms depending on its potential content. Among them, the most frequent are a burden specifying the type of the subject of the burden (*Gattungsauflage*), a burden to procure the subject of the burden (*Verschaffungsauflage*), an alternative burden (*Wahlauflage*) and a burden with the indication of a purpose (*Zweckauflage*)[72].

The first of them occurs when the testator defined the subject of testamentary burden by referring to its generic attributes (class). In this situation, as provided in the literature recommending the appropriate application of § 2155 BGB[73], the person charged with a duty to fulfil the burden

[70] Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2192 BGB, note 24.

[71] Some examples include § 2159 BGB (accrual), § 2187 BGB (limitation of the main legatee's liability), § 2188 BGB (right to reduce the performance of the charged legatee) or 2318 BGB (the heir's right to refuse to perform for the beneficiary of the burden). See Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2192 BGB, note 6.

[72] Some more forms of testamentary burden are: a substitute burden (*Ersatzauflage*), a burden specifying an amount (*Quotenauflage*), a sub-burden (*Unterauflage*), a preliminary burden (*Vorausauflage*), a burden specifying a value (*Wertauflage*), or a universal burden (*Universalauflage*). See Hanspeter Daragan in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 2192, notes 22–27.

[73] The provision points out that if the testator has specified the thing bequeathed only by class, a thing commensurate with the circumstances of the person provided for is to be given.

should provide the beneficiary with an item commensurate with their individual needs[74].

The second form of burden provides that the subject of the duty that it imposes is to provide an item that does not belong to the estate at the time of the opening of the succession. It is assumed that the item should be procured for the beneficiary by the person charged with the burden (§ 2170(1) BGB). If it is not possible to procure it or the procurement involves disproportionately high amounts of money, the charged person may, however, release themselves from this duty by paying to the beneficiary the equivalent value of this item[75].

The alternative burden provides that the testator may direct in his testamentary burden that the charged person is to fulfil only one of several performances, in particular they receive only one of several items indicated by the testator (§ 2154 BGB). The final choice in this respect may pass to the person charged with the duty to fulfil the burden but also to its beneficiary[76].

On the other hand, in the case of a burden whose purpose has already been determined by the testator (§ 2193 BGB), they may leave the determination of the performance of the legacy to the reasonable discretion of the person charged or of a third party (§ 2156 BGB). The implementation of this purpose clause (*Zweckauflage*) may also be assigned to the executor of a will[77].

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[74] Hanspeter Daragan in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 2192, note 19.

[75] Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2192 BGB, note 21.

[76] The doctrine shows that this construct does not violate the provisions of § 1940 BGB because the right to choose is not tantamount to a claim for its fulfilment. The fact of having a choice does not give the beneficiary the right to claim to comply with it; it is only binding on the person charged with the duty to fulfil. See Hanspeter Daragan in *Praxiskommentar Erbrecht*, ed. Jürgen Damrau, Manuel Tanck (Bonn: Zerb Verlag, 2020), no. 4, § 2192, note 18.

[77] Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2192 BGB, note 23.

However, in accordance with the provisions of the German Civil Code, a testamentary burden will be void, and thus ineffective, if it violates a statutory prohibition (§ 134 BGB), is contrary to public policy (§ 138 BGB), is impossible to execute (§ 275 BGB), or may be avoided (complained against – *angefochten*) if the testator was mistaken as to the contents of his declaration of will (§ 2078 BGB) or omits certain entities entitled to the legitim (§ 2079 BGB)[78]. Under certain circumstances, however, the interpretation of the content of a burden may lead to the recognition of an invalid burden as a different testamentary disposition[79], in particular as an additional legacy[80]. However, the invalidity of a burden does not, in principle, render the entire will invalid, unless it is its only disposition or the testator would not have drawn up their will without this invalid disposition (§ 2085 BGB).

4. SUMMARY

The deficiencies of the Polish regulation on testamentary burden are particularly evident against the background of German law. They raise significant doubts regarding not only the legal nature of the instrument but also the potential scope of the subject of the burden. Consequently, the legislator should consider the relevant legislative intervention. Such an intervention should complement the existing regulations to provide the testator with the broadest possible range of legal means that would enable them to dispose of their estate in the desired manner, in accordance with their will, and to achieve their testamentary aims.

Even a cursory analysis of the German acquis regarding testamentary burdens leads to a conclusion that, due to the similarity of the adopted

[78] Franz Linnartz in *Juris PraxisKommentar BGB*, Maximilian Herberger, Michael Martinek, Helmut Rüßmann, Stephan Weth, Markus Würdinger, no. 9 (2020), § 2192 BGB, note 24.

[79] If the content of a testamentary disposition permits more than one interpretation, then, in case of doubt, preference is to be given to the interpretation under which the disposition may be effective (§ 2084 BGB).

[80] Dieter Leipold in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Sibylle Kessal-Wulf (München: C.H. Beck, 2020), no. 8, § 1940 BGB, note 5.

legal construct, it would be desirable, even to a limited extent, if the Polish legislator allowed the auxiliary application of the provisions on an ordinary legacy, following the model adopted in the German Civil Code. The proper application of the provisions on legacies to testamentary burdens to the extent that it does not violate the very essence of the institution of burden and does not contradict the explicit wording of the relevant provisions thereon (including the enforcement of its performance) would increase the legal flexibility of the domestic legal construct, thus facilitating the resolution of many theoretical and practical doubts. It would also be advisable to contemplate the imposition on the beneficiary of a legal sanction of loss of the benefit obtained along with the inheritance in the event of their failure to fulfil the duties of the burden, as is the case in the relevant German legal regulation.

In the face of the superficial character of the Polish regulation, the experience of other countries may provide a valuable inspiration to the domestic legislator. The preliminary *de lege ferenda* conclusions, however, require further in-depth research on the institution of testamentary burden, including by exploring solutions in force in other countries and in different legal cultures.

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