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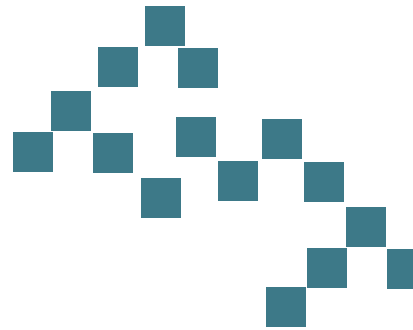

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TABLE OF CONTENTS

REVIEW OF EUROPEAN AND COMPARATIVE LAW
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EXCLUDING FORCED HEIRS DUE TO A LACK OF PERSONAL RELATIONSHIP WITH THE DECEASED IN SPAIN IN A COMPARATIVE PERSPECTIVE

Rosa M. Garcia-Teruel[*]

ABSTRACT

Forced heirship is considered a limit on the freedom of will of the deceased in favour of intergenerational solidarity. It involves that some relatives, usually descendants, have the right to claim a share of the deceased's assets or estate. Although recognized in most EU jurisdictions, authors discuss about the need to regulate this institution taking into account new family models and societal changes. In fact, this debate has been intensified due to the COVID-19 pandemic, which showed that several elders died alone in nursing homes without family support, and part of their assets shall be reserved to their relatives. This paper analyses the legal framework of forced heirship in Spain and examines to which extent it is possible to exclude this right due to a lack of personal relationship with the beneficiaries in view of comparative models.

Keywords: forced heirship, family relationships, familiar solidarity, inheritance

1. INTRODUCTION

During 2020, the COVID-19 pandemic added significance to the debate about family and intergenerational solidarity: at a first step of the pan-

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demic, people living in nursing homes were the most affected by the virus, since more than 19,000 people died in these institutions in Spain between March 2020–2021[1]. The worst situation occurred at the beginning of the pandemic, since the lack of sanitary measures and health equipment caused massive deaths, the closure of these centres and therefore isolation and lock down of the elderly there, who were obliged to live in their rooms or in reduced spaces for months[2]. The situation was not different in other EU Countries: in Ireland, over a third of COVID-19 deaths were linked to nursing homes[3], while in the Netherlands and Germany[4] deaths in these institutions represented more than a half of total COVID-19 casualties[5].

Once the elderly people in nursing homes were able to leave or, at least, to have a less restrictive movement regime, some of them noticed with more intensity the lack of family support, which is one of the key factors that leads to loneliness and depression in this sector of population[6]. But this lack of family support was not caused by the pandemic itself, but a trend in our post-traditional society, in which the traditional family care has been replaced by modern welfare state's protections against disability and illnesses[7].

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[1] Data from IMSERSO. *Actualización nº 4. Enfermedad por coronavirus (COVID-19) en Centros Residenciales.* 4.4.2021. Available at: https://www.imserso.es/InterPresent1/groups/imserso/documents/binario/inf_resid_20210312.pdf.

[2] Spain. Order SND/265/2020, 19 March, *de adopción de medidas relativas a las residencias de personas mayores y centros socio-sanitarios, ante la situación de crisis sanitaria ocasionada por el COVID-19.* BOE No. 78, 21.3.2020.

[3] The Irish Times. Covid-19: Over a third of February deaths linked to nursing homes. 9.2.2021. Available at: https://www.irishtimes.com/news/health/covid-19-over-a-third-of-february-deaths-linked-to-nursing-homes-1.4479497.

[4] Berlin.de. *Fast zwei Drittel der Corona-Toten sterben im Pflegeheim*. 27.1.2021. Available at: https://www.berlin.de/aktuelles/berlin/6426787–958092-fast-zwei-drittel-der-coronatoten-sterbe.html.

[5] RTLNieuws. *Aantal coronadoden boven de 6000, bijna de helft overleed in verpleeghuis*. 5.6.2020. Available at: https://www.rtlnieuws.nl/nieuws/artikel/5144186/corona-doden-sterfgevallen-overleden-verpleeghuis-ouderen.

[6] Joan Domènech-Abella et al., "Loneliness and Depression in the Elderly: The Role of Social Network," *Social Psychiatry and Psychiatric Epidemiology* 52, no. 4 (April 2017): 381–90. https://doi.org/10.1007/s00127–017–1339–3.

[7] Ronald J. Angel and Jaqueline Angel, *Family, intergenerational solidarity and post-traditional society* (New York and London: Routledge, 2018), 9.

One of the mechanisms that states use to ensure intergenerational solidarity[8] is through successions law. Succession law varies among Europe, but most EU countries, like Belgium, France, Germany or Austria,[9] regulate forced heirship or reserved shares of the inheritance, which limit the freedom to dispose of property upon death. This is usually an *ius cogens* measure to protect property interests of persons close to the testator[10], and has its origins in Roman Law (*querella inofficiosi testamenti*)[11]. As Kristić mentions[12], according to the support alimony theory, the compulsory share would aim to 'ensure and continue support from the inherited property for the persons that a testator had the obligation to support in his or her lifetime'.

Nevertheless, during last few years some authors in different jurisdictions proposed either the abolition of forced shares[13] or introducing more grounds to exclude forced heirs, often influenced by common law systems, considering that current family models do not fit into this institution. In fact, forced heirship was introduced to protect especially minor children, but current life expectancy makes forced heirs inherit when they are nearly in their sixties[14]. In fact, as seen below, the attribution of a forced shared

[8] Intergenerational solidarity is defined as the social cohesion between generations. Vern Bengston, Gerardo Marti, and Robert Roberts, "Age-group relationships: Generational equity and inequity," in *Parent-child relations throughout life* (New York and London: Routledge, 1991), 283–308.

[9] See the differences in these regimes in the e-Justice portal: https://e-justice.europa.eu/content_successions-166-en.do.

[10] Novak Krstić, "A doctrinal justification of the institution of compulsory share in modern legislature," *Teme*, no. 10 (February 2020), https://doi.org/10.22190/TEME200207092K.

[11] Ángel M. López López and Rosario Valpuesta Fernández, eds., *Derecho de sucesiones* (Valencia: Tirant lo Blanch, 2015), 114.

[12] Ibid.

[13] Josefina Alventosa Del Río et al., "Aspectos sustantivos del derecho hereditario," in *Derecho de sucesiones*, ed. Josefina Alventosa Del Río and María Elena Cobas Cobiella (Valencia: Tirant lo Blanch: 2017), 609. Under Argentinian Law, Fernando Ronchetti proposes a limitation on forced shares as a way to improve the quality of life of the elderly. Alfredo Fernando Roncheti, "Calidad de vida en la ancianidad: más libertad de testar es más justiciar," *Oñati Socio-Legal Series* 1, no. 8 (2011).

[14] Ángeles Parra, "Legítimas, libertad de testar y transmisión de un patrimonio," *AFDUDC*, no. 13 (2009): 481–554.

does not usually depend on the need of the heir, but on a mere family tie. Other authors[15], however, highlighted that a lack of forced shares could potentially damage interests of minor children, taking into account that current family models (e.g. parenting outside marriage, cohabitation) does not ensure that someone's estate remains in the family and thus children are not protected in patrimonial terms. Lamarca[16] concluded that forced shares actually protect the core value of solidarity between generations, which is not quantifiable or capable of evaluation in market terms. Moreover, it may cause inequality between children and family conflicts[17].

This paper analyses the legal framework of forced shares in Spain, taking into account the differences among Spanish Autonomous Communities (hereinafter CA; NUTS II); examines the grounds of exclusion of this right and, in particular, the possibility to exclude it due to a lack of personal relationship with the beneficiary, while discussing the need to keep or not this institution in the light of current family models. To do so, this paper follows a dogmatic analysis of current Spanish legislation, discusses last judgements on the possibility to exclude forced heirs due to a lack of relationship and makes a comparative law analysis with other EU jurisdictions.

2. LEGAL FRAMEWORK OF FORCED HEIRSHIP IN SPAIN

The Spanish Constitution foresees in Article 149.1.8 that, although the State has the exclusive power on civil law, Spanish CA may conserve, modify and develop their own civil law rules, where they existed at that time (1978). That is why successions law may vary depending on the per-

[15] Ralph C. Brashier, "Disinheritance and the Modern Family," *Case Western Reserve Law Review* 45, Issue 1 (1994). Note that this author is focused on *common law* succession law, which has traditionally protected in a higher degree the freedom of disposal.

[16] Albert Lamarca i Marquès, "We Are Not Born Alone and We Do Not Die Alone: Protecting Intergenerational Solidarity and Refraining Cain-ism Through Forced Heirship," *Oñati Socio-legal Series* 4, no. 2 (2014): 264–282.

[17] José Luís Lacruz Berdejo, *Elementos de Derecho civil. V. Sucesiones* (Madrid: Dykinson, 2004), 318.

sonal law applicable to the descendant (Article 9.1 Spanish Civil Code[18], hereinafter CC[19]). Thus, several Spanish regions have their own civil law rules on successions law, such as the Basque Country, Catalonia, Aragón or Navarre. In its turn, the CC also has a general regulation of succession law and, in particular, of forced heirship, which, as said, will be of application to those Spanish citizens that do not have the personal law of a region that regulated its own civil law (e.g. in Andalusia, Murcia or Castilla-La-Mancha).

In the CC, the so-called '*legítima*' is a non-disposable share of the deceased's goods, being reserved to the forced heirs (Article 806 CC)[20]. It is also possible to give to the heirs their share before the testator dies, as donations made to descendants are considered part of this forced share (Article 819 CC). According to Article 813 CC, the testator may not deprive his heirs of their reserved portion except in the cases expressly determined by law (see below 3.1. General exclusion grounds).

Forced heirs, i.e. the relatives that have the right of a share of the deceased's estate, are:

- The sons and daughters of the deceased. If one of them died before the testator, then the condition of 'forced heir' is attributed to grandchildren.
- If the deceased had no offspring, the forced heirs are his parents and, in case they died before the testator, other ascendants (e.g. grandparents).
- The surviving spouse[21].

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[18] Spain. *Codigo civil español*. Royal Decree of 24.7.1889. Spanish Official Gazzete núm. 206, 25.7.1889.

[19] Personal law is attributed, within Spain and generally speaking, according to one's CA with its own historical civil law; if none, the common civil law for Spain is applied, that is, the CC rules.

[20] Regardless of the fact that the CC uses the term 'forced heirs', the beneficiaries are not considered 'heirs': they are not entitled to a share of the testator's estate, but to claim a share of the goods. Juan José Rivas Martínez, *Derecho de sucesiones común. Estudios sistemático y jurisprudencial*. Tomo I. (Valencia: Tirant lo Blanch, 2020), 1323.

[21] The CC does not include legal partners as forced heirs. However, civil law rules of some Spanish CA do foresee this right for legal partners, such as in Catalonia or the Basque Country.

This basically follows the rule that 'love first descends, then ascends, and, finally, spreads sideways', included in Novel 118 of Justinian for *ab intestato* successions.

Although all of them are considered forced heirs, not all of them have the right to the same share. In general terms, the testator's estate is divided in the following shares:

- '*Tercio de legítima*' (third forced share): this share is intended to be given to the forced heirs in any case.
- '*Tercio de mejora*' (third for betterment): this share is intended to be given to improve the assets corresponding to one or more descendants in front of the other ones.
- '*Tercio de libre disposición*': this is the third share, which may be freely disposed by the testator.

First-degree descendants will be entitled to two thirds of the estate (including the so-called '*tercio de legítima*' and '*tercio de mejora*'), regardless of the number of descendants. The testator, however, may reserve the '*tercio de mejora*' for one or more specific forced heirs, so that they are more benefited ahead of the other descendants.

In case the deceased does not have descendants, but ascendants, they will be entitled to a half of the deceased estate (Article 809 CC); but, if there is also a surviving spouse, the parents will only be entitled to a third part of the deceased estate. In case the testator leaves by any title less than the reserved share that corresponds to the forced heir, they may request a complement to receive at least what the CC foresees (Article 815 CC).

In relation to the surviving spouse, although considered a 'forced heir', they are not entitled to receive the ownership of the deceased estate, but a usufruct, and provided that they were not divorced or separated from the deceased (Article 834 CC). The share that will be subject to this legal usufruct will depend on the number of the forced heirs having the right to receive an estate's share:

- If there exist children or descendants, the widow/er will be entitled to the usufruct of a third of the descendant's estate, the so-called '*tercio de mejora*' (Article 834 CC).
- If the testator does not have any descendants when he or she dies, but parents and ascendants, the widow/er will be entitled to a usufruct over half of the testator's estate (Article 837 CC).

- If the testator neither have descendants nor ascendants when dying, the widow/er will be entitled to a usufruct over two thirds of the testator's estate (Article 838 CC).

Table 1 summarizes forced shares in the Spanish Civil Code:

Table 1. Summary of the forced heirs and their forced share

Forced heirs	Sons/daughters and descendants	Parents and ascendants	Surviving spouse
Share	Two thirds (the '*tercio de legítima*' and the '*tercio de mejora*'). One of the thirds ('*tercio de legítima*') shall be distributed proportionally among the sons/daughters (or, if one of them died, his/her descendant will receive the share). However, the testator may use one of the thirds ('*tercio de mejora*') for the benefit of only one of the beneficiaries.	The share that parents are given depends on the existence of a surviving spouse. If the deceased was not married, parents will be entitled to half of the testator estate. If the testator was married when he or she dies, parents will receive a third part of the testator's estate.	He or she has the right to receive a legal usufruct over a share of the testator's estate. When the testator has children or descendants, the surviving spouse will be entitled to the usufruct of one third (the one corresponding to the '*tercio de mejora*'). If the testator does not have descendants but ascendants, the usufruct of the surviving spouse will cover half of the testator's estate. If the testator does not have descendants or ascendants, then the usufruct will cover two thirds of the estate.
Condition	They are the first degree of forced heirs, so sons/daughters are always entitled to a forced share, provided that they are not unworthy to inherit (see below).	They are forced heirs only if the testator does not have descendants.	He or she shall not be divorced or separated from the testator at the moment of death.

Source: own elaboration.

As commented above, some Spanish regions have their own civil law rules regarding succession law and therefore forced shares. Here are some examples:

- Basque country: the forced heirs are descendants and the surviving spouse or the legal partner, but not his parents (Article 47 Act 5/2015, on the Civil Law of the Basque Country[22]): the descendants are entitled to a third share of the testator's estate, and the surviving spouse or the legal partner[23] to the usufruct of half of the deceased estate. However, if the deceased does not have children or descendants, the usufruct of the surviving spouse or legal partner will be extended to two thirds of the deceased estate. Contrary to what the CC foresees, in the Basque Country the deceased may attribute the forced share to only one or more of the forced heirs (therefore, she may exclude some of them without any ground), and law admits the waive of a forced shared before the testator's death (Article 48 Act 5/2015). In addition, and due to historical reasons, there are some differences in the regulation on forced heirship in Bizkaia and in the municipalities of Aramaio and Llodio: in this region and these municipalities, the forced share represents four fifths of the deceased estate.
- Navarra: in this region, the deceased has full freedom to dispose his succession by will, so that descendants cannot claim any type of goods or economic value (*Law* 267, included in Act 1/1973, on the Compilation of Civil Law of Navarra[24]).
- Aragón: contrary to the CC, the forced share in this region corresponds to half of the deceased estate; however, the testator may exclude some of the forced heirs without the need of giving a particular reason (Article 486 Legislative Decree 1/2011, on the Code of civil law of Aragón[25]). The condition of forced heir is only given to descendants, and the forced share may be waived by them before the death of

[22] Spanish Official Gazette (*Boletín Oficial del Estado*, BOE) núm. 176, 24.7.2015.

[23] The condition of legal partner depends on each Autonomous Community. In the Basque Country, legal partners shall be registered in a Registry of Legal Partners to be considered as such, according to Article 3 Act 2/2003, which regulate legal partners in the Basque Country (BOPV núm. 100, 23.5.2003).

[24] BOE núm. 57, 7.3.1973.

[25] Official Gazette of Aragón, núm. 67, 29.3.2011.

the testator (Article 493 Legislative Decree 1/2011), contrary to what is established in Article 816 CC.

- Catalonia: in the Fourth Book of the Catalan Civil Code[26] (hereinafter, CCC), forced heirs are children and descendants, or parents or ascendants (when the deceased have no children when he or she dies). So, forced heirs are either testator's sons/daughters (or grandchildren, when sons and daughters had died before the testator) or testator's parents (or grandparents, when the testator's parents had died before her). In any case, the forced share corresponds only to one quarter of the testator's estate, regardless of the number of forced heirs (Article 451–5 CCC). Note that the surviving spouse or the legal partner is not considered a forced heir, but CCC provides him/her with a claim in order to be compensated for economic imbalance[27] and has the right to the so-called '*cuarta vidual*': this is one quarter of the testator's estate that the spouse may obtain if he or she does not have sufficient financial resources to meet their needs (Article 452–1 CCC).

3. THE POSSIBILITY TO EXCLUDE FORCED HEIRS DUE TO A LACK OF PERSONAL RELATIONSHIP WITH THE DECEASED

3.1. General exclusion grounds

As we have seen above, the forced heirship institution for general civil law in Spain is broad (a bit less in Catalonia and inexistent in Navarre), granting up to two thirds of deceased goods and considering forced heirs not only descendants, but also ascendants and the surviving spouse. That is why some Spanish authors consider that, at least, forced heirship should be limited[28].

[26] BOE núm. 190, 7.8.2008.

[27] M. del Carmen Gete-Alonso Calera, Josep Llobet Aguado, Judith Solé Resina and Maria Ysàs Solanes, *Derecho de sucesiones vigente en Cataluña*. 3rd ed. (Valencia: Tirant lo Blanch, 2011), 268.

[28] See an analysis of the Spanish authors at: Parra, "Legítimas, libertad de testar y transmisión de un patrimonio".

The fact is that, even though forced heirship is broad, the CC includes several causes to allow the testator to lawfully exclude some relatives from this right. These grounds of exclusion could serve to guarantee the support of the family, while penalizing those relatives who have not contributed to testator's wellbeing.

Among others, the grounds regulated in the CC are:

- Unworthiness to inherit (Article 756 CC): when the forced heir committed a crime against the testator (e.g. death, violence, crimes against the moral or sexual integrity, false reports, oblige the testator to make a will, abuse…). For example, in SAP Valladolid 7.10.2013[29], the forced heir abandoned his daughter when she was minor.
- Specific grounds of exclusion for descendants (Article 853 CC): when the forced heir is the testator's descendant, the testator may exclude them in case of denial of alimony and abuse or mistreatment of the testator. See SAP Murcia 11.6.1999[30], where descendants denied alimony to their father and thus the Court considered that they were not entitled to a forced shared.
- Specific grounds of exclusion for ascendants (Article 854 CC): when the forced heir is the testator's ascendant, the testator may also exclude them in case of denial of alimony, when the ascendant lost parental responsibility and when one of the parents committed a crime against the other parent's life (e.g. cases of gender violence between parents).
- Specific grounds for the surviving spouse: in this case, apart from not providing alimony to the testator and the commitment of a crime against the testator's life, surviving spouses may be also excluded due to a serious and repeated breach of marital duties (i.e. helping and treating the other spouse with respect, being faithful and sharing domestic responsibilities and children's care, Article 67 and 68 CC).

The testator may only use these grounds to exclude forced heirs (Article 848 CC). In addition, they are quite narrow, and they usually require a previous judgement proving the crime, a breach of family obligations, etc. However, the Spanish Supreme Court (TS) has given during last years a new interpretation of the exclusion ground due to 'abuse', as was seen in

[29] JUR 2013\325110.

[30] AC 1999\7153.

STS 3.6.2014[31]: according to the TS, Article 848 CC, when mentioning as an exclusion ground the 'abuse' (*maltrato de obra*), a psychological abuse should also be included. Recent case law[32] considers that the psychological abuse is related with someone's dignity (Article 10 Spanish Constitution, CE). In order to exclude a forced heir due to abuse, it is necessary that testator's mental health is affected, and that the abuse is only attributable to the forced heir. Does psychological abuse include the lack of relationship? Although a mere lack of relationship does not imply *per se* a phycological abuse[33], some minor judgments consider that the mental health of the testator may be affected in this case. For example, at SAP Badajoz 20.4.2020[34] a forced heir only phoned his father twice per year and did not visit him when he was in the hospital, thus being excluded from receiving his forced share. In SAP Castellón 29.11.2010[35] the Court considers that there exists an abuse due to a lack of relationship for 8 years[36], involving an emotional abandonment of the deceased. In SAP Valencia 8.2.2018[37], a forced heir was excluded because of a lack of relationship caused by past judicial claims against his mother (the deceased). And SAP Vizcaya 5.11.2016[38] considers that a phycological abuse may include a lack of affection, disparagement, and elder abuse and neglect. However, not any type of lack

[31] ECLI:ES:TS:2014:2484. After this judgment, there were other ones confirming this interpretation, such as STS 13.5.2019 (ECLI:ES:TS:2019:1523). Before this interpretation, regional courts did not consider a lack of relationship as a ground to exclude forced heirs. See SAP Asturias 7.11. 2004 (JUR 2004\66268), SAP Pontevedra 28.4.2008 (JUR 2008\303852) and SAP Córdoba 28.9.2011 (AC 2011\790), considering that the hostility and a lack of affection was not a ground to exclude a forced heir.

[32] STS 19.2.2019 (Roj: STS 502/2019) and SAP Asturias 10.10.2019 (AC 2019\1951).

[33] See Silvia Algaba Ros, "Maltrato de obra y abandono emocional como causa de desheredación," *Indret*, (April 2015) and M. del Carmen González Carrasco, "Comentario a la Sentencia del Tribunal Supremo de 3 de junio de 2014. Desheredación por maltrato psicológico," *Cuadernos Civitas de Jurisprudencia Civil*, no. 97 (2015).

[34] AC 2020\1022.

[35] JUR 2020\152408.

[36] Likewise, SAP Sevilla 7.3.2019 (JUR 2019\177885) also admits the exclusion due to a lack of relationship for 30 years.

[37] AC 2018\441.

[38] AC 2016\292.

of relationship may bring the exclusion of the forced heir: in SAP Valencia 20.9.2018[39], the emotional abandonment was only a perception of the deceased; the forced heir –her daughter– tried on several occasions to take care of her, but the deceased denied the personal contact.

As a conclusion, even though the CC does not include a lack of relationship as a ground to exclude forced heirs, this lack of relationship caused by the forced heir may have caused in the deceased some type of psychological abuse and an attack to their dignity, for a long period of time[40]. In this case, it would be possible to exclude a forced heir that caused this damage. However, the existence of the ground shall be interpreted by the court, which gives rises to the judicialization of these cases.

3.2. Exclusion of the forced share due to a lack of personal relationship in the Catalan Civil Code

The lack of personal relationship, which is not explicitly included in the CC as an exclusion ground, is nevertheless considered as such whenever the succession law from Catalonia is applicable to the deceased, i.e. his personal law is "Catalan", according to arts. 14 and 16 CC rules.

CCC foresees grounds for exclusion that, generally speaking, are similar to those ones included in Articles 756, 853 and 854 CC. But in addition, it also regulates the exclusion of forced heirship when there is a 'a clear and continuous absence of a family relationship between the deceased and the beneficiary, if it is caused solely by the beneficiary' (Article 451–17.e CCC). This exclusion ground is applicable to any type of forced heir, i.e., descendants and ascendants.

In this case, it is also the testamentary heir (not the forced one) who has to prove that the forced heir did not have a personal relationship with the deceased, if the forced heir challenges the will. And, in addition, this lack of relationship shall be:

[39] AC 2018\1687.

[40] Algaba Ros, "Maltrato de obra y abandono emocional como causa de desheredación," 19.

- Clear/obvious (*manifiesta*): it suggests that, in cases where the forced heir has at least some type of relationship (e.g. visits one or twice per year the testator), this exclusion ground would not be applicable.
- Continuous (*continuada*): it is not enough that the lack of relationship cannot be a temporary situation. As far as the CCC does not establish a minimum term, the courts will interpret whether the lack of relationship was continuous or not. In fact, judgements where this exclusion ground is accepted does not require a certain minimum period of time, but they apply this ground on a case-by-case basis. For example, in SAP Barcelona 17.11.2017[41], the lack of relationship lasted 18 years, while in SAP Barcelona 19.5.2016[42] only two years.
- Caused by the beneficiary: the lack of relationship shall be caused exclusively by the forced heir[43].

As some authors stated[44], this exclusion ground gives more room for the judge to decide and thus to interpret. In fact, these three requirements are difficult to be interpreted: what is a clear lack of relationship? If the testator and the forced heir are one year without contact, is this considered 'continuous'? May a lack of relationship be caused by only one person?

That is why there exist several judgements interpreting these requirements. In principle, a mere weak relationship is not included within this exclusion ground[45]. The high court of justice of Catalonia (TSJC) considered in Judgement 8.1.2018[46] that the lack of relationship was neither continuous nor caused by the beneficiary in a case where the two daughters of the testator had some sort of contact with him through social media. Although they had no contact for more than 20 years, during the last years

[41] AC 2017\1726.

[42] AC 2016\1572.

[43] According to Arroyo and Farnós, this is difficult to be assessed and it reduces the applicability of this exclusion ground. Esther Arroyo and Esther Farnós, "Entre el testador abandonado y el legitimario desheredador ¿A quién prefieren los tribunales?," *Indret*, no. 2 (2015): 18.

[44] Paloma De Barrón Arniches, "Libertad de testar y desheredación en los Derechos civiles españoles," *Indret*, no. 4 (2016): 45.

[45] See SAP Barcelona 10.10.2019 (JUR 2019\296264), where there was a weaker relationship due to a conflict caused by a new sentimental relationship of the testator.

[46] RJ 2018\1503.

the daughters contacted their father through the internet, and they eventually phoned him. In Judgement TSJC 31.5.2018[47], the court also considered that this exclusion ground was not applicable. In this case, the father abandoned the family home when children were underaged, and he did not try to keep the contact with them since then. Also, in case of family disputes that ended up in a lack of family relationship, courts usually consider that this is not attributable exclusively to the forced heir[48].

As a conclusion, although the Catalan legislator decided to introduce this exclusion ground to adapt law to social changes (in particular, to changes in traditional family care), the evidence of a clear and continuous lack of relationship attributable to the forced heir is problematic, which may increase litigation.

4. A BRIEF COMPARATIVE PERSPECTIVE

Legislation on forced shares is different among jurisdictions in several ways: on the reserved share entitled to forced heirs, on the nature of the forced share, on the methods for calculating it or on the exclusion grounds[49]. Spanish inheritance law regarding forced shares is considered one of the most restrictive systems due to its extension to ascendants and the amount granted[50]; however, note that some of the CA regimes reduced this right, such as Navarre, which do not recognize forced shares, or Catalonia, recognizing up to 25% of the value.

Most EU countries also regulate forced shares in favour of certain relatives, but it is not common to recognize them to ascendants[51]. For exam-

[47] RJ 2018\3912.

[48] See SAP Barcelona 31.3.2016 (AC 2016\1043), SAP Barcelona 19.6.2020 (JUR 2020\236941), SAP Lleida 19.5.2020 (AC 2020\1179) and SAP Barcelona 26.7.2018 (JUR 2018\247316), where the relationship was worse after a family dispute.

[49] Lamarca i Marquès, "We Are Not Born Alone and We Do Not Die Alone".

[50] Sergio Cámara Lapuente, "Chapter 6. Forced Heirship in Spanish Law," *Comparative Succession Law*. Vol. III, ed. Kenneth Reid, Marius J. de Waal, and Reinhard Zimmermann (Oxford: Oxford University Press, 2020).

[51] René Foqué and Alain Verbeke, "Conclusions. Towards an open and flexible imperative inheritance law," in *Imperative Inheritance Law in a Late-Modern Society*, ed. Chris-

ple, descendants and the spouse or legal partner[52] are entitled to half of the intestate portion in Austria (§ 760 *Allgemeines bürgerliches Gesetzbuch*, ABGB[53]). The same right applies in descendants and the spouse in France (Article 913 and ff. French Civil Code[54]), excluding ascendants from the forced shares since 2006[55]. In this case, the amount varies depending on the number of beneficiaries: if the testator has one son/daughter, the latter will be entitled to half of the testator's estate. If he has two son/daughters, they will be entitled to two thirds: if he has three or more sons/daughters, they will be entitled to three quarters (Article 913 French Civil Code); in case the testator does not have surviving descendants, the spouse will be eligible to a quarter of the testator's estate (Article 914 French Civil Code). In Germany, the spouse, descendants and parents are the ones entitled to the forced share (§ 2303 *Bürgerliches Gesetzbuch56,* BGB). In the Netherlands, only descendants of the testator are forced heirs (Article 4:63 Dutch Civil Code[57]), who are eligible for one half of the value of the testator's estate divided by the number of intestate heirs (Article 4:64.1 Dutch Civil Code); but the spouse is entitled to continue using the residential space (Articles 4:28 and ff. Dutch Civil Code)[58].

In contrast, common law countries have not traditionally foreseen forced share. According to Németh[59], '(t)he individualist anthropology of the Anglo-Saxon culture and the almost unlimited natural right of own-

toph Castelein, René Foqué, and Alain Verbeke, European Family Law Series (Mortsel: Intersentia, 2009), 203–221.

[52] Before 2015, ascendants were also entitled to a forced shared, but this changed with *Erbrechts-Änderungsgesetz* 2015 (BGBl. I Nr. 87/2015).

[53] Austria. *Allgemeines bürgerliches Gesetzbuch.* JGS Nr. 946/1811.

[54] France. *Code civil des Français*. 21.3.1804.

[55] France. *Loi n° 2006-728 du 23 juin 2006 portant réforme des successions et des libéralités* (NOR: JUSX0500024L).

[56] Germany. *Bürgerliches Gesetzbuch*. Published in the Reich Gazette on 24 August 1896.

[57] The Netherlands. *Burgerlijk Wetboek*. *Boek 4* (BWBR0002761).

[58] See the protection of the surviving spouse in the Netherlands in BarbaraE. Reinhartz, "Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?," *Electronic Journal of Comparative Law* 11, no. 1 (2007).

[59] Ildikó Németh, "The Successions in Europe. A Contribution to the Classification and Unification of the Succession Systems in Europe," *ELTE Law Journal*, no. 2 (2015): 109–126.

ership is expressed by the succession law in the way in which in England, Wales and Northern Ireland, the reserved share of it does not exist'. The same happens in the United States, where, in most of the States, law prioritize the individual freedom of will over property within the family[60]: this has been criticized by some authors, such as Brashier[61], who stated that 'Legislatures have yet to realize the serious consequences of permitting the total disinheritance of these children: minor children could be left behind in the event of their parents' death, as nobody would care for them (particularly, in cases of single-parent families).

According to Reid, de Waal and Zimmermann[62], in countries with forced shares, the possibility of disinheritance is not commonly recognized by law. They confirm that specific disinheritance for forced shares does not exist in France, Italy, the Netherlands or Belgium, but the forced heir can be excluded if he or she is unworthy to inherit. Nevertheless, general grounds of unworthiness are usually limited to the existence of criminal offences against the testator or their relatives, such as major offences or interference with the testator will (e.g. §§ 2339 and 2345.2 BGB and Article 4:3 Dutch Civil Code[63]).

In addition, the possibility to disinherit due to a lack of family relationship is not a common practice in these countries. Only Austria has a similar ground in § 776 ABGB, which establishes that the testator may reduce the forced share to half if he and the beneficiary did not at any time or, at least, for a long period before the death of the testator, have a close family relationship[64]. Also, the State of Louisiana, in the United States, is

[60] Vincent D. Rougeau, "No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in Americal Law," *Civil Law Commentaries* 1, Issue 3 (2008).

[61] Brashier, "Disinheritance and the Modern Family," 89.

[62] Reid, de Waal, and Zimmermann, "Comparative perspectives," 769.

[63] Although, in the case of Dutch law, unworthiness grounds may be broadly interpreted: in Judgement of the Hof Amsterdam 15.8.2002 (NJ 2002/53), a grandchild pretended to receive a forced share from his grandmother. However, it was possible to exclude him from this right, since the grandchildren killed his parents some years ago (the grandmother's children). Even when the Dutch Civil Code did not include this type of criminal offence as an unworthiness ground, the Court decided to exclude the forced share.

[64] Free translation from the German: *Der Verfügende kann den Pflichtteil letztwillig auf die Hälfte mindern, wenn er und der Pflichtteilsberechtigte zu keiner Zeit oder zumindest*

unique among the states in this country in regulating forced shares (due to, among others, historical and religious reasons[65], adapting this institution from French and Spanish Law); but in 1999 it introduced the possibility to exclude this mandatory right for family members due to a lack of relationship. According to Article 1621 of the Civil Code of Louisiana, 'A parent has just cause to disinherit a child if (8) the child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time'. In this case, the responsibility to keep the contact with the testator (parent) is attributed to the child; also, the Louisiana Civil Code regulates a minimum term of a lack of family relationship, intended to prevent disputes on that, such as the ones happening in Spain and, in particular, in the CA of Catalonia.

5. CONCLUDING REMARKS

Forced shares are considered a mechanism within succession law to keep intergenerational solidarity, but new family models and changes in family care increased the debate on their existence. In particular, the COVID-19 pandemic highlighted that many older people died in isolation, without family support, but part of their estate still had to be assigned to some family members.

Traditionally, the regulation of forced shares varied between common law and civil law jurisdictions. The first ones prioritized the freedom of individuals to decide upon the destination of their estates (e.g. in the United States or in England), whether civil law countries (or states, such as Louisiana) usually included forced shares within succession law. That is why in most EU countries, forced shares are recognized, but with differences regarding their nature, amount or beneficiaries.

über einen längeren Zeitraum vor dem Tod des Verfügenden nicht in einem Naheverhältnis standen, wie es zwischen solchen Familienangehörigen gewöhnlich besteht'.

[65] Rougeau, "No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in Americal Law," 2.

Forced shares in Spain are considered one of the most extensive ones, since even parents and other ascendants of the deceased are beneficiaries (which is not a common practice in other EU countries), and it does regulate several exclusion grounds. According to the CC, a forced heir may be excluded if he or she commits abuse against the deceased. However, the Spanish Supreme Court interpreted in 2014 that the term 'abuse' may include a phycological one, which may appear in cases of a lack of relationship. Moreover, in some Spanish CA, forced shares are quite limited: in the CA of Catalonia within Spain, a new ground of exclusion due to a lack of relationship was regulated in 2010, which is not common in other EU countries. And in Navarre, forced shares do not exist. Therefore, Spanish legislation is now more prone to the freedom of will in these situations, and abandoned elderly could exclude forced shares in these cases. Nevertheless, this legislation is still quite restrictive for the testator due to the amount that beneficiaries are granted (up to two thirds if the CC is applicable). It is also questionable whether the Spanish regime is actually protecting the rights of minor children or granting intergenerational solidarity for family members in need, since forced shares do not depend on how old the beneficiaries are or their wealth.

In addition, the exclusion ground due to a lack of family relationship is subject to interpretation, which does not provide legal security to citizens. First, under CC, because each judge shall assess whether a psychological abuse has been committed. Second, because the CCC requires a continuous and clear lack of relationship, caused solely by the beneficiary. These concepts are interpreted by courts on a case-by-case basis, which may increase litigation, providing different results for similar cases. This situation suggests the need to better regulate this exclusion ground, e.g. introducing objective requirements for excluding forced heirs (such as in Louisiana, where there exist a minimum term for the lack of relationship) or defining what the term 'psychologic abuse' means. Finally, while new elderly care models suggest that forced shares should be limited, a complete restriction may harm minor children or vulnerable family members, thus both interests should be taken into account in this debate.

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ADMINISTRATION OF THE ESTATE UNDER REGULATION (EU) NO. 650/2012

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ABSTRACT

In the period between the deceased person's death and division of assets in the deceased person's estate among the heirs, an essential matter is administration of the estate. Persons exercising such administration should have adequate competences allowing them to perform factual and legal acts in relation to assets in the succession estate. The range of such persons and the scope of their competences differ in specific Member States of the EU. The law applicable to the administration of the estate, as well as other matters relating to succession, is currently designated by the Regulation (EU) No. 650/2012. This article is devoted to an analysis of the provisions of that Regulation on the administration of the estate. In addition, the article discusses the issue of qualifying the institution of succession administration as applicable in Poland with regard to an enterprise belonging to the succession estate. As a result of the investigations made, it can be concluded that administration of the estate is governed by the law applicable to the entirety of succession matters (*lex successionis*). This is the case also in respect of the succession administration recently introduced in Poland. Grounds for a different treatment of the succession administration cannot be found in Art. 30 of Regulation (EU) No. 650/2012.

Keywords: succession, administration of the estate, executor of testament, succession administration

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1. GENERAL REMARKS

Conflict-of-law aspects of succession are currently regulated in Poland and other Member States of the EU (except for Denmark and Ireland) in Regulation (EU) No. 650/2012[1]. The law applicable to the total of succession matters (*lex successionis*) is designated predominantly in Arts. 21 and 22 ESR[2]. Under Art. 21 ESR, in principle, *lex successionis* is the law of the country where the deceased person had his habitual residence at the time of death. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of his last habitual residence, the law applicable to the succession shall be the law of that other State. However, under Art. 22 ESR, a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death. The choice must be made expressly in a declaration in the form of a disposition of property upon death or must be demonstrated by the terms of such a disposition.

[1] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 No. L201, 27 July 2012, p. 107 et seq. Hereinafter referred to as ESR.

[2] See Constanze Fischer-Czermak, "Anwendbares Recht," in *Europäische Erbrechtsverordnung*, eds. Martin Schauer and Elisabeth Scheuba (Wien: Manz, 2012), 43 et seq.; Paul Lagarde, "Applicable Law," in *EU Regulation on Succession and Wills. Commentary*, eds. Ulf Bergquist, Domenico Damascelli, Richard Frimson, Paul Lagarde, Felix Odersky, and Barbara Reinhartz (Köln: Verlag Dr. Otto Schmidt KG, 2015), 120 et seq.; Anna Wieczorek, "Ustalenie prawa właściwego w świetle rozporządzenia spadkowego nr 650/2012," *Problemy Prawa Prywatnego Międzynarodowego* 21 (2017): 74 et seq; Maksymilian Pazdan, in *Prawo prywatne międzynarodowe. Komentarz*, ed. Maksymilian Pazdan (Warsaw: C.H. Beck, 2018), 1162 et seq. and further literature cited therein.

2. LAW APPLICABLE TO THE ADMINISTRATION OF THE ESTATE UNDER REGULATION (EU) NO. 650/2012

In Member States other solutions have been adopted in respect of the assumption of assets in the succession estate by heirs[3]. Most often, the heirs themselves may administrate the estate upon the deceased person's death, however, one of the alternative solutions is the obligation to appoint an administrator to administrate the estate after the deceased person's death and only then to transfer the estate's assets to heirs[4]. Moreover, in many countries it is admissible to appoint an executor of testament entitled to administer the succession estate upon the testator's death. However, the powers of such executor of testament have been defined differently in those countries, as well as the executor's appointment and recall, or the scope of the executor's discretion regarding the choice of administrator and designation of the administrator's rights and obligations.

In the context of the dissimilarities signalled above, a need arises to determine the law applicable to the administration of the estate upon the deceased person's death. Under Art. 23 letter f ESR, the law applicable to the succession governs, among others, the rights of heirs, testament

[3] See Piotr Stec, in *Unijne rozporządzenie spadkowe Nr 650/2012*, ed. Mariusz Załucki (Warsaw: C.H. Beck, 2018), 225; Gianluca Contaldi, "Special Rules on the Appointment and Powers of an Administrator of the Estate in Certain Situations," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 419–420; Maksymilian Pazdan, "Zarząd sukcesyjny – aspekty kolizyjnoprawne," in *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce*, eds. Ewa Zielińska, Piotr Pinior, Paweł Relidzyński, Wojciech Wyrzykowski, and Mateusz Żaba (Warsaw: C.H. Beck, 2019), 71 and further literature cited therein.

[4] For more, see Agata Kozioł, "System administracji spadku w porządkach prawnych państw kręgu anglosaskiego," *Rejent* 2 (2006): 119 et seq.; Konrad Osajda, *Ustanowienie spadkobiercy w testamencie w systemach prawnych common law i civil law* (Warsaw: C.H. Beck, 2009), 236 et seq.

executors[5] or other administrators of the estate[6], especially in relation to the sale of property and payment of creditors, without detriment to the rights referred to in Art. 29(2) and (3) ESR[7].

Article 23 letter f ESR decides that administration of the succession estate is governed by the law applicable to the succession irrespective of whether the estate is administered by heirs, executor of testament or other administrators of the estate[8]. Persons administering the estate may perform factual and legal acts in relation to assets in the estate and [9] in particular, they may dispose of the assets or pay succession creditors (pay debts belonging to the estate). Finally, the cited provision lays down that, in respect of administration of the estate, the award and exercise of the powers referred to in Article 29(2) and (3) ESR are regulated differently[10].

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[5] As regards the scope of the law applicable to the succession law in respect of a testament executor, see Maksymilian Pazdan, "O rozgraniczeniu statutów i wsysaniu regulacji prawnej (na przykładzie prawa stosowanego do oceny różnych aspektów powołania i funkcjonowania wykonawcy testamentu i zarządcy sukcesyjnego przedsiębiorstwem)," *Problemy Prawa Prywatnego Międzynarodowego* 27 (2021): 163–164.

[6] By the term administrator of the estate, one should understand any person to whom the law applicable to the succession grants competences to administer the estate. See Dirk Looschelders, "EuErbVO," in *Nomos Kommentar. Band 6. Rom-Verordnungen*, eds. Rainer Hüßtege and Heinz-Peter Mansel (Baden Baden: Nomos, 2015), 925. Such category includes also a succession administrator, who will be discussed below.

[7] Moreover, under Art. 75(3) ESR, the Regulation does not preclude application of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised by the intergovernmental agreement between those States of 1 June 2012, by the Member States which are parties thereto, among others, in so far as the Convention provides for procedural aspects of administering the estate, as specified in the Convention, and assistance in that regard provided by the authorities of the State-Parties of the Convention.

[8] See recital 42.

[9] However, it must be emphasized that the contents of the estate do not depend on the law applicable to the succession. The circumstance if a given asset of the deceased person is included in that person's succession estate is decided by the law applicable to the given asset. For more, see Pazdan, in "Prawo prywatne," 1181.

[10] They were introduced in ESR because of the solutions adopted in the United Kingdom and Ireland. However, neither of these countries finally adopted the Regulation (EU) No. 650/2012. See recital 82 and Contaldi, in "The EU Succession," 421 et seq.

The specific scope of competences of persons administering the estate is defined in the law applicable to the succession. It also resolves in respect of the admissibility and procedures for appointing[11] and recalling the administrator, qualifications required to perform that function, the legal relationship between the administrator and other parties (especially heirs), and possible liability of the administrator vis-a-vis such parties. Moreover, the law applicable to the succession resolves about the scope of autonomy of will afforded both to the testator in the determination of the administrator's rights and obligations and to the administrator in the exercise of the rights granted to the administrator, including the possibility to surrender administration[12]. *Lex successionis* decides as well about the duration of the estate's administration and expiry of the rights afforded to persons exercising such administration. Considering the scope of the law applicable to the succession, as specified in Art. 23 ESR, such administration can be exercised, at the latest, until the completion of full division of the succession estate.

Under the provision of Art 29(1) ESR, where the appointment of an administrator is mandatory[13] or mandatory upon request under the law of the Member State[14] whose courts have jurisdiction to rule on the succession pursuant to the Regulation and the law applicable to the succession is a foreign law, the courts of that Member State may, when seised, appoint one or more administrators of the estate under their own law (*lex fori*), subject to the conditions laid down below[15]. As a result, in such

[11] However, if the administrator of the estate is appointed under a testament or other disposition of property upon death, the substantive and formal validity of such disposition is assessed according to the law designated by separate conflict-of-law rules. See Pazdan, "O rozgraniczeniu," 167.

[12] See Pazdan, "O rozgraniczeniu," 163–164.

[13] Stec, in "Unijne rozporządzenie," 227, argues that Art. 29 ESR should also apply when the appointment of administrator is not compulsory but belongs to the court's competences as a part of discretionary judicial powers. In the light of the above, it should apply also when the court appoints the administrator as needed. See also Art. 666 §1 of the Polish Code of Civil Procedure, (consolidated text, Journal of Laws 2021, item 1805, as amended) on the appointment of curator of the estate.

[14] See Łukasz Żarnowiec, *Wpływ statutu rzeczowego na rozstrzyganie spraw spadkowych – na styku statutów* (Warsaw: C.H. Beck, 2018), 232 et seq.

[15] Lagarde, in "EU Regulation," 161 et seq.

case, contrary to the provision of Art 23 letter f ESR, the administrator of the estate is appointed under the law of the court adjudicating in a given succession case. The discussed provision appeared in ESR because the rules of jurisdiction included in the Regulation may, in some cases, lead to a situation in which the court competent to decide a given succession case does not apply its own but foreign law[16]. When such situation is the case in a Member State whose law introduces an obligation to appoint an administrator of the estate (*ex officio* or upon request)[17], the Regulation permits that courts of that Member State, when seised, may appoint one or more administrators in accordance with their own law[18]. However, this requires consideration of the circumstances laid down in Art. 29 ESR[19].

The party appointed in the first place as the administrator is a person entitled to execute the deceased person's testament or to administer the deceased person's estate under the law applicable to the succession. This can be, for example, an executor of testament appointed by the testator or one of the heirs. If the person appointed as administrator is an heir, such heir should have the powers to administer the estate as afforded to heirs under the law applicable to the succession.

If *lex successionis* does not provide for a possibility of the estate being administered by a party other than beneficiary (heir or legatee), the court of the Member State in which the administrator is to be appointed may appoint a third-party administrator under its own law (*lex fori*) if the provisions of the court's own law so require, or in case of a serious conflict of interests between the beneficiaries or between the beneficiaries and creditors

[16] This can happen when court jurisdiction is based on the connecting factor of the deceased person's habitual residence at the time of that person's death (Art. 4 ESR) and the law applicable to the succession is designated under the choice of law (Art. 22 ESR), or when the court's jurisdiction is based on Art. 10 or 11 ESR. See Looschelders, in "Nomos Kommentar," 951.

[17] Such provisions apply in Cyprus, in Finland and in Sweden. The qualification of the solutions adopted in Austria and Germany is disputable. See Contaldi, in "The EU Succession," 424–425; Marcin Margoński, in *Komentarze Prawa Prywatnego*, T. VI B, *Prawo i postępowanie spadkowe. Komentarz*, ed. Konrad Osajda (Warsaw: C.H. Beck, 2018), 66; Looschelders, in "Nomos Kommentar," 925–926, 951 and further statements cited therein.

[18] See Recital 44.

[19] See Pazdan, "Zarząd sukcesyjny," 72.

or other parties who have guaranteed the deceased person's debts[20], or in case of disagreement among the beneficiaries about the administration of the estate, or when the administration of the estate is complicated, bearing in mind the nature of its assets. However, if a testator has appointed an executor of testament, such person may not be deprived of his powers unless *lex successionis* allows for such person's recall[21].

An administrator appointed as specified above is the only person entitled to exercise the powers referred to in Art 29(2) or (3) ESR. Under those provisions, a person appointed as administrator exercises the powers to administer the estate, as may be exercised under the law applicable to the succession. The court appointing the administrator may define the conditions of exercise of the administrator's powers in accordance with that law.

When *lex successionis* does not provide for sufficient powers to secure assets in the succession estate or to protect rights of creditors or other persons who have guaranteed the deceased person's debts, the court appointing the administrator may permit that the administrator supplementarily exercises the powers envisaged for that purpose in the provisions of law of the court's Member State (*lex fori*), and may specify, in the court's decision, the terms of exercising such powers according to the law of that Member State. However, in performance of such supplementing powers, the administrator must follow provisions of the law applicable to the succession on the transfer of title to the estate, liability for succession debts, beneficiary rights, including also, as the case may be, the right to accept or reject succession, and the rights of executor of the deceased person's testament. In consequence, acts performed by the administrator may also cover a transfer of the title to assets in the estate or payment of debts, but only when *lex successionis* so permits.

If, under the law applicable to the succession, appointment of a third-party administrator leads to a change of the heirs' liability for succession debts, such change should be respected. The supplementary

[20] This refers not only to guarantors but also to other parties liable, beside heirs, for the deceased person's debts, e.g., persons who have provided guarantees on behalf of the deceased or joined a debt incurred by the deceased. See Looschelders, in "Nomos Kommentar," 952.

[21] See Recital 43 *in fine*.

powers exercised by the administrator may, for instance, cover preparing an inventory of assets and debts belonging to the estate, notifying creditors about the opening of succession, calling on creditors to submit their claims, or taking any interim steps, including precautionary measures, for the purpose of preserving the assets in the estate[22].

Regardless of the above, the court appointing one or more administrators under Art. 29(1) ESR may, as an exception, in situations when the law applicable to the succession is the law of a third country[23], decide to grant to such administrators all administrative powers as provided for in the law of the Member State in which those administrators are appointed (*lex fori*). However, in exercise of such powers, the administrators must respect, in particular, the specification of beneficiaries and their succession rights, including the right to a reserved share or claims against the succession estate or heirs as per the law applicable to the succession.

3. PROOF OF THE STATUS OF ADMINISTRATOR OF THE ESTATE

In order to perform the rights relating to the administration of an estate located in different Member States, the executor of testament or another administrator of the estate should hold an appropriate document certifying the administrator's status. Such document may be, in the first place, the European Certificate of Succession (hereinafter: Certificate) as referred to in Art. 62 et seq. ESR[24].

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[22] See Recital 44 and Lagarde, in "EU Regulation," 164.

[23] Third countries are countries in which ESR does not apply, including Denmark and Ireland.

[24] For more on the European Certificate of Succession, see Jacek Górecki, "Europejskie poświadczenie spadkowe – nowy sposób potwierdzania praw do majątku spadkowego," *Rejent* 9 (2015): 9 et seq.; Bernhard Kreße, "Creation of a European Certificate of Succession," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 673 et seq.; Mariusz Załucki, in *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz*, ed. Mariusz Załucki (Warsaw: C.H. Beck, 2018), 334 et seq.; Andreas Köhler, in *Internationales Erbrecht*, eds. Walter Gierl, Andreas Köhler, Ludwig Kroiß, and Harald Wilsch (Baden Baden: Nomos, 2020), 138 et seq.

Under Art. 63 ESR, such Certificate is intended for use not only by heirs or legatees but also executors of testaments or administrators of the estate who need to prove, in another Member State, their status to exercise their rights as executors of testaments or administrators of the estate[25].

Under Art 65 ESR, the Certificate is issued, among others, upon application by an executor of testament or administrator of the estate. In such situations, the application should indicate the grounds on which the applicant claims to be entitled to execute the deceased person's testament or administrate the deceased person's estate. When considering the application, if needed, in order to establish the facts to be certified, the authority issuing the Certificate hears the executor of testament or administrator of the estate (Art. 66(4) ESR).

In the Certificate, the authority should include, among others, information on the circumstances giving rise to the rights or entitlements of testament executors or administrators of the estate (Art. 68 letter j ESR) and point to the entitlements held by the testament executor or administrator of the estate and restrictions on such entitlements under the law applicable to the succession or disposition of property upon death (Art. 68 letter o ESR).

Under Art 69(2), second sentence, ESR, it is presumed that the person named in the Certificate as the executor of testament or administrator of the estate has the status indicated in the Certificate or has the rights or entitlements specified in the Certificate without any conditions or restrictions on such rights or entitlements, otherwise than specified in the Certificate's content. Moreover, under Art. 69(3) ESR, the executor of testament or administrator of the estate is also covered by the presumption that any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

[25] See Bernhard Kreese, "Purpose of the Certificate," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 692–694.

Where an executor of testament or administrator of the estate mentioned in the Certificate as a person authorised to dispose of succession property disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence (art. 69(4) ESR)[26].

Apart from the Certificate, a document certifying the status of administrator of the estate may be a court ruling appointing the administrator or an official document in which an official certifies that the estate is administered by the administrator. Rulings delivered in such cases in Member States of the EU will be governed by Art 39 et seq. ESR on their recognition in other Member States without the need for any special proceedings[27]. On the other hand, in relation to official documents certifying the status of administrator of the estate, Art. 59 ESR will apply[28]. Such document may be, for example, a certificate of appointment of an executor of testament[29].

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[26] For more on the consequences of issuing the Certificate, see Carl Friedrich Nordmeier, in *Nomos Kommentar. Band 6. Rom-Verordnungen*, eds. Rainer Hüßtege, Heinz-Peter Mansel (Baden Baden: Nomos, 2015), 1079 et seq.; Barbara Reinhartz, "European Certificate of Succession," in *EU Regulation on Succession and Wills. Commentary*, eds. Ulf Bergquist, Domenico Damascelli, Richard Frimson, Paul Lagarde, Felix Odersky, and Barbara Reinhartz (Köln: Verlag Dr. Otto Schmidt KG, 2015), 283 et seq.; Christine Budzikiewicz, "Effects of the Certificate," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 770 et seq.; Köhler, in "Internationales Erbrecht," 145–146.

[27] See Elena D'Alessandro, "Staying of Recognition Proceedings," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 563 et seq.

[28] For more, see Heinz-Peter Mansel, "Acceptance of Authentic Instruments," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 625 et seq.; Jakub Biernat, in *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz*, ed. Mariusz Załucki (Warsaw: C.H. Beck, 2018), 327 et seq.

[29] See Art. 665 of the Polish Code of Civil Procedure.

4. LAW APPLICABLE TO THE APPOINTMENT OF A SUCCESSION ADMINISTRATOR

Under Art. 1 of the Polish Act on succession administration of a natural person's enterprise and other facilitations relating to the succession of enterprises[30], the Act governs the terms of temporary administration of an enterprise upon death of an entrepreneur who conducted business activities on his own behalf under an entry in the Central Registry and Information about Business Activity,[31] and continuation of business activities carried on using that person's enterprise, referred to, in further provisions of the cited Act, as enterprise in succession.

A basic question that arises in the conflict-of-law analysis of the institution of succession administration, as introduced by that Act, is the decision about the law applicable to the appointment of a succession administrator and his exercise of succession administration. As pointed out above, under Art. 23 letter f ESR, the powers of administrators of the estate are governed by *lex successionis*. This means that the provisions of the Act on the administration of an enterprise in succession should apply only when

[30] Consolidated text, Journal of Laws 2021, item 170. Hereinafter cited as the Act. For more on succession administration, see Tomasz Szczurowski, "Zarząd sukcesyjny przedsiębiorstwem w spadku," *Przegląd Ustawodawstwa Gospodarczego* 11 (2018): 31 et seq.; Jerzy Bieluk, *Ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej. Komentarz* (Warsaw: C.H. Beck, 2019), *passim*; Rafał Blicharz, *Zarząd sukcesyjny przedsiębiorstwem w spadku* (Warsaw: Difin, 2019), *passim*. The legal status of the succession administrator is discussed by: Maksymilian Pazdan, "Zarządca sukcesyjny a wykonawca testamentu," in *Ius est ars boni et aequi. Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi*, eds. Anna Dańko-Roesler, Marek Leśniak, Maciej Skory, and Bogusław Sołtys (Wrocław: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2018), 885 et seq.; Katarzyna Kopaczyńska-Pieczniak, "Status prawny zarządcy sukcesyjnego," *Przegląd Prawa Handlowego* 12 (2018): 4 et seq.; Konrad Kopystyński, "Zarządca sukcesyjny jako przedsiębiorca," *Przegląd Ustawodawstwa Gospodarczego* 6 (2019): 18 et seq.; Paulina Pacek, "Wykonawca testamentu, a zarząd sukcesyjny przedsiębiorstwem osoby fizycznej – wybrane zagadnienia," *Rejent* 6 (2019): 59 et seq.; Rafał Kapkowski and Marta Kaufmann, "Charakter prawny zarządcy sukcesyjnego na tle pokrewnych instytucji zarządu masą spadkową," *Rejent* 7 (2019): 54 et seq.

[31] See the Act on the Central Registry and Information about Business Activity and Entrepreneur's Information Point of 6 March 2018, consolidated text, Journal of Laws 2020, item 2296, as amended.

the succession from the deceased entrepreneur is effected under Polish law. On the other hand, when the law applicable to the succession is a foreign legal system, the appointment and exercise of succession administration may be based only on that foreign law. However, in Polish literature, a view has been expressed that the grounds for application of the Act in case of applying foreign law in succession matters can be sought in the provision of Art. 30 ESR. Its proponents argue that the provisions of the Act should apply regardless of whether the law applicable to the succession is Polish law or law of another country (Member State or a third country). They are of the opinion that the impact of the Act on the administration of an enterprise upon the entrepreneur's death means an impact on the enterprise's succession[32].

Under Article 30 ESR[33], where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.

[32] Such view is presented by Pazdan, "Zarząd sukcesyjny," 73–74; Pazdan, "O rozgraniczeniu statutów," 164 et seq. and Łukasz Żarnowiec, "Wpływ przepisów wymuszających swoje zastosowanie na rozstrzyganie spraw spadkowych pod rządami rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 650/2012," *Problemy Prawa Prywatnego Międzynarodowego* 25 (2019): 54 et seq.

[33] For more on Art. 30 ESR, see Gianluca Contaldi, "Special Rules Imposing Restrictions Concerning or Affecting the Succession in Respect of Certain Assets," in *The EU Succession Regulation. A Commentary*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davi, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 430 et seq.; Maria Anna Zachariasiewicz, in *Prawo Prywatne Międzynarodowe. Komentarz*, ed. Maksymilian Pazdan (Warsaw: C.H. Beck, 2018), 1225 et seq.; Looschelders, in "Nomos Kommentar," 953 et seq.; Łukasz Żarnowiec, "Wpływ statutu," 304 et seq.; Idem, "Wpływ przepisów," 47 et seq.; Anna Machnikowska, in *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz*, ed. Mariusz Załucki (Warsaw: C.H. Beck, 2018), 233 et seq.; Margoński, in "Komentarze Prawa Prywatnego," 67 et seq.; Köhler, in "Internationales Erbrecht," 88 et seq.

The cited provision overrides the principle of unity of the law applicable to the succession, as adopted for the purposes of ESR[34]. It is a special provision and, as such, requires strict interpretation[35]. This has been also confirmed in Recital 54[36].

Application of Art. 30 ESR in relation to the succession of enterprises depends on cumulative fulfilment of three preconditions[37]:

1. the enterprise is located in a country other than the country whose law is designated as the law applicable to the succession, regardless of whether the law applicable to the succession is determined by choice of law or using objective connecting factors. It is not necessary that the enterprise amounts to the entire estate or even its major part;
2. the law of that other county contains specific provisions imposing restrictions, on economic, family or social grounds, in respect of the succession or affecting the succession of an enterprise;

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[34] See Sarah Nietner, *Internationaler Entscheidungseinklang im europäischen Kollisionsrecht* (Tübingen: Mohr Siebeck, 2016), 125–126, 306 et seq.; Katarzyna Anna Dadańska, "O realizacji zasady jednolitości statutu spadkowego w świetle rozporządzenia nr 650/2012," *Problemy Prawa Prywatnego Międzynarodowego* 19 (2016): 75 et seq.; Köhler, in "Internationales Erbrecht," 88; Machnikowska, in "Unijne rozporządzenie," 236; Margoński, in "Komentarze Prawa Prywatnego," 68. See also the decision of the Polish Supreme Court of 11 March 2016, I CSK 64/15, Legalis.

[35] See the Decision of Oberlandesgericht (German Higher Regional Court) Nürnberg of 27 October 2017, 15 W 1461/17, *Zeitschrift für Erbrecht und Vermögensnachfolge* (2018), 339; and Looschelders, in "Nomos Kommentar," 954; Maria Anna Zachariasiewicz, "Przepisy wymuszające swoje zastosowanie a statut spadkowy," in *Nowe europejskie prawo spadkowe*, eds. Maksymilian Pazdan and Jacek Górecki (Warsaw: Lex a Wolters Kluwer business, 2015), 330.

[36] Lagarde, in "EU Regulation," 166. Academic authors indicate, as the most obvious example of applying Art. 30 ERS, the provisions on specific terms of succession of agricultural farms. See Jutta Müller-Lukoschek, *Die neue EU-Erbrechtsverordnung* (Bonn: Deutscher Notarverlag, 2013), 86; Maciej Mataczyński, "Przepisy ograniczające dziedziczenie na tle art. 30 rozporządzenia spadkowego," in *Nowe europejskie prawo spadkowe*, eds. Maksymilian Pazdan and Jacek Górecki (Warsaw: Lex a Wolters Kluwer business, 2015), 301 et seq.; Zachariasiewicz, "Przepisy wymuszające," 323; Contaldi, in "The EU Succession," 432 et seq. See also Pazdan, "Zarząd sukcesyjny," 74.

[37] See Anatol Dutta, in *Münchener Kommentar.* Band 10, *Internationales Privatrecht I*, ed. Jan von Hein (München: C.H. Beck, 2015), 1570; Köhler, in "Internationales Erbrecht," 104 et seq.

3. under the law of that other country, the specific provisions apply to the succession of an enterprise irrespective of the law applicable to the succession.

Establishment of the location of an enterprise in the discussed case should pose no major difficulties. The fact of an entrepreneur's registration in the Polish register entails that the entrepreneur operates in Poland. However, certain components of the enterprise may be situated outside Poland. This can relate to movable items (e.g. tractor units, machines, goods, raw materials for manufacture) but also to real estate or rights to real estate, as well as money or securities.

Under Art. 3(1) letter a ESR, "succession" means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession Therefore, succession is understood only as legal succession to a deceased natural person[38]. On the other hand, the concept does not cover the fate of the estate of such deceased natural person upon its transfer to the person's legal successors under statutory provisions or under a disposition *mortis causa*. In other words, administration of the estate cannot be treated as succession.

The provisions referred to in Art. 30 ESR must impose restrictions, on economic, family or social grounds, in respect of the succession or affect the succession of an enterprise. However, it is not clear what provisions exactly these could be[39]. This is the case since a considerable part of the provisions of succession law are motivated by family, social or economic grounds. Besides, the provisions of succession law on intestate succession, by their nature, limit succession from the deceased person since they eliminate from such succession a part of the deceased person's close persons and grant rights to the estate only to specific persons whose range is limited. One can only surmise that this refers to the provisions introducing specific terms of succession (legal succession) in respect of the assets

[38] See Looschelders, in "Nomos Kommentar," 841.

[39] See Mataczyński, "Przepisy ograniczające," 292–293.

listed in Art 30 ESR[40]. Such terms may refer both to their acquisition by legal successors (singular succession) or exclusion of certain persons from the succession of those assets, or imposition of additional requirements on the acquirers[41].

Finally, it is necessary for the regime under Art. 30 ESR to apply that the special provisions restricting or affecting the succession apply regardless of the law applicable to the succession. This should follow from a clear wording of such provisions or use of interpretation methods other than textual interpretation[42].

Referring the above remarks to the appointment of succession administration and its exercise, one should start with explaining that provisions of the Act do not impose restrictions on the succession of enterprises and do not affect such succession in any way. The Act does not interfere in this regard with the operation of the law applicable to the succession. Succession of an enterprise conducted in Poland by a deceased entrepreneur takes place exclusively under the provisions of law applicable to the succession, as established under the ESR regime. On the other hand, there should be no doubt that the purposes of the Act coincide with the purposes mentioned in Art. 30 ESR. Adoption of the Act was motivated by the need to maintain the unity of an enterprise and continuance of its operation despite death of the entrepreneur running the enterprise. Due to the above, the enterprise may still generate income to the deceased person's family, give jobs to the employees, pay public levies, etc[43].

It is also important that it does not follow expressly from the provisions of the Act that the Act should apply irrespective of the law applicable to the succession[44]. In any case, appointment of succession administration as

[40] See also Żarnowiec, "Wpływ statutu," 314–315. As pointed out by Zachariasiewicz, "Przepisy wymuszające," 333, the grounds listed in Art. 30 ESR are so vague that it would be difficult to treat the catalogue otherwise than as reference to the idea of protecting public order.

[41] See Machnikowska, in "Unijne rozporządzenie," 235; Köhler, in "Internationales Erbrecht," 90.

[42] See Mataczyński, "Przepisy ograniczające," 293–294.

[43] See Bieluk, "Ustawa o zarządzie," 2 et seq.

[44] Otherwise in Pazdan, "Zarząd sukcesyjny," 73 and Żarnowiec, "Wpływ przepisów," 55, who derive from Art. 1 of the Act an obligation of its application irrespective of

such is not compulsory in Poland. The provisions on succession administration do not require appointment of a succession administrator when the estate left by the deceased person includes an enterprise. In this regard, they are not imperative (mandatory) provisions. Appointment of a succession administrator after the death of an entrepreneur depends only on the decision of the entrepreneur's legal successors (owners of the enterprise in succession). Strict interpretation of Art. 30 ESR (having regard to its special nature) does not allow to extend its application to non-mandatory rules.

In consequence, it must be concluded that Art. 30 ESR does not justify the application of the Act and does not provide grounds to appoint succession administration as provided for in the Act if the law applicable to the entirety of succession matters relating to the estate left by a deceased entrepreneur is not Polish law. Administration of the estate is covered by the domain of *lex successionis*, as expressly stated in Art. 23 letter f ESR. Succession administration, as regulated in the Act, does not restrict the succession of enterprises and does not affect the succession of enterprises in the understanding of ESR. It does not modify the terms of transfer of the enterprise as a result of the entrepreneur's death to the entrepreneur's legal successors ("owners of the enterprise in succession" in the understanding of the Act). It refers only to the administration of an enterprise which, as a result of succession has been passed on to the legal successors of the deceased entrepreneur under provisions of the law applicable to the succession.

Appointment of succession administration (including of a succession administrator) is governed by the law applicable to the succession regardless if made prior to or upon the entrepreneur's death. In this regard, the Succession Regulation does not provide for a possibility of choice of law. On the other hand, by choice of law under Art. 22 ESR, an entrepreneur may submit the total of matters relating to the entrepreneur's succession to Polish law and, in the same way, open up the possibility to effectively appoint a succession administrator even when Polish law would not be applicable in this respect under Art. 21 ESR[45].

whether the law applicable to the succession is Polish law or law of another country.

[45] For more on the law applicable to the appointment of a succession administrator and legal acts performed by succession administrator, see also Jacek Górecki, "Prawo

5. CONCLUSIONS

Administration of the succession estate upon the deceased person's death is governed by the law applicable to the entirety of succession matters (*lex successionis*), determined under Arts. 21 and 22 ESR. In this context, it does not matter who administrates the estate. In situations specified in Art 29 ESR, administration of the estate may be partly based on the provisions applicable in the country in which the court examining the succession case (*lex fori*) adjudicates, as long as the court has jurisdiction under the ESR.

Succession administration, known in Poland since 2018, may be appointed only when the law applicable to the total of matters relating to the succession left by an entrepreneur conducting business activities in Poland is Polish law. Article 30 ERS does not provide basis for the application of succession administration, as regulated in Polish law, when the law applicable to the succession is foreign law. The provisions on succession administration do not impose any restrictions on the succession of enterprises and do not affect such succession. In the same way, one of the preconditions to the application of Art. 30 ESR is not fulfilled. As special provision, that Article may not be interpreted extensively.

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COMBINING LEGAL AND ECONOMIC THEORY. AN INTERDISCIPLINARY APPROACH TO DUTCH AND POLISH FAMILY PROVISIONS IN SUCCESSION LAW

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ABSTRACT

Although testamentary freedom is an important principle in succession law, legislators and judges across the world have recognized the importance of certain family members by granting them mandatory claims in the inheritance of their deceased relative (in spite of wishes of the deceased). This article focuses on these rights. The goal is to introduce the Dutch framework of imperative succession law and to demonstrate the possibilities of combining the legal and economic discipline to deepen knowledge on these provisions. Whilst examples will focus upon succession law, the concepts will be described in a general manner. This might inspire researchers to apply a similar interdisciplinary approach in other fields of law. The imperative provisions that currently exist for family members in the Netherlands can be divided into two types of claims. The first is the *legitime*, a fixed claim for children of the deceased. The second type are the *other statutory entitlements* that cover a specified range of situations in which judges have freedom in deciding upon the requests of family members. However, this discretion raises many questions on the way judges should handle such claims. A combination of law and economics can aid in describing and interpreting the law, for example by defining the need for support that is often required for a successful claim. By relying on economic data and theory, judges can come to a more consistent and substantiated way of establishing the need for support.

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The interdisciplinary methodology can also improve comparative legal research. The functional approach that is common in comparative legal research, assumes that law fulfills certain functions. Economic figures provide an objective basis that demonstrates what functions a law fulfills and to what extent this is done efficiently. This information can be used to compare the functioning of laws in different countries.

Keywords: interdisciplinary, family provisions, economics, comparative

1. INTRODUCTION

This contribution describes the Dutch inheritance claims that family members can have in an estate in spite of the wishes of the deceased. Furthermore, it demonstrates the possibilities of a legal-economic approach to these imperative claims in succession law. This means the law will not only be analyzed in a traditional doctrinal manner, but also from an economic perspective. Combining these disciplines can deepen the descriptive and interpretive value of legal research, as well as facilitate comparison. Given the general nature of economic theory, this methodology can also be used in other fields of (legal) research. Hence, this article can also be interesting for scholars who are concerned with the application of a legal-economic approach in other fields of law.

As mentioned, this article will specifically apply the legal-economic approach to analyze inheritance claims that family members can have in an estate, regardless of the wishes of the deceased. This topic is one of the most fundamental questions in inheritance law. In civil law countries such as the Netherlands and Poland, the *legitime* (also known as statutory portion, forced heirship or legitima portio) is the most famous example of an imperative claim by family members. This right differs between countries, but it entitles certain family members to a forced share or monetary claim in the estate. It is however not the only provision that protects family. The Netherlands for example also have a range of other provisions that benefit a varied range of persons.

The first paragraph introduces the Dutch framework of mandatory family protection in succession law. The second paragraph will analyze three examples of this and of the Polish system in more detail to illustrate

the application of the legal-economic approach. First, descriptive economics demonstrates what role the legitime plays in Dutch society. Second, financial figures will be used to interpret the need for support that is required for certain claims. Third, drawing on examples of Dutch and Polish law, the legal-economics approach will show possibilities for comparative research.

2. THE FRAMEWORK OF FAMILY PROTECTION

2.1. The legitime

Since 2003, Dutch succession law contains two sorts of imperative claims that family members can have in spite of wishes of the deceased. The oldest is the legitime. This right entitles specific persons to a fixed claim in the inheritance. It is not based on the needs of the claimant. Nowadays, this provision does not grant the Dutch claimant a share in the inheritance, as was the case in Roman law, but merely a right to a sum of money. Hence, technically, invoking the legitime does not lead to forced heirship, but only a monetary claim, art. 4:63 *Burgerlijk Wetboek* (hereafter: BW).[1]

Many Dutch scholars are in favor of abolishing the legitime as they consider it an unjustified infringement in testamentary freedom.[2] However, there is also academic support for the legitime.[3] Furthermore, empirical legal research demonstrates that many Dutch people still support

[1] *Burgerlijk Wetboek* is the Dutch Civil Code.

[2] See e.g. Wilbert D. Kolkman, "Pleidooi voor afschaffing van de legitieme portie," in *Dwingend erfrecht in Europa*, eds. René J.C. Flach, Grietje T. de Jong, Rosalie Koolhoven, and Fokke J. Vonck (Den Haag: Boom Juridische Uitgevers, 2015), 71–83; Lucienne A.G.M. van der Geld and Freek W.J.M Schols, *Legitieme portie. Een eerstelijns – en nader voort te zetten – veldonderzoek naar de wenselijkheid van de legitieme portie in het hedendaagse erfrecht* (Centrum voor Notarieel Recht, Radboud Universiteit en Netwerk Notarissen, 2020), 73–95.

[3] Johannes H.M. ter Haar, "Is de legitieme portie nog legitiem?," *Tijdschrift Erfrecht* 2 (2021): 23–29.

the legitime and it cannot be concluded that a majority of the population is in favor of abolishing the legitime.[4]

In the Netherlands, only children are entitled to a legitime. If a child has predeceased, his or her descendants can claim the legitime in his or her place. The right is solely based on the relationship with the deceased; there is no requirement that the child actually needs money. Any child has a right to a legitime. However, assets that the child acquires from its parent's inheritance diminish the value of the child's claim. The same applies to assets the child could have acquired from the estate, but rejected, unless certain conditions were attached to the bequest that made it inferior, art. 4:71 ff BW. Furthermore, as is common in European law, the child will lose the claim if it is convicted of certain criminal offences against the deceased parent, art. 4:3 BW. Apart from this rule, there is no possibility for a parent to prevent the child from claiming its legitime.

The legitime is usually worth half of what would be the child's entitlement if Dutch intestate succession law would be applicable. If intestate succession is applicable, the estate has to be divided equally between all children and the surviving spouse.[5] So, if the deceased leaves a surviving spouse and two children, the claim according to intestate succession would amount to 1/3 of the inheritance. It should be added that this claim is only due after the death of the surviving spouse. However, this does not influence the amount of the claim of a child. As the legitime is half of this amount, a child can claim 1/6 of the inheritance based on the rules of the legitime.

If the deceased parent gave away property during his or her life, this can influence the size of the legitime. For example, money given to a child diminishes the amount of the legitime by the amount of the gift (art. 4:70 BW). Gifts to other children enlarge the claim of the child that did not receive money (art. 4:67 sub d BW). These clawback rules prevent easy circumvention of imperative law, but also complicate rules

[4] Mark R. Beuker, "Rapport Legitieme Portie; wil het publiek aanpassing van de legitieme portie?," *Tijdschrift voor Familie- en Jeugdrecht* 29, afl. 5 (2021): 134–138.

[5] See art. 4:64 ff BW.

and can lead to court cases. Many court cases revolve around the right of children to acquire the information they need to calculate their right.[6]

The position of the person entitled to a legitime cannot be understood without taking into account the right of a surviving spouse. If the deceased leaves a spouse or registered partner, the legitime might not be able to immediately demand payment of the legitime. The testator can arrange that the legitime can only demand payment after the death of the surviving spouse.[7] The same could be the case if the deceased leaves an unmarried cohabitant with whom he or she had a notarial contract arranging the common household of the two persons involved.[8] The surviving spouse or unmarried cohabitant even has the right to use and sell all goods in the inheritance, leaving the child with a claim that cannot be paid even after death of the surviving spouse or unmarried cohabitant.

2.2. Other statutory entitlements

The other mandatory claims in Dutch succession law are called other statutory entitlements. They are a collection of different rights that each have their specific requirements. They can roughly be divided in rights for the surviving spouse and rights for other family members. Usually, they require the claimant to have a need for these claims. Judges have wide discretion in interpreting these claims and establishing their size. This freedom can and does however sometimes lead to unpredictable outcomes.

2.2.1. Other statutory entitlements for the surviving spouse

The most important claim is the right of the surviving spouse to a usufruct of the inheritance. Also the registered partner of the deceased is entitled to this claim. The usufruct enables the surviving spouse to keep using

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[6] Beuker and Kolkman, unpublished research data collected for vFAS (2015).

[7] Art. 4:81 BW. If there is no will, the legitime is only payable after the death or bankruptcy of the surviving spouse (art. 4:81 lid 2 BW). If a will is present, the legitime still is not due if the surviving spouse can claim a usufruct (see hereafter, paragraph 2.2.1 and art. 4:81 lid 3 BW). All this only applies insofar the estate transfers to the surviving spouse or partner.

[8] Note that in this case the testator has to actively arrange that de legitime will only be due after the death of the partner, art. 4:82 BW.

goods of the inheritance that were property of the deceased. The usufruct lasts until the death of the surviving spouse. Selling is only possible if the judge explicitly gives permission to do so.

As the other statutory entitlements merely function as a safety net in specific cases, a usufruct will only be granted if the surviving spouse is in need for this. The spouse who has enough financial needs to support him- or herself is supposed to use his or her own assets. However, the legislator assumes that the spouse has a need for a usufruct on the house and furniture (art. 4:29 BW). Therefore, merely invoking the right to a usufruct on the house and furniture obliges the heirs of the estate to cooperate in establishing a usufruct. If the heirs or other beneficiaries contest the need for the usufruct, it is up to them to prove that the surviving spouse can manage without the house and furniture.[9]

If the surviving spouse also (or only) wishes a usufruct on other goods of the inheritance than the house and furniture, he or she has to prove the need for this usufruct (art. 4:30 BW). Apart from the usufruct, the surviving spouse can often benefit from another entitlement. This right grants the spouse a right to continue living in the house of the deceased for a period of six months. Albeit this facility being merely a temporary solution for possible housing problems of the surviving spouse, it can fulfil a major role in settling the inheritance. This is because the right does not have to be invoked by the surviving spouse (contrary to the usufruct). Therefore, during the time that a usufruct has not been established, or the need for this usufruct is being contested, the surviving spouse can nevertheless remain in the house of the deceased thanks to the right of art. 4:28 BW. Persons entitled to this right are not only the spouse (art. 4:28 lid 1 BW), but also any other person who had a common household with the deceased (art. 4:28 lid 2 BW).[10]

[9] Dutch Parliamentary History, *Kamerstukken II* 1999/2000, 27021, no. 3.

[10] It is sometimes suggested that this right should continue even after the six month period, in case the surviving spouse has claimed a usufruct which has not been granted. Steven Perrick, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 4. Erfrecht en schenking* (Deventer: Wolters Kluwer, 2017), no. 364.

2.2.2. Other statutory entitlements for other family members

The other statutory entitlements do not only protect the surviving spouse, but also children of the deceased and certain other persons. Minor and young children can for example claim a sum of money that the heirs have to pay at once for upbringing and education (a lump sum). This right exists for children younger than 21 years and can only be claimed for the costs of upbringing and education until the 21st birthday. It is available also if the child has enough money to pay these things itself. However, no right is granted if a surviving spouse is obliged to take care of the child.

The lumpsum takes priority over the rights of a surviving spouse. It can therefore be considered a strengthened legitime.[11]

Another lump sum is available for children, step children, children in law and grandchildren of the deceased, art. 4:36 BW. It can be claimed if one of these persons has worked for the deceased's household or business without having received appropriate financial compensation. It is also required that the work has been carried out while the person was adult; if the child was still a minor, the work often is assumed to have characteristics of an internship in which the child learns things. Establishing what should be considered appropriate financial compensation can be quite challenging. The judge should also take into account non-monetary benefits the person has received, such as education or living within the household of the deceased without having to pay for the costs of the household. Judges tend to be strict when interpreting this provision. They usually only award a claim if the claimant had economic disadvantages by performing work for the deceased.

The last other statutory entitlement aims to protect economic interests by facilitating the continuity of businesses. If a child, step-child or spouse of one of these persons in practice already continues the business activities of the deceased, he or she can claim assets in the inheritance that are necessary for this business by application to the judge. The claim will only be awarded if it fulfils an important need of the claimant and awarding the claim will not gravely damage the interests of the person(s) who is/are entitled to the assets. The claimant will have to pay a reasonable

[11] Johannes H.M. ter Haar, "Minderjarigen en (de zorg voor) hun vermogen" (PhD diss., University of Groningen, 2013), 157–84.

price for the business assets that are being taken over. This claim can be made if the business goods were private property of the deceased, but also if the business was shaped as a corporation. However, in the latter case the claimant does not acquire specific business goods, but the shares in the corporation. In that case, it is required that the deceased was a director of the corporation and that he or she (possibly together with the other directors) possessed a majority of the company's shares. Furthermore, the child, step-child or spouse of one of these persons had to be a director of the company when the deceased died or he or she has to function as the successor in the company of the deceased.[12]

3. EXAMPLES OF THE LEGAL-ECONOMICS APPROACH

Hitherto, the text has focused upon introducing the mandatory claims that are present in Dutch succession law. To understand these claims more deeply, the following paragraphs will analyze certain aspects of these claims by applying a legal-economics approach. The aim of these analyses is not to evaluate in detail the working of these provisions given the limited space in my contribution. The goal is to illustrate the way in which the combination of legal and economic theory can strengthen knowledge on the legal rules by means of describing, interpreting and comparing them.[13]

3.1. Example 1: describing entitlements to the legitime

Traditionally, legal theory is concerned with describing the consequences of legal rules by doctrinal reasoning. It might for example demonstrate the implications of a rule in succession law, by interpreting it in relation to family property law. If the protection of the surviving spouse seems limited in succession law, it might seem that this spouse has a bad position.

[12] Wouter Burgerhart, "Waarde en erfrecht" (PhD diss., University of Nijmegen, 2008), 162–68 and 446–52 provides a more detailed interpretation of this provision.

[13] Although more often used in trust law, this approach has not been widely used in succession law. An interesting example is e.g. provided by Daniel B. Kelly, "Toward Economic Analysis of the Uniform Probate Code," *University of Michigan Journal of Law Reform* 45, no. 4 (2012): 855–98.

However, strict rules in family property law that lead to a 50-50 division of property of the spouses might take away the hard edges of succession law.

This widespread approach to law provides a bigger picture of the functioning of the law by taking into account the importance of other legal fields. However, it is not suitable to describe how effective the law is in fulfilling certain functions. Economics can help in quantifying and evaluating the impact of laws.[14] This might show that certain rules only apply to a limited number of cases and are therefore not very important in practice. An example of the legal-economic approach in succession law demonstrates how the legitime works out for children. After analyzing the requirements for claiming a legitime, it is interesting to research how many people can claim this right, what is the value of their entitlement and when they are able to actually collect the money. This was possible by using data from the Dutch national statistics office (CBS), an independent, government funded organization that is responsible for providing data on many societal subjects. By searching for data and combining data, it was possible to show that the average claim of a child, following from the legitime, amounted to €19,866.00 in 2016.[15] However, large differences exist when it comes to the sizes of estates and of the legitime.[16] Another interesting finding is that the age at which a child receives its legitime is quite high. More than 66% of the deceased were older than 76 years when they died, which implies that also the children entitled to a legitime were already not young anymore. Legal researchers already noted that the changes in society (and life expectancy) influenced (and diminished) the role of inheritances for the lives of children.[17] However, only this economic/sociological data proves the role of the legitime in modern-day society. It is sometimes stated that the legitime fulfills a function in caring for

[14] Antony W. Dnes, "Economics and Family Law," 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248776, 1–40 provides multiple concrete examples of the impact that legal change has on societal behavior.

[15] Mark R. Beuker, "De legitieme gekwantificeerd," *Weekblad voor Privaatrecht Notariaat en Registratie* 7313 (2021): 147–52.

[16] "Nalatenschappen; Nagelaten vermogen, kenmerken," CBS, Den Haag/Heerlen, 2020, https://opendata.cbs.nl/statline/#/CBS/nl/dataset/84242NED/table?dl=47817.

[17] John H. Langbein, "The Twentieth-Century Revolution in Family Wealth Transmission," *University of Chicago Law Occasional Paper* 25 (1989): 1–32.

family members. Polish legal research also explicitly acknowledges the social support function of the legitime.[18] However, the finding that many children receive a legitime only at an older age, questions the need for a legitime if claimants are often (soon) able to support themselves because of Dutch social provisions for elderly (AOW) or because they are usually working. However, it is good to notice that many situations differ from the average and that also young children are entitled to a legitime in the more rare cases that their parent dies.

The approach can also be applied to describe how much testamentary freedom testators have. Because of the legitime, roughly 37% of the value of inheritances can pass to children even if this is contrary to the wishes of the deceased. This figure does not even take into account the claims that can be made based on the other statutory entitlements. However, in 40% of the cases, there is a possibility that the children cannot immediately demand payment of their legitime. In these cases, there is a surviving spouse who could be entitled to all goods in the inheritance and also has the possibility to use (and sell) all these assets, possibly leaving the child of the deceased with a claim that later proves to be worthless as there is no money left. This economic research shows how the legitime works out in practice and can help in evaluating to what extent the law fulfils its function. Whilst the claim might seem a large infringement on testamentary freedom, it might prove to be less important as the child often has to wait before receiving its claim and possibly will not receive anything at all. If one of the aims of the legitime is the protection of children, these data pose questions as to how successful the current rules are in granting this protection.

3.2. Example 2: interpreting the necessity-criterion for the surviving spouse by relying on economic parameters

Certain societal developments, such as an increase in divorce rates and the popularization of unmarried cohabitation, lead to more diverse family

[18] Fryderyk Zoll, "Compulsory Portion in Poland," in *Comparative Succession Law v3 Mandatory Family Protection*, eds. Kenneth G.C. Reid, Marius J. De Waal, and Reinhard Zimmermann (Oxford: Oxford University Press, 2020), 371 and, more specifically, the references in footnote 52 of Zoll's contribution.

structures. Those relationships require a more tailor-made approach to imperative inheritance law. Whilst the benefits of provisions that are more based on the specific needs of family members is clear, it is not always easy to tailor-make the rights of possible claimants. The Dutch legislator introduced the other statutory entitlements that leave much discretionary freedom with the judge to take into account all relevant matters in establishing the right provision.

However, in legal practice it is not always easy to discern what factors are relevant and which are not. The legal-doctrinal approach is only to a certain extent well-equipped to aid judges (and other legal practitioners) in their interpretation of discretionary freedom. Judges in the Netherlands have therefor come to differing conclusions and taken into account different aspects of a case, and also weighing these aspects differently.[19] The same applies to the UK where judges have discretion in awarding family provisions, but where it is unclear how different factors should be weighed. This leads to an increase in court cases and a wish for more guidance on the interpretation of the statute.[20]

Questions often revolve around the concepts of 'necessity' or 'reasonability'.[21] Economics can provide benchmarks for researching what is necessary or reasonable by showing what average costs and income persons or household have that are in a similar situation (maybe depending upon the presence of children, age and other relevant factors). Furthermore, economics can also establish an absolute minimum amount of money that is required to live. It can also take into account the financial

[19] Two cases on the lumpsum ex art. 4:35, namely Rechtbank Amsterdam 30-09-2010, ECLI:NL:RBAMS:2010:BO8410 and Rechtbank Midden-Nederland 05-12-2014, ECLI:NL:RBMNE:2014:7147.

[20] See e.g. Re Ilott v. The Blue Cross and others, [2017] 2 WLR 979; and Rodger Kerridge, "Family Provision in England and Wales," in *Comparative Succession Law v3 Mandatory Family Protection*, eds. Kenneth G.C. Reid, Marius J. De Waal, and Reinhard Zimmermann (Oxford: Oxford University Press, 2020), 409–10.

[21] This is the case in the Dutch other statutory entitlements: the *need* for usufruct for the surviving spouse (art. 4:29 and 4:30 BW), the lump sums for minors and young adults can be claimed insofar they are *needed* (art. 4:35), the lump sums for unpaid labor will be paid to provide *reasonable* compensation (art. 4:36) and business goods can be taken over for a *reasonable* price (art. 4:38 BW).

position of the testator or his or her beneficiaries. An example can be given for the interpretation of the usufruct for the surviving spouse. As was described in 2.2.1, the usufruct entitles the surviving spouse to use inheritance goods for the rest of his or her life. However, the most important requirement to receive the usufruct is that the spouse should need this right; if he or she has enough financial means, no right exists. Economic data can be used to estimate what needs a person, such as a surviving spouse, has. These needs are based on certain costs of living. The Dutch Nibud and CPB publish data on the amount of money people need/use for the costs of living. The CBS has figures of the actual spending of households.[22] Relying on these data, it is possible to establish what are the exact minimum needs to be able to buy the most basic things to survive. It is also possible to research what average income and costs a certain person is expected to have. These costs depend on many factors. The income of the former household of the deceased and his or her spouse is usually a major factor in the spending pattern that the surviving spouse is used to. Age is another factor that should be taken into account; persons spend more money when they grow older, but after retiring, spending and income usually drop. Also the presence of children can play a role in the financial situation. Taking such factors into account, makes it possible to determine the need of the surviving spouse.

The spouse is not always entitled to continue living at the same standards of living after the death of the testator. The deceased's testamentary wishes are also important, which can render it reasonable that the surviving spouse has to accept a lower standard of living. Economics can take into account this value of testamentary freedom in the following way. The surviving spouse will always at least be entitled to a usufruct that guarantees the absolute minimum needs that have been calculated as mentioned in the last paragraph. Afterwards, there might be a need for more luxurious goods. After the absolute minimum is guaranteed, it seems fair to 'divide' the rest of the assets of the estate (the ones left after the usufruct to guarantee a minimum standard of living) between the heirs and the surviving

[22] *Bestedingen van huishoudens; huishoudenskenmerken, bestedingscategorieën*. Den Haag/Heerlen: CBS, 2019, https://opendata.cbs.nl/statline/#/CBS/nl/dataset/83678NED/table?dl=43C3A.

spouse. The result will be that only a maximum of half of those remaining assets will be subject to a usufruct, whilst the other half will immediately be available for the beneficiaries of the estate. Of course, if the need for luxurious goods is smaller than half of the remain assets, the usufruct will entail less than half of those assets. It should be noted that this is not a legal division, as there is no communal property between the surviving spouse and the beneficiaries and because the surviving spouse will not own any goods, but merely receive a usufruct.

A similar approach is already used in Dutch law when it comes to maintenance for spouses after divorce. The *Alimentatienormen*, a set of guidelines made by judges, provide direction for the calculation of maintenance.[23] Those calculations are greatly influenced by financial data on the situation of the spouses and the costs of living in the Netherlands.

3.3. Example 3: facilitating comparison of the Dutch and the Polish legal system

The functional approach to comparative law has become quite influential, if not standard.[24] This method for comparing legal systems does not only consider the meaning of specific areas of law, but analyzes in what ways different laws fulfil a specific function. Here, it is useful to take into account again the first lines of paragraph 3.1 where it is described that the spouse might be well protected, even though rules in succession law seem harsh, because matrimonial property law provides greater protection. Only considering the content of succession law will lead to an unfair representation of the system being researched.

This example shows that this wide approach to comparative law protects researchers from having a focus that is too narrow and from overlooking other relevant fields of law. However, it does not make clear in what societal circumstances these field of law operate. Societies

[23] *Rapport Expertgroep Alimentatienormen 2021* (Utrecht: De Rechtspraak, 2020), 1–69. See also the attached tables for establishing the need for child support and the ability of the other spouse to pay this support.

[24] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, trans. Tony Weir (Oxford: Oxford University Press, 1998), 32–47.

can differ enormously when it comes to for example wealth, income, but also individuality and labor market participation. Economic data can provide objective criteria that describe how laws work out in a specific society. This leads to empirical evidence showing to what extent the law is successful in fulfilling the function that is being researched. Sometimes, inheritances are quite small if a lot of property is part of a matrimonial property regime. Or, as is the case in England & Wales, the house usually automatically becomes property of the surviving spouse. Using economic data to describe the value of the house and the value of the inheritance in both countries can provide for a comparison of legal systems that depicts a more fair image of the way laws really work to fulfil a certain function, such as protecting the surviving spouse.[25]

When it comes to comparing Dutch and Polish succession law, it seems at first glance that rules on mandatory family protection differ to a major extent. However, the differences might not be so large in practice. The Dutch system for example does not provide protection for parents of the deceased while the Polish law does. However, economics shows that not a lot of children die before their parents. And, when they do, they often have a spouse and/or child(ren). In that case, also in Polish law, no claim exists for the parent of the deceased.[26]

The same applies to grandparents. No right exists in the Netherlands, but if it would exist, it probably would not often be applicable. Polish law awards a claim to grandparents that live below the poverty line, but in the Netherlands grandchildren do not often die before their grandparents. And when they do, those grandparents are often entitled to social security and pension benefits as the Dutch save a lot of money for retirement. This would often render a claim unsuccessful.

Also when it comes to comparing rules on unmarried cohabitation the Netherlands might in general appear to be different from Poland, but when looking at mandatory rules in succession law, it shows

[25] Richard A. Posner, *Economic Analysis of Law* (New York: Little, Brown & Co., 1973), 193-212 describes the basics of an economic approach within the context of the family.

[26] Fryderyk Zoll, "Compulsory Portion in Poland," in *Comparative Succession Law v3 Mandatory Family Protection*, eds. Kenneth G.C. Reid, Marius J. De Waal, and Reinhard Zimmermann (Oxford: Oxford University Press, 2020), 371–72.

that the unmarried partner does not get much protection. To explain the similarities and differences, economic data can be relevant. Societal developments happen at different speed. In the Netherlands, unmarried partnership was already popular for a longer time than in Poland.[27] That is probably why, in general, unmarried partners can more easily arrange formal aspects of their relationship. However, they hardly have any claims in imperative succession law as the basis for these claims lies in a more formal family relationship. Only the right to remain in the house of the deceased for half a year might be applicable, art. 4:28 BW. When it comes to business continuity, Poland might introduce a right somewhat similar to the Dutch rules on taking over businesses.[28] Economic theory positively interprets business activities. When more problems regarding business continuity arise in society, the legislator will start considering a provision in the law to safeguard economic interests. Recent waves of interest in governance related questions have also shifted the focus of researchers and lawmakers to the importance of family business continuity.[29] The market changes that have increased the wealth of Polish businesses have also increased the need for facilities that enable business continuity.[30] This economic background renders more logical the introduction of the Dutch-like provision to enable the transfer of businesses in mandatory succession law.

[27] Anna Matysiak, "Is Poland really immune to the spread of unmarried cohabitation?," *Demographic Research* 21, no. 8 (2009): 215–34 on the development of unmarried cohabitation.

[28] Fryderyk Zoll, "Compulsory Portion in Poland," in *Comparative Succession Law v3 Mandatory Family Protection*, eds. Kenneth G.C. Reid, Marius J. De Waal, and Reinhard Zimmermann (Oxford: Oxford University Press, 2020), 370.

[29] Aleksander Surdej and Krzysztof Wach, "The dynamics of succession in family businesses in Poland – Empirical results," *Economia Marche: Journal of Applied Economics* 31, no. 2 (2012): 109–28.

[30] Elżbieta Roszko-Grzegorek, "The Role and Importance of Succession Planning in Polish Family Firms," *Acta Universitatis Lodziensis. Folia Oeconomica* 224 (2008): 57–79.

4. CONCLUSION

Major differences exist in the ways in which legal systems protect the interests of family members in inheritance law. Current Dutch law has two types of claims that are rather different in nature. The *legitime* is a fixed claim for descendants, whilst the *other statutory entitlements* are open to a wider range of family members whose needs form the basis of the right that is to be awarded by a judge who has considerable discretionary freedom.

This article exemplifies the possibilities of applying an interdisciplinary legal-economic approach to succession law. Economics make clearer how rules work out in society, which can help evaluate their functioning. Furthermore, economics have proven useful in interpreting legal concepts. The economic figures aid in establishing the interpretation that is most in line with legal doctrine or most efficient. Lastly, economics can function as a discipline that provides objective measures by which legal systems can be compared. This promises to be a valuable tool for a more in-depth comparison of legal systems.

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SUCCESSION OF DIGITAL GOODS. A COMPARATIVE LEGAL STUDY

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ABSTRACT

The purpose of this article is to present possible solutions to the problem of access to digital contents left by a deceased user of Internet services under different European legal systems. Discussion of this issue from a comparative perspective will allow the drawing of general conclusions about the direction *de lege lata* in which European legislation is heading. In my opinion there should be dedicated legal provisons introduced into the polish civil code which would pertain to digital goods. This would also facilitate the harmonization of inheritance matters in a European perspective. Technological development requires amending the civil code to fit changing reality.

Keywords: digital content, digital state, Facebook, strictly personal rights, heirs

1. INTRODUCTION

Information technologies have contributed to significant changes in economy, law and society itself, whose essential part is currently formed by the so-called digital generation (digital natives). Contemporary services

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on the internet enable their users to actively create new digital content. As a result, such users produce, use and record huge amounts of data. Therefore, the question becomes relevant about the future of such content and the right to dispose of them in the event of "digital death," that is death of an Internet user[1].

The purpose of this article is to present possible solutions to the problem of access to digital content left by a deceased user of Internet services under different European legal systems. Discussion of that issue from a comparative perspective will allow to draw general conclusions about the direction *de lege lata* in which European legislation is heading.

2. DEFINITION OF DIGITAL GOODS

In order to fully understand the problems of admissibility of inheriting digital goods, in the first place one should consider the very concept discussed here, as an element of the deceased person's succession estate.

It must be strongly emphasized that digital goods are often understood differently in the normative instruments of particular countries or, oftentimes, they are not defined at all by the legislator in a given national legal system. The legislative chaos arising in that regard may, in future, lead to countless conflicts between heirs (future or present), possible heirs and service providers of particular content rendered by electronic means, who frequently base their activities and proposed solutions on the provisions applicable in the country of their domicile, which does not have to correspond to the legal regime applicable at the place of residence of the recipients of services.

Having the above in mind, at the beginning, one should quote the provision of Art. 2 item 5 of the Act on consumer rights[2], where digital content was defined by the Polish legislator as data produced and supplied in digital form. The above provision is an implementation of the Directive of

[1] Anetta Breczko and Marta Andruszkiewicz, "Prawo spadkowe w obliczu postępu technologicznego (nowe wyzwania w XXI wieku)," *Białostockie Studia Prawnicze* 22, no. 2 (2017).

[2] Act of 30 May 2014 on consumer rights (i.e. Dz. U. 2020 r. poz. 287).

the European Parliament and of the Council of 2011[3] on consumer rights. In turn, under Recital 19 of the cited Directive, Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.

At the time being, however, there is no uniform and consistent, for all Member States of the EU, definition of the term "digital goods". Certain authors point to the need to differentiate between both the above terms, treating digital goods as a concept with much broader meaning than digital content, covering as well the right of access to such content, the right of their creation or to use a virtual account[4]. In the author's opinion, the position should be considered correct according to which one can use the cited terms interchangeably since the very general nature of the statutory definition of digital content allows to qualify the concept of digital goods as included in the cited formula[5]. Therefore, for the purposes of this study, I have adopted the latter of the indicated understandings of digital content.

However, in the context of the above, it becomes necessary to point out that digital goods are characterized primarily by their wide variety, deriving in the first place from the multiformity of services rendered by electronic means. Those contents may fall under such categories as email accounts, virtual currencies, musical works in digital format, e-books or, which is most important for the present considerations, social networking accounts. From the point of view of such wide diversity, one should agree with the position that the currently applicable legal provisions of Polish succession law should not be, at the time being, indiscriminately referred

[3] Directive of the European Parliament and of the Council 2011/83/UE of 25 October 2011 (OJ EU L 2011.304.64).

[4] Paweł Szulewski, "Śmierć 2.0 – problematyka dóbr cyfrowych post mortem," in *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, ed. Jacek Gołaczyński, Jacek Mazurkiewicz, Jarosław Turłukowski, and Daniel Karkut (Wrocław: Oficyna Prawnicza, 2015), 734

[5] Mateusz Mądel, "Dostęp do treści cyfrowych zmarłego użytkownika usług internetowych na tle orzeczenia Federalnego Trybunału Sprawiedliwości w Niemczech," *Transformacje Prawa Prywatnego* 2 (2020): 126.

to all the listed categories of digital goods in a general and abstract manner, and this is the case because of the heterogeneous nature of each of those contents[6]. Differing views of Polish academic authors in that respect and practically undeveloped position of the judiciary[7] led to the need to reach for a breakthrough, from the point of view of the present considerations, judgment of the Federal Court of Justice in Germany (*Bundesgerichtshof*) of 2018[8]. The Court resolved a case, which had been pending for several years, concerning the possibility of inheriting an account of a minor user of the social networking portal Facebook.com by her ascendents, namely parents.

3. THE GERMAN BUNDESGERICHTSHOF'S DECISION ON ACCESS TO THE FACEBOOK ACCOUNT OF A DECEASED CHILD

In the decision delivered by the Federal Court of Justice in Germany, it was strongly indicated that in case of death of an owner of a social networking account, the user's contract passes to the user's heirs under § 1922 BGB[9]. In a thesis presented by the Court, it was also pointed out that access to a user account and the communication contents kept in that account does not violate *post mortem* personal rights of the deceased or the right to the protection of personal data or secrecy of correspondence. It must be noted that the cited ruling admits as well the possibility to inherit

[6] Anna Wszołek, "Między Facebookiem a Instagramem. Wirtualny wizerunek czy prawo majątkowe? – analiza dóbr cyfrowych in concreto," *Internetowy Przegląd Prawniczy TBSP UJ* 3 (2017): 131.

[7] Mariusz Załucki, ed., *Kodeks cywilny. Komentarz*. Wyd. 2 (Warsaw: Legalis, 2019).

[8] Judgment of the Federal Court of Justice in Germany of 12 July 2018, III ZR 183/17, accessed June 16, 2021, https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1.

[9] German Civil Code of 18 August 1896 (BGB — Bürgerliches Gesetzbuch, BGBl I S. 42, FNA 400–2), accessed June 16, 2021, http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf.
§ 1922(1) BGB provides that upon the death of a person (devolution of an inheritance), that person's property (inheritance) passes as a whole to one or more than one other persons (heirs). ("Mit dem Tode einer Person (Erbfall) geht deren Vermögen (Erbschaft) als Ganzes auf eine oder mehrere andere Personen (Erben) über").

the entire Internet account left by a deceased user, and not only the digital content kept on the account. The difference in this case is fundamental. Succession of an entire portal account left by a deceased user offers the possibility of further use of the account in the same way as the deceased user did. On the other hand, succession of digital accounts would only allow to obtain access to the goods kept in the portal, however, without the possibility of further using the account, that is enjoying all of its functions by the heirs – as in the case of living and active portal users.

To recall the factual background of the decision cited above, it must be pointed out that the dispute relating to the succession of digital contents left by a late user of Internet services related to the deceased person's Facebook account. Parents of a fifteen year old deceased girl, by gaining access to their daughter's Internet account on Facebook, wanted to clarify the circumstances of her death. The conclusion of the official investigation was that the deceased died as a result of injuries sustained in an accident at a subway station. However, based on the digital contents kept on the Internet account, taking into consideration the correspondence gathered in the account, the heirs of the deceased wanted to learn if she had committed suicide or if it had been only an unfortunate accident. However, the portal's administrator refused the heirs' access to the deceased person's Internet account, by blocking access to that account and changing its status to *in memoriam*[10]. It must be noted that the above-mentioned status disabled the heirs to log in to the account using the access data (login and password) used by their deceased daughter during her life. Interestingly enough, after changing the account's status to *in memoriam*, the parents of the deceased, as her only heirs, did not have the access to the contents stored in the account – except for conversations in which they took part themselves – whereas partners in communication (the deceased girl's friends) had such possibility. Because of the above, the heirs asserted a claim against the portal's administrator for a grant of access to the user's full account and the data stored in the account, including to the recorded communication contents. On the contrary, the portal's administrator, justifying the refusal to provide the heirs with access to the deceased user's

[10] Mateusz Mądel, *Następstwo prawne treści cyfrowych na wypadek śmierci* (Warsaw: C.H. Beck, 2018), 92–93.

account, argued that it was necessary to protect personal interests, personal data of the original user, secrecy of correspondence of that late user and to protect data of other users of the portal as her partners in communication. All the doubts cited above were resolved in the course of further proceedings, and the final position in that matter was taken by the Federal Court of Justice in Germany.

Adjudicating in the first instance, the Land Court in Berlin concluded that under § 1922 BGB (which, in the Polish context, would be, as it were, an equivalent of Art. 922 CC[11]) the "property" accumulated on the service provider's servers did not pass to the heirs, however, the heirs inherited the right of access to the servers under the original contract concluded between the deceased and the service provider[12]. In the justification of the judgment, it was highlighted that the legal relationship originally binding between the deceased and the service provider was "property" in the understanding of 1922 BGB. At the same time, it was excluded that the rights and obligations under the contract between a portal's user and the service provider were strictly linked to the deceased person. The position expressed by the court was justified by the lack of any exact verification by Facebook of the user's identity when the account had been created. In consequence, it was concluded that the Terms and Conditions on the personal nature of an account were not binding. In the opinion of the court, in the examined case there was also no infringement of the personal data of partners in communication. It was pointed out that in situations when an account is taken over by heirs through universal succession, under § 1922 BGB, there is no interference with third party rights, as in the case of inheritance by legal successors of traditional correspondence. The position taken by the I instance court was not accepted by the service provider, who appealed against the decision, and as a result of appellate proceedings, the court's position changed and the heirs' claims were dismissed.

[11] See Art. 922 § 1 and 2 of the Polish Civil Code: "§ 1.Property rights and obligations of the deceased pass, upon his death, to one or several persons in accordance with the provisions of this book. § 2. Succession does not include the deceased person's rights and obligations that are strictly and personally related to him or rights which, on his death, pass to specified persons irrespective of whether they are heirs."

[12] See the judgment of the Land Court in Berlin of 17 December 2016, 20 O 172/15, accessed June 16, 2021, https://dejure.org/ext/f551ef3d8be146b2dca4a1011db1feca.

The II instance court emphasized that it was possible to conclude that the heirs entered into the rights and obligations under the contract but not in a sense permitting active use of the social networking account, that is in a manner enjoyed by the deceased person, but in a passive way, consisting in the possibility to view the digital contents stored in the account[13]. It was also emphasized that it was inadmissible for the heirs to obtain access to the deceased person's account because of the provisions of telecommunications law and norms of the Constitution[14]. Under Art 10(1) of the Constitution of the Federal Republic of Germany (GG), the privacy of correspondence, posts and telecommunications are inviolable. On top of that, Art. 10(2) GG provides that any restrictions of those rights may be ordered only pursuant to a statutory law.

In the opinion of the Federal Court of Justice, such claim is hereditary and not precluded by the *post mortem* right to the protection of personal interests, secrecy of correspondence, provisions on the protection of personal data or the right to protect personal interests of partners in communication. It was emphasized that the heirs' claim followed from the contract transferred to them, concluded *inter vivos* between the deceased minor and the administrator of the Facebook portal. In the justification of the judgment, it was pointed out that in the contract between the deceased and the portal's administrator the possibility was not excluded of the heirs entering into the rights and obligations of the former. In the opinion of the Federal Court, the provisions of the contract were irrelevant in the examined case providing that the user must maintain the account under the user's real name and surname, or that the user shall not pass the user's access data to other individuals. It was pointed out that the cited contractual provisions related to the behaviour of the original user of the account during her life and, in the same way, did not refer to the account's fate *post mortem*.[15]

[13] See the judgment of the Land Court in Berlin of 31 May 2017, 21 U 9/16, accessed June 16, 2021, https://dejure.org/ext/1792778f38a579e9316dccd9d7a6e5f4.

[14] Constitution of the Federal Republic of Germany of 23 May 1949, accessed June 9, 2021, https://www.gesetze-im-internet.de/gg/.

[15] The discussed ruling left undecided and open the question of the possibility of excluding heredity of an Internet account under a contract.

The portal's administrator was compared to a postal operator, who is responsible only for placing a letter in the appropriate box but cannot be accountable for whether the person specified as addressee reads the letter or shows it to a third party. The Federal Court concluded that for a conscious user of the Internet it is obvious that, upon sending a message, the user is no longer in control of who learns about the message's content, with whom the message will be shared, and that the sender of the communication may not request its return once it has been posted. Since partners in communication assume the risk that third parties may gain access to the contents stored in the account, they should, all the more so, take into consideration that the access to the contents might be obtained by the user's heirs.

In the justification of the ruling, the Court undertook also to resolve questions relating to an attempt to distinguish between inheriting an account on the portal and inheriting only its substance, that is the digital content stored in that account. It was emphasized in the judgment that under German law it is not justified to inherit only specific digital content according to the division into material content and specifically personal content. It was concluded that in such event the same category of digital contents (e.g. messages) would be split so that communications relating to property rights exchanged through the website would be hereditary and messages unrelated to property rights would not constitute a part of the inheritance. In support of the above, it was indicated that heirs enter into the deceased person's legal position also when a legal relationship includes strictly personal contents irrespective of their material value. At this point, the Court relied on § 2047(2) BGB and § 2373, second sentence, BGB[16], providing for the inclusion in the succession estate of strictly personal

[16] Under § 2047(2) BGB, Documents relating to the personal circumstances of the deceased or of his family or to the whole estate remain joint property (Schriftstücke, die sich auf die persönlichen Verhältnisse des Erblassers, auf dessen Familie oder auf den ganzen Nachlass beziehen, bleiben gemeinschaftlich). Under § 2373 BGB, a share of the inheritance that devolves upon the seller after the completion of the sale, by subsequent succession or as a result of a person ceasing to be a co-heir, and a preferential legacy given to the seller are, in case of doubt, not to be deemed included in the sale. The same applies to family papers and family pictures. (In Erbteil, der dem Verkäufer nach dem Abschluss des Kaufs durch Nacherbfolge oder infolge des Wegfalls eines Miterben anfällt, sowie ein dem

goods, including documents, souvenirs, photographs, etc., among which the Court included also strictly personal digital content produced within the framework of obligational relationships to which the deceased was a party. In support of the above position, it was also indicated that the differentiation between strictly personal and other content would give rise to practical problems impossible to overcome.

In the justification of the decision, the Court referred also to the possibility of violating the right to the protection of personal data by providing the heirs with access to the deceased person's account in the context of the provisions of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[17] – GDPR. In response to the service provider's objection, it was pointed out that rights relating to the protection of the deceased person's personal data would not be infringed since in the examined case the service provider was not bound by the provisions of the Regulation. It was justly highlighted that the Regulation applies only to living persons. In the context of the possibility of the service provider's violation of the provisions of the Regulation in relation to partners in communication, it was concluded that in the discussed case their rights would not be infringed. Again, at this point the Court distinguished between the existence of the contract and the related account, on one hand, and the deceased person, on the other. It was emphasized that in spite of death of the person originally entitled to use the account, the account still exists after her death, and her heir becomes the person entitled to use the account. By recalling Art. 6(1) letter b GDPR, it was concluded that processing of personal data was necessary for further performance of the contract since, as a result of its performance, the service provider sends messages and other digital content between the accounts of the website's

Verkäufer zugewendetes Vorausvermächtnis ist im Zweifel nicht als mitverkauft anzusehen. Das Gleiche gilt von Familienpapieren und Familienbildern).

[17] The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, p. 1, with rectification).

users. Therefore, processing of personal data by the portal's administrator as a part of the existing obligational relationship was considered legitimate.

4. INHERITABILITY OF DIGITAL CONTENT UNDER POLISH LAW

The parties' obligations were not specifically personal, which was to be an argument for the hereditary nature of the rights and obligations under the contract. It should be noted that the position presented in the justification may be difficult to defend in the context of Polish succession law. It must be emphasized that under Art. 922 § 2 CC, succession does not include the deceased person's rights and obligations that are strictly and personally related to him or rights which, on his death, pass to specified persons irrespective of whether they are heirs[18].

In Polish legislation no special provisions have been envisaged with regard to inheriting documents, souvenirs, photographs, etc. This is why in such situations the general provision under Art 922 CC should apply. However, doubts seem legitimate as expressed by the German Federal Court of Justice in respect of the possibility of a dichotomous division of digital goods into those serving strictly personal purposes and those serving only legal and material purposes. Such distinction would require specific investigation into all existing and possible future digital content, and their classification according to the criterion presented above. However, this is not possible because of their very wide diversity and the fact that new forms still keep emerging. It must be stressed that the problem was noticed not only in the context of German law. In Polish conditions, based on the currently applicable provisions, one should always examine the character and nature of digital contents for the purpose of their classification under Art. 992 CC[19].

[18] Mateusz Mądel, "Dostęp do treści cyfrowych zmarłego użytkownika usług internetowych na tle orzeczenia Federalnego Trybunału Sprawiedliwości w Niemczech," *Transformacje Prawa Prywatnego* 2 (2020): 137.

[19] Mądel, "Dostęp do treści cyfrowych zmarłego użytkownika," 140.

5. INHERITABILITY OF DIGITAL CONTENT FROM OTHER COUNTRIES' POINT OF VIEW

Austrian inheritance law is covered by § 531 ABGB to § 824 Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB).[20] Pursuant to § 531 ABGB, the rights and obligations of deceased person constitute their estate, unless they are of a strictly personal nature. This definition of estate does not make a distinction between digital or non-digital (analog) content. The question of whether digital content is inheritable (i.e. whether parents can access the Facebook account of their deceased daughter or not) depends on whether the underlying rights of legal relationships are classified as strictly personal under the exception in § 531 ABGB.[21] Although § 531 ABGB does not contain a list of inheritable and non-inheritable rights and obligations, it does specify the decisive criterion: strictly personal nature. § 1448 ABGB is of similar nature when stating that death only terminates those rights and obligations that are limited to a person or relate to individual acts of the deceased. § 1393 sentence 2 ABGB also refers to the strictly personal nature of rights, providing that rights which relate to a person and hence terminate with him or her, cannot be assigned. Furthermore, § 1171 ABGB provides that a contract for service relating to works, for which the specific individual qualities of the contractor are essential, expires upon his death[22]. Contracts with providers of digital content or digital services are inheritable according to the general rule laid down in § 531 ABGB. However, rights and obligations are non-inheritable when the replacement of an obligation or obligator by an heir would change the performance of the obligation; then they are of a strictly personal nature. One has to look at each case individually, but in general, contracts with providers of digital content or digital services are not strictly personal and thus inheritable. Telecommunications and data protection law does not prevent the heirs' access either. Even if content is

[20] See https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622, accessed June 16, 2021.

[21] Joachim Pierer, "Inheritability of Digital Content under Austrian Law," *European Review of Private Law* 27, no. 5 (2019): 1119.

[22] Pierer, "Inheritability of Digital Content," 1120.

non-inheritable, heirs would get access if they have a compelling reason that overrides the deceased's interest in privacy[23].

Under Belgian law the rights that the deceased girl derived from her contract with Facebook would be inherited by her parents. Article 724 of the Belgian Civil Code (hereafter: CC) provides that by law the deceased's heirs are put in possession of his or her goods, rights and claims. It must be noted that the word 'possession' in the article lacks accuracy, because the heirs do not become mere possessors of these assets: they acquire full ownership of them, by means of substitution to be precise[24]. Digital rights are part of the girl's estate, because they were not established for her lifetime only nor do they originate from an *intuit personae* contract. Moreover, Facebook's rules on memorialized estates were found not to apply to the aforementioned contract under Belgian law. In the second part of this article, a number of legal grounds that might prevent the rights from being inherited were elaborated on. The focus of the discussion was on the Electronic Communications Act of 13 June 2005, Article 29 of the Belgian Constitution, which protects the confidentiality of the mail, and the GDPR. With regard to each of these legal grounds the answer to the question whether it prevents the parents from inheriting their daughter's rights under the contract with Facebook appears to be same: it depends on the outcome of a balancing test in which the rights and interests of the parents are balanced against the rights and interests of the communication partners of their daughter[25].

Now we must describe The German *Bundesgerichtshof's* Decision on Access to the Facebook Account of Your Deceased Child from a Dutch Law Point of View. The discussion deals with the important question of how 'open' the system of Dutch property law is. Article 3:1 od the Dutch

[23] Pierer, "Inheritability of Digital Content," 1129.

[24] See art. 724 of the Belgian Civil Code: "Les héritiers sont saisis de plein droit des biens, droits et actions du défunt, sous l'obligation d'acquitter toutes les charges de la succession. L'Etat doit se faire envoyer en possession par justice, dans les formes déterminées ci-après."; https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/60a09398940a143bc1256e-700032d7bb/$FILE/code_civil.PDF, accessed June 18, 2021.

[25] K.K.E.C.T. Swinnen, "The German *Bundesgerichtshof's* Decision on Access to the Facebook Account of Your Deceased Child from a Belgian Law Point of View," *European Review of Private Law* 5 (2019): 1148.

Civil Code (DCC) defines 'goods' (*goederen*) as either 'things', meaning corporal objects (*zaken*, Art. 3:2 DCC), or as *vermogensrechten* (Art. 3:6 DCC)[26]. Some of the Dutch scholars tell that an online account is a personal right that does not pass on to the heir. They argue that it is useless for an heir to continue the deceased's account, and moreover, that the deceased protected his account with a password, making it unlikely he would want his heirs to be able to access it. Others see no obstacle in the nature of the contract[27].

Article 659 of the Spanish Civil Code deems an inheritance to comprise all assets, rights and obligations that are transferable, whether financial or personal in nature. In addition, as the universal successor, the heir takes over the legal positions held by the testator in the host of legal relationships that comprise the inheritance (Art. 661 of the CC)[28]. According to Spanish researchers highly similar reasoning the Spanish High Court could have reached the same decision as the BGH. In short, what it does is apply the *principle of functional equivalence* between the analogue and the digital world, without expressly stating so, when throughout its arguments it compares the sending of a letter by post, for example, to the sending of information via a personal account on a social network to other registered users; or, for inheritance purposes, when it compares a bank account to a personal account on a social network or a telephone communication with a different communication made using electronic means[29].

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[26] See art. 3:6 of the Dutch Civil Code: ""Ejendomsrettigheder" er rettigheder, som enten hver for sig eller sammen med en anden rettighed kan overdrages, eller som har til formål at give indehaveren en væsentlig fordel, eller som opnås til gengæld for levering eller udsigt til fortsat at levere en væsentlig fordel.", http://www.dutchcivillaw.com/civilcodebook033.htm, accessed June 18, 2021.

[27] Valérie Tweehuysen, "Digital Afterlife Under Dutch Law: The German Case on Inheriting a Facebook Account From a Dutch Perspective," *European Review of Private Law* 5 (2019): 1150–53.

[28] See art. 659 of the Spanish Civil Code: "An estate comprises all properties, rights and obligations pertaining to a person, unless they are extinguished as a result of his death.", https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish%20Civil%20Code.pdf, accessed June 18, 2021.

[29] Susana Navas, "Digital Content of the Inheritance: Remarks on the Judgement of the German Federal Court of Justice (BGH) of 12 July 2018 from Standpoint of Spanish Law," *European Review of Private Law* 5 (2019): 1169.

6. CONCLUSION

The indicated analyses of foreign legal systems prove that in the Member States there is no uniform position concerning succession of digital goods. One should agree with the correct view that digital contents, upon death of the user of Internet services, should not be erased, left to themselves or to the good will of the administrators of Internet portals. Therefore, the question must be asked what to do with an account and digital content upon death of a user of Internet services. It must be noted that practice looks different in that regard, however, it can generally be divided into three models. The first variant assumes that the account and the digital contents stored in the account are erased upon death of the user of the service. The second method of proceeding implies suspension/archiving of the account and the related digital contents upon the user's death. Finally, the third model assumes a transfer of rights to the account or digital contents to the heirs, close persons or a specific person appointed during the lifetime of the user of Internet services[30].

In my opinion there should be dedicated legal provisions introduced into the civil code which would pertain to digital goods. This would also facilitate the harmonization of inheritance matters in a European perspective. Technological development requires amending the civil code to fit changing reality.

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[30] Mateusz Mądel, *Następstwo prawne treści cyfrowych na wypadek śmierci* (Warsaw: C.H. Beck, 2018), 247.

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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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THE LEGAL STATUS OF MINOR TESTATOR'S PARENTS DEPRIVED OF PARENTAL AUTHORITY IN INTESTATE SUCCESSION. SOME REMARKS ON THE SOLUTIONS IN POLISH, RUSSIAN, AND ITALIAN LAW

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ABSTRACT

The legal situation of minor testator's parents in intestate succession poses a significant legal and social problem. In Polish law, parents who have been deprived of parental authority continue to enjoy their civil-law status; in other words, they maintain the right to inherit from their child under statute. Meanwhile, the reasons for which the court applied the strictest possible "sanction" in the form of deprivation of authority of parents who, in exercising their rights under parental authority, seriously violated the child's interest or grossly neglected parental obligations, which is noticeable even to an ordinary bystander, seem to be sufficient "proof" that family ties, which are decisive for the statutory title to inherit, do not exist. If these ties are severed or seriously disrupted, the consequences should be seen in all areas of life. Simply put, persons who deliberately break apart the family should not enjoy the advantages that the law provides for testator's closest relatives. In such a case, to consider the effect of deprivation of parental authority by "releasing" its holders from any obligation towards the child may not be considered a sufficient civil sanction, especially given that in the vast majority of cases, the reason for such deprivation is gross neglect of parental duties by one or both parents. The consequences of this type of negligence should also, if not primarily, consist in the deprivation of pecuniary benefits that the parents of a minor could

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enjoy after his or her death. The current legal solutions governing this area undoubtedly need to be revised. Such imperfect normative solutions adopted in Polish law prove the need to propose *de lege ferenda* recommendations. In this context, it is worthwhile to have a look at the normative solutions adopted in foreign legal systems and whether they can be grafted on Polish law. The reference to the Russian and Italian legal systems seems particularly recommendable due to the fact that their normative solutions directly allude to the institution of deprivation of parental authority in the context of admissibility of the title to inherit.

Keywords: deprivation of parental authority, unworthiness to inherit, intestate title to inherit, minor testator

1. INTESTATE TITLE OF PARENTS TO INHERIT FROM A MINOR AND THE QUESTION OF PARENTAL AUTHORITY

Next to the capacity to inherit, the intestate title to inherit is a positive prerequisite for the acquisition of an estate. It is based on a specific relationship under family law[1] existing between a testator and a potential heir upon the opening of the succession and demonstrable through civil-status certification documents[2]. Family ties in the legal sense, and conclusive for intestate succession, exist when a testator and their heirs share a particular line and degree of relationship[3] upon the opening of the succession. Thus, proof of a linear relationship in the first degree between a testator and an heir upon the opening of the succession is a necessary condition to be met for legal succession to take place[4]. Parents are the second line of

[1] See, for example, Józef S. Piątowski, Hanna Witczak, and Agnieszka Kawałko, "Dziedziczenie ustawowe," in *System Prawa Prywatnego. Tom 10. Prawo spadkowe*, ed. Bogudar Kordasiewicz (Warszawa: C.H. Beck, 2015), 229–230, Nb 18.

[2] See Article 4 of the Act of 28 November 2014 – Law on Civil Status (consolidated text, Journal of Laws of 2021, item 709).

[3] Also in relation to marriage (Article 932 § 1 CC and Article 932 § 2 CC) and relationship by affinity (Article 934[1] CC).

[4] See in particular Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 45–48.

intestate succession and inherit the entire estate in equal parts (Article 932 § 3 of the Civil Code ["CC"])[5].

As a rule, until the opening of the succession, a minor testator is subject to parental authority under the first-degree linear kinship (Article 92 of the Polish Family and Guardianship Code, ["FGC"])[6], still the existence or non-existence of this relationship does not affect the testator's parents intestate title to inherit. The parents of a minor testator also enjoy the legal title to succession irrespective of whether until the child's death they have exercised the duties inherent in parental authority and, if yes, whether they have done so properly or improperly. Even in the most extreme cases, i.e. deprivation of parental authority due to gross neglect by the parent(s) of their parental duties[7] (Article 111 § 1 FGC), the mother or father still inherit from their child by virtue of the law[8]. Parents who have been deprived of parental authority continue to enjoy their civil-law status; in other words, they maintain the right to inherit from their child[9]. If we rightly assume that "a family relationship between parent and child based on love

[5] In the second line, along with the testator's parents, there is the testator's spouse, yet this goes beyond the scope of this paper (the testator is a minor).

[6] "Parental authority, as follows from the overall provisions of the Family and Guardianship Code, in particular Articles 95 § 1, 96 and 98 § 1, constitutes a set of duties and rights in relation to a child that ensure that the child is properly cared for and that their interests are safeguarded (underline H.W.)" – Decision of the Supreme Court of 5 May 2000, II CKN 761/00, *LEX* no. 51982.

[7] Obviously, as deprivation of parental authority is not of a general nature, when parents have more children, it can only be imposed in relation to one child. Everything depends on where the grounds justifying the deprivation of parental authority occur (Decision of the Supreme Court of 12 September 2000, file ref. III CKN 1143/00, *LEX* no. 532145).

[8] Provided there are no negative grounds for succession exist on their side. For more, see Hanna Witczak, "Skutki wyłączenia od dziedziczenia," *Rejent*, no. 3 (2009): 73–96.

[9] See, for exmaple, Krzysztof Pietrzykowski, "Komentarz do art. 111," in *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2020), Legalis, Nb 14; Jerzy Strzebińczyk, "Pozbawienie władzy rodzicielskiej," in *Prace z prawa cywilnego dla uczczenia pamięci Profesora Jana Kosika, Acta Universitatis Wratislaviensis. Prawo CCCVIII* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), 491; idem, "Władza rodzicielska," in *System Prawa Prywatnego. Tom 12. Prawo rodzinne i opiekuńcze*, ed. Tadeusz Smyczyński (Warszawa: C.H. Beck, 2011), 358, Nb. 266 and Iwona Długoszewska, *Przesłanki oraz skutki ograniczenia i pozbawienia władzy rodzicielskiej* (Warszawa:

is, as a rule, a sufficient guarantee for the exercise of parental authority"[10] and that the same family relationship determines the mutual title to inherit, it is difficult not to see a fundamental paradox in this situation. Indeed, the assumption underlying the concept of the institution of parental authority, under which parents guarantee due and even best possible care for their child, sometimes appears so erroneous that the only solution is to deprive them of parental authority[11]. In view of the fact that the vast majority of cases of withdrawal of parental authority are attributed to reprehensible and culpable behaviour of parents towards their minor child, the moral justification of inheriting from a testator is not at all compelling, and consequently, the fitness of the relevant legislative solutions should remain open to question. The mere fact that decisions on withdrawal of parental authority are issued relatively rarely, given the number of children under authority and other judicial decisions interfering with the exercise of parental authority, does not downplay the importance of the problem, which is both of a legal and social nature[12].

2. INTERNATIONAL, UNLAWFUL CONDUCT BY PARENTS TOWARDS A MINOR TESTATOR AS GROUNDS FOR EXCLUSION FROM THE SUCCESSION V. GROUNDS FOR DEPRIVATION OF PARENTAL AUTHORITY

There seems to be no doubt that certain intentional behaviour by persons holding a title to inherit that can also be considered unlawful, and therefore violating not only the law but also the principles of social

LexisNexis, 2012), 264. Cf. Jacek Wierciński, "Uwagi o teoretycznych założeniach dziedziczenia ustawowego," *Studia Prawa Prywatnego*, no. 2 (2009): 84.

[10] Decision of the Supreme Court of 20 April 2000, file ref. II CKN 452/00, *Lex,* no. 52546, thesis 2.

[11] Jerzy Strzebińczyk, "Pozbawienie władzy rodzicielskiej," in *Prace z prawa cywilnego dla uczczenia pamięci Profesora Jana Kosika, Acta Universitatis Wratislaviensis. Prawo CCCVIII* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), 477.

[12] See Elżbieta Holewińska-Łapińska, "Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej," in *Prawo w działaniu. Tom 14. Sprawy cywilne*, ed. Elżbieta Holewińska-Łapińska (Warszawa: LEX a Wolters Kluwer Business, 2013), 27.

coexistence, may give grounds to disinheritance, i.e. deprivation of the right to a reserved share and exclusion from the succession[13]. In the context of the conditions for acquisition of inheritance, unethical or even unlawful behaviour by an heir can only be assessed under civil-law events that result in exclusion from the succession[14]. Certainly, such an assessment is consistent only in relation to heirs who enjoy capacity to inherit and who hold a valid title to inheritance[15].

In Polish law, intentional and reprehensible behaviour of potential heirs may lead to negative legal consequences when two institutions become applicable: unworthiness to inherit (Articles 928-930 CC) and disinheritance (Articles 1008–1010 CC). As regards debarment from succession (*expressis verbis*, an unworthy heir is excluded from inheriting as if they had not lived to see the opening of the succession, Article 928(2) CC), it takes place when a constitutive court decision approving the defendant as unworthy to inherit becomes final. The consequences of disinheritance, meaning deprivation of the right to a reserved share of the estate, are to be decided by the testator themselves, as this kind of deprivation may only be expressed in a will (Article 1008 CC) and only for the reasons set out in that provision. Among the grounds for disinheritance, Article 1008 CC points to: persistent behaviour in contravention of the principles of

[13] Cf. Maksymilian Pazdan, "Komentarz do art. 1008," in *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2021), Legalis, Nb 1; Elżbieta Skowrońska-Bocian and Jacek Wierciński, in *Kodeks cywilny. Komentarz. Spadki. IV*, ed. Jacek Gudowski (Warszawa: Wolters Kluwer Polska, 2017), 293, thesis 1–2; Józef Kremis, *Komentarz do art. 1008*, in *Kodeks cywilny. Komentarz*, eds. Edward Gniewek and Piotr Machnikowski (Warszawa: C.H. Beck, 2016), 1831–1832, Nb 1 and 10; Elżbieta Skowrońska-Bocian, *Testament w prawie polskim* (Warszawa: LexisNexis, 2004), 1521; Joanna Kuźmicka-Sulikowska, *Komentarz do art. 1008*, in *Kodeks cywilny. Komentarz*, Edward Gniewek, Piotr Machnikowski (Warszawa: C.H. Beck, 2019), Legalis, Nb 1–3 and Hanna Witczak, "O skutkach wydziedziczenia w kontekście przesłanek nabycia spadku," in *Państwo. Konstytucja. Prawo. Księga Pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi, Studia i Materiały Trybunału Konstytucyjnego, tom LX* (Warszawa: Trybunał Konstytucyjny, 2018), 513–521.

[14] Hanna Witczak, "Skutki wyłączenia od dziedziczenia," *Rejent*, no. 3 (2009): 73–75.

[15] For more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 57.

community life contrary to the will of the testator; an intentional offence against life, health or freedom, or a glaring insult to their dignity committed with respect to the testator or one of the persons closest to them; persistent neglecting of family duties with respect to the testator. Due to specific subjective requirements of possessing the capacity to draw up or revoke a will, which is conditioned by full capacity for acts in law (Article 944 § 1 CC), in view of the discussed topic, the issue of disinheritance, which concerns the parents of a minor testator, must remain outside the sphere of author's interest[16]. Under Polish law, full legal capacity for acts in law is acquired at the moment of becoming an adult, i.e. upon reaching 18 years of age or 16 years of age in the case of women who have entered into a marriage with the consent of the guardianship court (Article 11 CC in conjunction with Article 10 CC).

These individuals cannot be incapacitated by the court (Articles 12 and 15 CC), so cannot be those for whom no temporary advisor has been appointed in the course of proceedings for legal incapacitation (Articles 548 and 549 of the Code of Civil Procedure).

As noted elsewhere, reprehensible behaviour of a potential heir may be a reason for denial of the succession if it meets the conditions for considering them unworthy to inherit. Grounds for unworthiness to inherit are included in Article 928 § 1 CC and form a closed list. Of the three of them indicated by the legislator, in the case of a minor testator, only the one specified in Article 928 § 1(1) CC applies, i.e. intentional perpetration by an heir of a grave offence against the testator[17]. The other two (Article 928(1)(2) and (3) CC) concern the heir's influence on the testator's

[16] Grounds for disinheritance would not be difficult to prove when conditions justifying deprivation of parental authority occur, particularly in the event of persistent failure to fulfil family duties with respect to the testator by persons entitled to a reserved share (Article 1008(3) CC).

[17] Obviously, unworthiness cannot be adjudged if there are circumstances excluding the unlawfulness of a prohibited act, such as acting in self-defence or in a state of necessity. Unworthiness cannot be adjudged against an insane offender either. For more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 139-146 and 161–170.

freedom of will in the manner specified in the relevant provision[18]. As mentioned above, in Polish law, only natural persons with full capacity for acts in law may draw up or revoke a will, which excludes minor testators.

In view of the general considerations above, it is doubtful whether this kind of protection afforded to persons entitled to inherit from a minor testator is sufficient and whether such a system of succession conveys a sense of justice. On the face of it, it seems that the answer to this question should be negative. There are no relevant regulations in the law of succession that would sanction or would make it possible to sanction failure to fulfil family obligations[19] defined in the law, especial with regard to parent-child relations (Article 95 § 1 FGC), i.e. while the child remains under parental authority. And yet, especially in the case of minor individuals, this type of behaviour should be particularly condemned, not only in moral terms but also, and perhaps above all, legally, and should produce pecuniary consequences as well as depriving the offenders of protection of their financial interests both while the injured party is alive and after their death. Certainly, the abovementioned regulations concerning the option of declaring a parent-heir unworthy to inherit after committing an intentional and grave offence against the testator (Article 928(1)(1) CC) can be used as a counterargument; it is worth noting that for a civil court to declare an heir unworthy, the perpetrator does not have to be convicted by a criminal court or even tried[20]. Although the application of the provision of Article 928 § 1(1) CC raises certain doubts due to the use by the legislator of the vague term "grave offence," it seems that the character of the injured party somewhat mitigates interpretation difficulties, which is discussed below. While the very concept of offence used in the provision of Article 928 § 1(1) CC is understood uniformly across the doctrine and jurisprudence owing to reference to concepts in penal law[21], this is not the case with the term "grave crime." On the one hand, penal law does

[18] It is pointless to discuss in detail the cases of violation of the freedom to draw up a will as listed by the legislator, as they do not contribute to the topic of this paper.

[19] Especially persistent and culpable conduct.

[20] Kazimierz Przybyłowski, "Notka do uchwały SN z dnia 10 września 1958 r. (3 CO 16/58)," *OSPiKA*, no. 5 (1959): 244.

[21] Advocates of the presented view, taking into account an isolated position that equates the offence under Article 928 § 1(1) CC and a prohibited act, are listed by

not generally use this term[22]; on the other, the idea of gravity of the offence in the context of unworthiness to inherit should be interpreted along with its *ratio legis*. No automatic approach is possible, i.e. to recognise that the gravity of an offence is determined solely by the gravity of penalties provided for a particular prohibited act. The objectives of penal and civil law and the sanctions provided for therein are in fact quite divergent. The literature and case-law are right to emphasise that in order to assess whether an offence committed by an heir is grave within the meaning of Article 928(1)(1) CC, it is necessary to consider not only the type of the offence assessed from the point of view of the limits of statutory penalties (crime or misdemeanour) but also the circumstances of the offence, including, in particular, the perpetrator's motives and how they acted. Thus, a civil court makes an independent assessment as to whether, in a specific case, an offence committed by an heir meets the criteria of "gravity." This assessment, as underlined elsewhere, is linked not only to the statutory penalty for this offence, but the court also takes into account the type of threatened interest and the perpetrator's motivation (intent to humiliate or demean the testator in a particularly severe manner), the manner of committing the offence (cruelty, particularly high degree of ill will), the extent of the wrong and, in the author's view, the person wronged[23]. Certainly, it can be assumed that offences with a severe statutory penalty, i.e. those which penal law regards as crimes *in abstracto*, constitute grave offences, but this is only a preliminary assessment in the context of the provision of Article 928 § 1(1) CC. The circumstances of a particular case may cause that an act qualified as a crime within the meaning of the provisions of penal law will not be regarded as a serious offence for the purposes of

Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 139–140.

[22] Cf. Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 175-177 and the penal-law literature referenced therein.

[23] See, in particular, Elżbieta Skowrońska, "Przegląd orzecznictwa z zakresu prawa spadkowego (za lata 1989–1990)," *Przegląd Sądowy*, no. 9 (1992): 43; Maksymilian Pazdan, "Komentarz do art. 928," in *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2021), Legalis, Nb 14 and Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 178–206.

the aforesaid provision and cannot therefore constitute grounds of adjudging unworthiness to inherit. Also, a reverse situation can take place, namely that under certain circumstances, a misdemeanour may also become a serious offence[24].

It does not seem going too far to say that conviction for any offence against a minor meets the criteria of committing a grave offence against a testator, especially if the injured party is the convicted person's minor child. Indeed, the view proposed above that the assessment of an offence in terms of gravity should also provide for who is being wronged should be endorsed. Hence, it offences against minors should deserve a special place among serious offences. Harming the life or health of children, both physical and mental, is extremely abhorrent. There should therefore be no doubt as to the seriousness of offences against mental and physical health of minors (e.g. the offence of abuse, not only with particular cruelty – Article 207 of the Penal Code; the offence of causing serious damage to health – Article 156§1 of the Penal Code), or against their life (e.g. murder or the attempted murder of a minor – Article 148 of the Penal Code), or sexual offences against sexually immature persons (e.g. rape of a minor or forcing him or her to submit to another sexual activity – Article 197 of the Penal Code), which are considered to be among the most serious violations of the broadly understood best interest of the child[25]. Sexual exploitation of children involves the kind of harm that is "not only highly traumatic but also produces serious consequences in emotional, sexual, and social life when becoming an adult"[26]. Among the consequences of sexual abuse, there are, in particular, chronic depression, anxiety disorders, post-traumatic stress disorder, low self-esteem, a tendency to self-harm,

[24] See Judgement of the Administrative Court in Gdańsk of 14 June 2000, file ref. I ACa 262/00, *LEX* no. 51706 with the glosses of Paweł Kłak, *OSP*, no. 9 (2005): 81–90 and Michał Niedośpiał, *OSA*, no. 6 (2006): 76–88. See also Jacek Wierciński, "O przestępstwie jako przyczynie niegodności dziedziczenia," *Kwartalnik Prawa Prywatnego*, no. 2 (2010); for more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 213–215.

[25] Sławomir Hypś, "Komentarz do art. 200," in *Kodeks karny. Komentarz*, eds. Alicja Grześkowiak and Krzysztof Wiak (Warszawa: C.H. Beck, 2021), Legalis, Nb. 1.

[26] Joanna Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystaniem seksualnym* (Warszawa: LEX a Wolters Kluwer Business, 2012), 25.

a feeling of guilt, sleep and concentration disorders, distorted sexual development, including a tendency to abuse minors after reaching sexual maturity. The literature also highlights the prevalence of post-traumatic psychiatric symptoms, including pathological suspicion, mood lability, and autism[27]. These type of offences affect not one but many interests of the wronged. Extremely severe and prolonged psychological traumas occurs in minor victims of parental incest[28]. The extreme reprehensibility of this phenomenon is not at all lessened by the fact that the above-mentioned types of offences relatively rarely lead to adjudication of unworthiness to inherit, which results from the obvious rule that a child inherits from their parents and not vice versa.

Notably, in the current legal order, a penal court is obliged to notify the competent family court of the need to deprive or limit parental or custodial rights in the event of committing an offence against a minor or in cooperation with a minor (Article 51 of the Penal Code ["PC"])[29]. However, the PC currently in force does not provide for deprivation of parental (or custodial) authority among its penalties (penal measures)[30].

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[27] Sławomir Hypś, "Komentarz do art. 200," in *Kodeks karny. Komentarz*, eds. Alicja Grześkowiak and Krzysztof Wiak (Warszawa: C.H. Beck, 2021), Legalis, Nb. 2 with the literature referenced therein, and Joanna Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystaniem seksualnym* (Warszawa: LEX a Wolters Kluwer Business, 2012), 28.

[28] Joanna Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystaniem seksualnym* (Warszawa: LEX a Wolters Kluwer Business, 2012), 28 with the literature referenced in Note 11 and p. 47.

[29] Violetta Konarska-Wrzosek, in *System Prawa Karnego. Tom 6. Kary i środki karne. Poddanie sprawcy próbie*, ed. Mirosława Melezini (Warszawa: C.H. Beck, 2010), 875, Nb. 919.

[30] It should be recalled that both the Penal Code of 1932 (Article 49) and the Penal Code of 1969 (Article 38(2)) provided for an additional penalty of deprivation of parental or custodial rights. Under Article 49 of the 1932 PC, if convicted of an offence committed against a minor under 17 years of age or in collaboration with such a minor, the court was authorised to adjudge the loss of parental or custodial rights. Compared to the 1932 PC, the option of imposing the penalty of deprivation of parental or custodial rights was extended in the 1969 CP to include offences committed in circumstances where the act had a demoralising effect on a minor, as well as to offences resulting in damage to any minor's property (before, the list of offences had been limited only to acts against a person). See, in particular, Violetta Konarska-Wrzosek, in *System Prawa Karnego. Tom 6. Kary i środki*

The exclusion of the possibility for a penal court to decide on withdrawing parental or custodial authority, which is completely wrong, is widely criticised by the doctrine of the protection of minors and other persons in need of third-party care under penal law. Leaving aside the assessment of the purpose of reinstating the penalty of deprivation of parental or custodial authority in the PC, the doctrine of penal law emphasises the substantial damage that such offences cause to the mental and physical capability of the minor, not infrequently leading to pathological states (illness, demoralisation). Indeed, almost any offence may be committed to the detriment of a minor, yet this should not lead to hasty and far-reaching conclusions as to the rationale of imposing, in each of such cases, an additional penalty of deprivation of parental or custodial authority. The literature on the subject has aptly pointed out that these are acts which would disqualify the perpetrator as a person enjoying parental rights. In particular, it would be appropriate to point to those offences where acting against a minor is a prohibited act at law, i.e. physical or mental abuse of a child (Article 207 PC), paedophilia (Article 200 PC), child abandonment (Article 210 PC), encouragement of a minor to drink alcohol (Article 208 PC) or persistent failure to fulfil marital or parental obligations (Article 209 PC)[31].

However, even if the proposed interpretation of the provision of Article 928 § 1(1) CC is accepted, the sole institution of unworthiness to inherit does not seem to constitute sufficient protection against admitting the parents of a minor testator to inherit upon the opening of the succession after they have been deprived of their parental authority. First, although the right to act in proceedings for debarment from succession is defined very broadly (the first sentence of Article 929 CC), the time limit for filing a request for declaring an heir unworthy of inheritance (the second sentence of Article 929 CC) is a period of prescription under substantive law, and upon its expiry such a right also expires. Second, reprehensible behaviour of the testator's parents, e.g. gross neglect of family

karne. Poddanie sprawcy próbie, ed. Mirosława Melezini (Warszawa: C.H. Beck, 2010), 866, Nb. 906 and 871, Nb 913. Also, the age limit was increased for victims, up to which perpetrators were deprived of their parental or custodial rights. This was based on the understanding that such protection should continue throughout the period of minority.

[31] Mieczysław Goettel, "Pozbawienie praw rodzicielskich w polskim kodeksie karnym," *Nowe Prawo*, no. 7–8 (1978): 1079.

duties, even if of a persistent nature, does not have to meet the statutory criteria of a specific type of offence; besides, in view of the procedure of disinheritance adopted in the CC (the requirement to draw up a will), such behaviour will not give grounds for deprivation of the right to a reserved shared of the estate, either. Although deprivation of the right to a reserved share entails the loss of the capacity to inherit from the testator under statute[32], it should be borne in mind that this applies only to a testator who has the capacity to draw up or revoke a will. Oddly enough, parents who fail to fulfil their parental duties, and have even been deprived of parental authority, are in a more favourable position than other immediate relatives who have persistently failed to fulfil their family responsibilities towards the testator. If they are not declared unworthy to inherit, they will be in a position to claim the entire inheritance in equal shares by virtue of intestate succession[33], which is undoubtedly shocking.

The reasons for deprivation of parental authority are set out in Article 111 § 1 FGC[34]. Among them, the FGC provides, which is particularly relevant to the subject of this article, for abuse of parental authority by parents and gross neglect by parents of their duties towards the child. Both reasons seem to share the component of culpable violation of parental authority[35]. In the literature on the subject, abuse of parental authority is understood as the exercise by parents of the rights under parental

[32] Hanna Witczak, "O skutkach wydziedziczenia w kontekście przesłanek nabycia spadku," in *Państwo. Konstytucja. Prawo. Księga Pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi, Studia i Materiały Trybunału Konstytucyjnego, tom LX* (Warszawa: Trybunał Konstytucyjny, 2018), 517–519.

[33] As already mentioned earlier, testamentary succession is not possible in this case.

[34] If any of the grounds set out in Article 111 FGC are found to exist, the court is obliged to deprive the parent(s) of parental authority. The article omits to discuss the case of optional deprivation of parental authority pursuant to Article 111 § 1a CC. Cf. Józef Strzebińczyk, "Pozbawienie władzy rodzicielskiej," in *Prace z prawa cywilnego dla uczczenia pamięci Profesora Jana Kosika, Acta Universitatis Wratislaviensis. Prawo CCCVIII* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), 477–479.

[35] Krzysztof Pietrzykowski, "Komentarz do art. 111," in *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2020), Legalis, Nb 4. Cf. Jerzy Strzebińczyk, "Władza rodzicielska," in *System Prawa Prywatnego. Tom 12. Prawo rodzinne i opiekuńcze*, ed. Tadeusz Smyczyński (Warszawa: C.H. Beck, 2011), 353–353, Nb. 253–254.

authority "in a manner seriously violating the best interest of the child"[36]. Examples of parental abuse include punishing children in ways that endanger their health or life, maltreatment, forcing a child to drink alcohol, forcing a child to immoral or antisocial acts, or even to commit prohibited acts. Very often, the abuse of parental authority manifests itself in the use of inappropriate parenting methods, which take various forms of aggression and physical and psychological violence[37]. Case-law shows that "Abuse of parental authority also occurs when the parent's conduct has, in objective terms, a damaging effect on the child's upbringing and mental development, even if this is not related to the parent's subjective negative attitude towards the child"[38]. Two groups of cases are identified linked to gross neglect of parental duties. One covers social pathology involving alcoholism, drug addiction, parents pursuing criminal activities, etc. which results in leaving the child unattended, ignoring their education needs or not securing decent living conditions. Letting a child live in a pathological environment poses an immediate threat to their health and life. The other group covers cases of lack of interest in the child and their affairs, lack of contact and, as a result, the dissolution of emotional ties[39]. It must be stressed that neglect of parental duties only justifies the withdrawal of parental authority if it is gross, i.e. serious, glaring, and discernible even to a random beholder[40].

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[36] Karol Jagielski, "Istota i treść władzy rodzicielskiej," *Studia Cywilistyczne* 3 (1963): 155.

[37] Elżbieta Holewińska-Łapińska, "Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej," in *Prawo w działaniu. Tom 14. Sprawy cywilne*, ed. Elżbieta Holewińska-Łapińska (Warszawa: LEX a Wolters Kluwer Business, 2013), 53 and 57–58.

[38] Decision of the Supreme Court of 7 September 2000, file ref. I CKN 931/00, *LEX* no. 1166290. Cf. Jacek Ignaczewski, "Przesłanki pozbawienia władzy rodzicielskiej," in *Komentarz do spraw rodzinnych*, ed. Jacek Ignaczewski (Warszawa: LexisNexis, 2012), 321.

[39] For more, see Jacek Ignaczewski, "Przesłanki pozbawienia władzy rodzicielskiej," in *Komentarz do spraw rodzinnych*, ed. Jacek Ignaczewski (Warszawa: LexisNexis, 2012), 321-329 and Elżbieta Holewińska-Łapińska, "Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej," in *Prawo w działaniu. Tom 14. Sprawy cywilne*, ed. Elżbieta Holewińska-Łapińska (Warszawa: LEX a Wolters Kluwer Business, 2013), 52–54 and 56–57.

[40] Jerzy Strzebińczyk, "Pozbawienie władzy rodzicielskiej," in *Prace z prawa cywilnego dla uczczenia pamięci Profesora Jana Kosika, Acta Universitatis Wratislaviensis. Prawo CCCVIII* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), 483 and the literature referenced therein.

That certain parents' behaviours that can be regarded as abuse of parental authority or gross neglect of their parental duties often meet the criteria of certain types of offences remains no longer debatable[41]. The literature on the subject emphasises that despite penal courts do not adjudge on the deprivation of parental authority, some views expressed in the doctrine and case-law regarding the type of offences that give sufficient grounds for the deprivation of parental authority are still legitimate. This is more than justified as there is invariably a close correlation between parents' crimes and abuse of parental authority or gross neglect of parental duties[42]. Research shows that in the vast majority of cases the reason for withdrawal of parental authority is gross neglect of duties towards the child by one or both parents[43].

It seems that the last of the reasons for withdrawing parental authority is no longer so obvious in the context of the discussed subject. As in the same of culpable violation of parental authority, the court denies this authority to the parent or parents who are unable to exercise it due to a permanent obstacle. In the literature on the subject, the general term "permanent obstacle" is interpreted as an impediment that is reasonably expected to continue over a long and indefinite period or a definite one but spanning many years. For example, a parent leaves for another country and does not maintain contact with the child[44], or is in a penitentiary

[41] And sometimes also petty offences [e.g. exploitation of child begging (Article 104 of the Code of Petty Offences) or allowing a child under seven years of age to remain in circumstances hazardous to health (Article 106 of the Code of Petty Offences); for more, see Krzysztof Pietrzykowski, "Komentarz do art. 111," in *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2020), Legalis, Nb 9]. However, in such a case the institution of unworthiness to inherit will apply.

[42] Iwona Długoszewska, *Przesłanki oraz skutki ograniczenia i pozbawienia władzy rodzicielskiej* (Warszawa: LexisNexis, 2012), 279–280.

[43] See Elżbieta Holewińska-Łapińska, "Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej," in *Prawo w działaniu. Tom 14. Sprawy cywilne*, ed. Elżbieta Holewińska-Łapińska (Warszawa: LEX a Wolters Kluwer Business, 2013), 52–54 and 56. Cf. Henryk Dolecki, *Ingerencja sądu w wykonywanie władzy rodzicielskiej* (Warszawa: Wydawnictwo Prawnicze, 1983), 50.

[44] Cf. Urszula Nowicka, "Pozbawienie władzy rodzicielskiej w polskim porządku prawnym," *Ius Matrimoniale*, no. 4 (2017): 16 and the literature referenced therein.

facility, or has fallen ill[45]. No doubt failure to exercise parental authority for reasons not attributable directly to the mother or father should not produce such acute legal effects with regard to succession as a permanent obstacle to do so for reasons attributable to either parent.

3. DEPRIVATION OF PARENTAL AUTHORITY AS GROUNDS FOR UNWORTHINESS TO INHERIT IN SELECTED FOREIGN LEGAL SYSTEMS

Among the laws of succession effective in other countries, there are some which explicitly approach deprivation of parental authority as a reason for unworthiness to inherit, i.e. negative grounds for the acquisition of inheritance. The differences occur in the legal concept of unworthiness, which may bring *ex lege* consequences or produce effects by virtue of a decision of a constitutive court[46], with entails further legal consequences. Among the solutions adopted in foreign legal systems, particular attention should be paid to Russian and Italian law due to the fact that they directly refer to the institution of deprivation of parental authority in the context of the admissibility of inheritance from a minor. It is also interesting to note that the legal systems of Germany, France, the Czech Republic or the Netherlands, the possibility of denying inheritance to minor testator's parents deprived of parental responsibility may, as in Polish law, only depend on the institution of unworthiness to inherit and may be related to the committing of a certain type of wilful offence against a minor testator,

[45] See, for exmaple, Krzysztof Pietrzykowski, "Komentarz do art. 111," in *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2020), Legalis, Nb 5; Jerzy Strzebińczyk, "Pozbawienie władzy rodzicielskiej," in *Prace z prawa cywilnego dla uczczenia pamięci Profesora Jana Kosika, Acta Universitatis Wratislaviensis. Prawo CCCVIII* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), 481; idem, "Władza rodzicielska," in *System Prawa Prywatnego. Tom 12. Prawo rodzinne i opiekuńcze*, ed. Tadeusz Smyczyński (Warszawa: C.H. Beck, 2011), 353, Nb. 251 and Jacek Ignaczewski, "Przesłanki pozbawienia władzy rodzicielskiej," in *Komentarz do spraw rodzinnych*, ed. Jacek Ignaczewski (Warszawa: LexisNexis, 2012), 332.

[46] This is an inaccurate wording as some legal systems adopt both models of unworthiness to inherit, e.g. Russian law, as discussed below, or French law. For more, see: Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 74–79.

with the proviso that sometimes a final conviction for such an offence in a criminal trial may be required[47].

The Russian legislator has adopted the simplest solution, *ex lege* excluding from intestate succession the testator's parents who have been deprived of parental authority by a court decision that is valid upon the opening of the succession. Such parents are then referred to as absolutely unworthy heirs[48]. However, this legal concept of unworthiness adopted in Russian law, unlike that existing in Polish law, is not uniform[49]. On the one hand, an unworthy heir is a person who has no right to inherit due to circumstances listed in para. 1 of Article 1117 CC if confirmed by a court's decision; this is the case, for example[50], with parents who were deprived of their parental rights by a court and did not hold these rights upon the opening of the succession (sentence 2, para. 1 of Article 1117 of the Russian Civil Code ["RCC"])[51]. On the other hand, an unworthy heir

[47] Cf. § 2339 German CC; Article 726 French CC; § 469 Czech CC; Article 4:3 Dutch CC. Form more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 292–298.

[48] The analysis of the question of the effects of a court's decision withdrawing parental authority on the capacity to inherit from a testator should also cover situations in which there is inheritance from a testator who has reached the age of majority. First, in their will, such a testator may point to their parents as heirs, which may be regarded as an act of forgiveness; it may also be the case of intestate succession, subject to the condition that the testator is at the age of majority at the time of the opening of the succession at the latest.

[49] Cf. Борис А. Булаевский, "Комментарий к статье 1117," in Комментарий к Гражданскому Кодексу Российской Федерации части третьей, eds. К. Б. Ярошенко and Н. И. Марышева (Москва 2011), thesis 3; Алексей Н. Гуев, Постатейный коментарий к части третьей Гражданского кодекса (Москва 2006), 30–31 and Лариса В. Саникова, "Комментарий к статье 1117," in Комментарий к части третьей Кодекса Российской Федерации, eds. Т. Е. Абова, М. М. Богуславский, and А. Г. Светланов, (Москва 2004), thesis 1.

[50] Other circumstances excluding *ex lege* certain entities from inheritance as unworthy are listed in sentence 1, para. 1 of Article 1117 RCC, and the law excludes them both from intestate succession and succession by will. However, a closer analysis of these goes beyond the scope of this paper.

[51] Restoration of parental rights is possible if grounds on which the mother or father was deprived of these rights have ceased to exist, in other words, they have changed their behaviour, lifestyle and view on child upbringing (Article 72(1) RCC). Courts investigate such cases at the request of persons who have been deprived of parental rights. Even if the parents have changed their behaviour and are able to bring the child up properly, the court will not examine the request if the child has already been adopted and when

is a person who, in accordance with paragraph 2 of Article 1117 RCC, has been excluded from the succession by a court[52]. Grounds for absolute and relative unworthiness are varied. The legislator has also differentiated the consequences of unworthiness to inherit by limiting them in certain cases only to intestate succession.

In the literature on the subject, the first category of persons unworthy to inherit, i.e. those who fail to inherit through a court's decision confirming the existence of circumstances referred to in the aforesaid provision, including deprivation of parental authority, is sometimes referred to as "absolutely," "totally" or "definitely" unworthy. Persons excluded from the succession at the request of competent entities are referred to as "conventionally" or "relatively" unworthy. The idea of this division, as emphasised in the doctrine, is that no adjudication of unworthiness is required to recognise an heir from the former of the two groups as unworthy to inherit. As noted above, in this case, a court's decision, for example, depriving the testator's parents of parental authority, is sufficient[53]. This means that if a notary public has been submitted a court's decision depriving an heir of their parental rights in relation to the testator, and there is no evidence that these rights have been restored upon the opening of the succession, the notary may resolve the issue of unworthiness to inherit on their own and refuse to issue a certificate of succession to the potential heir. The heir has

the child, if over 10 years old, has objected to it, regardless of their motives. If the child is not yet 10 years old, the court should investigate the case, first, taking into account the child's opinion and, second, only in the child's best interest. See Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 303.

[52] For more, see Гайнан Э. Авилов, "Комментарий к статье 1117," in Комментарий к части третьей Кодекса Российской Федерации, eds. А. Л. Маковский and Э. А. Суханов (Москва 2002), thesis 1; Аалексей Н. Гуев, Постатейный комментарий к части третьей Гражданского кодекса (Москва 2006), 30–31 and Борис А. Булаевский, "Комментарий к статье 1117," in Комментарий к Гражданскому Кодексу Российской Федерации части третьей, eds. К. Б. Ярошенко and Н. И. Марышева, (Москва 2011), thesis 3.

[53] Or a final sentence of a penal court declaring the heir guilty of an intentional offence. See Борис А. Булаевский, "Комментарий к статье 1117," in Комментарий к Гражданскому Кодексу Российской Федерации части третьей, eds. К. Б. Ярошенко and Н. И. Марышева (Москва 2011), thesis 4; idem in Наследственное право, ed. К. Ярошенко (Москва 2005), 66.

a right to challenge the notary's refusal before court[54]. Moreover, the distinction in question is important because the "absolutely" unworthy cannot participate in the succession relations, even if the other heirs and creditors agree to it and even wish for it to happen. The "relatively" unworthy, on the other hand, participate in the succession relations if the other heirs agree and "have not registered their active opposition"[55].

Deprivation of parental authority in Russian law is the ultimate measure of interference in the exercise of parental rights and is applied only when there are no other means of protecting the child's rights. This measure is employed where at least one of the grounds listed in Article 69 RCC exists; at the same time, judging by case-law, there is a strong emphasis that the deprivation of parental rights on the grounds provided for in the aforesaid article may only take effect in cases of culpable conduct of the father or mother[56]. These grounds partly coincide with those set out in Article 111 of the Polish CC. The shared elements include evading parental duties, including malicious avoidance to pay child support, leaving the child alone at home unattended and without a meal, which is considered non-concern for the child's spiritual and physical development, learning, and preparation for future work. Deprivation of parental authority may also follow parents' abuse of their rights in relation to the child, that is, exercising these rights in a manner that is contrary to the minor's interest, for example by hindering education, encouraging begging, thievery, prostitution, alcohol or drug abuse. The Russian legislator also provides for the sanction of deprivation of parental authority for a father or mother who treats his or her children in a cruel manner, in particular by using physical or mental violence or by assaulting their sexual integrity. Cruelty can also manifest itself in reprehensible child rearing methods, insults, exploitation, or crude treatment that disregards a child's dignity. The court will also deprive parents of their authority if they suffer from permanent

[54] See, for example, Татьяна И. Зайцева and Павел В. Крашенинников, Наследственное право. Комментарий законодательства н практика его примененииа (Москва 2009), 37–38 and Александр П. Горелик, Наследственное право (Москва-Воронеж 2011), 90–91.

[55] Алексеев С. Василев, "Комментарий к к статье 1117," in Комментарий к Гражданскому Кодексу Российской Федерации. Части 1, 2, 3, 4 (учедно- практический), ed. С. А. Степанов (Москва), thesis 1.

[56] Алла В. Вишнякова, Семейное и наследственное право (Москва 2010), 112.

alcoholism or drug addiction (confirmed by a medical opinion). The final reason for the withdrawal of parental authority is when the mother or father of a minor commits a crime against the life or health of their children or spouse.

In the current legal system of Italy, deprivation of parental authority is also considered grounds for unworthiness to inherit, although the relevant provisions were incorporated into the Italian Civil Code no earlier than in 2005 under Act No. 137. This change was a major improvement as it removed a crucial normative inconsistency: a parent deprived of parental authority lost the right to use the minor's property while retaining the right to acquire it *mortis causa*[57]. Parental authority is withdrawn by the decision of a family court only if the conditions set out in the law apply. Pursuant to Article 330 of the Italian Civil Code ("ICC"), a court may terminate parental authority when a parent violates or neglects their duties towards the child or abuses their powers to the serious detriment of the child[58].

This will be discussed further, but in Italian law, unlike in Russian law, to exclude parents deprived of parental authority over their child from the succession, the legislator requires a constitutive court decision on unworthiness to inherit[59]. The prevailing view in the literature on the subject is that as with the other grounds for deprivation of parental rights so with the ground in the form of debarment from succession – there must be no automatism allowed whatsoever. The effect of denial of inheritance does not arise *ipso iure*; a court's judgement is required. Only if a legitimate entity has brought an appropriate action, which has been upheld by the court, the parent loses their rights in relation to their child's estate[60].

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[57] Giovanni Bonilini and Massimo Conforlini, *Codice commentato delle successioni e donazioni* (Milano: Utet Giuridica, 2011), 177.

[58] On the other hand, irrespective of the deprivation of parental authority, according to Article 463(1) ICC, persons may be considered unworthy to inherit if they intentionally killed or attempted to kill the testator or their spouse, descendant, or ascendant.

[59] Gaetano Azzariti, *Le successioni e le donazioni. Libro secondo del Coice civile* (Napoli: CEDAM, 1990), 50. See also Giovanni Bonilini and Massimo Conforlini, *Codice commentato delle successioni e donazioni* (Milano: Utet Giuridica, 2011), 172-173 and 177.

[60] Giovanni Bonilini and Massimo Conforlini, *Codice commentato delle successioni e donazioni* (Milano: Utet Giuridica, 2011), 177.

In Italian law, withdrawing parental authority is also an additional penalty imposed in penal proceedings. According to Article 32(1) of the Italian Penal Code, if sentenced to life imprisonment, a parent is deprived of parental authority. The penalty of deprivation of parental authority, next to more general provisions, is also provided for in laws governing specific types of offences if parental authority is one of the statutory constituent elements of an offence, e.g. incest (Article 564 of the Italian Penal Code) or forcing a child to prostitution (Article 609 of the Italian Penal Code)[61].

4. *DE LEGE FERENDA* CONCLUSIONS AND RECOMMENDATIONS

The observations shared above lead to a conclusion that the current legal solutions in Poland regarding the subject of the article should be assessed critically. What follows, proposals for legislative changes should be made. Some of these changes should address the provision of Article 928 § 1 CC. First, it is necessary to consider whether it is sufficient to introduce an additional reason justifying the recognition of an heir as unworthy through deprivation of parental authority. The answer, unfortunately, seems to be negative. This is so for at least two reasons. First, the reasons for which a court may deprive parents of their authority are inconsistent. In other words, although most of them are related to culpable and reprehensible behaviour of the parents, some of them should not be attributed to them (e.g. severe, chronic parent's illness), yet they may prevent the exercise of parental authority on a permanent basis. Second, if the amended regulations were only to extend grounds for unworthiness to inherit by including the criterion of deprivation of the minor testator's parents of their parental authority, there would always be a risk of not excluding them from inheritance due to the lack of an appropriate request by the entitled entity or bringing an action after the time limit specified in sentence 2 or Article 929 CC. It does not seem right if such significant legal consequences as regards the acquisition of an inheritance from a minor testator are left to chance. Hence, it is no less important to be considered whether

[61] See Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 305 and the literature referenced therein.

the concept of unworthiness to inherit in Polish law is sufficient enough to effectively sanction cases of depriving the parents of a minor testator of parental authority.

By proposing *de lege ferenda* conclusions, because there is no question that the discussed problem should be addressed, it must not be ignored that the normative shape of the institution of unworthiness to inherit may be based on one of two models: either unworthiness occurs *ipso iure* and is qualified as a relative incapacity to inherit (*incapacitas*) or is the result of a constitutive court decision at the request of entitled entities and constitutes unworthiness in the strict sense (*indignitas*)[62]. In the first case, when determining the group of heirs, the court *ex officio* examines grounds for unworthiness; in the second case, it only decides on unworthiness when a relevant request is submitted by an entity enjoying active rights in proceedings related to establishing inheritance unworthiness.

With regard to the institution of unworthiness to inherit in Polish law, both of the concepts discussed above were in use although at different times[63]. There is no doubt that the legal concept of unworthiness to inherit in the current legal framework is rested on the latter of the two models. Inheritance unworthiness is decided on the basis of a constitutive court decision (the provision of Article 928 § 1 CC provides *expressis verbis* that "an heir may be adjudged unworthy by the court"). The court's decision

[62] Maksymilian Pazdan, "Niegodność dziedziczenia w polskim prawie prywatnym międzynarodowym," *Nowe Prawo*, no. 2 (1974): 149. As mentioned earlier, some foreign jurisdictions adopt both models (see Note 38). For more, see: Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 71–81.

[63] As for the legal nature of unworthiness to inherit the provisions of the Decree of 8 October 1946 Law of Succession (Journal of Laws No. 60, item 328), divergent opinions were voiced in the literature. There was no agreement as to whether the provisions of Articles 7–9 of the Decree concern unworthiness in the strict sense or a relative unworthiness to inherit. Cf. Article 63(3) of the Decree of 8 November 1946 on Succession Proceedings (Journal of Laws No. 63, item 346). Zob. Adam Kozaczka, "Z zagadnień niegodności dziedziczenia w polskim prawie spadkowym," in *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, eds. Wacław Osuchowski, Mieczysław Sośniak, and Bronisław Walaszek (Kraków-Warszawa: Państwowe Wydawnictwo Naukowe, 1964), 143 and Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (Warszawa: LexisNexis, 2013), 67–71 and the literature referenced therein.

produces as effect *ex tunc*; an unworthy heir is excluded from the succession as if they were no longer alive during the opening of the succession (Article 928 § 2 CC)[64], and the exclusion from inheritance occurs only when the decision becomes final[65]. This construct of the institution produces certain practical consequences, in particular such that "notification of unworthiness to inherit" now requires bringing an action. It is not possible for the court to establish unworthiness in proceedings regarding confirmation of acquisition of an inheritance; in the event that an argument of unworthiness is raised in such proceedings, the case is suspended until the issue of unworthiness to inherit is resolved in another procedure[66].

It should be noted that also in Italian regulations on inheritance unworthiness, it is considered a certain type of sanction under civil law that works as a prerequisite for exclusion from inheritance under a constitutive court's decision. Because unworthiness to inherit is qualified as *ex post* exclusion from the succession, it is necessary for entitled entities to bring an appropriate action. Such a position is uniform across case-law. Although opinions in the doctrine are divided, the prevailing view also shows that unworthiness to inherit, unlike incapacity to inherit, does not in itself deny title to inherit, yet it deprives the right to acquire an inheritance on the basis of a constitutive court's decision issued upon a party's request and respecting the principle *indignus potest capere sed non potest retinere* (the unworthy has the right to acquire but may not keep)[67]. Hence, it should be regarded as a reason for denying an inheritance, for the application of *officio iudicis*, and a causative factor preventing the party unworthy to inherit from

[64] See, for example, justification for the Decision of the Supreme Court of 3 February 2012, file ref. I CZ 9/12, Legalis.

[65] See, for example, justification for the Decision of the Supreme Court of 30 January 2015, file ref. III CSK 140/14, *LEX* no. 1651011 and justification for the Judgement of the Administrative Court in Kraków of 20 May 2014, file ref. I ACa 357/14, *LEX* no. 1587205. For more, see: Hanna Witczak, "Komentarz do art. 928," in *Kodeks cywilny. Komentarz. Tom IV. Spadki (art. 922–1087)*, eds. Magdalena Habdas and Mariusz Fras (Warszawa: Wolters Kluwer, 2019), thesis 2.

[66] Zob. Janusz Pietrzykowski, in *Kodeks cywilny. Komentarz. Tom 3. Księga czwarta – Spadki. Przepisy wprowadzające Kodeks cywilny*, ed. Janusz Pietrzykowski (Warszawa: Wydawnictwo Prawnicze, 1972), 1837.

[67] Giovanni Bonilini, *Manuale di diritto ereditario e delle donazioni* (Torino: Utet Giuridica, 2010), 43ff.

keeping their acquired rights[68]. Therefore, the supporters of the presented position approach this institution as having attributes typical of exclusion from an inheritance *ex post* and assume that the unworthy party acquires an inheritance and then loses it *ex tunc* once a court adjudges their unworthiness[69]. Only some representatives of the doctrine perceive this institution as a "form" of relative incapacity to inherit (in relation to *de cuius*) and as an imposed private penalty[70]. They emphasize that although in practice unworthiness to inherit may overlap with incapacity, there are some conceptual differences between them which, due to their importance, cannot be ignored. For example, a person considered unworthy has the "capacity to rehabilitate," which is not the case with incapacity to inherit. There are also differences in the scope of application: it is limited in the case of unworthiness to inherit which applies to a strictly defined person and prevents inheritance from a specific testator, while incapacity to inherit is more general, unlimited, and not linked to the deceased. Based on this concept, unworthiness to inherit would be an obstacle to the acquisition of an inheritance as a sanction for perpetration of a particularly reprehensible act. That sanction would occur *ipso iure,* thus making it impossible to acquire an inheritance[71]. The practical consequences of adopting one of the concepts of unworthiness to inherit are anything but trifling. In the case of incapacity, the legal consequences are automatic without court, and therefore no intervention of a judge is required; according to the other concept, such intervention is necessary because there is acquisition of an inheritance that comes into play, and its retroactive reversal is possible only through a constitutive court's decision. Russian law adopts a different solution. Parents deprived of parental authority are *ex lege* excluded from the succession as absolutely unworthy heirs.

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[68] Gaetano Azzariti, *Le successioni e le donazioni. Libro secondo del Coice civile* (Napoli: CEDAM, 1990), 37ff.

[69] Giovanni Bonilini, *Manuale di diritto ereditario e delle donazioni* (Torino: Utet Giuridica, 2010), 474.

[70] See Cesare M. Bianca, *Diritto civile. II. La famiglia – Le succesioni* (Milano: Giuffrè, 2001), 482.

[71] Luigi Ferri, "Succesioni in generale. Art. 456–511," in *Commentario del codice civile*, eds. A. Scaloja and G. Branca (Bologna-Roma: Utet Guardica, 1997), 175.

Given the considerations above, reasonable doubts arise as to whether the legislative solution adopted in Polish law of succession should also be applied in cases of depriving the parents of a minor testator of parental authority if it gives grounds to unworthiness to inherit[72]. Unworthiness in the strict sense means, as mentioned elsewhere, the acquisition of an inheritance by an heir, which is then lost on the basis of a constitutive court's decision. Grounds for unworthiness may therefore arise both before and after the opening of the succession, and the testator's act of forgiveness[73] removes its effects. This would highlight another difference, namely the adoption of unworthiness in the strict sense by ordinary legislation when they aim to exclude a specific person's title to inherit in the testator's best interest[74]. Meanwhile, a person with a relative incapacity to inherit does not acquire an inheritance at all, and this incapacity effect occurs *ipso iure*[75]. The relative incapacity to inherit works "automatically *erga omnes*" upon the opening of the succession, i.e. without the need to determine or adjudge it in a special court's judgement[76]. There is no controversy that this "shape" of this institution requires that grounds for unworthiness arise before the opening of the succession. Characteristic of this concept of unworthiness is that, in principle, it is impossible to remove the consequences of unworthiness by testator's pardon. As underlined in the literature on the subject, this is because "ordinary legislations resort to

[72] Of course, if we agree with the idea that it should exclude the parents of the deceased from the group of heirs.

[73] Who does not have to have full legal capacity, it is enough for them to act with "sufficient understanding" (see Article 1010 § 2 CC).

[74] Jan Gwiazdomorski, *Prawo spadkowe* (Warszawa: Państwowe Wydawnictwo Naukowe, 1959), 72. Cf. Alfred Ohanowicz, "Recenzja pracy J. Gwiazdomorski 'Prawo spadkowe' (PWN: Warszawa, 1959) 468," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 41 (1959): 193–194.

[75] Jan Gwiazdomorski, *Przepisy ogólne dotyczące spadków, dziedziczenie ustawowe, testament* (Katowice: Wydawnictwo Zrzeszenia Prawników Polskich, 1965), 20.

[76] Adam Kozaczka, "Z zagadnień niegodności dziedziczenia w polskim prawie spadkowym," in *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, eds. Wacław Osuchowski, Mieczysław Sośniak, and Bronisław Walaszek (Kraków-Warszawa: Państwowe Wydawnictwo Naukowe, 1964), 143.

the concept of relative incapacity to inherit when they intend to exclude the title for inheritance of a certain person for general and social reasons"[77].

It seems that the deprivation of parental authority should not only be included among grounds justifying unworthiness to inherit, but, in this case, it is reasonable to apply a different model of this institution than the one selected by the legislator in Articles 928-930 CC. Such heirs should be excluded from inheritance *ex lege*, that is, without the requirement of a civil court's decision in connection with an action brought within the time limit specified in the law for declaring the heir unworthy to inherit. Of course, whether the relevant regulation should be incorporated into the provisions on unworthiness to inherit or, due to the relevant exclusion, in the provisions on intestate succession is still debatable. If added to the Civil Code, Article 932[1] could, for example, provide that the provisions on the intestate title to inherit do not apply to the testator's parents who, upon the opening of the succession, are deprived of parental authority. Undoubtedly, due to the different nature of grounds for withdrawing parental authority, amendments would also be advisable to the provisions of the Family and Guardianship Code. It would be necessary to clearly separate the culpable and non-culpable causes of such withdrawal. By doing so, it would be possible to point to the legal basis for deprivation of parental authority, which would only highlight the culpable causes for such a court's decision. Given the proposed changes, it also seems appropriate to make relevant notes in civil registers.

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[77] Jan Gwiazdomorski, *Prawo spadkowe* (Warszawa: Państwowe Wydawnictwo Naukowe, 1959), 73.

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DEATH IN TIMES OF SARS-CoV-2 PANDEMIC. LEGAL REGULATIONS OF THE BURIAL OF THE COVID-19 DECEASED IN POLAND

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"you are no more than a mist
That appears for a little while and then disappears"
(Jm, 4, 14)

ABSTRACT

The article discusses the issues of death in times of the SARS-CoV-2 pandemic and burial of the COVID-19 deceased. It also presents some currently binding legal regulations as well as restrictions and obligations for the organizers of the funeral connected with the infection of the deceased with COVID-19. Moreover, it shows the influence of state law on funeral regulations in the denominational form and the cult of memory of the dead.

Keywords: SARS-CoV-2 pandemic, COVID-19, death, corpse, funeral, religious cult

1. INTRODUCTION

Sickness and death have been present in human life since the very beginning of man's existence. For years, death has been the subject of interest not only in medicine, anthropology, theology or law, but also in

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other fields of science[1]. Death is also often a common motif present in literature and paintings[2], as people have always searched for an appropriate way to express its mystery with words and images. The outbreak of the SARS-CoV-2 virus pandemic at the end of 2019, which started in the Chinese city of Wuhan, presented mankind with new challenges[3]. The COVID-19 pandemic revived questions about dignified death[4], dying, access to the sick, contact with family members dying in hospitals and care facilities, as well as manners and forms of burial.

The article attempts to answer questions about the scope of duties related to the organization of burial in the pandemic. It analyzes some restrictions which were introduced to the burial of the Sars-CoV-2 deceased, the effect of state legal regulations on funeral regulations in denominational form and the cult of memory of the deceased.

[1] Jan Perszon, *Na brzegu życia i śmierci, zwyczaje, obrzędy oraz wierzenia pogrzebowe i zaduszkowe na Kaszubach* (Lublin: Towarzystwo Naukowe KUL, 1999); Jacek Sobczak and Maria Gołda-Sobczak, "Prawo do grobu jako problem kulturowy i prawny," *Zeszyty Naukowe KUL* 60, no. 1(241) (2018): 198.

[2] For example the anonymous Medieval text "De morte prologus, Dialogus inter Mortem et Magistrum Polikarpum," (in Polish: "Rozmowa Mistrza Polikarpa ze Śmiercią,") in *Historia Literatury Polskiej w Dziesięciu Tomach*, t. 1: *Średniowiecze*, ed. Anna Skoczek, (Bochnia-Kraków-Warszawa: Prowincjonalna Oficyna Wydawnicza, 2002), 389–399, William Shakespeare's *Romeo and Juliett* (1597), and Albert Camus' *The Plague* (Paris: Gallimard, 1947). Among world's commonly known painting there are*: The Triumph of Death* by Pieter Bruegel the Elder, (1562); *Death* by Jacek Malczewski (*Śmierć*, 1902), and *Crawling Death* by Zdzisław Beksiński (*Pełzająca śmierć*, 70s of the 20th century).

[3] For some information on one of the first pandemics in the 20th century (which claimed from 30 to 50 million victims) go to: Łukasz Mieszkowski, *Największa. Pandemia hiszpanki u progu niepodległej Polski* (Warsaw: Wydawnictwo Polityka, 2020).

[4] Marcin Śliwka and Anita Gałęska-Śliwka, "Prawo do godnej śmierci pacjentów niezdolnych do podjęcia decyzji," *Medycyna Paliatywna w Praktyce* 6, no. 1 (2012): 15–22, accessed August 10, 2021, https://journals.viamedica.pl/palliative_medicine_in_practice/article/view/28512/23282.

2. COVID-19 AND SARS-CoV-2 VIRUS. TERMS AND DEFINITIONS. DEMOGRAPHIC EFFECTS

The term "COVID-19" refers to the disease caused by the SARS-CoV-2 virus. The name was given by the World Health Organization (WHO) as applicable worldwide because previously some descriptive forms were used, such as "2019 novel coronavirus (2019-nCoV)", "disease caused by coronavirus" and "Wuhan coronavirus infection". The WHO recommended this name to prevent social stigma of the geographical location of the place where the virus was first reported, as well as to avoid some negative political consequences related to this fact. Additionally, the guidelines of the International Committee on Taxonomy of Viruses (ICTV)[5] were applied. The individual elements of the name consist of abbreviated lexical forms derived from the following English words: "CO" for corona, "VI" for virus, "D" for disease, and number 19 is for 2019, the year in which the outbreak was first identified. The full name of this new disease is *Corona-Virus-Disease-2019.* The name of the SARS-CoV-2 virus is an acronym of the English words *severe acute respiratory syndrome coronavirus 2*, as opposed to SARS-CoV. SARS-CoV-2 is a newly discovered pathogen which belongs to coronaviruses[6], with a single strand of positive polarity

[5] The International Committee on Taxonomy and Viruses (ICTV) is concerned with naming of viruses. On February 11, 2020 ICTV announced "severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)" as the name of the new virus. The decision was based on the fact that the virus is genetically related to the coronavirus responsible for the 2003 SARS outbreak, see: https://talk.ictvonline.org/, accessed August 8, 2021; https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it, accessed August 10, 2021. Also on February 11, 2020 the WHO announced "COVID-19" as the name of the new disease, following guidelines previously developed with the World Organization for Animal Health (OIE) and the Food and Agriculture Organization of the United Nations (FAO), see: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it, accessed August 8, 2021; Marlena Kostyńska, *Koronawirus SARS-CoV-2 – słowniczek pojęć, które warto znać*, published March 16, 2020, accessed August 12, 2021, https://www.medonet.pl/zdrowie,koronawirus-sars-cov-2---slowniczek-pojec--ktore-warto-znac,artykul,70847711.

[6] See: International Institute of Molecular and Cell Biology (IIMCB, Międzynarodowy Instytut Biologii Molekularnej i Komórkowej) in Warsaw, information as of

ssRNA (+) that causes acute respiratory disease – COVID-19. There are many already known coronaviruses that cause cold and respiratory diseases in human and animals – some of them are mild, but other variants may cause severe illnesses and kill an infected person. One of such illnesses is SARS (severe acute respiratory syndrome) caused by the SARS-CoV virus. Most common symptoms of COVID-19 include: fever, dry cough and breathing difficulties (shortness of breath). SARS often produces flu-like symptoms such as fatigue and muscle pains. People can also experience diarrhea, sore throat, runny nose and loss of smell and taste. The above mentioned symptoms are variable, ranging from mild symptoms to severe illnesses, whereas in some cases the infection may be asymptomatic.

An epidemic occurs when on a given area there are infections or cases of an infectious disease in a significantly higher number than in the previous period, or there are infections or infectious diseases that previously did not occur[7]. The term "pandemic" is used when an epidemic of an infectious disease simultaneously affects several countries. These countries may be located on a single continent or worldwide. In a pandemic, there is high contagiousness of the disease and its asymptomatic form at the initial stage of infection[8].

November 10, 2020, *Struktura RNA genomu koronawirusa SARS-CoV-2 szczegółowo zbadana*, accessed August 20, 2021, https://www.iimcb.gov.pl/pl/aktualnosci/aktualne-informacje/1205-struktura-rna-genomu-koronawirusa-sars-cov-2-szczegolowo-zbadana; Danuta Kruszewska, "Współczesne zoonozy – klątwa XXI wieku," *Życie Weterynaryjne* 95(7) (2020): 405–413, accessed August 10, 2021, https://www.vetpol.org.pl/dmdocuments/ZW-07–2020–02.pdf; Zuzanna Drulis-Kawa, "Koronawirus SARS-CoV-2 – biologia, wykrywanie i zwalczanie," *Przegląd Uniwersytecki On-line*, accessed August 14, 2021, https://uni.wroc.pl/koronawirus-sars-cov-2-biologia-wykrywanie-i-zwalczanie/.

[7] The definition of an epidemic is specified in the *Act on preventing and combating infections and infectious diseases in humans of December 5, 2008* (Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi z dnia 5 grudnia 2008 r.), Journal of Laws 2008, No. 234, item 1570 in art. 2 point 9. The legislator defined a number of terms related to the occurrence of infectious diseases, including "state of the epidemic" and "state of epidemic threat', see Art. 2 points 22 and 23.

[8] In Germany, due to COVID-19, the life expectancy loss of the population in 2020 was estimated at 305,641 years. These calculations were presented by a team of scientists – Alexander Rommel, Elena von der Lippe, Dietrich Plass, Thomas Ziese, Michaela Diercke, Matthias An der Heiden, Sebastian Haller, and Annelene Wengler, and published in the article "The COVID-19 Disease Burden in Germany in 2020—Years

The first known infection from SARS-CoV-2 was discovered on November 17, 2019 in the city of Wuhan in southern China. After two months it spread to Iran, South Korea and Italy, and then it was soon reported in other European countries. The WHO recognized Europe as the center of the pandemic in March 2020. In European Union countries, health protection is the responsibility of the Member States. The Decision of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health determines the rules on epidemiological surveillance, monitoring serious cross-border threats to health, early warning and combating emerging threats, including preparedness and response planning to coordinate and complement the national policies of the Member States[9]. The Decision defines such terms as "communicable disease", "epidemiological surveillance" and "serious cross-border threat to health"[10]. Moreover, an Early Warning and Response System (EWRS) was established (Art. 8), as well as Health Security Committee, to support the exchange of information between the Member States and the Commission regarding the implementation of the Decision of the Parliament and the Council, and to coordinate the preparedness and response planning and to coordinate the risk and crisis communication and responses

of Life Lost to Death and Disease Over the Course of the Pandemic," accessed August 12, 2021, https://pubmed.ncbi.nlm.nih.gov/33634787/; Agata Wawrzyniak, Karolina Kuczborska, Agnieszka Lipińska-Opałka, Agata Będzichowska, and Bolesław Kalicki, "Koronawirus 2019-nCoV – transmisja zakażenia, objawy i leczenie," *Pediatr Med Rodz* 15, no. 4 (2019), accessed August 10, 2021, https://www.pfizerpro.com.pl/sites/default/files/pediatria_4_2019_wawrzyniak_koronawirus_2019-ncov_pl.pdf; Jerzy Duszyński, Aneta Afelt, Anna Ochab-Marcinek, Radosław Owczuk, Krzysztof Pyrć, Magdalena Rosińska, Andrzej Rychard, and Tomasz Smiatacz, *Zrozumieć Covid-19. Opracowanie Zespołu ds. Covid-19 przy Prezesie Polskiej Akademii Nauk*, published September 14, 2020, accessed August 18, 2021, https://informacje.pan.pl/images/2020/opracowanie-covid19-14-09-2020/ZrozumiecCovid19_opracowanie_PAN.pdf.

[9] Under Art. 168 of the Treaty on the Functioning of the European Union, the European Union complements national health policies of particular member states, see the Decision of the European Parliament and the Council No. 1082/2013/UE of 22 October, 2013 on serious cross-border threats to health, and repealing the Decision No. 2119/98/WE, OJ L 293/1.

[10] Art. 3 of the Decision of the European Parliament and the Council No. 1082/2013/UE of 22 October 2013.

to serious cross-border threats to health (Art. 17 point 2). The Decision also emphasizes the role of the European Centre for Disease Prevention and Control (ECDC)[11]. In the initial phase of the pandemic in Europe, the European response and coordination system did not fulfill its role, also due to the deteriorating health situation in northern Italy, especially in the Lombardy region. Italy reported the first positive coronavirus test on January 31, 2020 and on February 1, 2020 the Italian government introduced a state-wide state of emergency. Italy was the first European country to face the outbreak of the epidemic and had to deal with it basically alone. It was only on March 10, 2020 that the European Commission and the president of the European Council called on the Member States to coordinate their actions[12]. During the video conference on COVID-19 the following four priorities were identified: limiting the spread of the virus, provision of medical equipment, promotion research and tackling socio-economic consequences. The Member States expressed sympathy with Italy and other states which were severely hit by the pandemic[13].

As of August 15, 2021, since the first recorded death in France on February 15, 2020, a total of 1,221,930 deaths due to COVID-19 have been registered in Europe. The highest number of deaths has been reported in the United Kingdom, that is 131,260 (data as of August 19, 2021). So far there have been 210,135,054 infections with the virus and 4,405,954 deaths[14] worldwide. The official number of deaths is: 75,324 for Poland,

[11] For more on the responsibilities of the ECDC go to: https://europa.eu/european-union/about-eu/agencies/ecdc_pl.

[12] See: Melchior Szczepanik and Jolanta Szymańska, "Reakcja Unii Europejskiej na epidemię koronawirusa," *Biuletyn*, no. 48 (1980), 17 March 2020, (Polski Instytut Spraw Międzynarodowych), accessed August 20, 2021, https://pism.pl/publikacje/Reakcja_Unii_Europejskiej_na_epidemie_koronawirusa.

[13] The European Council, *Conclusions by the President of the European Council following the video conference on COVID-19*, March 10, 2020, accessed August 21, 2021, https://www.consilium.europa.eu/en/press/press-releases/2020/03/10/statement-by-the-president-of-the-european-council-following-the-video-conference-on-covid-19/.

[14] For statistics and facts see: *Coronavirus (COVID-19) disease pandemic – Statistics & Facts*, accessed August 20, 2021, https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country/ and https://www.statista.com/topics/5994/the-coronavirus-disease-covid-19-outbreak/, accessed August 14, 2021.

53,521 for Ukraine, 12,547 for Slovakia[15], 30,387 for the Czech Republic, 92,522 for Germany and 128,855 for Italy[16].

In Poland, on March 2, 2020 the Act on special solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them[17] was issued in order to provide the basics for the regulation of extraordinary situations related to the pandemic. The first case of an infection with the SARS-CoV-2 virus was recorded on March 4, 2020, and this day is considered the beginning of the pandemic in the country. Then, on March 14, 2020, a few days after declaring a state of pandemic in the world by the World Health Organization, an epidemic emergency was introduced[18]. First, educational institutions and care facilities were closed from March 12 till 25, 2020. The first death from COVID-19 in Poland was on March 12, 2020, and on March 20, 2020 until further notice, due to the SARS-CoV-2 virus infections, the epidemic has been introduced throughout the whole country[19]. Under

[15] Łukasz Ogrodnik, *Słowacja w walce z pandemią COVID-19 i jej skutkami dla gospodarki*, accessed August 12, 2021, https://pism.pl/publikacje/Slowacja_w_walce_z_pandemia_COVID19_i_jej_skutkami_dla_gospodarki.

[16] See: *Number of novel coronavirus (COVID-19) deaths worldwide as of August 25, 2021, by country*, accessed August 20, 2021, https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country/.

[17] Journal of Laws 2020, item 374. The Act entered into force on March 8, 2020 and is commonly known as "specustawa" ("special act").

[18] The state of the epidemic emergency was introduced with the *Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland* (Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego), Journal of Laws 2020, item 433, par. 1.

[19] *Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland* (Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii), Journal of Laws 2020, item 491; see: https://www.gov.pl/web/koronawirus/wprowadzamy-stan-epidemii-w-polsce, accessed June 4, 2021; see: Art. 1, 22) of the *Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans* (Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi), Journal of Laws 2008, No. 234, item 1570 with further amendments. Under Art. 46 point 2 of this act if an epidemic threat or an epidemic occurs in more than one voivodship, the state of an epidemic threat or an epidemic is introduced or dismissed by

the Act on preventing and combating infections and infectious diseases in humans of December 5, 2008, the state of pandemic is understood as a legal situation introduced in a given area in connection with the occurrence of an epidemic in order to take the anti-epidemic and preventive measures specified in the Act to minimalize the effects of the pandemic.

On September 19, 2020 the number of daily infections exceeded 1,000 and the highest number of cases (27,875) was reported on November 7, 2020. November 25, 2020 was the day with the highest number of deaths, namely 674[20]. According to the data published by the Statistics Poland (GUS), as of the end of June 2021 Poland had about 38,162 inhabitants. In 2020, a total of 477,335 people died and it was an increase of approximately 68,000, as compared to 2019. The highest number of deaths was recorded in the fourth quarter of 2020. Over 60% more of deaths were registered than in the corresponding period of the previous year. The Ministry of Health announced that the main cause of the increase in the number of deaths was the SARS-CoV-2 pandemic, with its highest intensity in fall 2020. Mortality surpluses were and are generated by people burdened with comorbidities and those who died as a result of the limited access to diagnostics and planned medical services. Moreover, with the introduction of lockdown in Poland online doctor consultations[21]

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the regulation of the minster responsible for health in agreement with the minister responsible for public administration, at the request of the Chief Sanitary Inspector.

[20] For more information on death rates go to: https://www.medonet.pl/koronawirus/koronawirus-w-polsce,rok-epidemii-covid-19-w-polsce—eksperci-mowia—co-nas-czeka,artykul,90113652.html, accessed August 2, 2021; the *Regulation of the Minister of Health of 6 April 2020 on infectious diseases resulting in the obligation of hospitalization, isolation or isolation at home and the obligation to quarantine or epidemiological supervision* (Rozporządzenie Ministra Zdrowia z dnia 6 kwietnia 2020 r. w sprawie chorób zakaźnych powodujących powstanie obowiązku hospitalizacji, izolacji lub izolacji w warunkach domowych oraz obowiązku kwarantanny lub nadzoru epidemiologicznego), Journal of Laws 2020, item 607.

[21] Art. 42 of the *Medical Profession Act of 5 December 1996* (Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty), Journal of Laws 1997, No. 28, item 152, consolidated text Journal of Laws 2021, item 790 stipulates that the doctor decides about the health of a particular person after prior personal examination of this person or examination via IT or communication systems, as well as after analyzing the available medical documentation of this person.

became a common practice, which significantly reduced the detection and prevention of life-threatening diseases. In the first half of 2021, the actual decline in the population was -0,27%, which means that for every 10,000 people 27 people died in Poland (as compared to 8 people the year before), and the number of deaths increased to about 271,000 people. The highest increase in mortality was in April and May 2021, with over 40% and over 60% more registered deaths, respectively, than in the corresponding months of last year. As a result of excessive mortality, the overall death rate increased from 10.9‰ in 2020 to 14.2‰ in the first half of 2021[22]. At the end of June 2021, the population of Poland was smaller than at the end of both June and December last year. Between January and June this year there were also fewer births than a year ago, with a significant increase in deaths. As a result of the lower number of births than deaths, the population growth rate remained negative by about 192,000 less than in the same period last year.

3. RESPONSIBILITIES CONNECTED WITH THE BURIAL OF THE COVID-19 DECEASED

Each death implies certain obligations related to a person's burial, especially when the death occurred due to an infectious disease. They are borne by various entities, especially hospitals, funeral companies, family or institutions responsible for organizing the funeral. The Regulation of the Ministry of Health of 3 April 2020[23] specifies in detail the procedure

[22] Statistics Poland (Główny Urząd Statystyczny), "Analizy statystyczne 06/2021, Sytuacja społeczno-gospodarcza kraju w pierwszym półroczu 2021," Warsaw: July 2021, accessed August 3, 2021, https://stat.gov.pl/covid/opracowania-covid-19/, and https://stat.gov.pl/obszary-tematyczne/inne-opracowania/informacje-o-sytuacji-spoleczno-gospodarczej/sytuacja-spoleczno-gospodarcza-kraju-w-pierwszym-polroczu-2021-r-,1,110.html, accessed August 8, 2021.

[23] The *Regulation of the Ministry of Health of 3 April 2020 amending the regulation on handling human corpses and remains* (Rozporządzenie Ministra Zdrowia z dnia 3 kwietnia 2020 r. zmieniające rozporządzenie w sprawie postępowania ze zwłokami i szczątkami ludzkimi), Journal of Laws 2020, item 585 amended the *Regulation of the Ministry of Health of 7 December 2001 amending the regulation on handling human corpses and remains*

of dealing with the SARS-CoV-2 deceased. It states that the corpses of people who died from COVID-19 have to be disinfected with a disinfecting liquid with a virucidal effect, whereas the usual procedure of washing the corpse should be abandoned, unless it is necessary, and then some special preventive measures should be taken. Dressing up the body and its presentation should be avoided. The corpse should be placed in a protective, airtight bag along with the clothing or hospital cover that is put next to it, and in the case of transferring the corpse for incineration, the first bag with the corpse should be placed in the second bag. Next, the outer surface of each bag should be disinfected by spraying it with a disinfectant with a virucidal effect. If transported to the crematorium, the protected corpse is to be placed in a transport capsule made of materials enabling its washing and disinfection, which, after transferring the corpse to the incinerator, is subject to standard decontamination with surfactants. However, if the corpse is to be buried in the cemetery, it is placed in a coffin, except that a layer of fluid-absorbing substance with a thickness of 5 cm should be placed at the bottom of the coffin. Immediately after placing the body in a transport coffin or capsule, it is sealed tightly and sprayed with a virucidal disinfectant fluid. Transportation of the body, if possible, should be carried out with one transportation unit, which means that the means of transport should not be changed. The rooms where the person died from COVID-19, as well as any items with which they came into contact, should be decontaminated.

If the person dies in a hospital, activities related to the preparation of the body for burial are performed by people employed by the hospital, whereas in the case of death outside the hospital, activities related to transportation to a crematorium or cemetery – by appropriately trained employees of funeral companies[24]. In the event of the patient's death in a hospital

(Rozporządzenie ministra zdrowia z dnia 7 grudnia 2001 r. w sprawie postępowania ze zwłokami i szczątkami ludzkimi), Journal of Laws 2001, No. 153, item 1783 and 2007, No. 1, item 10 by adding §5a -5c after §5. See also the *Regulation of the Ministry of Health of 18 March 2021 amending the regulation on handling human corpses and remains* (Rozporządzenie Ministra Zdrowia z dnia 18 marca 2021 r. zmieniające rozporządzenie w sprawie postępowania ze zwłokami i szczątkami ludzkimi), Journal of Laws 2021, item 511.

[24] In Poland, there are currently no special regulations concerning employees of funeral homes. Such institutions are often small family businesses and establishing a funeral

the procedures are given in the Regulation of the Ministry of Health of 10 April 2012 on the manner of conduct of a healthcare entity performing medical activities such as inpatient and round-the-clock healthcare services with the patient's corpse in the event of the patient's death[25]. The person indicated in the organizational regulations of the healthcare entity notifies a person or an institution of the death of the deceased immediately after confirming the person's death[26]. If the hospital has doubts as to the identity of the COVID-19 deceased person, there is a problem with the personal identification of the body. In this case, the hospital may send photos by MMS or e-mail to the family of the deceased person, however such practice is not legally regulated. If the deceased person did not have any relatives or it was not possible to identify or contact them despite the attempts made, then the duty to bury the body falls on the local authority, which should be informed about the occurrence of this circumstance.

Under Art. 43 of the Medical Profession Act, the doctor can confirm the death on the basis of personally performed tests and findings[27]. Decla-

activity does not require any special qualifications or licenses. It is enough to have the appropriate entry in the economic activity and fulfil sanitary requirements specified in the *Regulation of the Minister of Health of 23 March 2011 on the method of storing human corpses and remains* (Rozporządzenie Ministra Zdrowia z dnia 23 marca 2011 r. w sprawie sposobu przechowywania zwłok i szczątków), Journal of Laws 2011, No. 75, item 405; Cf. the Regulation of the Ukrainian Ministry of Health and the Chief Sanitary Doctor of 4 August 2020, Постанова №44, Про внесення змін до Тимчасових рекомендацій щодо безпечного поводження з тілами померлих осіб з підозрою або підтвердженням коронавірусної хвороби *(COVID-19)*, accessed August 20, 2021, https://moz.gov.ua/golovnij-derzhavnij-sanitarnij-likar-ukraini.

[25] *Regulation of the Ministry of Health of 10 April 2012 on the manner of conduct of a healthcare entity performing medical activities such as inpatient and round-the-clock healthcare services with the patient's corpse in the event of the patient's death* (Rozporządzenie Ministra Zdrowia z dnia 10 kwietnia 2012 r. w sprawie sposobu postępowania podmiotu leczniczego wykonującego działalność leczniczą w rodzaju stacjonarne i całodobowe świadczenia zdrowotne ze zwłokami pacjenta w przypadku śmierci pacjenta), Journal of Laws 2012, item 420.

[26] See: Art. 28 par. 1 point 2 of the *Medical Profession Act of 15 April 2011* (Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej), Journal of Laws 2011, No. 112, item 654, consolidated text Journal of Laws 2013, item 217, with further amendments.

[27] The *Act of 5 December 1996 on the profession of a physician and dentist* (Ustawa z dnia 5 grudnia 1996 r. o zawodzie lekarza i lekarza dentysty), Journal of Laws 1997,

ration of death involves preparing appropriate documentation, especially a death certificate. This document is required for burial, for the preparation of a death certificate by a competent registry office, and for statistical purposes. A death certificate is an administrative confirmation of the death of a given person. It may also be drawn up on the basis of a written notification from the institution investigating unnatural causes of death or on the basis of a court decision, which includes a decision on a declaration of death or a decision on declaring a person dead.

The bodies of the deceased in hospitals are put into closed and decontaminated coffins and transferred to the family, persons or entities that undertook to organize the funeral[28]. As a rule, burial takes place after settling formal matters in the registry office and in a funeral home, and, if it is of a religious nature, at the priest at the Roman Catholic parish or another representative of the deceased's religious denomination, or at the cemetery administrator. There is no legal obligation to bury the COVID-19 deceased within 24 hours from death, as it is the case with other infectious diseases, regulated by the Act on preventing and combating infections and infectious diseases in humans of 5 December, 2008[29]. The immediate burial of

No. 28, item 152, consolidated text Journal of Laws 2021, item 790, 1559. General practitioners are not formally obliged to declare death. The problem was exacerbated during the pandemic because the doctors were often afraid of contracting the coronavirus. If a person died outside the hospital, e.g. at home, it could be difficult for the family to bring a doctor to confirm death and issue a death certificate. There were also situations that the body of the deceased was left in a public place for several hours because there was no one to confirm the person's death. Moreover, the institution of a coroner has not been introduced in Poland and, under Art. 11 point 1 of the *Act on cemeteries and burying the dead* (Ustawa o cmentarzach i chowaniu zmarłych), the death and its cause should be determined by the doctor who was last treating the sick person. See: the *Act of 31 January 1959 on cemeteries and burial of the deceased* (Ustawa z dnia 31 stycznia 1959 r. o cmentarzach i chowaniu zmarłych), Journal of Laws 1959, No. 11, item 62, consolidated text Journal of Laws 2020, item 1947.

[28] For more on entities entitled to organize funerals see: Sobczak and Gołda-Sobczak, "Prawo do grobu jako problem kulturowy i prawny," 202–203; Jan Gołąb, *Prawo do pogrzebu i jego wykonanie w prawie kanonicznym i polskim* (Rzeszów: Poligrafia Wyższego Seminarium Duchownego, 2004), 222–247.

[29] The *Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans* (Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi), Journal of Laws 2008, No. 234, item 1570. However, then

the body[30], referred to in the Regulation of the Ministry of Health of 3 April 2020 does not mean that the body cannot be transported to the funeral home or chapel for the funeral ceremony prior to burial in the cemetery. The term "immediate burial" (Polish "bezpośrednie pochowanie") used in the Regulation refers to burial without prior cremation[31]. The fact that the body of the deceased does not have to be buried within 24 hours is due to the fact that COVID-19 was not entered on the list of infectious diseases specified in this regulation. In accordance with the Regulation of the Ministry of Health of 6 December 2001 on the list of infectious diseases for which the declaration of death requires special treatment of the corpse of those who died of these diseases, such corpses must be immediately removed from the flat and buried at the nearest cemetery within 24 hours from death. The Regulation includes the following diseases: 1) cholera, 2) typhoid fever and other rickettsial diseases, 3) plague, 4) relapsing fever, 5) poliomyelitis, 6) glanders, 7) leprosy, 8) anthrax, 9) rabies, 10) yellow fever and other viral hemorrhagic fever[32]. The fact that COVID-19 was not entered on the list of infectious diseases may be explained by several reasons, including the fear that too many deaths per day will cause problems with the organization of burial within 24 hours from death. Moreover, not every virus infection causes acute respiratory failure referred to

the act was consolidated and published in 2020 (Journal of Laws 2020, item 1845), and to this text some further amendments were introduced in the following positions: 2112, 2401, and in 2021: items 159, 180, 255, 616, 981.

[30] Under the *Regulation of the Ministry of Health of 3 April 2020 amending the regulation on handling human corpses and remains* the body secured in the manner specified in the regulation should be placed in a coffin for burial if there is an immediate burial in the cemetery, see §1, point 6.

[31] See: Państwowy Wojewódzki Inspektor Sanitarny w Bydgoszczy, "Pochówek i ceremonia pogrzebowa w dobie pandemii koronawirusa," accessed August 18, 2021, http://pliki.diecezja.sosnowiec.pl/20210318/Poch%C3%B3wek_i_ceremonia_pogrzebowa_w_dobie_pandemii_koronawirusa.pdf.

[32] The *Regulation of the Ministry of Health of 6 December 2001 on the list of infectious diseases for which the declaration of death requires special treatment of the corpses of people who dies of these diseases* (Rozporządzenie Ministra Zdrowia z dnia 6 grudnia 2001 r. w sprawie wykazu chorób zakaźnych, w przypadku których stwierdzenie zgonu wymaga szczególnego postępowania ze zwłokami osób zmarłych na te choroby), Journal of Laws 2001, No. 152, item 1742.

in the Regulation, and not every infected person requires hospitalization. The virus can also cause an asymptomatic condition in the infected person.

4. RESTRICTIONS ON THE ORGANIZATION OF FUNERAL CEREMONIES

Under the 1959 Act on cemeteries and burial of the deceased[33] there are two possible ways of burying the deceased in Poland, namely in a cemetery in a grave (this also applies to urns and ashes) and by sinking the body into the sea[34]. The funeral may be either denominational or secular in its form. The coffin with the body of the deceased is transported to the cemetery chapel or to the funeral home, where religious or secular ceremonies are held, eulogies and condolence letters are read, and then the coffin is interred in the grave or the urn with ashes is placed in the columbarium. In the case of the denominational ceremony, e.g. a Catholic ceremony, the celebration may take place first in the cemetery, then in a church or chapel, or vice versa. As a rule, the funeral begins with the holy mass in a church, without bringing the coffin inside, and then continues in the cemetery. There are also practices of first interring the coffin in the grave, preceded by appropriate prayers, and then performing the holy mass. Due to the coronavirus pandemic, restrictions were introduced in Poland in order to limit the number of mourners and the customary consolation ceremonies.

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[33] *Act of 31 January 1959 on cemeteries and burial of the deceased*, Journal of Laws 1959, No. 11, item 62, consolidated text from 2020, item 1947.

[34] Art. 12.1. of the *Act on cemeteries and burial of the deceased* specifies that "corpses can be buried in earthen graves, built tombs, catacombs or they can be sunk in the sea. The remains from incineration can also be put in columbaria". The terms "human corpses" and "human remains from incineration" are used in the regulation the *Regulation of the Ministry of Health of 7 December 2001 amending the regulation on handling human corpses and remains*, Journal of Laws 2001, No. 153, item 1783, and §2 stipulates that human corpses are understood as bodies of the deceased and still born children. In §8, human remains include ashes from the incineration of a corpse, remains of a corpse excavated while digging a grave or in other circumstances, as well as other parts of human body separated from the rest of the body. See: Teresa Gardocka, *Czy zwłoki ludzkie są rzeczą i co z tego wynika?*, accessed August 20, 2021, https://www.repozytorium.uni.wroc.pl/Content/77834/17_T_Gardocka_Czy_zwloki_ludzkie_sa_rzecza_i_co_z_tego_wynika.pdf.

On March 24, 2020 a regulation of the minister of health introduced some restrictions on movement and the organization of assemblies[35], including the limit of the faithful at masses, services and funerals. The number of funeral participants was then limited to 5 persons, in addition to persons involved in the conduct of religious ceremonies or employees of the funeral home involved in burial, for the period of March 25, 2020 to April 11, 2020 (§1, 4), b)). Then, on March 31, 2020 the Council of Ministers issued a Regulation on the establishment of certain restrictions, orders and bans in connection to the epidemic[36]. In accordance with this regulation, from April 1, 2020 to April 11, 2020 it was forbidden to organize assemblies within the meaning of Art. 3 of the Act of 24 July – the Law on Assemblies, as well as other assemblies organized as part of the activities of churches and other religious associations (§14.1). Under the same regulation, in the period from April 12, 2020 until further notice the ban on organizing assemblies will not apply if the number of participants does not exceed 50 persons, including the organizer and persons acting in his name (§15). Another restriction connected with the performance of religious ceremonies, including religious activities and rituals, was the maximum number of persons per square meter of a building intended for religious worship[37], such as a church or chapel. This limit was initially 1 person per 15 square meters until May 15, 2020, and from May 17, it was 1 person per 10 square meters. If the building did not exceed 75 square meters, and from May 17 – 50 square meters, the maximum number of participants simultaneously taking part in

[35] The *Regulation of the Ministry of Health of 24 March 2020 amending the regulation on the declaration of an epidemic in the territory of the Republic of Poland* (Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 r. zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii), Journal of Laws 2020, item 522.

[36] Journal of Laws 2020, item 566.

[37] The *Regulation of the Council of Ministers of 16 May 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic* (Rozporządzenie Rady Ministrów z dnia 16 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii), Journal of Laws 2020, item 878, see §8.

religious worship was 5, not including persons conducting the worship[38]. Further restrictions were introduced as a result of the increasing number of infections during the so-called "second wave of SARS-CoV-19" in the fall of 2020. The country was then divided into three zones: red, yellow and green. Depending on the number of infections there were various restrictions[39] applied, which were changed in the following months. In all Polish dioceses there was a limited possibility of taking part in holy masses – only the people booking the mass intention were allowed to participate, and in the case of a funeral only the immediate family. Appropriate regulations in this matter were issued by diocesan bishops. However, for the first time in Polish history, all cemeteries in the country were closed from October 31 to November 2, 2020, except for burial of the deceased. It was possible to enter the cemetery only for the time of the funeral and conducting related activities[40]. The improving pandemic situation in the country in the spring of 2021 made it possible to increase limits and from June 13, 2021 half of the places designated for the faithful could be occupied in churches and places of worship. Therefore, on

[38] There could be no more than 50 participants during a single funeral in the cemetery, except for people conducting the ceremony and the burial, and employees of a funeral institution or a funeral home.

[39] The *Regulation of the Council of Ministers of 16 May 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic*, Journal of Laws 2020, item 1758, Art. 28, point 8, 1) a) and 2. Restrictions on the presence of people in the places of religious worship were introduced several times. See: the *Regulation of the Council of Ministers of 19 March 2021* (Rozporządzenie Rady Ministrów z dnia 19 marca 2021 r.), Journal of Laws 2021, item 512, see §26 point 8; the *Regulation of the Council of Ministers of 6 May 2021* (Rozporządzenie Rady Ministrów z dnia 6 maja 2021 r.), Journal of Laws 2021, item 861, §26, point 10, 11.

[40] The *Regulation of the Council of Ministers of 16 May 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic*, Journal of Laws 2020, item 1917. Also see https://www.gov.pl/web/koronawirus/epidemia-koronawirusa-przybiera-na-sile-dlatego-zamykamy-cmentarze-na-wszystkich-swietych, accessed August 20, 2021. It should be emphasized that November 1 has been celebrated by the Catholic Church as *Sollemnitas Omnium Sanctorum* since the 9th century. It is a public holiday included in and guaranteed by the Concordate; see: The *Concordat between the Holy See and the Republic of Poland,* signed in Warsaw on July 28, 1993 (Konkordat między Stolicą Apostolską i Rzecząpospolitą Polską, podpisany w Warszawie dnia 28 lipca 1993 r.), Journal of Laws 1998, No. 51, item 318, Art. 9.

June 20, 2021 Polish bishops lifted dispensation from participation in Sunday and holiday masses[41].

On July 7, 2021 the government issued some rules and restrictions on participation in religious ceremonies, including the limit on the number of participants in religious worship to a maximum of 75%. This limit does not apply to people fully vaccinated against COVID-19. It was also recommended to hold religious ceremonies outdoors[42]. The pandemic not only limited the number of people participating in burial but it also led to such a situation that the family of the deceased had to postpone the funeral because there was no one to perform burial, for example because the entire family was sick with COVID-19, or the immediate family members were in quarantine. The same case is with the organization of state funerals. When the world-famous Polish composer Krzysztof Penderecki died on March 29, 2020, due to the pandemic situation, the funeral ceremony was postponed until the pandemic would subside[43].

[41] Due to the improving pandemic situation in the country, the bishops gathered at the 389th Plenary Meeting of the Polish Bishops' Conference in Kalwaria Zebrzydowska decided to lift the dispensation which was introduced for the period of the pandemic. See: *Komunikat z 389 Zebrania Plenarnego KEP*, accessed August 25, 2021, https://archidiecezjalubelska.pl/blog/komunikat-z-389-zebrania-plenarnego-konferencji-episkopatu-polski/.

[42] See "Informacja," accessed August 25, 2021, https://www.gov.pl/web/koronawirus/aktualne-zasady-i-ograniczenia. The introduced restrictions were in force until August 31, 2021, and were then prolonged until September 30, 2021, https://www.gov.pl/web/koronawirus/aktualne-zasady-i-ograniczenia, accessed August 31, 2021.

[43] On April 2, 2020 a family celebration took place and the urn with the ashes was placed in the crypt of the Collegiate Church of St. Florian in Kraków, where it is to remain until the official funeral. The ashes of the composer are to be buried on March 29, 2022 and placed in a sarcophagus in the National Pantheon, in the crypts of the Church of Saints Peter and Paul in Kraków, see: Mska, "Państwowy pogrzeb Krzysztofa Pendereckiego za rok. W drugą rocznicę śmierci kompozytora pandemia osłabnie," published March 27, 2021, accessed August 20, 2021, https://krakow.wyborcza.pl/krakow/7,44425,26924960,panstwowy-pogrzeb-krzysztofa-pendereckiego-za-rok-w-druga.html.

5. CONCLUSION

Although the European Union introduced rules on epidemiological surveillance, monitoring of serious cross-border threats to health and early warning and established the Early Warning and Response System (EWRS) in 2013 no adequately coordinated actions were undertaken early enough, and Italy became an example of a country that struggled alone against the virus attack at the beginning of 2020.

On March 14, 2020 a state of epidemic crisis was declared, which from March 20, 2020 until further notice was transformed into the state of epidemic throughout the country. The procedures as regards dealing with people who died due to the SARS-CoV-2 virus infection were specified in the Regulation of the Minister of Health of 3 April 2020. Although COVID-19 is a contagious disease there is no obligation to bury the deceased within 24 hours from death. There are also no specific regulations on training employees of funeral homes connected with burial of COVID-19 deceased outside the hospital. Lack of the institution of a coroner causes problems with declaring death of a person who died outside the hospital, not only from COVID-19. Polish regulations on cemeteries and burying the dead are outdated and do not meet modern requirements[44]. Also such issues as the decomposition of the bodies of people buried in tightly closed bags put into a coffin or their possible future exhumation still remain unclear.

On April 3, 2020 the Ombudsman expressed his opinion on some of the restrictions introduced with the government regulation, including restrictions on the number of people participating in religious worship, and recognized them as unconstitutional. In his view these regulations violate freedom of religion that is guaranteed in Art. 53 sec. 1 of the Constitution

[44] Cf. in Slovakia the binding act on cemeteries is from April 2, 2010, which came into force on January, 2011; Zákon o pohrebníctve, Zákon č. 131/2010 Z. z., (v znení č. 398/2019 Z. z.), accessed August 18, 2021, https://www.zakonypreludi.sk/zz/2010–131. In Germany the binding act is *Gesetz über das Friedhofs- und Bestattungswesen* (Bestattungsgesetz - BestG NRW) of 17 June 2003 with further amendments, accessed August 18, 2021, https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=5320141007092133713.

of the Republic of Poland[45]. Under Art. 233 of the Constitution, freedom of religion is one of the freedoms that may not be restricted in states of emergency[46]. A body of executive power, including the Council of Ministers, may not define the limits of freedom to manifest religion. Moreover, any restriction of the freedom to manifest religion may not be in the form of a prohibition.

Statistical data indicate the excessive mortality of citizens in Poland in 2020 and the first half of 2021. Thousands of people died due to difficulties with the access to doctors and medical services or a proper diagnosis, connected with the introduction of online doctor consultations and limited admissions to hospitals of people suffering from diseases other than COVID-19. The sick in hospitals died without contact with their immediate family and without access to a priest. No requests of the sick or their families as regards the spiritual needs of the dying were fulfilled. Restrictions on the number of participants in burial were also recommended by diocesan bishops and the funeral was often attended only by a small group of the closest family at the cemetery and the funeral mass. Moreover, the pandemic forced a change in the ways of burying the dead and also influenced the existing traditions and customs connected with burial and the cult of memory of the dead.

Translation by dr Anna Bysiecka-Maciaszek

[45] Rzecznik Praw Obywatelskich, "Koronawirus. Rozporządzenie rządu z 31 marca o ograniczeniach poruszania się – krytyczna ocena RPO," published April 3, 2020, accessed August 20, 2021, https://bip.brpo.gov.pl/pl/content/koronawirus-rozporzadzenie-rzadu-z-31-marca-krytyczna-ocena-rpo%C2%A0; Katarzyna Myszona-Kostrzewa, "Wolność uprawiania kultu religijnego w Polsce w czasie zarazy – analiza przypadku," *Studia Iuridica* 86 (2020): 191–194, accessed August 25, 2021, file:///tmp/pdf-01.3001.0014.9748.pdf.

[46] Art. 233.1 of The *Constitution of the Republic of Poland*: "The statue specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in […] Article 53 (conscience and religion) […]," transl. from https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed August 12, 2021. See Jarosław Krzewiecki, "Relacje Kościół-Państwo w Polsce wobec Covid-19," *Kościół i Prawo* 9(22), no. 1 (2020): 83–100.

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MEDIEVAL CANON LAWYERS AND EUROPEAN LEGAL TRADITION. A BRIEF OVERVIEW

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ABSTRACT

The Roman Church was a leading public institution of the Middle Ages and its law, canon law, belonged to most powerful factors of European legal history. Today's lawyers have hardly any awareness of the canonist origins of several current legal institutions. Together with Roman law, canon law constituted the system of "both laws" (*utrumque ius*) which were the only laws acknowledged as "learned" and, consequently, taught at medieval universities. The dualism of secular (*imperium*) and spiritual power (*sacerdotium*), symbolized by so-called two swords doctrine, conferred to the Western legal tradition its balance and stability. We analyze the most important institutional achievements of the medieval canon lawyers: acquisitive prescription, the Roman-canonical procedure, the theory of just war, marriage and family law, freedom of contract, the inheritance under will, juristic personality, some institutions of constitutional law, in particular those based on the concept of representation, and finally commercial law. Last not least, the applicability of canon law defined the territorial extension of medieval and early modern Christian civilization which exceeded by far the borders of the Holy Roman Empire, where Roman law was effective as the law of the ruler. Hence, the first scholar to associate Roman law with (continental) Europe as a relatively homogeneous legal area, Paul Koschaker, committed in his monograph *Europa und das römische Recht*, published in 1947, the error of taking a part for the whole. In fact, Western legal tradition was based, in its entirety, not on Roman, but rather

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on canon law; embracing the common law of England, it represented – to cite Harold Joseph Berman – the first great "transnational legal culture". At the end, some structural features of canon law are discussed, such as the frequent use of soft-law instruments and the respect for tradition, clearly visible in the approach to the problem of codification.

Keywords: canon law sources, two swords doctrine, *utrumque ius*, transnational law, soft law, codifications

1. SOME GENERAL REMARKS

East and West. The border between East and West in the framework of European legal culture or, maybe somewhat more exactly, European legal tradition, is in reality the border between Eastern and Western Christendom. Whereas the political systems of the East, based on the legacy of the Byzantine Empire, relied on a power structure that, even if not entirely monolithic, was at least characterized by the clear supremacy of secular over spiritual power, the political culture of Western Christianity consisted in an equitable dualism of *regnum* (*imperium*) and *sacerdotium*[1]. At the legal level, this dualism found expression, notably, in a twofold system of "both laws" (*utrumque ius*) – Roman and canon[2].

The sharp distinction between religious and political power is a direct consequence of the universalism of Christianity which, like many contemporary religions, transcends the borders of nations and countries[3]. In fact, within the framework of Western civilization, Christianity was the first religion to emancipate itself from the state. Moreover, as already mentioned, this new religion produced its own legal system, which was characterized in the later Roman legislation as *lex christiana* (CTh. 1.27.1) or

[1] Brian Tierney, *Church Law and Constitutional Thought in the Middle Ages* (London: Variorum Reprints, 1979); Marie Theres Fögen, "Das Politische Denken der Byzantiner," in *Pipers Handbuch der politischen Ideen*, vol. II, ed. Iring Fetscher and Herfried Münkler (München, Zürich: Piper Verlag, 1993), 41–85.

[2] Tomasz Giaro, "Europejska geneza polskich zasad i wartości konstytucyjnych," *Państwo Prawne* 3 (2013): 9.

[3] Remigiusz Sobański, *Europa obojga praw* (Katowice: Księgarnia Św. Jacka 2006), 35–38.

lex catholica (CTh. 16.2.11)[4]. During the High Middle Ages, the dualism of *imperium* and *sacerdotium,* separating secular from religious authority, took the personalized form of the contest between Emperor and Pope.

Spiritual and secular matters. In the venerable city of Rome on Christmas Day of the year 800, Pope Leo III crowned as Emperor the King of the Franks and Longobards, Charlemagne, who exercised authority in that capacity as the "administrator of the Roman Empire" (*Romanum gubernans imperium*). The crowning ritual was accomplished on grounds of the so-called transfer of power (*translatio imperii*) – essentially a pure legal fiction which implied the historical continuity of the Empire from antiquity to the Middle Ages. Yet already in Charlemagne's Empire, symbolically "transferred" from the ancient Western Empire of Rome (*Imperium Occidentis*), spiritual matters were precisely delimited from secular ones[5].

In high medieval Poland, this dualism of spiritual and secular jurisdiction is best illustrated by the conflict between King Boleslaw II the Generous (or the Bold), crowned in 1076, and Cracow's Bishop Stanislas of Szczepanów. Their dispute over sexual morality ended with the excommunication of the King by the Bishop who forbade the canons of Cracow Cathedral from praying the Office in case Boleslaw might be in attendance. However, the King's subsequent denunciation of Bishop Stanislas for treason revealed that their conflict, terminated in 1079 with the bishop's murder, exemplified only – as a similar later case of Archbishop Thomas Becket and King Henry II of England – the conflict between secular and canon law[6].

The Church as a leading institution. The current image of canon law corresponds to its reduced condition of a poor remnant from the glorious past. But during late antiquity and Early Middle Ages, the Church of

[4] Wolfgang Kaiser, *Authentizität und Geltung spätantiker Kaisergesetze* (München: C.H. Beck 2007), 321.

[5] Peter Brown, *The Rise of Western Christendom. Triumph and Diversity* (Malden MA, Oxford: Blackwell 1998), 297–298.

[6] Roman Grodecki, *Sprawa św. Stanisława* (Kraków: Wydawnictwo Literackie, 1979); Wacław Uruszczak, "Les répercussions de la mort de Thomas Becket en Pologne," in *Opera Historico-Iuridica Selecta* (Kraków: Jagiellonian University Press, 2017), 53–61.

Rome was an important social institution which preserved ancient heritage, thereby literally saving it from destruction. Furthermore, the medieval Church stood as the leading public institution in Western Europe[7]. Where state courts failed, there was bishop's jurisdiction (*episcopalis audientia*)[8]. However, despite this historic centrality, the achievements of canon law are nowadays so miserably faded that it would be rare for a modern lawyer to have any awareness of the canonist origins of several present-day legal institutions.

According to a renown saying *ecclesia vivit lege Romana*, the universal Roman Church lived during the Middle Ages by Roman law[9]. From this point of view, it seems legitimate to consider canon law as a more or less extensive modification to the ancient Roman law as transmitted to posterity in the 6th century Byzantium by Justinian's compilation. Nevertheless, the social and legal importance of these modifications impels us to view the achievements of medieval canon lawyers in another light, namely as historical foundations of modern law. It was exactly canon law which essentially influenced European legal tradition and, moreover, delimited the borders of the international community of that time[10].

2. SOURCES OF CANON LAW

Decretum Gratiani. Canon law was, however, traditionally considered as somehow inferior to Justinian's compilation which was older and employed numerous intellectually advanced methods of juristic

[7] Brown, *The Rise*, 319–320.

[8] Brown, *The Rise*, 103–104; A.J. Boudewijn Sirks, "The episcopalis audientia in Late Antiquity," *Droit et Cultures* 65 (2013): 79–88; Marzena Wojtczak, "Audientia sacerdotalis? Remarks on the Legal Nature of Dispute Resolution by Ecclesiastics in Late Antiquity," *Zeitschrift für Antikes Christentum* 25.1 (2021): 108–149.

[9] Richard Henry Helmholz, *The Spirit of Classical Canon Law* (Athens GA: The University of Georgia Press, 1996), 17–20; Antoni Dębiński, *Church and Roman Law* (Lublin: Wydawnictwo KUL, 2010), 44–61.

[10] Tomasz Giaro, "Legal Historians and the Eastern Border of Europe," in *Methodenfragen der Romanistik im Wandel*, ed. Tommaso Beggio and Aleksander Grebieniow (Tübingen: Mohr Siebeck, 2019), 147–164.

interpretation, as well as legal arguments and techniques. On the other hand, about 1140, a collection of the rules of Church law appeared[11]. Its author was Gratian, a canon lawyer from Bologna, who was possibly also a Camaldolese monk. The name under which this authoritative collection of canon law material was issued, read *Concordia* (or *Concordantia*) *Discordantium Canonum* which meant "Harmony – or Concordance – of Divergent Norms", but it was better known simply as the *Decretum Gratiani* or the *Decretum*[12].

The sources of the *Decretum* were the Bible, Justinian's compilation, the Church Fathers, papal decretals (*litterae decretales*), as well as the acts and decrees of synods and councils of the Christian Church. The *Decretum* marked the starting point of the development of canon law into a kind of system, even if a very loose one. Its body of doctrine, contained in the first part and divided in 101 *distinctiones*, was similar to Justinian's compilation of Roman law, first of all in view of uncritical and unsystematic arrangement. The second part of the *Decretum* included brief annotations, called *dicta Gratiani*, which resolved 36 fictitious cases (*causae*). The third part, titled *De consecratione*, analyzed, within 5 distinctions, the sacraments[13].

Later sources. After the publication of the *Decretum Gratiani* much papal legislation appeared. In 1230, the *Decretum* was united with the papal decretals which consisted of letters containing pope's decisions addressing particular questions and directed to individuals. In 1234, Pope Gregory IX promulgated a large collection of new papal decretals called – because of its location outside the *Decretum* – *Liber Extra*, edited by the Catalan Dominican friar Raymond of Peñyafort. In 1298, Pope Boniface VIII issued a further collection called, as a new book added to the five

[11] Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 49–51.

[12] Peter Landau, "Gratian and the Decretum Gratiani," in *The History of Medieval Canon Law in the Classical Period*, ed. Wilfried Hartmann and Kenneth Pennington (Washington DC: The Catholic University of America Press, 2008), 22–54; Helmholz, *The Spirit*, 7–10, 178–185.

[13] Eltjo J.H. Schrage, *Utrumque Ius. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts* (Berlin: Duncker & Humblot, 1992), 93–95.

compiled by Raymond, *Liber Sextus*, and in 1314 Pope Clement V began the publication of the so-called (*Decretales*) *Clementinae*[14].

In 1582, after the Council of Trent (1545–1563) which consolidated the Roman Catholic faith against the beliefs of the Protestant Reformation, Pope Gregory XIII disseminated an official critical compilation of all canon law materials ranging from the *Decretum Gratiani* to the later decretals, issued during the 14th and 15th centuries. Since the end of the 16th century, the compilation was styled the *Corpus Iuris Canonici*, a designation mirroring the secular *Corpus Iuris Civilis*. As a matter of fact, the latter, from the time of its publication in 1583 by the French humanist jurist Denis Godefroy (Dionysius Gothofredus) in the first critical complete edition, printed at Geneva, signified for the era the whole body of Roman law[15].

The influence of the *Decretum*. The *Decretum Gratiani* inspired the activity of recording secular local laws (*iura propria*) throughout Europe[16]. Indeed, the conviction that written legislation was possessed of higher dignity generated several collections of customary law in different territories during the 13th century. The most influential in Central Europe was the *Sachsenspiegel*, or the "Mirror of the Saxons", published in 1220–35 by a free German noble Eike of Repgow in Magdeburg[17]. Like the *Decretum*, the *Sachsenspiegel* also ordered the customs observed in Saxony in a purely associative manner, merging norms and institutions of public and private law, criminal law, property and successions, jurisdiction and procedure.

The *Sachsenspiegel* enjoyed a vast influence. Its progeny were the *Deutschenspiegel* of 1274, *Schwabenspiegel* of 1275, and *Frankenspiegel*

[14] Manlio Bellomo, *The Common Legal Past of Europe 1000–1800* (Washington DC: The Catholic University of America Press, 1995), 73–74.

[15] Raoul C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), 64.

[16] Kenneth Pennington, "Western Legal Collections in the Twelfth and Thirteenth Centuries," in *Religious Minorities in Christian, Jewish and Muslim Law (5th-15th Centuries)*, ed. Nora Berend, Youna Hameau-Masset et al. (Tournhout: Brepols Publishers, 2017), 92–98.

[17] Hans Hattenhauer, *Europäische Rechtsgeschichte*, 2nd ed. (Heidelberg: C.F. Müller, 1994), 264–67; Friedrich Ebel and Georg Thielmann, *Rechtsgeschichte. Ein Lehrbuch*, vol. I (Heidelberg: C.F. Müller, 1989), 140–146.

of 1328–38. Moreover, similar collections appeared in Western Europe slightly earlier or later: in England, before 1190 a practical account of the remedies of the King's courts, *Tractatus de legibus et consuetudinibus Angliae* attributed to Ranulf de Glanvill, and before 1268 the similarly titled work labeled Henry de Bracton; in Spain, the collections of local Germanic laws called *Fueros*; and in France, records of local customs, particularly the *Coutumes de Beauvaisis*, drafted by Philippe of Beaumanoir around 1280. The *Sachsenspiegel* influenced medieval Hungarian town law as well[18].

3. THE SYSTEM OF "BOTH LAWS"

Utrumque ius. Canon law was the product of ecclesiastical sources and their interpretation. Gratian's followers, called decretists, started to produce new glosses and collect the existing ones in a way essentially similar to the glossators of Roman law. In the 13th and 14th centuries there emerged a strong competition between commentators on civil (i.e. Roman) and canon law. On the other hand, although the two bodies of law differed, and the work of jurists in each field remained distinct in content and application[19], canon and civil law were so intertwined that neither could be understood without the other: *civilista sine canonista parum valet, canonista sine civilista nihil*. Hence, many lawyers were schooled in both civil and canon law[20].

In principle, civil law was concerned with justice directed towards worldly happiness and prosperity, whereas the remit of canon law was the soul's salvation (*salus animae*). Canon law and civil law interacted

[18] Nadja El Beheiri, "Der Einfluss des Sachsenspiegels auf die Entwicklung des ungarischen Rechts im Mittelalter," in *Sachsen im Spiegel des Rechts. Ius Commune Propriumque*, ed. Adrian Schmidt-Recla et al. (Köln, Weimar, Wien: Böhlau, 2001), 79–93.

[19] James Gordley, *The Jurists. A Critical History* (Oxford: Oxford University Press, 2013), 51–81.

[20] James A. Brundage, *The Medieval Origins of the Legal Profession* (Chicago, London: The University of Chicago Press, 2008), 123–125; Hermann Lange and Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, vol. II. *Die Kommentatoren* (München: C.H. Beck, 2007), 209–215.

constantly following the principle of complementarity: on the one hand, in the absence of canon law norms, ecclesiastical courts were expected to apply civil law, and on the other, secular courts regularly took into consideration general principles of canon law. Moreover, against the protests of the legists (*legistae*), who specialized in the study of secular law, the Roman Church strove to expand the number of cases involving a spiritual element and, therefore, the scope of the ecclesiastical jurisdiction[21].

In fact, several rules belonging to the ordinary private and criminal law were applied also within ecclesiastical jurisdiction. All in all, on subject-matter grounds (*ratione materiae*), canon law governed cases involving a spiritual element (matters spiritual, *causae mere spirituales*), such as marriage, as well as related cases (*causae spiritualibus annexae*), i.e. cases about ecclesiastical property, tithes, wills and contracts made under oath. Finally, the ecclesiastical jurisdiction also encompassed cases whose distinct feature was the personal status (*ratione personae*), in which either clerics were summoned, or disadvantaged persons, such as poor, widows and orphans (*personae miserabiles*), were involved[22].

The two swords doctrine. The complicated relation between secular and spiritual law was frequently manifested in their concurrent applicability. The *Sachsenspiegel* begins with the so-called 'two swords' doctrine, connoting the equivalence of both spiritual and secular power. The doctrine was definitively formulated during the so-called Papal Revolution of the years 1050–1150 in connection with the investiture controversy of that time[23]. The authorship of the doctrine was ascribed to Pope Gelasius I (492–496) who, in a letter to the East Roman Emperor Anastasios I (491–518), was supposed to have invented the dual understanding of powers in the state, imperial and episcopal, without giving precedence to any of them.

During the Papal Revolution these supremacy claims were cleverly renewed by Pope Gregory VII (1073–1085), hearkening back to the biblical metaphor of two swords (Luke 22.38) delivered by God himself to

[21] Bellomo, *The Common Legal Past*, 76–77.

[22] Helmholz, *The Spirit*, 116–144; Maximiliane Kriechbaum, "Die Zuständigkeiten der kirchlichen Gerichte im Spiegel der Legistik," *Glossae* 13 (2016): 361–370.

[23] Helmholz, *The Spirit*, 338–365; Stein, *Roman Law*, 41–43.

the emperor and the pope[24]. The canonist interpretation, integrated into the *Decretum Gratiani* (D. 96, c. 10), dogmatized the natural superiority of the spiritual power, which was the sole universal power, over the temporal. The *Decretum* proceeded on the basis that God had originally delivered both swords to the pope who only subsequently ceded the secular one to the emperor. By contrast, the interpretation promoted by the legists or civilians asserted a relation of equality between the two powers[25].

Acquisitive prescription. This legal institution became the subject of direct contestation since the 1215 constitution of Pope Innocent III introduced the requirement of continuous good faith. Hence, the canonists formulated the principle that "supervening bad faith undermines the prescription" (*mala fides superveniens nocet*), subsequently included in the "Decretals" (X. 2.26.20)[26]. Against the ancient Roman law (*ius civile*), which required good faith exclusively at the moment of the entry in possession and not later (*mala fides superveniens non nocet*), the canonists argued that attaining profit from bad faith is always immoral, since everything not descending from (good) faith is a sin (Romans 14.23 *peccatum*)[27].

The canonists' restrictive reframing of the acquisitive prescription penetrated in due course into secular private law of main continental countries[28]. Their civil codifications of the 19th century are divided on the matter. The Roman rule was adopted by the French *code civil* (art. 2269), the Italian *codice civile* (art. 1161), the Greek *astikos kodix* (art. 1044),

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[24] Randal Lesaffer, *European Legal History. A Cultural and Political Perspective* (Cambridge, New York: Cambridge University Press, 2009), 214–216.

[25] Bellomo, *The Common Legal Past*, 75–76.

[26] Willem Jans Zwalve and Boudejiwin Sirks, *Grundzüge der Europäischen Rechtsgeschichte. Einführung und Sachenrecht* (Wien, Köln, Weimar: Böhlau, 2012), 292, 326.

[27] Emilio Bussi, *La formazione dei dogmi di diritto privato nel diritto comune.* vol. I (Padova: Cedam, 1937), 66–72; Łukasz Korporowicz, "Roman Law Behind the Decrees 39–41 of the Fourth Lateran Council," in *The Fourth Lateran Council and the Development of Canon Law and the ius commune*, ed. Atria A. Larson et al. (Turnhout: Brepols, 2018), 235–250; Andrea Massironi, "Prescrizione e buona fede acquisitiva: la costituzione Quoniam omne (c.41) nell'interpretazione della canonistica medievale," ibid., 251–279.

[28] Olivia F. Robinson, T. David Fergus, and William M. Gordon, *European Legal History*. *Sources and Institutions*, 3rd ed. (London, Edinburgh, Dublin: Butterworths, 2000), 88–89.

and the Dutch *burgerlijk wetboek* (art. 3:118), whereas the canonist one found favour in the Austrian ABGB (§ 1463), the German BGB (§ 937) and the Swiss ZGB (art. 728). Under the Polish civil code of 1964, supervening bad faith precludes the acquisition of movables (art. 174 KC), but in respect of immovables the more lenient Roman rule remains in force (art. 172 KC).

Roman-canonical procedure. The "mother of all procedures" on the continent is a supreme example of synthesis between the two laws[29]. As a result of the Papal Revolution, started in the 11th century, the ecclesiastical jurisdiction expanded; specifically, breach of contract and tort also came to be considered sins and thus constituted effective foundations for actions launched before the ecclesiastical courts. During the 13th century the "learned" Roman-canonical procedure spread in due course across Europe, from ecclesiastical to secular courts. It was first outlined in the work *Speculum iudiciale* ("Mirror of Justice"), penned by the French canonist, Bishop Guillaume Durand (or William *Durantis*) and published in 1271–76.

The Roman-canonical procedure was born in the Church courts and arbitrations led by ecclesiastical authorities. It was based upon the late Roman procedure called *cognitio extra ordinem* from which it borrowed several positive features. Following the Roman *cognitio*, it allowed appeal to a higher court, but on the other hand, the proceedings were private, less formal than the contemporary Germanic tribal procedure, written, and generally required the presence of witnesses and documents. The judge was not a commoner, but from the beginning a professional university-educated episcopal functionary. He both investigated the case and pronounced the sentence. The Roman-canonical procedure was documentary in character.

Accordingly, all procedural stages involving the statements of the parties, their advocates and the judge, complete with the testimony of witnesses, were set down in writing[30], following the maxim "what is not re-

[29] Cornelius H. van Rhee, "English and Continental Civil Procedure. Similarities Today and in the Past," in *Studies in Honour of Wiesław Litewski*, ed. Janusz Sondel et al., vol. II (Kraków: Jagiellonian University Press, 2003), 201–216.

[30] Wiesław Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudiciarii*, vol. I (Kraków: Jagiellonian University Press, 1999), 66–67.

corded in the acts, does not exist in the world" (*quod non est in actis, non est in mundo*)[31]. Furthermore, the Roman-canonical procedure was governed by two allied principles of party control: first, over allegations and proof (*Verhandlungsmaxime*), and second, over the subject matter (*Dispositionsmaxime*). The procedure was formalistic; its "articulated trial" prescribed a fixed order of steps needing to be taken by the parties at every procedural stage in line with the so-called positional procedure (*Positionalverfahren*)[32].

The intricacy of the Roman-canonical procedure with its many interim judgments required the participation of professional judges and advocates proficient in both continental "learned laws". Moreover, from the 16th century on the German local courts followed ever more frequently the practice of "dispatching the records of the case" (*transmissio actorum* or *Aktenversendung*)[33]. The records were sent to the law faculties of universities in order to obtain authoritative expert opinions issued by their committees (*Spruchfakultäten*), which the courts were obliged to follow[34]. The institution of *Aktenversendung* was abolished at the end of the 18th century by the German territorial princes, but at the *Reich*-level only in 1879.

4. ACHIEVEMENTS OF MEDIEVAL CANON LAWYERS

Bellum iustum. Both the conceptual framework and the ideas of power and organization, developed by medieval canon lawyers descended from Roman law, but the contents differed. In the realm of international law, the medieval theory of just war (*bellum iustum*) arose from the reflections of saint Augustine, Gratian, decretists, decretalists and Thomas

[31] Raoul C. van Caenegem, "History of European Civil Procedure," in *International Encyclopedia of Comparative Law*, vol. XVI, ed. Mauro Cappelletti (Tübingen: Mohr Siebeck, The Hague, Paris: Mouton, New York: Oceana, 1973), 18.

[32] Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, trans. Tony Weir (Oxford: Clarendon Press, 1995), 139–140.

[33] Peter Oestmann, "Gemeines Recht und Rechtseinheit," in *Hierarchie, Kooperation und Integration im Europäischen Rechtsraum*, ed. Eva Shumann (Berlin, Boston: Walter de Gruyter, 2015), 25–26.

[34] Raoul C. van Caenegem, *Judges, Legislators, Professors* (Cambridge, New York: Cambridge University Press, 1987), 64–65.

Aquinas[35]. However, its broad formulation, embracing non-Christian peoples as well, was set forth at an early point by the Polish canonist of Cracow University, Paulus Vladimiri (Paweł Włodkowic 1370–1435), who represented Wladyslaw Jagiello, King of Poland and Grand Duke of Lithuania, in his contest against the Teutonic Knights at the Constance Council (1414–1418)[36].

The Poles were accused by the *Ordo Teutonicum* as "traitors" of Christianity who resorted to the military aid of Lithuanians, Samogitians, Tatars of the Golden Horde and other "infidels". The Knights justified their presence and territorial acquisitions in Lithuania and Poland by reference to the privileges of 1226 and 1245, granted to them apparently by Holy Roman Emperor Frederick II Hohenstaufen (1220–1250). In particular, it was alleged by the Knights that the emperor had given to them the lands of the Samogitians (*Žemaitija*), situated northwest of Lithuania: in fact, the conversion to Christianity of these enduringly pagan lands – the last remaining in Europe after Lithuania's conversion in 1387 – occurred only in 1413[37].

However, Paulus Vladimiri replied to the charges of the Teutonic Knights with an argument borrowed directly from ancient Roman law, namely that nobody can dispose of an object he has no right to. Vladimiri, who cited in this context the ancient Roman principle *nemo plus iuris ad alium transferre potest quam ipse haberet*, ridiculed the old emperor, the last from the House of Hohenstaufen, who – *liberalis in re aliena* – purported to donate lands "which never belonged to him". Further, Vladimiri stressed, again invoking ancient Roman law, that the Teutonic Knights could have neither legally acquired these lands by prescription which in

[35] Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975).

[36] Tomasz Giaro, "Europa und das Pandektenrecht," *Rechtshistorisches Journal* 12 (1993): 335–36; Kenneth Pennington, "Between Naturalistic and Positivistic Concepts of Human Rights," in *Vetera novis augere. Studia Wacław Uruszczak*, vol. II (Kraków: Jagiellonian University Press, 2010), 849–50; Wojciech Bańczyk, "The Right of Infidels to Protect their Goods," *Ethical Perspectives* 24.1 (2017): 39–58.

[37] Stephen Christopher Rowell, *Lithuania Ascending. A Pagan Empire within East-Central Europe, 1295–1345* (New York, Melbourne: Cambridge University Press, 1994).

no case applies to goods violently taken, even if their previous holders were pagans[38].

The final argument of Paulus Vladimiri seems to be the most striking: Christian faith never justifies the conversion of infidels by martial means which is expressly forbidden by canon law itself[39]. The infidels enjoy, in fact, the innate right to a peaceful life in their country. Vladimiri presented this stance in two writings: "A Treatise on the Power of the Pope and the Emperor against Infidels" (*Tractatus de potestate papae et imperatoris respectu infidelium*) and "Conclusions" (*Opinio Hostiensis*). In both works Vladimiri had anticipated the original rights of indigenous people which since the late Spanish scholastics were to become classical in the theory of public international law: the rights of just war, resistance, and religious freedom[40].

In this way, Paulus Vladimiri may be considered an early forerunner of the doctrine of "peaceful coexistence" between Christian and pagan countries, officially acknowledged in public international law only by the late scholastic thinkers of the School of Salamanca, such as Dominicans Francisco Vitoria (1483–1546) and Bartolomé de las Casas (1484–1566)[41]. The difference between Poland-Lithuania and the *Ordo Teutonicum* was not definitely resolved at the Constance Council. However, the Council debates brought a considerable success for Paulus Vladimiri whose ideas had to contend with the widespread condemnation of alliances with pagan peoples pursued to obtain military reinforcement against Christian enemies[42].

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[38] Ludwik Ehrlich, ed., *Works of Paul Vladimiri (a selection)*, vol. I (Warszawa: Instytut Wydawniczy Pax, 1968), 57–58, 81–83.

[39] Tomasz Graff, "Servants of the Devil or Protectors of Christianity and Apostles Among Pagans?," *Folia Historica Cracoviensia* 23 (2017): 143–176.

[40] Loïc Chollet,"Paul Vladimir et le Ius Gentium polonais," *Mémoires de la Société pour l'Histoire du Droit et des Institutions des anciens pays bourguignons, comtois et romands* 69 (2012): 43–67.

[41] Charles H. Alexandrowicz, *The Law of Nations in Global History* (Oxford: Oxford University Press, 2017), 51–61; Władysław Czapliński, "A Right of Infidels to Establish Their Own State?," in *Religion and International Law. Living Together*, ed. Robert Uerpmann-Wittzack et al. (Leiden, Boston: Brill Nijhoff, 2018), 37–56.

[42] Tomasz Widlak, "From Vladimiri's Just War to Kelsen's Lawful War. The universality of the bellum justum doctrine," *Studia Philosophiae Christianae* 53 (2017): 77–84.

Marriage and family law. As a sacrament conferring the divine grace on the participants, marriage belonged to the matters spiritual (*causae mere spirituales*), whereas the residual family cases, such as engagement, dowry, and status, were considered mixed cases annexed to the spiritual ones (*causae spiritualibus adnexae* or *mixtae*). In consequence, from the 9th to the 19th centuries, marriage law in Europe was a dominating concern of canon law and, therefore, of the Church of Rome. The Church adopted the Roman principle "mutual consent makes the marriage" (*consensus facit nuptias*), which necessarily required, contrary to the old Germanic guardianship marriage (*Muntehe*), the consent of the woman.

In a clear departure from Roman law, which depended upon the continuous marital consent (*affectio maritalis*), canon law referred exclusively to the moment of the marriage's inception: *matrimonium autem solo consensu contrahitur* (*Liber extra* IV.1.14)[43]. Since the 12th century, the woman's agreement was necessary, equally in the case of the *Muntehe*. Given that Christian marriage became a sacrament, it engendered a prohibition of divorce. In fact, this institution was replaced with a less radical separation "from bed and board", the original concept being "from table and bed" (*a mensa et thoro*). The separation reduced the duties of marriage without, however, dissolving it, and thus remarriage remained excluded[44].

Freedom of contract. Freedom of contract was also developed first and foremost by the canonists and not by the medieval Romanists[45]. As against the classical Roman dichotomy of binding *contractus* and non-actionable agreements (*pacta*), which probably has its origins in the ritualistic nature of archaic Roman contract law, the canon lawyers applied the maxim *pacta sunt servanda* (agreements must be kept) to all pacts. Consequently, they

[43] Stephan Meder, *Rechtsgeschichte. Eine Einführung* (Köln, Weimar, Wien: Böhlau, 2002), 127; Jan Zabłocki, "Consensus facit nuptias," in *Marriage. Ideal – Law – Practice*, ed. Zuzanna Służewska and Jakub Urbanik (Warsaw: The Raphael Taubenschlag Foundation, 2005), 245–247.

[44] James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago, London: The University of Chicago Press, 1987), 370–376, 453–458; Helmholz, *The Spirit*, 240–242.

[45] Piotr Alexandrowicz, *Kanonistyczne uzasadnienie swobody umów w zachodniej tradycji prawnej* (Poznań: Wydawnictwo Naukowe UAM, 2020).

were, without more, to be considered "clothed" (*pacta vestita*). They were described in this way in recognition of the fact that they became actionable and therefore treated on par with traditional contracts attended by a valid ground or basis (*causa*) for their enforcement[46].

In contrast to ancient Roman law, which required the enduring intention to remain married (*affectio maritalis*), medieval canon law had regard only to the consent of the couple in the moment at which the marriage was contracted (*Liber extra* IV.1.14 *solo consensu contrahitur*). Furthermore, the example of Roman marriage law, ruled by the proverb "agreement and not copulation creates marriage" (Ulp. D. 50.17.30 *nuptias non concubitus, sed consensus facit*), engendered the tendency in medieval private law doctrine towards the assumption that all contracts are necessarily grounded on consent. Moreover, according to the maxim *solus consensus obligat*, consent alone was sufficient to conclude a contract.

In this way, during the Late Middle Ages, the old requirement that contracts be matched to a closed list of types, which was the precondition to their enforcement in ancient Roman law, was gradually overcome. Under the influence of, first, canon lawyers and, subsequently, natural law scholars, there emerged and became dominant the diametrically opposed doctrine of the enforceability of all agreements, concluded with or without valid grounds (*causa*), as well as with or without usual form[47]. Within the German *Reich*, the principle "a promise is a promise" (*ein Mann, ein Wort*) supported the canon lawyers in pruning away contract formalities which were previously required in the Frankish Kingdoms.

From out of the paradigm of freedom of contract there had to emerge in medieval legal scholarship, sooner or later, the question of its limits. These were mostly connected with problems of contractual equality and contractual justice[48]. Their fair solution required a moral inquiry into

[46] Łukasz Korporowicz, "Pacta sunt servanda w prawie kanonicznym," in *Pacta sunt servanda: nierealny projekt czy gwarancja ładu społecznego i prawnego?*, ed. Ewa Kozerska et al. (Kraków: AT Wydawnictwo, 2015), 113–125.

[47] Meder, *Rechtsgeschichte*, 131–134; Roberto Fiori, "The Roman Conception of Contract," in *Obligations in Roman Law. Past, Present, and Future*, ed. Tomas A.J. McGinn (Ann Arbor: The University of Michigan Press, 2012), 66.

[48] James Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006), 361–376.

the content of contract agreed upon in order to ensure some kind of material equivalence between performance and counter-performance. This inquiry, started already by the ancient Church Fathers, was furthered by medieval civilians and canonists from the school of commentators who, in early modern times, were followed in this endeavour and eventually substituted by natural-law thinkers.

Obviously we must acknowledge that the traces of the institution of fair price (*iustum pretium*), negatively mirrored by unfair advantage (*laesio enormis*), had backwardly emerged already in the framework of the contract of sale practiced at the threshold of the Later Roman Empire[49]. However, by the lawyers of the 14th and the early 15th century the problem of equality in exchange was considered from a wider perspective than that of the ancient Roman law. In particular, inspired by saint Augustine and the *Decretum* (C. 22, q. 2, c. 14), they extended the requirement of contractual equality to situations in which since the contract's conclusion an unexpected change of circumstances had intervened (*clausula rebus sic stantibus*)[50].

Successions. In the law of successions, the medieval canonists, following the ancient Fathers of the Church, promoted energetically the testamentary inheritance, i.e. inheritance under will, as against inheritance on intestacy. Notably they promoted the institution of the so-called soul-portion (*Seelteil* of the Germanic law) or God's portion[51]. It was the portion amounting to one third of the inheritance free from relatives' rights and properly assigned to the benefit of the Christian Church alone. In this

[49] Aleksander Grebieniow, *Rechtsfolgen der Übervorteilung. Eine rechtsvergleichende Untersuchung der modernen Figuren der laesio enormis* (Zürich, Basel, Genf: Schulthess 2015), 16–20.

[50] Tomasz Giaro, *Excusatio necessitatis nel diritto romano* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 1982), 24–25, 194–195; Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town, Wetton, Johannesburg: Juta & Co., 1990), 579–582; Andreas Thier, "Legal History," in *Unexpected Circumstances in European Contract Law*, ed. Ewoud Hondius and Hans C. Grigoleit (Cambridge: Cambridge University Press, 2011), 15–32.

[51] Eberhard Friedrich Bruck, "Kirchenväter und Seelteil," *Zeitschrift der Savigny-Stiftung Romanistische Abteilung* 72 (1955): 191–210; Harold J. Berman, *Law and Revolution*, vol. I (Cambridge MA, London: Harvard University Press, 1983), 230–231.

respect, the local German laws, first and foremost that of Saxony, offered fierce resistance since the jurymen (*Schöffen*) of the city of Magdeburg even in the 14th century still remained reluctant to accept the will as a proper legal institution.

Although generally the dying meditate upon the soul's salvation more eagerly than the living, the Church was benefitted in like manner by means of a simple transaction *inter vivos*, designated as gift "for the (salvation of the) soul" (*donatio pro anima, pro remedio* or *pro salute animae*)[52]. This institution, known already in the 7th to the 9th centuries, was strictly connected to almsgiving, in line with the supposition that the donated goods did not belong to bishops, but directly to the poor[53]. The extended family grouping offered no noteworthy opposition, since from the 12th century on, its importance declined. The wider kindred, whether related through husband or wife, remained relevant only in cases of transfer of immovables.

Juristic personality. Of special note is the contribution of the medieval canonists to the institution of the legal person. Whereas corporate bodies remained a comparative rarity in lay society, within the structure of the medieval Church they were present at every level. Probably, the origin of these developments relies in the early medieval monastic communities which were considered as self-governing and autonomous. However, the sharp division between the Church and secular rulers introduced by the Papal Revolution, initiated by Pope Gregory VII in the mid-11th century, drove the re-conceptualization of the whole Church as one public "corporation of the faithful" (*universitas fidelium*) or "body of Christians" (*corpus Christianorum*)[54].

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[52] Raoul C. van Caenegem, *An Historical Introduction*, 185; Eliana Magnani, "Le don au Moyen Age. Pratique sociale et représentations. Perspectives de recherche," *Revue du Mauss* 19 (2002): 311–314.

[53] Eliana Magnani, "Almsgiving, Donatio Pro Anima and Eucharistic Offering in the Early Middle Ages," in *Charity and Giving in Monotheistic Religions*, ed. Miriam Frenkel and Yaacov Lev (Berlin, New York: Walter De Gruyter, 2009), 111–121.

[54] James A. Brundage, *Medieval Canon Law* (London, New York: Pearson Education, 1995), 19–21, 99–105.

By 1200, the canon lawyers could already distinguish clearly between natural and juristic persons which meant that in a particular case the holder of an office had to be considered as clearly distinct from the office itself[55]. Concerning the identity of the juristic person, the canonists inclined with Sinibaldo dei Fieschi, later pope Innocent IV, toward the fiction doctrine (*persona ficta*) which in the 19th century came to be partially adopted by the great Romanist Savigny, and subsequently rejected by the Germanist Gierke with his concept of the "real associative person"[56]. During the Late Middle Ages, private corporations endowed with legal personality emerged, having as their object the common exploitation of mines, quarries and mills[57].

Constitutional law. There are also examples of some influence exercised by medieval canon law on contemporary constitutional law. Meditating upon this topic, the today's jurist must take into consideration that the medieval Church of Rome was not a purely religious undertaking in the modern meaning. It was rather an all-embracing institution of social governance assuring the authoritative guidance aimed at rebuilding the whole society in the new, Christian sense. In this framework the Church disposed, from a technical point of view, not only of the monarchic model of papacy powers, but also of an alternative "democratic" model of decision making which at an early stage can be defined as synodal and later as conciliar[58].

Let us consider some aspects of the constitutional law of the medieval Church which did not remain without historical consequences. First,

[55] Ernst H. Kantorowicz, *The King's Two Bodies. A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), passim.

[56] AA. VV., *La persona giuridica collegiale in diritto romano e canonico*, ed. Onorio Bucci and Tarcisio Bertone (Città del Vaticano: Libreria editrice vaticana, 1990); Tomasz Giaro, "Krótka historia istoty osoby prawnej," in *Consul est iuris et patriae defensor* (Warszawa: Ministerstwo Spraw Zagranicznych, 2012), 65–68.

[57] Germain Sicard, *Aux origines des sociétés anonymes. Les moulins de Toulouse au Moyen Age* (Paris: Armand Colin, 1953).

[58] Walter Ullmann, *Law and Politics in the Middle Ages. An Introduction to the Sources of Medieval Political Ideas* (Cambridge: Cambridge University Press 1975), 40–41, 120–121, 151–152.

Bernhard of Pavia (*Papiensis*) in his *Summa de electione* and other canonists analyzed electoral law as early as the late 12th century. In this framework, the requirement of the consent of all interested parties according to the misinterpreted Roman rule "what touches all, must be approved by all" (*Liber sextus* V.13.29 *quod omnes tangit debet ab omnibus approbari*) mutated almost imperceptibly into the principle of majority decision in line with the saying *pars maior pars sanior*[59]. The latter found application in the obligatory two-thirds majority required since 1179 for pope elections[60].

In the second place, legal historians adduce the medieval theory of representation, and specifically its influence on the practices that have come to constitute modern representative government, representative constitutional ordering, and representative democracy[61]. Admittedly, the term *repraesentatio* was known to ancient Roman lawyers, but the legal institution itself was developed only by the medieval canonists. In fact, the Church of Rome even allowed the establishment of a relationship as strictly personal as marriage by representatives (*per procura*). From the 14th century on, corporatism, and particularly conciliarism, flourished within the Church; the next historical steps were constitutionalism and parliamentarism[62].

Finally, in reference to the current public administration system, mention must be made of the medieval institutions of territorial self-governance. These institutions of local democracy were rooted not only in the tradition of the late medieval municipalities (communes) of Central and Northern Italy, but also in the much older ancient tradition of self-organization of the monastic communities and monasteries in the times of the early Christian Church. The Church was traditionally an autonomous social organization which during the High Middle Ages became able to

[59] Wacław Uruszczak, "Reguła quod omnes tangit debet ab omnibus approbari," in id., *Opera*, 485–487.

[60] Peter Landau, "Der Einfluss des kanonischen Rechts auf die europäische Rechtskultur," in *Europäische Rechts- und Verfassungsgeschichte*, ed. Reiner Schulze (Berlin: Duncker & Humblot, 1991), 49–50; Jasmin Hauck, "Quod omnes tangit debet ab omnibus approbari," *Zeitschrift der Savigny-Stiftung Kanonistische Abteilung* 130 (2013): 412–413.

[61] Tierney, *Church Law*; Jan Baszkiewicz, *Myśl polityczna wieków średnich* (Poznań: Wydawnictwo Poznańskie, 2009), 130–137.

[62] Joseph Canning, *A History of Medieval Political Thought 300–1450* (London, New York: Routledge 1996), 174–184; Lesaffer, *European Legal History*, 218–221.

include and apply many elements and mechanisms of corporate self-government. These were then transmitted by clerics as "officials of the law"[63] to lay polities.

5. HISTORICAL SIGNIFICANCE OF MEDIEVAL CANON LAW

The first transnational law. The historical significance of medieval canon law consists not only in its multifarious contributions to modern substantive and procedural law, public and private, but also in its modern form. In what precisely does this modernity of medieval canon law consist? Above all, its modern character is evident in its being the first – to apply a current term – 'trans-national' law in history. Admittedly, the concept of transnational law was first formulated by Philip Caryl Jessup, an American judge of the International Court of Justice in the Hague, in his monograph published in 1956 under the same title[64]. But canon law was a supra-territorial and, in this sense, trans-national system already during the Middle Ages[65].

Usually, the place of honour in this respect is awarded by European legal historians, rather wrongly than rightly, to medieval commercial law recognized as the "law merchant" or, in Latin, the *lex mercatoria* or *ius mercatorum*[66]. As a matter of fact, the medieval canon law was, at least in its intention, neither supranational nor international, but nonetheless it was considered binding by all the faithful without regard to their citizenship, nationality or subjection to any state power. The modern American canon lawyer, Kenneth Pennington, in some circumstances went even so far as to

[63] Brundage, *The Medieval Origins*, 73–74.

[64] Philip Caryl Jessup, *Transnational Law* (New Haven: Yale University Press, 1956).

[65] Tomasz Giaro, "Transnational Law and its Historical Precedents," *Studia Iuridica* 68 (2016): 73–85.

[66] Ralf Michaels, "Response. Legal Medievalism in Lex Mercatoria Scholarship," *Texas Law Review* 90 (2012): 259–268, id., "The True Lex Mercatoria: Law Beyond the State," *Indiana Journal of Global Legal Studies* 14.2 (2007): 452–468.

attribute this transnational quality to the whole body of the European *ius commune*, consisting as *utrumque ius* of both civil and canon law[67].

So, it is clear that the territorial extension of medieval and early modern Christianity (*Respublica Christianorum*) exceeded by far the borders of the Holy Roman Empire, where Roman law was effective as the law of the ruler. Hence, the first scholar to associate Roman law with (merely continental) Europe as a relatively homogeneous legal area, Paul Koschaker, committed in his renown monograph *Europa und das römische Recht*, published in 1947[68], the banal error of taking a part for the whole. In fact, the Western legal tradition was based, in its entirety, not on Roman, but rather on canon law; embracing the common law of England, this tradition represented – to cite Harold Joseph Berman – a "transnational legal culture"[69].

Origins of commercial law. Canon law influenced medieval trade as well. The juristic crux was here the prohibition of lending at interest, censured by the Church as the sin (*peccatum*) of usury. The ban descended from Jewish law with its prescription "lend, expecting nothing back" (Luke 6.35 *mutuum date nihil inde sperantes*), as well as from Roman law which classified the contract of loan (*mutuum*) as necessarily gratuitous. So, in 1179, Pope Alexander III threatened every usurer with excommunication, and in 1215 Innocent III censured the Jews for taking interest[70]. Moreover, in 1236 Gregory IX condemned Roman sea loans as usurious, and Clement V declared in 1311 any secular law allowing usury as void.

However, medieval legal doctrine found always new avenues for evasion, transforming the canon law of usury at the end – this is Harold Joseph Berman's conclusion – in "a system of exceptions to the prohibition against usury"[71]. Some of them were already known to ancient Roman law,

[67] Kenneth Pennington, "Sovereignty and Rights in Medieval and Early Modern Jurisprudence," in *Studies in Honour of Wiesław Litewski*, vol. II, ed. Janusz Sondel et al. (Kraków: Jagiellonian University Press, 2003), 26–27.

[68] Paul Koschaker, *Europa und das römische Recht* (München: Biederstein, 1947).

[69] Berman, *Law and Revolution*, 11.

[70] John Henry A. Munro, "The Medieval Origins of the Financial Revolution," *International History Review* 25 (2003): 507–509.

[71] Berman, *Law and Revolution*, 249.

such as the transfer of a thing with an authorization to sell it and keep the realized price as a loan (*contractus mohatrae*), as well as the giving of a thing in payment (*datio in solutum*)[72], others were vigorously developed by the juristic interpretation only during the High and Late Middle Ages. In this framework emerged most notably the early forms of limited commercial partnership (*commenda*), the bill of exchange (*cambium*), and marine insurance.

The *commenda* contract had its origins – except some Muslim influences – in the Northern Italian city-states of Venice and Genoa during the 12th century. The name *commenda* stems from entrusting, that is the 'commending' (*commendare*), of a certain amount of money to a travelling partner (*commendatarius*) who acted as business agent. From him the sedentary financing partner (*commendator*) demanded not interest, which was forbidden by canon law, but merely the sharing of the profit or loss arising out of this commercial voyage, which was allowed[73]. Subsequently, the shares of the limited commercial partnership became documented and transferable, determining precisely the extent of liability of each partner.

The bill of exchange (*cambium*), "the most important financial innovation of the High Middle Ages"[74], was originally a written informal order directed by a merchant to a foreign business contact, or to the merchant's agent-banker in some other city. The order required that the latter pay a sum of money to another merchant on behalf of the merchant who had given the order[75]. This operation, known in Central-Northern Italy as early as the end of the 12th century, allowed to avoid the cost and risk of money transport. The bill of exchange became an important negotiable instrument, since in calculating the exchange rate a certain surcharge was tolerated by canon law as a kind of premium for the exchange effort[76].

[72] Zimmermann, *The Law of Obligations*, 162–163, 170–172, 753–754.

[73] John H. Pryor, "The Origins of the Commenda Contract," *Speculum* 52 (1977): 5–37.

[74] Edwin S. Hunt and James M. Murray, *A History of Business in Medieval Europe 1200–1550* (Cambridge: Cambridge University Press, 1999), 65.

[75] Abbot Payson Usher, "The Origin of the Bill of Exchange," *Journal of Political Economy* 22 (1914): 566–576.

[76] Jared Rubin, "Bills of Exchange, Interest Bans, and Impersonal Exchange in Islam and Christianity," *Explorations in Economic History* 47 (2010): 215–221.

Finally, we must take into consideration the sea or marine insurance. This "elder brother to all other insurance"[77] appeared in the late 13th and early 14th centuries in several republican city-states of Northern Italy, allowing the insurer to collect interest in the guise of a premium interpreted as counter-performance for the insurer's assumption of risk[78]. Insofar as sea insurance was functionally a successor to the forbidden ancient Roman sea loan, called *fenus nauticum* or *pecunia traiecticia*, the latter institution came to disappear from the global market of financial instruments, albeit this occurred on account of competing commercial developments which took the form of more sophisticated contracts of marine insurance.

Aspects of soft law. Medieval canon law was not only the first transnational law in legal history; it was also the first legal system to make extensive use of many instruments of legal communication which today would be considered typical elements of so-called soft law, rather than classic commands in imperative form. Most legal encyclopedias and dictionaries state and most of their readers gladly believe that soft law was invented by the British jurist Lord McNair sometime in the 1970s[79]. However, a species of law consisting of numerous non-mandatory normative speech acts, such as recommendations, admonitions, exhortations, and counsels of advice (*consilia*), was already manifest in the canon law of medieval times[80].

Although this law, being a legal system of transnational type, could not make a direct use of the coercive apparatus of a "national" state *avant la lettre* or of other kind of polity, we must take into consideration the whole richness of legal instruments and factual remedies being at the disposal of

[77] C. Bradford Mitchell, *A Premium on Progress. An Outline History of the American Marine Insurance Market* (New York: The Newcomen Society in North America, 1970), 9.

[78] Florence Edler de Roover, "Early Examples of Marine Insurance," *The Journal of Economic History* 5 (1945): 172–200; Sebastian Lohsse, "Vom Seedarlehen zur Versicherung in der mittelalterlichen Rechtswissensachaft," *Zeitschrift der Savigny-Stiftung Romanistische Abteilung* 133 (2016): 372–399.

[79] Tomasz Giaro, "Dal soft law moderno al soft law antico," in *Soft law e hard law nelle società postmoderne*, ed. Alessandro Somma (Torino: Giappichelli, 2009), 83–84.

[80] Norberto Bobbio, "Comandi e consigli," in *Raccolta di scritti in onore di Arturo Carlo Jemolo*, vol. IV (Milano: Giuffrè, 1963), 75.

the Church. This is exactly what is alluded to by the famous paradoxical dictum of an outstanding British legal historian, Frederic William Maitland: "the medieval Church was a State"[81]. Nevertheless, in spite of their frequently optional nature, the rules of canon law, equal for all subjects, were followed – and are followed to this day – because Christians accepted the authority of the religious office from which they emanated.

Modern codifications. Canon law could not avoid the problems inherent in the modern phenomenon of codification. So, the old compilation of ancient and medieval canonical sources, the *Corpus Iuris Canonici* of 1582, remained in force only until 1917, when it was replaced by the *Codex Iuris Canonici* of Pope Benedict XV. Yet, during the pontificate of John Paul II in the wake of the Second Vatican Council (1962–65), a new *codex,* which is still in force, was promulgated in 1983. Interestingly, as far as lending at interest is concerned, the former code allowed it, excluding only an "immoderate" rate of interest (can. 1543), but in the latter code the medieval anti-usury stance of the Church is not even mentioned[82].

At the same time, even if each codification adopted had to be regarded as containing the new law presently in force, the canonists cultivated the virtue of continuity, which is so characteristic of their legal thinking[83]. In marked contrast to the schemes of continental private law, whose successive codifications purport to present several novelties and, first and foremost, a new systematization of the matter, canon law disavows such intentions. Usually, old sources of canon law remain in force despite the advent of new codifications. Thus, the code of 1917 provided explicitly (can. 6, n. 2) that the canons containing the old law (*ius vetus*) should continue to be interpreted according to their former way of interpretation[84].

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[81] Frederic William Maitland, *Roman Canon Law in the Church of England* (London: Methuen, 1898), 100; cf. Giaro, *Transnational Law*, 77.

[82] Angelo Riccio, *Il contratto usurario nel diritto civile* (Padova: Cedam, 2002), 13–14.

[83] Paolo Grossi, *A History of European Law* (Chichester: Wiley-Blackwell, 2010), 135–137.

[84] Franciszek Longchamps de Berier, "Wobec dekodyfikacji: tradycja romanistyczna i prawo kanoniczne," *Acta Universitatis Wratislawiensis. Prawo* 305 (2008): 183–187.

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THE CONTROL OF THE CONSTITUTIONALITY OF EUROPEAN UNION LAW BY MEANS OF CONSTITUTIONAL COMPLAINTS

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ABSTRACT

The subject of this article is the institution of the constitutional complaint, which is analysed in connection with European integration. It should be noted that Poland's membership of the European Union has had a great influence, not only on the system of national law, but also on the jurisprudence of the Polish Constitutional Tribunal; therefore considerations are carried out here mainly in relation to the Constitutional Tribunal. In examining the issue of the constitutional complaint, the following assumptions may be stated. First, the constitutional-complaint procedure, is in fact, the examination of the compliance of legal norms with the Constitution, any deviation being related to the entities initiating proceedings before the Constitutional Tribunal, Article 191(1)(6), of the Constitution[1], and to the material scope of the complaint, as determined in Article 79 of the Constitution. Second, there is no doubt that the constitutional complaint can become an important legal instrument shaping the jurisprudence of the Polish Constitutional Tribunal, which has to face constitutional issues related to European integration[2]. Following the example of the practice of other Member States,

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[1] The Constitution of the Republic of Poland, Journal of 2 April 1997, Journal of Law 1997, No. 78, item 483, as amended.

[2] The literature on the subject indicates that the membership of nation States of the European Union obliges constitutional courts to act in the field of integration. Their

e.g. Germany, the Tribunal may use the institution of the constitutional complaint as a means of controlling the compliance of the secondary law of the European Union with the Constitution of the Republic of Poland.

Keywords: Constitutional Tribunal, constitution, constitutional complaint, legal system

1. INTRODUCTION

The constitutional complaint can be defined as a system serving the entities required in the Constitution to protect, by way of specific proceedings before a constitutional court, their rights contained in the Constitution in the event of their infringement by organs of public authority[3]. Depending on the specific model of the constitutional complaint adopted in a given nation State, broad and narrow models are distinguished. The narrow model of the constitutional complaint refers to its material scope, and may concern the legal norm on the basis of which the final decision or judicial decision concerning an individual has been issued. The second model, which adopts a wide material scope of the constitutional complaint, allows complaints both against acts of the application of the law (court decisions, administrative decisions), and against normative acts[4].

task is to set the boundaries and conditions for the integration process. Jurisprudence in this area is referred to as *acquis constitutionnel*. Cf. Aleksandra Kustra, "Model skargi konstytucyjnej jako czynnik kształtujący orzecznictwo sądów konstytucyjnych w sprawach związanych z członkostwem państwa w Unii Europejskiej," *Państwo i Prawo*, no. 3 (2015): 35.

[3] Bogusław Banaszak, *Prawo konstytucyjne* (Warsaw: C.H. Beck, 2008), 493.

[4] The division into broad and narrow models of complaints is quite general, as there are certain differences in individual States, e.g. a narrow material scope can concern acts of the application of the law, and this is characteristic of the Czech Republic, Slovakia, and Slovenia; complaints directed exclusively against normative acts occur in Belgium, Latvia, Poland, and Hungary. A broad material scope of the constitutional complaint allowing complaints against acts of application of the law (court decisions, administrative decisions), as well as normative acts, is characteristic of Austria, Spain, and Germany. Cf. Aleksandra Kustra, *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska. Studio wpływu* (Toruń: Wydawnictwo UMK, 2015), 153 et seq.; The widest-possible material scope of the complaint, also allowing complaints about the inaction of State authorities,

The Polish model of the constitutional complaint, due to its narrow material scope, allows the Constitutional Tribunal (hereinafter the CT) only to examine the compliance of normative acts with the Constitution[5]. The jurisprudence of the Federal Constitutional Court (hereinafter the FCC) is an example of the implementation of the constitutional complaint in a very-broad sense, as can be seen in the judgment made by the FCC in the context of a constitutional complaint concerning the EU Treaties, the Maastricht Treaty[6], or the Lisbon Treaty[7]. It is stressed that the FCC has opened the way for individuals to challenge by means of constitutional complaint the provisions of subsequent treaties and agreements concluded within the European Union (hereinafter the UE)[8]. The jurisprudence of the FCC confirms the strong position of the constitutional complaint as a legal remedy within the German legal system, in which there are also attempts to use the constitutional complaint to block political decisions related to participation in the integration process[9]. The Polish CT cannot boast of as extensive a jurisprudence issued in the mode of the constitutional complaint as its German counterpart, especially in European cases. However, the judgment of 16 November 2011, SK 45/09[10], shows how European integration also influences the jurisprudence of the Polish CT. The institution of the constitutional complaint has enabled

is in force in Germany. Cf. Marta Derlatka, *Skarga konstytucyjna w Niemczech* (Warsaw: Wydawnictwo Sejmowe, 2009).

[5] Cf. Anna Łabno, "Skarga konstytucyjna jako środek ochrony praw człowieka. Przyczynek do dyskusji," *Przegląd Prawa Konstytucyjnego*, no. 4 (2012): 41.

[6] Federal Constitutional Court, Judgment of 12 October 1993, 2 BvR 1234, 2 BvR 2159/92; Rainer Arnold, "Orzecznictwo Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej," *Studia Europejskie*, no. 1 (1999): 1.

[7] Federal Constitutional Court, Judgment of June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.

[8] Magdalena Bainczyk, *Polski i Niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej* (Wrocław: Wydawnictwo Uniwersytet Wrocławski, 2017), 114.

[9] Aleksandra Kustra, *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska*, 159 and 175. The FCC responsibilities listed here should be regarded only as examples, and not as an exhaustive list.

[10] Polish Constitutional Tribunal, Judgment of 16 November 2011, Ref. No. SK 45/09, Journal of Laws 2011, item 97.

the Tribunal, with the appropriate interpretation of constitutional provisions, to examine the compliance of an act of secondary EU law with the Polish Constitution.

2. THE POSITION OF SECONDARY EU LAW IN THE POLISH LEGAL SYSTEM

The normative acts which make up the Polish legal system, although they have the same binding force, differ in their legal force, subject matter, and mode of their enactment[11]. The Constitution of the Republic of Poland designates a catalogue of such acts in Chapter III, entitled *Sources of Law*[12]. This catalogue has a hierarchical structure, at the top of which is the Constitution, followed by acts, ratified international agreements, regulations, acts of local law, and law enacted by international organisations, which are applied directly, and takes precedence in the case of conflicts with other acts (Article 91(3) of the Constitution).

Thus, if the Polish legal system consists of normative acts, then acts of secondary law of the EU are part of this system[13]. The Polish legal system has been to a certain extent harmonised with the provisions of EU law. However, this has not contributed to avoiding conflicts between these systems of law. Therefore, the question arises as to which body is authorised to resolve the conflict which has occurred. It is obvious that the control of the compliance of a norm of national law with regard to its compliance with the Constitution is carried out by the national constitutional court. On the other hand, the control of such a norm with regard to its compliance with EU law belongs indirectly to the Court of Justice

[11] Grzegorz Leopold Seidler, Henryk Groszyk, and Antoni Pieniążek, *Wprowadzenie do nauki o państwie i prawie* (Lublin: Wydawnictwo UMCS, 2009), 164.

[12] Sources of law also include Articles 235 and 234 of the Constitution of the Republic of Poland.

[13] It is rather unanimously recognised in doctrine that regulations, directives and decisions are normative acts. Cf. Anna Chmielarz, "Kontrola konstytucyjności prawa pochodnego Unii Europejskiej," *Przegląd Sejmowy*, no. 4 (2012): 16–18; Bartłomiej Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego* (Kraków: Zakamycze, 2004), 37.

of the EU (hereinafter the CJEU), (which issues binding interpretations of EU law), and directly to the national Court, which decides whether the result of the interpretation of EU law as indicated by the CJ accepts the pro-EU interpretation of a provision of national law, or whether it requires the national court to refuse to apply the national provision, and to rule on the basis of the EU-legal norm[14].

The Constitution of the Republic of Poland does not grant the CT the right to control the constitutionality of secondary law. However, in its judgment of 11 May 2005, the Tribunal indicated that neither Article 90(1) nor Article 91(3) could constitute a basis for delegating to an international organisation (or its body) the authority to enact legal acts, or to make decisions which would be contrary to the Constitution of the Republic of Poland (para. 4.5 of the justification)[15].

While the transfer of authority on the basis of Article 90 of the Constitution, and the possibility of control by the CT of such a transfer, do not raise any doubts, the issue of Article 91(3) is not entirely clear. Could it be that the Tribunal is giving itself a green light to control the constitutionality of secondary EU law? The Constitution of the Republic of Poland does not allow the CT to control secondary law in any place. Moreover, allowing the ongoing examination of acts of secondary EU law by the Tribunal would create an excessive risk of conflicts with the CJEU[16]. It should be added that treaties grant Member States certain legal instruments to

[14] Aleksandra Kustra, "Odroczenie przez TK utraty mocy obowiązującej przepisu niezgodnego z prawem UE – glosa do wyroku TS z 19.11.2009 r. w sprawie Krzysztof Filipiak przeciwko Dyrektor Izby Skarbowej w Poznaniu, C-314/08," *Europejski Przegląd Sądowy*, no. 6 (2012): 38.

[15] Polish Constitutional Tribunal, Judgment of 11 May 2005, Ref. No. K 18/04, Journal of Laws 2005, item 49.

[16] Stanisław Biernat, "Glosa nr 2 do wyroku TK 11.05.2005," *Kwartalnik Prawa Publicznego*, no. 4 (2005): 193; Likewise Jan Barcz, "Glosa nr 1, Glosy do wyroku Trybunału Konstytucyjnego z 11.5.2005 r. (zgodność Traktatu akcesyjnego z Konstytucją RP) K 18/04," *Kwartalnik Prawa Publicznego*, no. 4 (2005): 176; Anna Wyrozumska, "Glosa nr 4. Umowy międzynarodowe w wyrokach Trybunału Konstytucyjnego dotyczących Traktatu o przystąpieniu do UE oraz ENA," *Kwartalnik Prawa Publicznego*, no. 4 (2005): 231. In a different view, Władysław Czapliński argues that for the purposes of the law of treaties, the concept of an international agreement extends to all documents related to that agreement, and thus there are no obstacles to interpreting the provision of

control whether the adopted acts of secondary legislation fall within the authority granted to the EU.

3. THE CONTROL OF SECONDARY EU LAW BY THE CONSTITUTIONAL TRIBUNAL

At the outset of considerations, the question needs to be posed as to whether the legal acts established by EU institutions may be subject to control in the mode of constitutional complaints set out in Article 79 (1) of the Constitution. It follows from the systematic structure of the Constitution that the subject matter of the jurisdiction of the Tribunal has been specified in two articles of the Constitution, i.e. Articles 79 and 188 (1–3). Interesting reflections on the correlation of these Articles were made by the CT in the judgment of 16 November 2011, SK 45/09. The aim of the examination conducted by the CT was to determine whether the subject of constitutional complaints may only be the acts enumerated in Article 188 (1–3) of the Constitution, or other normative acts referred to in Article 79 of the Constitution (para. 1.2 of the justification). Therefore, the question arises as to whether Article 188 (1–3) of the Constitution exhaustively defines the catalogue of acts which can be controlled by the Tribunal. Or does it not, and Article 79 of the Constitution lists a separate authority of the Tribunal?

The Tribunal, in the indicated judgment of 16 November 2011, stated *"(...) the material scope of normative acts, which can be subjected to control of compliance with the Constitution in proceedings initiated as a result of filing a constitutional complaint has been defined in Article 79 (1) of the Constitution in a manner autonomous and independent from Article 188 (1–3), because the examination of constitutional complaints constitutes a separate type of proceedings".* (para. 1.2 of the justification). Quoting one of the representatives of the doctrine, *"if it were meant*

Article 188 of the Constitution extensively, "Glosa nr 3 do wyroku TK z dnia 11 maja 2005 r., K 18/04," *Kwartalnik Prawa Publicznego*, no. 4 (2005): 211.

to be otherwise, Article 188 (5) of the Constitution would be completely redundant"[17].

The Constitution in Article 188 (1–3) enumerates the types of normative acts subject to the control of the Tribunal in the mode of ex-post control. None of the enumerated acts may be included in the category of secondary EU law, as they are not acts enacted by the organs of the Republic of Poland[18]. Part of the doctrine rightly holds *"the way the cognition of the Constitutional Tribunal is determined* a limine *does not exclude from its scope the acts of secondary EU law, as long as the examination of constitutionality would proceed by way of constitutional complaint. Given the fact that Article 188(5) refers to Article 79(1) of the Constitution, the notion of 'another normative act' used in the latter provision could have an autonomous meaning in relation to the normative acts enumerated in items 1–3 of this Article (188)"*[19]. There is also no shortage of negative voices according to which acts of secondary EU law are not listed among the legal acts subject to the control of the CT (Article 188 of the Constitution)[20].

[17] Marek Zubik, ""Akt normatywny" jako przedmiot kontroli Trybunału Konstytucyjnego," *Gdańskie Studia Prawnicze* 31 (2014): 734.

[18] Marzena Laskowska, "Dopuszczalność kontroli zgodności aktów pochodnego prawa UE z Konstytucją RP. W przeddzień rozstrzygnięcia Trybunału Konstytucyjnego," *Studia Prawnicze KUL*, no. 2 (2011): 61.

[19] After Marzena Laskowska, "Dopuszczalność kontroli zgodności aktów pochodnego prawa UE z Konstytucją RP. W przeddzień rozstrzygnięcia Trybunału Konstytucyjnego," 61; Krzysztof Wojtyczek, *Przekazanie kompetencji państwa organizacjom międzynarodowym* (Cracow: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007), 326–327. As Marcin Wiącek rightly notes, constitutional complaints and legal questions are means primarily serving the protection of an individual against the infringement of his or her freedoms or rights by means of an individual decision based on an unconstitutional legal norm. From this point of view, it should not matter what source the legal norm interfering with the status of an individual derives from, "Glosa do postanowienia TK z dnia 17 grudnia 2009 r., U 6/08," *Państwo i Prawo*, no. 6 (2010), www.lex.pl, accessed January 21, 2021.

[20] Cf. Kazimierz Działocha, "Uwagi do art. 91 Konstytucji RP," in *Konstytucja RP. Komentarz*, Vol. III (Warsaw: Wydawnictwo Sejmowe, 2003), 8; Jan Galster and Agnieszka Knade-Plaskacz, "Glosa do wyroku Trybunału Konstytucyjnego z dnia 16 listopada 2011 r. (sygn. Akt SK 45/09)," *Przegląd Sejmowy*, no. 6 (2012): 133.

These acts are not listed in Article 87 of the Constitution, and are not normative acts[21].

The author is of the opinion that the constitutional complaint has been detailed in a separate article of the Constitution for a reason, and in doing so it determined in an autonomous and exhaustive manner, the scope of the provisions subject to appeal. The Constitutional Tribunal, in its verdict of 11 May 2005, clearly emphasised *"the norms of the Constitution in the field of individual rights and freedoms set a minimum and impassable threshold, which may not be lowered or questioned as a result of the introduction of Community regulations"*. It is clear that in the system of domestic law no normative acts should be in force which are not subject to the cognition of the CT.

4. THE SUBJECTS OF CONSTITUTIONAL COMPLAINTS

The Constitution indicates that constitutional complaints may be based on a statute or another normative act, on the basis of which a court or a public-administration body has made a final decision about freedoms or rights, or about the obligations of the complainant as set out in the Constitution. The article in question refers to a normative act, that is an act including in its content norms of an abstract and general nature. It seems that the subject of control in the mode of constitutional complaints should be understood more broadly than the "provision of law" as

[21] After Małgorzata Masternak – Kubiak, "Dyskusja," in *Stosowanie prawa międzynarodowego i wspólnotowego w wewnętrznym porządku prawnym Francji i Polski*, ed. Mirosław Granat (Warsaw: Wydawnictwo Sejmowe, 2007), 101; Jan Barcz goes on to say, that, alternatively, *"one could only consider filing a constitutional complaint against an Act by virtue of which consent to ratification of an international agreement by the President of the Republic of Poland is expressed. This route would, however, be closed, if the consent to ratify an international agreement was expressed – as in the case of the Treaty of Accession – by virtue of a decision of the sovereign expressed in a nationwide referendum"*, "Glosa nr 1, Glosy do wyroku Trybunału Konstytucyjnego z 11.5.2005 r. (zgodność Traktatu akcesyjnego z Konstytucją RP) K 18/04," 181.

contained in Article 188 (1–3) of the Constitution[22]. Such a thesis is justified by the specific nature of constitutional complaint, the aim of which is the protection of individual rights and freedoms. This was stressed by the CT in its decision of 21 September 2006, SK 10/06, in which it described this constitutional procedure as the last chance to assert the rights and freedoms infringed by the application of the provision challenged in the complaint[23].

In the commented-on judgment of 16 November 2011, the Tribunal recognised that the regulation of the European Union was "another normative act" within the meaning of Article 79(1) of the Constitution, and thus could constitutes the subject of a constitutional complaint. In deciding on the question of the "normative act", the Tribunal indicated that such an act in the understanding of Article 79(1) of the Constitution might not only be a normative act issued by one of the Polish bodies, but also – on meeting further conditions – an act issued by an organ of an international organisation of which Poland is a member. This applies first and foremost to acts which belong to the law of the European Union, enacted by the institutions of this organisation. These acts, as the Tribunal points out, are part of the legal order in force in Poland, and determine the legal situation of an individual (paragraph 1.3 of the justification).

The Tribunal treats EU regulations as normative acts, on the basis of which a court or public-administration body makes a final decision on freedoms or rights, or on the obligations of individuals, as set out in the Constitution.

5. THE EFFECTS OF JUDGMENTS BY THE CONSTITUTIONAL TRIBUNAL

The Constitution of the Republic of Poland only applies to acts of Polish law in the case in which the effect of declaring an act unconstitutional

[22] After Marek Safjan and Leszek Bosek, eds., *Konstytucja RP*. Vol. 1 (Warsaw: C.H. Beck, 2016), 1833; Marek Zubik, ""Akt normatywny" jako przedmiot kontroli Trybunału Konstytucyjnego," 734.

[23] Polish Constitutional Tribunal, Judgment of 21 September 2006, Ref. No. SK 10/06, Journal of Laws 2006, item 117.

is the loss of the binding force of the normative act[24]. The CT, in a decision of 21 March 2000 (K 4/99)[25], stated that the direct effect of a judgment of the CT on the inconsistency of a normative act (specific provisions or norms) with the Constitution was the loss of the binding force of provisions inconsistent with the Constitution on the date of entry into force of the Tribunal's judgment, or on another date specified by the Tribunal. The normative act or its part (specifically designated provisions), deemed by the Tribunal to be inconsistent with the Constitution, are removed from the legal order, and cease to be an element thereof. The judgment by the CT on the inconsistency of a normative act, or part thereof, with the Constitution, results in the absolute, unconditional, and direct abolition (annulment) of the provisions (norms) indicated therein (item 3 of the justification). In the case of acts of EU law, such an effect would be impossible, as the binding force of such acts is not determined by the Polish authorities. The only consequence of the CT judgment would be to deprive acts of secondary EU law of the applicability by the Polish authorities, and of having legal effect in Poland. The Tribunal points out that as a result of the judgment, such a state of affairs is unacceptable, and could become the basis for instituting proceedings against Poland before the CJEU (SK 45/09). The Tribunal emphasises that the ruling on the inconsistency of the EU law with the Constitution should be of an *ultima ratio* nature, and should occur only when all other ways of resolving the conflict with the norms belonging to the legal order of the EU have failed (e.g. making changes to the Constitution[26], influencing changes to EU regulations, making the decision to withdraw from the EU). However,

[24] Article 190 (1) and (3) of the Constitution.

[25] Polish Constitutional Tribunal, Judgment of 21 March 2000, Ref. No. K 4/99, Journal of Laws 2000, item 65.

[26] As the authors of the gloss to the judgment of the Constitutional Tribunal rightly point out, a solution in the form of amending the Constitution of the Republic of Poland should be excluded, since the Constitutional Tribunal decided on the unconstitutionality of a given act of secondary law due to the breach of constitutional rights and freedoms, and not in order to lower the standard of protection of these rights by amending the Constitution of the Republic of Poland, Piotr Bogdanowicz and Paweł Marcisz, "Szukając granic kontroli. Glosa do wyroku TK z dnia 16 listopada 2011 r., SK 45/09," *Europejski Przegląd Sądowy*, no. 9 (2012), www.lex.pl, accessed January 21, 2021.

should the Tribunal rule that certain norms of secondary Union law are inconsistent with the Constitution, action to remedy the situation should be taken immediately. The Tribunal indicates that the effects of such a ruling should be postponed, pursuant to Article 190(3) of the Constitution[27]. The Tribunal, referring to the judgment of 27 April 2005 (P 1/05)[28] concerning the European Arrest Warrant, justified this by the fact that in that judgment it postponed the loss of binding force of the act implementing EU law, referring in particular to the constitutional obligation of Poland to comply with international law binding it, as well as the community of systemic principles binding Poland and the other EU Member States, ensuring the proper administration of justice (para. 2.7 of the justification).

It needs to be emphasised, however, that in the referenced judgment of 27 April 2005 the period of postponement was intended for the Polish legislator (it concerned the implementing act), in order to amend the Constitution of the Republic of Poland, and remove the state of inconsistency with EU law[29]. In the judgment of 16 November 2011 the situation arose in which the issue was the inconsistency of certain norms of secondary EU law with the Constitution, i.e. the appropriate solution would be to undertake actions aimed at introducing changes to EU regulations, i.e. actions whose effectiveness depends on the will of entities other than the Polish State[30].

At this point the following question seems appropriate. What about an act of secondary legislation after the ineffective expiry of the period for which the effects of the Tribunal's decision had been postponed?

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[27] In the doctrine it is noted *"since in Article 190(3) of the Constitution the legislator* expressis verbis *determined that the effect of the entry into force of a judgment of the CT is the loss of the binding force of a normative act, it is debatable whether the Tribunal is entitled to give this notion a different meaning in relation to a given category of acts".* Tomasz Jaroszyński, "Glosa do wyroku TK z dnia 16 listopada 2011 r., SK 45/09. Dopuszczalność kontroli zgodności unijnego prawa pochodnego z Konstytucją," *Państwo i Prawo*, no. 9 (2012): 9, www.lex.pl, accessed January 21, 2021.

[28] Polish Constitutional Tribunal, Judgment of 27 April 2005, Ref. No. P 1/05, Journal of Laws 2005, item 42.

[29] After Piotr Bogdanowicz and Paweł Marcisz, "Szukając granic kontroli. Glosa do wyroku TK z dnia 16 listopada 2011 r., SK 45/09".

[30] *Ibidem*.

According to the position of the CT, an unconstitutional act cannot be applied by the Polish authorities and has no legal effect in Poland. The consequences of such an action could be detrimental to the Polish State, as the Treaty on the Functioning of the EU[31] provides the Commission with certain legal instruments it may use if Poland breaches its obligations under treaties[32].

The obligation resting with the Polish State to comply with EU law is evident. However, the superior legal force of the Polish Constitution in the system of domestic law should also be borne in mind. The CT emphasised that on the basis of Article 8, the Constitution is the supreme law of the Republic of Poland, and therefore the Tribunal is obliged to understand its position in such a way that in matters of fundamental, systemic, significance it retains the position of the "court of last resort" with regard to the Polish Constitution. The CT draws attention to the need to distinguish between, on the one hand, the examination of the compliance of acts of secondary EU law with the treaties, that is with the primary law of the Union, and on the other hand, the examination of their compliance with the Constitution. This is why the Tribunal pronounced that the body which ultimately decides on the compliance of EU regulations with the treaties is the Court of Justice of the EU, and on the compliance with the Constitution it is the Constitutional Tribunal (SK 45/09, para. 2.3 of the justification). Excluding the situation of competition between these two bodies, the CT noted that it was not only a matter of eliminating the phenomenon of duplication between the two courts or dualism in adjudicating on the same legal problems, but also dysfunctionality in relations between the EU and the Polish legal order (SK 45/09, para. 2.3 of the justification).

It follows from the statements of the CT that the consequence of inconsistency of a norm of EU law with the Polish Constitution may not mean the derogation of this act, but only the impossibility to apply it in internal law. It should be stressed, however, that such a judgment will not

[31] The Treaty on the Funcioning of the European Union, OJ EU 202/47 of 7 June 2016 (consolidated version, hereinafter: TFEU).

[32] Art. 258 of the TFEU.

have a direct effect on external relations[33]. A rather-general statement of the CT regarding the consequences of its verdict stating the unconstitutionality of an act of secondary EU law suggests that an amendment to the Constitution of the Republic of Poland would be the appropriate solution. It seems that the considerations of the radical consequences of a CT judgment are only of a theoretical nature.

6. CONCLUSIONS

The CT has for the first time exercised control over acts of secondary law in the mode of a specific regulation. At the same time, it chose not to enter into dialogue with the CJEU. In the case in question, it concluded that there was no need to submit to the CJEU a request for a preliminary ruling, as the CT had no doubts as to the compatibility of the contested regulation with primary EU law.

Ultimately, the Tribunal stated that the material scope of normative acts, which can be subjected to the control of compliance with the Constitution in the proceedings initiated as a result of filing a constitutional complaint, had been defined in Article 79 (1) of the Constitution in a manner autonomous and independent from Article 188 (1–3). The author, unlike the CT, is of the opinion that the examination of constitutional complaints does not constitute a new type of proceeding, which emanates, in the opinion of the Tribunal, from the systematic structure of the Constitution, from which it interprets several types of proceedings (before the Tribunal), and, in one of them, unlike the others, it defined the proceeding in which constitutional complaints were to be examined. One cannot agree with the standpoint of the CT here; a complaint is aimed at protecting the freedoms and rights of the individual, which it does by examining the compliance of a normative act with the Constitution. This means the examination of the constitutionality of the act, which is no different from the responsibility of the Tribunal as indicated

[33] Aleksandra Syryt, *Oddziaływanie prawa międzynarodowego na sądownictwo konstytucyjne w Polsce-perspektywa konstytucyjna* (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 162.

in Article 188 (1–3) of the Constitution. The reference to Article 79 in Article 188 (5) of the Constitution confirms the authority of the CT to adjudicate in the mode of the constitutional complaint, and at the same time is an argument confirming the distinctness of its material scope. Article 191 (1) (6) of the Constitution, in conjunction with Article 79, defines the circle of entities which may initiate proceedings in this matter.

It is a very good thing that the CT was able to examine the constitutionality of an act of EU law in the course of constitutional complaints. So far, it has only ruled on EU law, but in relation to ratified international agreements under the procedure specified in Article 188 of the Constitution[34], whereas constitutional complaints have broadened the scope of the Tribunal's jurisdiction. It was for the only instance where constitutional complaints and only complaints were an act of UE secondary law.

The statement of the CT concerning the consequences of judgments in the event of a ruling on inconsistency with the Constitution of the norms of secondary EU law leaves something to be desired. It is probably impossible to formulate a specific standpoint on this issue, given the obligations resting on Poland as a result of its membership of the EU. However, should the incompatibility of secondary EU law entail a change to the Polish Constitution? The Tribunal referred to its statement in the judgment of 11 May 2005, in which it stated that a conflict between EU law and the provisions of the Polish Constitution cannot lead to the recognition of the primacy of a EU norm in relation to a constitutional norm. In such a situation, according to the Tribunal, it would be up to the Polish legislator to decide whether to amend the Constitution, or to effect changes to EU regulations, or – ultimately – to decide to withdraw from the EU (justification, para. 6.4). Ultimately, such a conflict will most likely end with an amendment of the Constitution of the Republic of Poland[35]. The CT was more decisive in its verdict of 24 November 2010 on the Treaty of Lisbon, in which it stated *"(...) the preservation*

[34] The two most- important judgments in this respect are: Polish Constitutional Tribunal, Judgment of 11 May 2005, Ref. No. K 18/04, Journal of Laws 2005, item 49 and Polish Constitutional Tribunal, Judgment of 24 November 2010, Ref. No. K 32/09, Journal of Laws 2010, item 108.

[35] This also happened in 2006, when Article 55 of the Constitution was amended by Article 1of the Act of 8 September 2006, Journal of Laws 2006, No. 200, item 1471;

of the supremacy of the Constitution in the conditions of European integration must be considered to be tantamount to the preservation of state sovereignty (...), and Poland's accession to the European Union changes the perspective on the principle of the supreme legal force of the Constitution (its primacy), but does not constitute a questioning of it" (para. 1.3 of the justification). This means that in the situation of European integration, the supremacy of the Constitution of the Republic of Poland should be perceived differently, as its provisions are covered by the principle of pro-EU interpretation of the law, i.e. European law has gained influence on the shaping of constitutional principles[36].

Thus, if the rights of the individual are under a special "protective umbrella", and since constitutional complaints are an extraordinary means of protecting constitutional freedoms and rights, while the Constitutional Tribunal is the "court of the last word" with regard to the Polish Constitution, then the control initiated by way of constitutional complaints may be perceived as an instrument protecting the supremacy of the Constitution of the Republic of Poland. This thesis may be confirmed by the verdict of the CT of 11 May 2005, in which it stated that the norms of the Constitution in the field of individual rights and freedoms set a minimum and impassable threshold which cannot be lowered or questioned as a result of the introduction of Community regulations. The Court stressed the guarantee role of the Constitution, from the point of view of the protection of rights and freedoms explicitly set out therein, and this in relation to all entities active in the sphere of its application.

To date, the Constitutional Tribunal has expressed its opinion on EU law, but in relation to ratified international agreements in the mode of Article 188 of the Constitution, whereas the interpretation of the provisions of the Constitution of the Republic of Poland has made it possible to examine, in the mode of the constitutional complaint (and only in this mode), the constitutionality of directly applicable norms of secondary EU law. Following the jurisprudential practice, in cases concerning

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The amendment of the Constitution occurred due to the incompatibility of the European Arrest Warrant with Article 55 of the Constitution of the Republic of Poland.

[36] Cf. Mirosław Granat, "Tożsamość Konstytucji," in *Zmieniać Konstytucję Rzeczypospolitej czy nie zmieniać?*, ed. Dariusz Dudek (Lublin: Wydawnictwo KUL, 2017), 52.

European integration, of its German counterpart, the CT should more frequently, and with greater certainty, use the constitutional complaint to examine the compliance of the norms of EU law with the Polish Constitution.

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SOLVENCY TEST IN POLISH SIMPLE JOINT-STOCK COMPANY: A REVIEW AND COMPARATIVE ANALYSIS

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ABSTRACT

The subject of the article is a comparative analysis of the solvency test - a legal instrument that conditions *causa societatis* payments for limited liability companies upon ascertaining their impact on its future liquidity (ability to pay debts as they come due), which has recently been incorporated into the Polish legal system with reference to a simple joint-stock company (pol. Prosta Spółka Akcyjna) (Article 300^{15} § 5 of Polish Commercial Companies Code). Considering that the solvency test originated in common law, the comparative analysis of the instrument in question was set against the background of selected foreign legal systems, i.e., the law of New Zealand, United States and the United Kingdom, where the solvency test is shaped much differently than the polish one.

Keywords: solvency test, Article 300^{15} CCC, distribution to shareholders, legal capital, creditor's protection

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1. INTRODUCTION

For at least two decades, the solvency test attracts a lot of interest among company law doctrine and legislators all over the world. It is considered to be an answer to large-scale criticism of the legal capital regime and its ineffectiveness with respect to safeguarding limited liability companies' creditors' interests. The solvency test, which in the context discussed by this article can be defined as a corporate law mechanism aimed at restricting *causa corporationis* payments leading to the loss of company's liquidity, was first recognized by English law and later developed, in particular, in the United States and New Zealand. Recently, it has been also incorporated in the Polish Commercial Companies Code as a result of the adoption of the Act amending the Act – Commercial Companies Code and certain other acts of 19 July 2019[1]. Considering that the title instrument has been successfully functioning for decades in *common law* legal systems, where it is considered to be the most effective test for regulating corporate payments[2], this Article presents the Polish construction of the solvency test in comparison with selected foreign legislation of United States, New Zealand and the United Kingdom.

2. POLISH REGULATIONS ON SIMPLE JOINT-STOCK COMPANIES

On July 1, 2020, when the Amending Act came into force, a new, third type of limited liability company – the simple joint-stock company (PSA; Articles 300^{1}-300^{134} Commercial Companies Code[3]) was intro-

[1] Journal of Laws 2019, item 1655, as amended; hereinafter: the Amending Act. The Act finally entered into force on 1 July 2021. The change of the originally specified date of entry into force resulted from Article 15 point 12 of the Act Amending the Act - Code of Civil Procedure and Certain Other Acts of 13 February 2020 (Journal of Laws of 2020, item 288) and Article 7 of the Act on Amending the Act - Code of Administrative Procedure and Certain Other Acts of 21 January 2021 (Journal of Laws of 2021, item 187).

[2] John B. Heaton, "Solvency Test," *The Business Lawyer* 62, no. 3 (2007): 987, http://www.jstor.org/stable/40688428.

[3] Journal of Laws of 2020, item 1586, as amended; hereinafter: CCC.

duced into the Polish legal system. The special features of the simple stock company include above all: resignation from a fixed legal capital which was replaced with a variable share capital[4], introduction of non-par value shares, allowance of contributions with no balance-sheet capacity, and changes in the rules governing the distribution to shareholders (see Articles 300^2-300^3 and Articles 300^{15}-300^{21} CCC)[5]. The changes were aimed, inter alia, at facilitating *causa societatis* payments, making them more flexible, since in PSA they can also be made at the expense of capital contributions[6].

The changes to the distribution regime are a consequence of the departure by simple joint-stock company from the legal capital regime along with its statutorily fixed minimum amount. The share capital of a PSA is not permanent[7]. Although it constitutes the company's obligatory basic equity (pol. *podstawowy kapitał własny*) within the meaning of the Accounting Act[8], to which the shareholders' monetary and non-monetary contributions are made, it can be returned to the shareholders as part of dividend payment (Article 300^{15} CCC), share redemption (Article 300^{44} § 4 CCC) or purchase of the company's own shares (Article 300^{47} § 2 point 3 CCC)[9].

From the discussed point of view the basic provision constitutes Article 300^{15} CCC. Pursuant to § 1 of this Article, a shareholder is entitled

[4] Andrzej Herbet, "Kapitał akcyjny prostej spółki akcyjnej i jego funkcje," in *Kodeks spółek handlowych po 20 latach*, ed. Marek Leśniak, Bogusław Sołtys, and Maciej Skory (Wroclaw: Wolters Kluwer, 2021), in print.

[5] Explanatory Memorandum to the Draft Law on Amendments to the Commercial Companies Code and Certain Other Acts of 12 February 2019 (parliamentary print no. 3236/VIII cad.; hereinafter: Explanatory Memorandum), 1-2. See also the analysis of simple joint-stock company capital structure by Adam Opalski, "Prosta spółka akcyjna – nowy typ spółki handlowej (część I)," *Przegląd Prawa Handlowego* 11 (November 2019): 7–12.

[6] Explanatory Memorandum, 1-2, 10 and 17.

[7] In other words, the principles of full coverage and maintenance of legal capital rooted in German doctrine do not apply to the PSA share capital (inviolability; German: *Kapitalaufbringung und -erhaltung*).

[8] Accounting Act of 29 September 1994 (Journal of Laws 2021, item 217 as amended).

[9] Although the legislator has not chosen to introduce such a uniform concept, for the purposes of further considerations regarding polish CCC regulations by "distribution" we will understand all the above-mentioned types of benefits (in normative terms of "distributions") made *causa societatis*.

to a share in company's profits and to a distribution from the share capital in the amount resulting from the annual financial statement, which was designated for distribution in the shareholders' resolution (unless the articles of association provide otherwise). Pursuant to § 2 of Article 300^{15} CCC, which sets forth the rules of the so-called balance sheet payment test, the amount to be distributed to shareholders may not exceed the sum of the last financial year profit, undistributed profits from previous years, reserves created from the profit which may be designated for dividends, and the amount from the share capital designated for dividends. This sum must be reduced by uncovered losses, company's own shares and the last financial year profits that – according to law or the company's statute – should be allocated to reserves undesignated for dividends. Therefore, when it comes to PSA the CCC allows for a considerably unrestricted payout from its share capital, especially by previous standards that still apply to other polish limited liability companies, however subject to some further conditions. Firstly, a distribution from the share capital may not reduce the amount of that capital below PLN 1 (Article 300^{15} § 4 CCC). Secondly, if a part of share capital constituting 5% of the company's liabilities resulting from the last approved financial statement is to be impaired by the payment, the company should conduct a special convocation proceeding (pol. postępowanie konwokacyjne) within the meaning of Article 456 § 1 and 2 CCC, in order to satisfy or secure the creditors' rights (see Article 300^{15} § 4 sentence 2 CCC). Thirdly, according to Article 300^{15} § 5 CCC, which is central to these considerations, payment to shareholders must not lead to the company losing, under normal circumstances, its ability to fulfill its due monetary obligations within six months from the date of the payment.

While Article 300^{15} § 5 CCC resembles. to a certain extent, a construction of "testing" the company's solvency, treated as a condition of *causa societatis* legality known to foreign legal systems, the Explanatory Memorandum of the Amending Act does not indicate directly any foreign legal models which would constitute an inspiration for the Polish legislator in regard to the solvency test, even though it does refer to the American legal system with respect to other Amending Act solutions[10]. In this context,

[10] Cf. Explanatory Memorandum, 7, 17 and 87.

it is important to notice the laconic nature of the regulation finally adopted in Article 300^{15} § 5 CCC and its deviation from the typical construction of a solvency test, which is particularly vivid against the background of comparative regulations. And this is not just about reservations raised by local legal doctrine concerning the lack of clear criteria for preparing a solvency forecast[11]. It needs to be emphasized that Article 300^{15} § 5 CCC expresses only a simple prohibition rule: payment to shareholders may not lead to the company losing its ability to perform its financial obligations within a specified time horizon of 6 months from the payment date. When the legal norm is composed in this manner, only the loss of the ability to perform due monetary obligations within 6 months from the date of the payment remaining in a causal relationship with the payment, should be deemed unacceptable - and at the same time sanctioned by other CCC provisions[12]. Strictly speaking, considering the Article under review, it is difficult to even speak of a "solvency test" in the sense of this term as developed by foreign legislation.

The analyzed provision does not specify the addressee of the norm contained therein, does not specify the manner or form in which the "test" is to be carried out, does not explicitly require that a separate resolution of management in this regard should be adopted, nor does it require for a so-called "solvency certificate" to be issued or published – which might be important from the creditors', as well as shareholders and directors perspective, regarding their potential liability for a wrongful payment. In other words, the terms and conditions of solvency test are left to the company's discretion.

Despite the lack of a clear indication in this regard, it should be stated that the primary addressee of the prohibition arising from Article 300^{15} § 5 CCC is the company's management board (board of directors), which is

[11] The lack of clear criteria for conducting a solvency test was already pointed out with the respect to drafted reform of limited liability company capital structure in 2010, see Jowita Gajownik-Zienkiewicz, "Kilka uwag o teście wypłacalności," *Przegląd Prawa Handlowego* 9 (September 2011): 55–56.

[12] Since the standard is formulated in the convention "It shall not be the case that in circumstances X it is unlawful for effect Y to occur", it will only be a breach of the prohibition if unlawful effect Y occurs in circumstances X. This finding is fundamental in determining the rules of liability for wrongful payment from PSA capital under CCC.

responsible for executing the relevant resolution and making the distribution. This is confirmed by the Explanatory Memorandum, which explicitly indicates – although a bit exaggeratedly – that a forecast of the company's solvency will "have to" be made by the company's management board before each planned distribution, assuming normal circumstances[13].

Indeed, preceding further considerations, it should be noted that the management board – especially aiming to limit or eliminate the risk of its personal liability or trying to find grounds for refusal of dividend payment – should make such an assessment. Nevertheless, pursuant to the analyzed regulation, it is also possible for the board to neglect the forecast, hoping the insolvency will not occur within the indicated period of time. Since it is only forbidden to make a payment that subsequently led to the company loss of its ability to fulfill due monetary obligations if the company's ability to pay is not impaired, the liability of the directors or the shareholders will not be triggered even in the absence of the test. From the shareholders' point of view, however, contrary to popular opinion, the prerequisite for making a distribution (a condition for the maturity of the dividend payment claim) is not the positive outcome of the company's future solvency forecast, but its negative outcome (finding that the distribution may lead to a loss of the ability to perform due monetary obligations) that abrogates its maturity.

The management board decision made at the end of the assessment should take a form of resolution, which does not arise from the wording of Article 300^{15} § 5 CCC, but from the general rules governing the functioning of this corporate body. In the absence of a different statutory, contractual or regulatory norm, the decision shall be made by a simple majority of votes (art. 300^{58} § 4 CCC). It is worth ensuring that the said resolution contains an appropriate justification, citation of materials, analyses, or opinions constituting its basis, while the minutes of the management board meeting shall specify the result of the individual votes cast.

As already noted, in contrast to many other contemporary legal systems and the original text of the draft amending CCC[14], the results of

[13] Explanatory Memorandum, 36.

[14] According to the original assumptions, Articles 300^{15} § 5 and 6 of CCC were to oblige the management board of the company to make a resolution that states the legality of

the solvency test conducted by PSA management does not need to be public. The solvency test does not need to be carried out in any particular form or public procedure at all, nor does it have to be published by filing it to the registry court or on the company's website. As consequence, trading participants will not be able to know and assess the grounds of the payment or to assess the economic assumptions on company's condition used to justify the payment.

The fundamental issue for the application of Article 300[15] § 5 CCC will undoubtedly be the understanding of the prognosis objective and the effect (company's financial stage) prohibited by it, i.e., the loss of the company's capacity to fulfill due monetary obligations. The expression used in Article 300[15] § 5 CCC is based on Article 11 par. 1 of the Act on the Insolvency Law of 28 February 2003[15], which introduces the basic definition of the debtor's insolvency, justifying the filing of the bankruptcy petition. As the Explanatory Memorandum emphasizes, the introduced restriction on dividend payments is aimed at "correlating the regulations of the corporate law with the provisions of the insolvency law (…), by eliminating the cases in which payments are made <on the vicinity> of company insolvency or even directly causing this effect"[16]. The conclusion that the solvency test will determine whether, as a result of a distribution, the company will not become insolvent within the meaning of Article 11 par. 1 of the Insolvency Act does not, however, solve all the questions arising in this context. This is because the interpretation of the provision cited and, consequently, the qualification of the state of insolvency is not entirely unambiguous[17]

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the payment in whole or in part, while the resolution itself should be submitted to the registration court. Marcin Mazgaj, in *Kodeks spółek handlowych. Komentarz*, ed. Zbigniew Jara (Warsaw: C.H. Beck, 2020), comment to Article 300[15], side no. 34.

[15] Journal of Laws 2020, item 1228, hereinafter: Insolvency Act.

[16] See Explanatory Memorandum, 26.

[17] See for example: Rafał Adamus, *Prawo upadłościowe. Komentarz* (Warsaw: C.H. Beck, 2019, Legalis). See also: Supreme Administrative Court, Judgment of 28 April 2006, Ref. no. V CSK 39/06, Legalis; Piotr Zimmermann, *Prawo upadłościowe. Prawo restrukturyzacyjne*. *Komentarz* (Warsaw: Wolters Kluwer, 2020, Legalis); Patryk Filipiak, in *System Prawa Handlowego. Prawo restrukturyzacyjne i upadłościowe*, ed. Anna Hrycaj, Andrzej Jakubecki, and Antoni Witosz (Warsaw: C.H. Beck, 2019), 724. See also the decision of Supreme Administrative Court, Judgment of 14 June 2000, Ref. no. V CKN 1117/00, Legalis. Cf. an interesting proposal of insolvency interpretation presented by Ar-

- both in the context of the understanding of the "ability" to perform due monetary obligations and sustainability of this state. For the purpose of these considerations, the interpretation of the notion of insolvency based only on linguistic directives seems to be insufficient. When assessing insolvency, one cannot limit oneself to the analysis of the current state but has to examine both, the perspective of the probable improvement of the debtor's financial situation and the negative perspective, because in some cases the debtor may lose the ability to meet its financial obligations before the first unfulfilled obligation comes due[18]. Moreover, the Insolvency Act is aiming at examining insolvency *ex post*, and not *ex ant*. Therefore, in this context, it seems to be an open question whether, given the protective function of the Article 300[15] § 5 CCC, it would not be more appropriate to refer to the "threat of insolvency" within the meaning of Article 6 par. 3 of the Act on Restructuring Law of 15 May 2015[19].

Considering the above, an equally significant shortcoming of the new Polish regulation is the accepted 6-month time horizon, within which the company should not, under normal circumstances, lose its ability to perform its due monetary obligations, which is far too short[20]. Apart from the fact that economic theory has developed a number of reliable (albeit complicated) models for the prediction of insolvency over a much longer time horizon[21], it is crucial to note that a statement of this type,

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tur Nowacki, "Niewypłacalność płynności jako przesłanka ogłoszenia upadłości," *Przegląd Prawa Handlowego* 8 (September 2020): 4–12.

[18] Marcin Kubiczek and Bartosz Sokół, "Metodyka badania płynnościowej przesłanki niewypłacalności w świetle jej prawnej definicji," *Doradca Restrukturyzacyjny*, no. 1 (2016): 107–109. At this point it is worth noting that on the basis of Article 11 par. 1 of Insolvency Act, it is traditionally acknowledged that in order to state insolvency, it is necessary to cease to perform at least two obligations towards two different creditors. However, this is not a uniform and unquestionable view. Cf. Patryk Filipiak, in *Prawo restrukturyzacyjne. Komentarz*, ed. Patryk Filipiak and Anna Hrycaj (Warsaw: Wolters Kluwer, 2020, Lex), comment to Article 11. Cf. also Supreme Administrative Court, Judgment of 19 May 2019, Ref. no. III UK 85/18 (Lex no. 2642120).

[19] Journal of Laws 2020, item 814, hereinafter: Restructuring Act.

[20] In a similar direction, Mazgaj, *Kodeks spółek handlowych*, comment to Article 300[15], side no. 33, advocating the originally proposed one-year estimation horizon.

[21] See Elżbieta Mączyńska and Maciej Zawadzki, "Dyskryminacyjne modele predykcji upadłości przedsiębiorstw," *Ekonomista* 2 (2006): 205–235; Elżbieta Mączyńska, "Oce-

with a 12-month assessment horizon, is submitted annually by the management board for the purpose of auditing and approving the financial statements and the management report. Indeed, it is only the possibility of making the going concern assumption, that allows the application of the general principles for the valuation of the company assets (see Article 5 par. 2 of the Restructuring Act, § 25 of International Accounting Standards No. 1 "Presentation of Financial Statements", International Auditing Standard 570(Z) and National Auditing Standard 570(Z) "Going Concern")[22]. The evaluation horizon of 6 months does not even coincide with the balance sheet classification of liabilities or assets as current liabilities or current assets.

Furthermore, such a radical shortening of the solvency forecast does not seem to be justified when considering the literal wording of Article 300^{15} § 5 CCC, according to which a payment to shareholders must not lead to insolvency "under normal circumstances". In other words, the payment will not be considered unlawful if the loss of the ability to perform due monetary obligations will emerge due to "extraordinary" circumstances. Performing a solvency test requires considering the current and anticipated financial situation of the company and its economic environment in the context of a normal, i.e., typical pattern of economic phenomena, without any obligation to take account of exceptional circumstances, unforeseeable for a diligent manager, as sudden collapse of sales markets, a jump in inflation, or the unexpected insolvency of major contractors[23]. However, it goes without saying that the requirement of acting with due

na kondycji przedsiębiorstwa: Uproszczone metody," *Życie Gospodarcze* 38 (1994): 42–45; Błażej Prusak, *Nowoczesne metody prognozowania zagrożenia finansowego przedsiębiorstw* (Warsaw: Difin, 2005), 7 et seq., and in legal studies: Mirosław Marek, Paweł Multaniak, Błażej Piechowiak, and Anna Szymańska, in *Postępowanie restrukturyzacyjne. Komentarz praktyczny. Wzory pism i przykłady postępowań restrukturyzacyjnych*, ed. Andrzej Głowacki and Cezary Zalewski (Warsaw: C.H. Beck, 2020), 53 et seq.; Michał Żurek, *Reforma regulacji prawnej kapitału zakładowego spółki z ograniczoną odpowiedzialnością. Problematyka ochrony wierzycieli* (Warsaw: C.H. Beck, 2018), 192 et seq.

[22] The latter constitutes Appendix no. 1.24 to Resolution no. 3430/52a/2019 of the National Council of Statutory Auditors of 21 March 2019.

[23] Similarly Mazgaj, *Kodeks Spółek Handlowych*, comment to Article 300^{15}, side no. 32; Małgorzata Wawer, in *Kodek spółek handlowych. Komentarz*, ed. Jacek Bieniak, Michał Bieniak, Grzegorz Nita-Jagielski, Krzysztof Oplustil, Robert Pabis, Anna Rachwał,

diligence (Article 300^{54} CCC) indicates that in assessing "normal circumstances" one should refer to the state of knowledge that a member of the company's management board has or should have, performing his/her duties in a manner consistent with this yardstick: acting diligently and loyally towards the company. This means that circumstances that are extraordinary, but at the same time known to the board member, not only can but should be considered.

The last issue to be discussed in the context of the new Polish regulations are the liability for unlawful *causa societatis* payouts. Firstly, the PSA shareholders are obliged to return the wrongful payment (Article 300^{22} § 1 and 2 CCC). Secondly, the management board members who approved (allowed) the payment are jointly and severally liable for its return. This liability exists only towards the company and in practice will usually occur in the event of a change of control or declaration of company's bankruptcy when the claims in question will be submitted by a receiver. Referring to the previous remarks, it has to be remembered that payment is in breach of Article 300^{15} § 5 CCC if within 6 months from its date and as a result of it, the company, acting under normal circumstances, loses its ability to fulfill due monetary obligations. What might be surprising, from the shareholder's point of view the obligation to return the funds will arise both in the case of failure to carry out, a defective carrying out as well as a correct carrying out of the solvency test and the good faith of a shareholder is of no importance. It only determines the length of the limitation period for the claim (see Article 300^{22} § 4 CCC). The fact of conducting the solvency test in a proper manner will be significant only for management board members whose liability is based on the principle of fault (presumed, similarly as in the case of ordinary contractual liability). Thus, a director will be able to defend him/herself against a claim for reimbursement of an unlawful payment by proving that his/her act or omission was not culpable.

Marcin Spyra, Grzegorz Suliński, Marcin Tofel, Małgorzata Wawer, and Robert Zawłocki (Warsaw: C.H. Beck, 2020, Legalis), comment to Article 300^{15}, side no. 14.

3. UNITED STATES – MODEL BUSINESS CORPORATION ACT

Both the solvency test itself and the legal solutions accompanying it are shaped much differently in the common law legal system. Since it is safe to say that most foreign legislatures that adopted an instrument in question in recent decades have modeled their solutions up to some point on American law, the comparative analysis should begin with the Model Business Corporations Act[24] provisions, that constitutes a model set of rules, regularly amended and accompanied by extensive official commentary, adopted by the vast majority of U.S. state corporate codes[25].

According to § 6.40(c)(1) MBCA, which governs distributions to a business corporation's shareholders, no distribution may be made if, after giving it effect, the company would not be able to pay its debts as they become due in the usual course of business. The solvency test is enforced by enhanced net asset test (§ 6.40(c)(2) MBCA), according to which after the payment the corporation's total assets cannot be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to

[24] American Bar Association. Committee on Corporate Laws, *Model Business Corporation Act: Official Text with Official Comment and Statutory Cross-References*, (December 2020), https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2020_mbca.pdf.%20Hereinafter:%20MBCA. The origin of the solvency test, understood as a tool to regulate the mechanisms for dividends payment, dates back to the mid-1970s, when members of the American Bar Association - Committee on Corporate Laws pointed out the need to move away from the principles of maintenance and inviolability of the legal capital to flexible regulations relating to the maintenance of liquidity and balance sheet surplus of the company. Larry Scriggins, "The Model Business Corporations Act Financial Provisions: A Historical Snapshot," *Law and Contemporary Problems* 76 (Winter 2011): 125.

[25] Due to the federal character of the United States, local legal system has a two-tier character, where the company law is regulated separately at the level of each U.S. state. Nevertheless, the legislatures of more than 40 U.S. states have based their dividend law provisions on the MBCA. Business Law Section Corporations Committee the State Bar of California, *Revisions to Streamline and Update Corporation Code Provisions Relating to Distributions and Repurchases of Shares Legislative Proposal (bls-2011-01)* (April 2010): 9.

those receiving the distribution. The term "distribution" used in § 6.40 MBCA defines the scope of the payment test, and it is understood broadly, since a distribution might take the form of a dividend, a payment in respect of the purchase, redemption or other acquisition of company's own shares, the repayment of debts, a liquidation payment or any other form (§ 1.40 MBCA)[26].

The solvency test regulated by MBCA is more detailed than the Polish solutions, outlining the rule governing evaluation procedure. Both the admissibility of the payment and its date is determined by the board of directors. In principle, the effect of a distribution is measured as of the date of its authorization, but only if the payment occurs within 120 days after the date of authorization (§ 6.40 (e)(3) MBCA). Therefore, after 4 months it is in the officers' own interest to reassess an evaluation, as its legality will be measured as of the date of the actual payment[27]. At the same time the MBCA, alike Article 300^{15} § 5 of Polish CCC, does not explicitly oblige the directors to carry out the solvency assessment and their duty is derived indirectly from the director's standards of conduct rules. Another common feature is that officers are not formally obliged to prepare a solvency certificate or to state the result of the projection in any written or documentary form.

The range and the depth of the assessment carried out by the directors is determined by their fiduciary duties, with a key role played by the business judgement rule[28]. Next to the fact that § 6.40(d) MBCA indicates itself that the officers may base their appraisal on the company's financial

[26] At the same time, the literature indicates that the dividend regulations of the MBCA do not cover so-called hidden distributions, since the making of such payments is not considered there in terms of violations of dividend rules, as typical to European countries, but of the fiduciary duties and voidable transactions law rules. Andreas Engert, "Life Without Legal Capital: Lesson from American Law," Working Paper, Ludwig Maximilians Universität München (27 February 2006): 25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=882842.

[27] These time limits differ slightly for other ways of making distributions from the company's assets. For instance, in case of purchase, redemption or other acquisition of the company's own shares, the effect of the distribution is measured by the date on which the distribution is made, or by the date on which the debt arises or the shareholder ceases to have the status of a shareholder. Cf. § 6.40(e)(1) and (2) MBCA.

[28] Cf. Article 300^{125} § 2 CCC.

statements, more detail guidance in this regard is to be found in § 8.30 MBCA[29], which specifies the information that the directors may rely on, listing e.g., information, opinions, reports or statements provided by reliable employees, legal counsel or public accountants. Moreover, although, like in Poland, the legal definition of insolvency and the method of its assessment is not uniformly defined by American legal doctrine, case law generally agrees on the primacy of evaluating insolvency in the context of the loss of an entity's ability to pay its obligations as they come due[30] and the official commentary to the MBCA gives some vital guidance about the test procedure itself. It recognizes that if a company's financial statements are regularly audited and the qualification of its status as a "going concern" is not endangered according to the most recent auditor's opinion as well as there are no subsequent adverse events, in most cases, it can be considered as decisive for approving a payout, since "it will be apparent from information generally available that no particular inquiry concerning the equity insolvency test in section 6.40(c)(1) is needed"[31].

[29] According to § 8.30 MBCA each member of the board of directors, when discharging the duties of a director, shall act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation. Moreover, a director is entitled to rely on, among others, one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided, as well as legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters (i) within the particular person's professional or expert competence, or (ii) as to which the particular person merits confidence.

[30] See e.g., Heaton, "Solvency Test," 991, where the author discusses practical difficulties in defining solvency under U.S. law. The jurisprudence indicates that when assessing the solvency of an entity, all foreseeable future financial operations of the company must be taken into consideration, as well as other circumstances such as macroeconomic returns, strong drops in sales or high value lawsuits brought against the company. As regards the assessment of the company's solvency potential immediately after the distribution, the number of liquid assets in the form of cash or cash equivalents should be compared with current liabilities. See also the ruling in *F.T.C. vs. Med. Restors Intern Inc.*, 2000 WL 1889635 (N.D. Ill. 2000) or *in re Brownstein vs. Fiberonics Industries, Inc.*, where the court assessed a company's insolvency by comparing its short-term claims and assets, under the assumption that short-term claims can only be paid with funds generated from liquid assets.

[31] American Bar Association, *Model Business Corporation Act*, comment to § 6.40 MBCA. See Bernhard Pellens and Thorsten Sellholm, "Improving Creditor Protection

Unlike the Polish solvency test, which is limited to an exceptionally short 6-month time horizon, MBCA does not prejudge the time limit for forecasting the company's liquidity, which in the literature is even sometimes interpreted as an obligation to carry out a prognosis as far into the future as to the date of maturity of the most forward-looking company's liability[32]. However, as a rule, case law assumes that the examination should cover a minimum period of one year, although it is often stressed that in some cases the future solvency projection should cover a much longer period[33].

The liability of directors for making unlawful *causa corporationis* payment is governed by § 8.32(a) MBCA[34]. Directors who vote for or authorize a distribution in violation of § 6.40(a) MBCA or the corporation articles of association are personally liable for its return to the corporation's estate in excess of the amount that could have been paid legally, but only if it is proven that they violated the provisions of § 8.30 MBCA governing directors' fiduciary duties. The director held liable for an unlawful pay-

Through IFRS Reporting and Solvency Tests," in *Legal Capital in Europe*, ed. Marcus Lutter, *European Company and Financial Law Review*, Special Volume 1 (2006): 381 and Igor Komarnicki, "Ograniczenia wypłat na rzecz akcjonariuszy w prawie europejskim," in *Europejskie prawo spółek – t. I. Instytucje prawne dyrektywy kapitałowej*, ed. Mirosław Cejmer, Jacek Napierała, and Tomasz Sójka (Cracow: C.H. Beck, 2004), 65.

[32] Christoph Kuhner, "The Future of Creditor Protection Through Capital Maintenance Rules in European Company Law," in *Legal Capital in Europe*, ed. Marcus Lutter, *European Company and Financial Law Review*, Special Volume 1 (2006): 357.

[33] 2001 WL 243537, 10 - 11 (S.D.N.Y. 2001) cited in Pellens, Sellholm, Improving Creditor Protection, 17. By way of example, the United States Bankruptcy Court, Northern District of Georgia in *re Vista Eyecare* indicated that the scope of the projection will vary depending on the circumstances surrounding a particular company's operations, but it covers at least the period up to the date on which the company is required to make material payments in satisfaction of existing obligations. In *Pereira v. Cogan* (267 Mass. 52, 165 N.E 889 (1929)), on the other hand, the court based its decision on an analysis of the entity's cash flows over a three-year period.

[34] According to § 8.33 (a) MBCA a director who votes for or assents to a distribution in excess of what may be authorized and made pursuant to MBCA distribution rules is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating of MBCA distribution rules, if the party asserting liability establishes that when taking the action the director did not comply with section MBCA's director's standards of conduct.

ment is entitled to contribution from every other director who could be held liable and to the recoupment from each shareholder of the pro-rata portion of the unlawful distribution amount the shareholder that accepted the payment knowing that it was made in violation of the MBCA[35]. It is generally accepted that not only the directors who made the decision of illegal payment might be held liable but also those who failed to take action to prevent it or who neglected their duty of care or duty of loyalty[36]. What's interesting, as far as shareholders are concerned, for their liability to arise on the basis of the MBCA it is necessary for the officer to be found liable for unlawful distribution first. Therefore, their liability is subsidiary and limited by the presumption of good faith.

Although the solvency test is regarded to be the most important American criterion for corporate distributions, there is a number of judgments determining the liability for an unlawful payment based on the infringement of the MBCA. Whereas those that exist deal primarily with intra-company conflicts involving payment of dividends to majority shareholders, redemption rights, the exercise of put options, or the redemption of shares[37]. This results from the fact that American company law is not designed to play a direct role in creditors protection, and as a consequence, the character of shareholders liability is subsidiary and claims for unauthorized distributions must be based on a breach of directors' fiduciary duties, which violation, by the way, is often hard to prove due to the "safe harbor" of the business judgment rule[38]. The liability for distribution infringing solvency test rules is thus dependent on a violation of § 8.30 MBCA and, therefore, an attempt to assert a claim thereunder will require proof of a breach of the standards of conduct.

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[35] A claim against the remaining directors may be brought within one year of the date of the final determination of director liability under § 8.33(a) MBCA.

[36] For instance, in *Calkins vs. Wire Hardware Co*. (267 Mass. 52, 165 N.E 889 (1929)), the directors who were not present at the meeting at which the resolution to distribute profits was passed, were held liable on the ground that they knew of the plans to vote on the disputed distribution, which was understood to be their implied consent. In *Pereira vs. Cogan*, the court emphasized that abstention by directors from voting on major corporate decisions does not relieve them of liability.

[37] Engert, "Life without Legal Capital," 25.

[38] Ibid.

In the context of the above, is important to notice, that as the official commentary to the article in question explains, MBCA establishes the validity of distributions from the corporate law standpoint, and this is why it determines the potential liability of directors for improper distributions under § 8.30 and 8.32 MBCA regarding its fiduciary duties. This is because it is American federal bankruptcy laws and state fraudulent conveyance statutes[39] that are designed to enable the trustee or other entities to recapture for the benefit of creditors funds distributed to others in some circumstances, not the provisions of company law itself, which is crucial for understanding the systemic context and the true role of the MBCA solvency test in the USA[40]. Therefore, lack of need to rely on allegations of violation of § 6.40(c)(1) MBCA results from the fact that American company's creditors are entitled to much more effective legal instruments, regulated at the level of insolvency and civil law – the voidable transactions regulations, which are similar to *actio Pauliana* (Articles 527 et seq. of Polish Civil Code[41]) and bankruptcy provision concerning the ineffectiveness of the bankrupt's legal acts (Article 127 et seq. of Polish Insolvency Act).

4. NEW ZEALAND – COMPANIES ACT 1993

In New Zealand, the growing dissatisfaction with inflexible law solutions modeled so far on the English, and consequently EU, regulations, gave rise to a thorough revision of company law. As a result, the legislature adopted a new Companies Act 1993[42], which, among others, changed the corporation's payment regulations, from then based on the MBCA solvency test[43]. Today, despite initial criticism and concerns about a possible

[39] See § 4 et seq. of Uniform Voidable Transactions Act (formerly Uniform Fraudulent Transfer Act) (as amended in 2014), 8 March 2016 and § 48 et seq. of Title 11 of the United States Code – Bankruptcy Code.

[40] American Bar Association, *Model Business Corporation Act*, comment to § 6.40 MBCA, point 4.

[41] Civil Code of 23 April 1964 (Journal of Laws of 2020, item 1740, as amended).

[42] Hereinafter: NZCA.

[43] Constructs such as the assessment of solvency in the context of the "normal course of business" are taken from the MBCA. New Zealand Law Commission, *Report No. 16,*

"paperwork war" accompanying the new rules on distributions of limited liability companies' profits[44], the NZCA, being a result of the New Zealand Law Commission many years' work[45], is regarded as a progressive legislative achievement, far more responsive to market needs than the previous norms. The New Zealand accomplishments have also found recognition among European legal doctrine, being described by the European Interdisciplinary Group on Capital Maintenance as "impressive"[46].

Alike in most modern legal systems, the NZCA solvency test is accompanied with the balance sheet test. Whereas the second one is fairly detailed, the solvency itself is framed succinctly, as it indicates that the company must be able to pay its debts as they become due in the normal course of business. Therefore, if the board of directors is satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test, it may authorize distribution by the company at a time, and of an amount, and to any shareholders, it thinks fit (§ 52 NZCA).

As defined in § 2 NZCA, "distributions" include dividend payments, share redemption payments, payments for the acquisition of the company's own shares, and financial assistance procedure (Part 6 of NZCA)[47]. The solvency test will also apply when carrying out a merger of companies

Company Law Reform: Transition and Revision (September 1990): 18, www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R16.pdf. Report no. 16 is a supplement to Report no. 9.

[44] Michael J. Ross, "Evaluation New Zealand's Companies Law," *Agenda: A Journal of Policy Analysis and Reform* 1, no. 2 (1994): 192.

[45] The New Zealand Law Commission was established in the 1980s. In 1989 the commission submitted a comprehensive report proposing a major overhaul of the New Zealand company law system, eliminating the flaws and inefficiencies of the legal capital-based system.

[46] Jonathan Rickford, "Reforming Capital. Report of the Interdisciplinary Group on Capital Maintenance," *European Business Law Review* 15 (April 2004): 979. Interdisciplinary Group on Capital Maintenance was established in May 2003 to review company law on capital maintenance and developing accounting standards.

[47] According to § 2 NZCA, in relation to a distribution by a company to a shareholder, the distribution means direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the shareholder; or the incurring of a debt to or for the benefit of the shareholder, in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means.

pursuant to Part 13 of NZCA, or when transferring the company's seat pursuant to Part 19 of NZCA. The doctrine also points out that the wording of the definition of "distribution" (i.e., distribution "(…) in relation to shares held by that shareholder") indicates that the solvency test also covers non-corporate (hidden) payments, such as payment of remuneration to the shareholder under a contract concluded with the company[48].

Since the fairly "new" New Zealand solvency distribution test refers to long-known local voidable preferences rules, regulated already in 1955. the practice of carrying out solvency test is well-established in New Zealand and the jurisprudence sets out a number of guidelines as to the principles of its conduct[49], which is largely missing on the grounds of Polish regulations. Moreover, due to the above, in New Zealand the obligation to assess the impact of a planned payment on the company's liquidity was derived from case law many years before the introduction of the NZCA. Nevertheless, the most significant change proposed by the act was the requirement of drawing up the directors' solvency certificate. Currently, § 52 NZCA requires directors voting in favor of distribution to prepare and publish a solvency certificate which includes a statement that, in their opinion the company will, immediately after the distribution, satisfy the solvency test. As part of the certificate, the directors are required to provide justification for the assessment. The justification should be precise, detailed, and include separate explanations to confirm that the company meets the balance sheet and liquidity criteria of the payout test[50]. The obligation to prepare, carefully justify and publish a statement of solvency accompanying every corporate distribution from the company's assets undoubtedly reinforces the New Zealand solvency testing rules, giving them a real value in terms of creditor protection.

The New Zealand liability rules for breach of the solvency test requirements are much more clearly structured and better adjusted to the role of creditor protection than Polish ones. If a company did not meet the re-

[48] See more Christopher I. Haynes, "The Solvency Test: A New Era in Directorial Responsibility," *Auckland University Law Review* 7 (1996): 127.

[49] Ross, "Evaluation New Zealand's," 192.

[50] Haynes, "Solvency Test," 135. At the same time, it is permissible to draw up a single certificate to be signed by all the members of the board of directors and separate documents for each officer, signed on the same terms as the joint certificate (§ 394 NZCA).

quirements of the solvency test on the payout date, the amount unlawfully paid shall be in the first place returned to the company's estate by its' beneficiaries. They may only be relief from the obligation to return the payment under fulfillment of three cumulative conditions: (1) receiving the payment in good faith, with no awareness of the company's violation of legal regulations, (2) raising of doubts about the legality of the payment, and (3) a change in the shareholder's situation to such an extent that it would be unfair to require him to return the unlawfully made payment in full or at all (§ 56 (1) NZCA). In practice, the cumulative fulfilment of the above requirements may prove difficult, especially for companies with dispersed shareholders conducting large-scale operations. Undoubtedly, however, the severity of these conditions furtherly reinforces the protective role of the discussed instrument. At the same time, if during the trial the court becomes convinced that the company could, by making a distribution of a lesser amount, have satisfied the solvency test, the court may permit the shareholder to retain an amount equal to the value of any distribution that could properly have been made (§ 56 (5) NZCA).

As for the liability of the directors, under § 56 (2) NZCA, a director is personally liable to the company for the repayment of a distribution made to shareholders that do not comply with the NZCA up to an amount that cannot be recovered from the shareholders if, in connection with the distribution: the payout test procedures were not followed, or the payout was made despite there being no indication that the company would reasonably be expected to meet the test at the time the certificate was signed, and at the same time the director did not take reasonable steps to ensure that the procedure for making the payout was followed, or he/she signed the certificate in circumstances that did not justify making the payout. The liability of officers is therefore personal, subsidiary and concerns both the failure to comply with the procedure as well as the misjudgment of the company's maintenance of liquidity after the payout. Also, with respect to officers if, in an action brought against them the court is satisfied that the company could, by making a distribution of a lesser amount, have satisfied the solvency test, the court may relieve the director from liability in respect of an amount equal to the value of any distribution that could properly have been made. In addition, directors convicted of an offense against distribution to shareholders provisions are liable to a fine

not exceeding 5,000 NZD (§ 373 (1)(4) NZCA). Directors are subject to the same penalty if they fail to prepare a solvency certificate on time, as well as for failing to state the grounds of their decision. Moreover, a director who prepares a solvency assessment that is false, or misleading is liable to imprisonment for a term not exceeding 5 years or a fine not exceeding 200,000 NZD (§ 377 (1) and § 373 (4) (c) of the NZCA).

5. UNITED KINGDOM – COMPANIES ACT 2006

The increasing regulatory competition which took place in the last decades among EU Member States has also led to a liberalization of United Kingdom law under which the Company Law Reform Steering Group proposed a significant revision of company law, broadly concerning a private limited company (Ltd.)[51]. The reform objective was to loosen the legal capital regime and strengthen the company's creditor's protection[52]. The changes included the introduction of an optional solvency testing procedure.

Although the British solvency test regulated in Companies Act 2006[53] does not apply to a dividend payment, which is limited by a retained earnings test (830 et seq. CA), it does apply to other *causa corporationis* payments, i.e., the procedure of share capital reduction and the redemption or acquisition of companies own shares. Previously, the capital reduction procedure had to be approved by the court. Now, a private company limited by shares may reduce its share capital also by special resolution supported by a solvency statement (§ 641(1)(a) CA). However, the decision to reduce the capital is still made by the shareholders' meeting, it must be preceded by a directors' solvency statement. Despite the initial recommendations of the Company Law Reform Steering Group, that conducting of the solvency test and certification of its result should fully replace the capital

[51] The regulations came into force on 1 October 2009.

[52] Jennifer Payne, "Legal Capital in the UK Following the Companies Act 2006. Rationality In Company Law: Essays In Honour Of D.D. Prentice, J. Armour and J. Payne, eds., Hart Publishing," *Oxford Legal Studies Research Paper*, no. 13 (October 2008): 1, 42, https://ssrn.com/abstract=1118367.

[53] Hereinafter: CA.

reduction mechanism based on court approval, currently these regulations constitute only an alternative[54]. Also, a payment out of capital by a private company for the redemption or purchase of its own shares is not lawful unless: (1) directors' solvency statement and auditor's report is provided, (2) it is approved by a special resolution, (3) public notice of proposed payment is made, and (4) the directors' statement and auditor's report are available for inspection (§ 713(1) CA).

What is characteristic for both British and New Zealand solutions, and what constitutes a significant weakness of Polish regulations, is that the English solvency test rules focus strongly on the solvency certification procedure, requiring a company's directors to form an opinion on the company's ability to meet its debts after the payment. The content of an English solvency statement is shaped similarly to the statement submitted in connection with the repealed financial assistance procedure (the so-called financial assistance "whitewash" procedure[55]), except the fact that currently the statement on reduction of the company's capital does not have to be accompanied by an auditor's report, although it is required in case of redemption or acquisition of the company's own shares[56]. The § 643 CA specifies the content of the document, declaring that it is a statement where each of the directors had formed the opinion, as regards the company's situation at the date of the statement, that there is no ground on which the company could then be found to be unable to pay (or otherwise discharge) its debt. When it is intended to commence the winding up of the company within twelve months of the payment date, the directors are obliged to state that the company will be able to pay (or otherwise discharge) its debts in full within this period of time. In any other case, that the company will have to be able to pay its debts as they fall due during the year immediately following that payout (§ 643 (1) CA).

The solvency statement prepared for the purposes of capital payment for the redemption or purchase of private company own shares shall be prepared in a bit different manner since according to § 714(3) CA,

[54] Company Law Reform Steering Group, *Company Formation and Capital Maintenance* (URN 99/1145), § 3.27.

[55] Cf. § 115 Companies Act 1985.

[56] Payne, "Legal Capital in the UK," 26. See § 643 Companies Act 1985.

the directors' having made a full inquiry into the affairs and prospects of the company need to declare that immediately after the date of the proposed distribution, there will be no reason to believe that the company will not be able to pay (or otherwise discharge) its liabilities, and in respect of the prospects of the company for the year following the date of the distribution, the company will be able to carry on business on a going concern basis ("as a going concern") and meet its liabilities as they fall due. The assessment needs to take into account the intention of the directors in relation to the management of the company during that year and the quantity and nature of financial assets which the directors believe will be available to the company during that year.

As indicated, the British construction of the solvency statement takes a specified time perspective limited to a period of one year. When the company is expected to be wound up within one year of the date of the statement, the directors are forced to change their perspective by estimating the company's ability to settle all its liabilities, not just those that will arise within the said period. Analyzing the solvency of the company, the directors should consider contingent and future liabilities (§ 643(2), § 714 (4) CA), excluding extraordinary events[57].

The solvency statement shall be prepared not less than 15 days before the date of the relevant shareholders' resolution. Where a resolution is passed in writing, a copy of the directors' statement shall be sent or given to each shareholder entitled to vote before or at the time of the vote. Where the resolution is passed at a meeting, a copy of the solvency statement shall be made available for inspection during the meeting. The solvency statement shall include the date on which it is signed and the name of each director of the entity[58]. Furthermore, a copy of the solvency statement shall be delivered to the Registrar of Companies within 15 days of the shareholders' meeting resolution together with a statement of capital. However, failure to provide the aforementioned documents to the Regis-

[57] Ibid, 39.

[58] The English literature indicates that the legislature's use of the phrase "each director" may suggest an obligation for so-called de facto directors to sign the statement as well. Brenda Hannigan, *Company Law* (Oxford: Oxford University Press, 2018), 600. Cf. the ruling in *Flap Envelope Co Ltd, Cook vs. Green* ((2009) BCC 204).

trar, including the statement of solvency itself, does not affect the validity of the resolution. Similarly, the resolution remains valid if the board of directors fails to comply with its obligation to provide the shareholders with a certificate when passing the resolution (§ 644 CA).

Whereas the liability of the recipients of a wrongful dividend is governed by § 847(2) CA, which oblige the shareholders to return to the company's assets any distribution made in contravention of the law to the extent that, at the time of the distribution, they knew or had reasonable grounds to believe that such distribution had been made in breach of the law, this rule does not apply to any payment made by a company in respect of the redemption or purchase by the company of shares in itself[59]. Nonetheless, in this regard, the literature points to the case law that indicates the invalidity of an unauthorized return of capital, even in the case of procedural failures[60]. Irrespective of this, the doctrine argues for an explicit regulation of the wrongful payment consequences at the statutory level[61].

The officer's liability rules are clearer than those concerning company's shareholders. Taking as an example a share capital reduction procedure, if the board of directors has prepared a solvency statement without reasonable grounds for the opinion contained therein, and the statement has been delivered to the Register of Companies, the action of the member of the body constitutes an offense punishable by imprisonment of up to two years or a fine (§ 643(4)-(5) CA)[62]. The liability of directors is regulated in a similar manner with respect to the procedure for the acquisition or redemption of own shares (§ 713 CA). If a solvency statement has not been presented to the shareholders, an offense is committed by any officer who has failed to perform his legal duty (§ 644 (7) CA). Moreover, failure to comply with the other rules expressed in the section on reduction of capital, is an offense committed by any officer of the entity who has failed to perform his duty (§ 644 (8) CA). A person guilty of an offense under § 644 (7) or (8) CA is liable to a fine. In addition to the sanctions cited,

[59] Thomas Bachner, *Creditor Protection in Private Companies Anglo-German Perspectives for a European Legal Discourse* (Cambridge: Cambridge University Press, 2009), 120.

[60] See *MacPherson vs. European Strategic Bureau Ltd* ([2000] 2 BCLC 683).

[61] Payne, "Legal Capital in the UK," 41.

[62] The mentioned criminal measures may be applied cumulatively.

violation of the interests of the company's creditors may involve personal liability of the directors related to breach of fiduciary duty[63].

At the end, it is important to note that even though the English regulations do not expressly regulate the prohibition of making dividend payments that could result in the company's lack of liquidity, as it is the case in all three analyzed legal systems, the prohibition of making such payouts to shareholders results from fiduciary duties imposed on the board of directors, as well as from wrongful (fraudulent) trading rules (known in New Zealand as reckless trading[64]), which are regulated at the level of company and insolvency law, and shape the prohibition on undertaking trade in the state of imminent insolvency of the company, applying financial personal responsibility for directors for its further obligations.

6. CONCLUSIONS

The solvency test undoubtedly constitutes an interesting instrument of company law, widely and successfully applied both in common and civil law countries. A model of protection that takes into account the necessity of conducting a prognosis of an entity's future liquidity limit the risk of making distributions to shareholder on the verge of bankruptcy, especially when compared to solutions based solely on calculations referring to the company's profit, positive balance sheet or legal capital maintenance rules. On the level of the Polish legal system, it also allows ensuring better correlation between the provisions of corporate and insolvency law. However, in the form adopted in the CCC the solvency test is subject to numerous flaws, being constructed far too laconically, with too many doubts as to its evaluation criteria and liability resulting from its infringement. A substantial objection needs to be raised against a noticeably short forecast period for the company's future solvency, which is unprecedented on the comparative background, as well as the lack of requirement to adopt a separate directors' resolution as a prerequisite for the payment claim or the lack of obligation to justify the payment decision. Therefore, the sol-

[63] Payne, "Legal Capital in the UK," 41.

[64] See § 135 NZCA, § 993 CA and § 213-214 of Insolvency Act 1986.

vency test in the form adopted in Article 300^{15} § 5 CCC is far from optimal, especially against the background of foreign legislation and the systemic context in which it is used, up to the point that now, up to some point, it is hard to decode the rules governing pay-outs form the simple joint-stock company. In view of the foregoing, it is to be feared that unless the Polish version of solvency test is substantially reformulated, its role of creditor protection will be devoid of any practical significance whereas it will most likely cause numerous problems in corporate practice or will be fully ignored by a vast number of market participants.

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GLOSS TO THE RESOLUTION OF THE SUPREME COURT OF 26 FEBRUARY 2021, III CZP 24/20 [ON THE INTERPRETATION OF THE WILL][1]

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ABSTRACT

The resolution with gloss concerns the rules for interpreting a will. The Supreme Court stated in it that an interpretation of a will should be performed taking into account all circumstances, including those external to the will and using all means of evidence. The Supreme Court decided that it is the court adjudicating in the case for inheritance acquisition, assessing the evidence gathered in a specific case, that should assess whether it is actually possible to establish the will of the testator. The author of the gloss accepts the thesis of the resolution, but argues with the position of the Supreme Court contained in its justification that only the rules for evidence assessment constitute an instrument allowing one to establish the testator's will. In the opinion of the author of the gloss the functional interpretation of Art. 948 of the Polish Civil Code (k.c.) indicates limits to the interpretation of the will. After all this is a process that renders it possible to determine the testator's will in a manner that does not raise any doubts. Therefore, if the interpretation of the will of such fails to secure such a degree of certainty, even despite a positive assessment of the evidence gathered in the case, the court should state that the inheritance has been acquired under the Act.

Keywords: freedom of testation, interpretation of a will, external circumstances in interpreting a will

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[1] Biuletyn Sądu Najwyższego 2021, nr 2.

The thesis of the resolution that is subject to the gloss reads:

"*A will should be interpreted taking into account the circumstances of its making, which can be established with the use of any means of evidence*."

The resolution is worth attention for at least two reasons. Firstly, it was set against the background of an interesting state of affairs that is rarely occurring in practice, and perhaps even unique. Secondly, it concerns issues that cause very serious judicial difficulties to courts hearing cases for confirmation of inheritance acquisition. Although the resolution formally concerns the interpretation of the will using non-testamentary sources of information about the will of the testator, its practical significance rests in the attempt by the Supreme Court to define the limit of interpretation of the will, which - of course - proves to pose a very difficult task.

The resolution was adopted against the background of the following facts. The testator left a handwritten will with the following content: "After settling any obligations, my property should be divided equally among my friends (men in my photo) (...)." The testator signed the will, indicating the place and date. However, no photo was attached to the will, but, in the personal belongings of the testator in his locker at work, a color A4 format copy of a collage of 9 photos of 11 men and photos of photographs of other friends were found.

The court hearing the case for inheritance acquisition at first instance found the will valid, but ineffective. The district court stated that if the heir was not explicitly named, the will must contain indications allowing the testator's intention to be stated in a manner that does not raise reasonable doubts. The determination of the heir may be the result of an interpretation aimed at the fullest possible implementation of the testator's will (Art. 948 § 1 of the Civil Code) and take into account all circumstances that assist this process, including external ones (e.g. the testator's declaration related to the content of the will, but not included in it), however, these rules may only serve to remove ambiguities contained in the testator's last will, and they cannot supplement or modify the content of the will. Therefore, they do not allow for the determination of the person appointed testates based on the phrase: "my friends - men from the photo" in a situation where the photo was not attached to the will and the testator had many photos of friends. The court of first instance

also found that in the evidence collected there was no confirmation that the collage submitted to the file was a photograph referred to by the testator. It considered the fact that his photocopy was known to some participants in the proceedings insufficient, particularly since not all participants saw the connection between the collage and the will, and there was a difference between the concepts of "photo" and "photo collage". It assessed the applicant's testimony, which referred to the collage, as unreliable, as it did with the statements of other participants inspired by its position. Consequently, the district court stated that establishing the heirs by way of interpretation would, in this particular case, constitute an inadmissible supplementation to the content of the will.

When examining the applicant's appeal, the regional court raised two fundamental doubts. First, whether, in the case of a holographic will, the meaning of an unclear testamentary disposition determining the heir can be determined on the basis of the testimony of witnesses or persons having interest in inheriting. Secondly, whether the determination of the grounds for determining the heir is effective in a will only if it makes it possible to establish the will of the heir beyond any doubt.

The Supreme Court, distancing itself a bit from the facts of the case, replied on a higher level of generality than that most likely expected by the questioning court and, answering both questions, stated that "the will should be interpreted taking into account the circumstances of its preparation, which can be established with the use of any evidence".

In its arguments, the Supreme Court started from the premises, already well-established both in the jurisprudence and in the literature, that the heir does not have to be named in a will, and it is sufficient to indicate him or her in any way that renders their identification possible. If such a definition of the heir is not precise enough, it is necessary to try to determine its meaning by referring to additional guidelines, including those that are external to the content of the will. In the opinion of the Supreme Court, when interpreting such a will, in addition to its text and linguistic rules of meaning, one should take into account the circumstances of its making, i.e. those that occurred before the declaration of will and accompanying its submission. These circumstances can be verified by any evidence, including evidence from the testimony of witnesses or from the questioning of the parties (such evidence is not directed against

the basis of the document, but is used to establish, by way of interpretation, unclear declarations of will contained in the document). There are also no formal limitations of evidence resulting from the provisions which stipulate that certain categories of persons may not be witnesses when making a will, e.g. because the will provides for some benefit for them (cf. Art. 957 of the Civil Code). On the other hand, circumstances that are relevant in the light of these provisions may be relevant when assessing the credibility and probative value of the evidence (cf. Art. 233 § 1 of the Polish Code of Civil Procedure). The option of applying all means of evidence in such a situation (including evidence from the testimonies of witnesses and from the questioning of the parties) is also recognized in the jurisprudence in *de lege lata*. If, after resorting to non-substantive interpretative guidelines and the use of additional evidence (including testimonial evidence), the meaning of a testamentary provision specifying persons appointed to testate can be clarified, we cannot question its effectiveness. Also with the assumption - albeit questioned by some experts - that Art. 948 § 2 of the Civil Code does not allow supplementing the content of a will, for example by applying the so-called supplementary interpretation. For it is something else (interpretation) to determine the person appointed as an heir in a situation in which the testator undoubtedly had a specific person in mind, and the doubt concerns only identification of such person, and another (supplement) to define the heir when the testator did not make a specific decision in this respect, confining only to general guidelines that may apply to an unspecified circle of people. Although the Supreme Court admitted that in borderline cases this distinction may raise some doubts, however, they do not apply to the circumstances of the present case, because the indication as heirs of "friends (men in my photo)" allows it to be considered, especially taking into account Art. 948 § 2 of the Civil Code, stating that the deceased made and expressed a decision as to the circle of heirs (he meant specific men, from a specific photo), but he did so imprecisely, because he did not directly indicate which photo was meant. Nevertheless, this lack of precision does not in itself rule out the effectiveness of the disposition, as it remains possible to specify it on the basis of additional circumstances, also when the deceased had many photos. Then, further external circumstances may be important, such as the intensity of personal ties with in-

dividuals or any statements made during the testator's lifetime regarding the appointment of heirs. Ultimately, whether it is actually possible to determine the testator's will is determined by the evidence collected in a specific case and its assessment by the court, therefore this issue cannot be resolved in an abstract manner. Nevertheless, the Supreme Court emphasized that in such cases, Art. 948 § 2 of the Civil Code speaks in favour of not only assuming that the testator, who was vaguely expressing his will, had a circle of specific heirs in mind, but also that when specifying these persons, the decisive importance should be attributed not as much to the absolute certainty of the result as to its rationality, because this criterion is referred to by the legislator in the said provision.

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The thesis formulated by the Supreme Court raises no doubt and should be fully shared. It should be remembered, however, that it was formulated at a fairly high level of generality, and therefore it is not controversial in itself. Moreover, it strengthens the previous jurisprudence in this respect. However, a closer analysis of the legal questions, especially the second one and the justification of the resolution, is somewhat polemical. Regardless of the accuracy of the resolution itself, one can doubt whether the Supreme Court did not allow the limits of the interpretation of the will to be exceeded in justifying its position.

The provision defining the rules for interpreting a will is Art. 948 of the Civil Code. It requires that the will should be interpreted in such a manner as to ensure the fullest possible implementation of the testator's will (§ 1), and if the will can have various interpretations, it should be interpreted in such a way that the testator's orders should be kept in force and given reasonable content (§ 2).

Article 948 of the Civil Code does not regulate the admissibility of taking into account circumstances that are external in relation to the content of the interpreted will. Despite this, both the jurisprudence and the literature rightly assume that - as a rule - taking into account such circumstances in

the interpretation is permissible[2], and sometimes it is even stated (rightly) that it is necessary[3]. The jurisprudence and literature to date, however, feature examples of such circumstances (mainly for the purposes of determining the *animus testandi*), such as the level of intelligence and education of the testator, knowledge (ignorance) of the rules for making and executing wills, psychophysical condition of the author of the disposition at the time of testing (e.g. agonal state resulting from the stage of the disease, waiting for a complicated surgical procedure, and even the testator's subjective feeling of coming death), the testator's relationship with the family and people outside the family, the content of previously made wills[4], all oral and written statements of the testator (e.g. draft of the will, letters, notes, explanations provided to the witnesses of the will, both before, during and after the testation), personal characteristics, features of the environment in which the testator lived, local customs, including language customs in the testator's environment[5], the relationship between the testator and others subjects, not only heirs (including personal relationships, sympathies, but also hatred of certain people), views and broadly understood lifestyle of the testator, as well as his or her manner of expression (e.g. calling of a person unrelated to the testator "brother")[6]. The conviction that

[2] Cf. Decisions of the Supreme Court of 28 October 1997, I CKN 276/97, OSNC 1998, No. 4, item 63; 13 February 2001, II CKN 378/00; 13 June 2001, II CKN 543/00, OSNC 2002, No. 1, item 14; 6 May 2005, II CK 676/04; 14 July 2005, III CK 694/04; 6 October 2016, IV CSK 825/15; Judgment of the Supreme Court of 5 September 2008, I CSK 51/08. In the literature, see Jan Gwiazdomorski, *Prawo spadkowe w zarysie* (Warszawa: Państwowe Wydawnictwo Naukowe, 1985), 116; Konrad Osajda, in *Kodeks cywilny. Komentarz. Tom III. Spadki (art. 922-1088)*, ed. Konrad Osajda (Warszawa: C.H. Beck, 2013), 326–327; Maciej Rzewuski, "Wykładnia słusznościowa testamentu," *Białostockie Studia Prawnicze*, no. 17 (2014): 231; Maciej Rzewuski, "Wykładnia testamentu a okoliczności zewnętrzne towarzyszące testowaniu," *Przegląd Sądowy*, no. 1 (2015): 113; Jacek Wierciński, "Uwagi o zamiarze testowania," *Przegląd Sądowy*, no. 7-8 (2012): 140.

[3] So Rzewuski, "Wykładnia słusznościowa testamentu," 231.

[4] Cf. Wierciński, "Uwagi o zamiarze testowania," 140; Rzewuski, "Wykładnia testamentu a okoliczności zewnętrzne towarzyszące testowaniu," 113.

[5] Sylwester Wójcik, "Rozrządzenia testamentowe," in *System Prawa Cywilnego, Tom IV, Prawo spadkowe*, ed. Józef Stanisław Piątowski (Wrocław-Warszawa-Kraków-Gdańsk: Wydawnictwo Polskiej Akademii Nauk, 1986), 219.

[6] Michał Niedośpiał, *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym* (Kraków–Poznań: Polski Dom Wydawniczy „Ławica" 1993), 171.

the use of extra-testament circumstances allowing for the correct reading of the testator's intentions is also confirmed by the jurisprudence allowing for proving the content of a holographic will and the circumstances of its making in correct form[7], establishing the fact of making a holographic will and its content only on the basis of witnesses' testimonies[8], allowing for proof of the content of a lost holographic will on the basis of a photocopy[9], or allowing the determination of the content of a letter stating the content of a lost or damaged oral will, even after the deadlines specified in Art. 952 § 2 and 3 of the Civil Code[10].

There are also no obstacles to clarify the identity of the heir by interpreting the will. In this respect, the testator's ability to use terms indicating the degree of kinship, or other circumstances allowing for the identification of the heir, e.g. "my eldest son" or "my only niece", etc., is unquestionable. The testator also described the heirs in the actual state of the case on the basis of which the voted resolution was adopted in a similar way. The testator described his heirs there as "friends" and, in addition, referred in this respect to a photograph which he failed to specify, in which "friends" were to appear.

The issue of a will referring to another document on the basis of which the testator's intention can be established has already been noticed in Polish literature. M. Rzewuski, referring to Swiss and German literature, which - with the proviso that it may not lead to supplementation of the content of the will - allow references to other documents in wills - postulates to introduce the institution of references in the content of the will to other documents into the Polish legal system. On the other hand he does not exclude using references to this type of documents in the current legal system. Since the legislator did not introduce an explicit prohibition in this matter to the code, then, according to *lege non distinguente* principle, such

[7] Cf. the resolution of the Supreme Court of 29 May 1987, III CZP 25/87, OSNCP 1988, No. 9, item 117.

[8] Cf. the decision of the Supreme Court of 20 July 2005, II CK 2/05.

[9] Cf. the decision of the Supreme Court of 16 April 1999, II CKN 255/98, OSNC 1999, No. 11, item 194.

[10] Cf. the decision of the Supreme Court of 6 March 1975, III CRN 450/74, OSPiKA 1976, No. 8, item 147 and the resolution of the Supreme Court of 13 November 1992, III CZP 120/92, OSNC 1993, No. 3, item 26.

a possibility appears to be entirely allowed[11]. Indeed, there are no normative obstacles to taking the circumstances contained in other documents to which the will refers, when interpreting a will. On the other hand, even intuitively it seems that there must be some limit to the permissibility of making such determinations. This is particularly so in those cases, where through the interpretation of the will, the identity of the heir should be specified. The need to draw such a border is also noticed by the previous jurisprudence of the Supreme Court, which indicates that the determination of an heir through the interpretation of a will is possible only if the will contains objective, unambiguous and proven criteria that allow to determine the will of the testator in a way that does not raise any doubts[12]. It should also be assumed that the Supreme Court also had (on the basis of the case for establishing the content of a lost holographic will) such a limit in mind, by stating that the testimony of witnesses testifying in such a case should be assessed with particular insight and caution, especially when there is no trace of written evidence confirming the fact making a will, which may facilitate possible manipulations and fraud[13]. It is also in the justification of the resolution, subject to the gloss, that such a "boundary" is set by the Supreme Court, however, it sees it in the rules of assessing the evidence collected in the case. The issue, however, is that these rules may not prove sufficient. The collected evidence may be reliable in a formal sense (e.g. documents undoubtedly originating from the testator or clear and firm testimonies of witnesses who are strangers to the participants to the proceeding), and yet they may not give us certainty in determination of the heir. For example: in a case with facts similar to that assessed by the Supreme Court, it could have happened that the interviewed witnesses testified honestly and, thanks to their testimony, the court was able to establish the identity of the persons shown in the photograph. However, this does not in any way remove the uncertainty arising from the lack of a link between the will and the "appendix" thereto. Therefore, the lack of such

[11] Rzewuski, "Wykładnia testamentu a okoliczności zewnętrzne towarzyszące testowaniu," 115–119.

[12] As an example, the Supreme Court in the justification of the decision of 13 June 2001, II CKN 543/00.

[13] Cf. the decision of the Supreme Court of 20 July 2005, II CK 2/05.

a link causes the degree of certainty of the interpretation result to decrease, even when we assume a positive evaluation of the evidence. Therefore, it is necessary to search for another rule that would allow for defining the limit of the interpretation of a will. For this, we need to re-examine Art. 948 of the Civil Code to consider, whether the answer to this question will not be provided by a functional interpretation of this provision.

The main purpose of Art. 948 of the Civil Code is to support the realization (implementation) of one of the basic principles of inheritance law, which is the freedom of testation. Without specific rules for interpreting a will, many testators, due to the lack of skills or the ability to precisely define the heir, or express the will to test, might not effectively appoint them. Should this provision not apply, the will should be interpreted on general principles, i.e. based on the objective interpretation of declarations of will. However, in the area of appointing an heir, the freedom of testation is not an absolute value. It must take into account a certain degree of certainty concerning the appointment of heirs. Therefore, since the implementation of the freedom of testation means excluding persons closest to the testator (most often close family members) from the inheritance, then taking into account, for example, the constitutional principle of protection of family (Art. 18 of the Polish Constitution), it must be expressed as certainly as possible. It is doubtful that the legislator accepts the risk of not quite surely appointing a testamentary heir, while at the same time providing wide possibilities in terms of the form of testation. After all, the testator has a choice of a notarial form, which almost completely excludes the risk of imprecise identification of the heir, so if he or she does not apply it and executes a will by hand, or orally, it is the testator, and not his statutory heirs, who should bear the risk of imprecise expression of such a will[14]. All this leads to the conclusion that the interpretation of the will within the meaning of Art. 948 of the Civil Code is a process of interpreting the testator's will that allows it to be clearly defined.

[14] As Zbigniew Radwański points out in, "Wykładnia testamentów," *Kwartalnik Prawa Prywatnego*, no. 1 (1993): 24, the testator should be required to demonstrate a minimum of responsibility when formulating his or her last will, shall it become properly executed after their death.

Therefore, it seems that although the regional court's question was based on a certain simplification (the obligation to clearly define the grounds for determining the heir was not derived from the limits of the interpretation of the will), the Supreme Court should specifically answer the second of the legal questions asked by the questioning court in the above-mentioned manner.

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