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REVIJA

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No. 1/2025
BEOGRAD

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REVIJA KOPAONIČKE ŠKOLE PRIRODNOG PRAVA
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Radovi u ovom časopisu podležu anonimnoj recenziji od strane dva recenzenta. Ocene iznesene u člancima lični su stavovi njihovih autora i ne izražavaju mišljenje uredništva ovog časopisa ni ustanova u kojima su autori zaposleni.

REVIJA KOPAONIČKE ŠKOLE PRIRODNOG PRAVA

ČASOPIS ZA PRAVNU TEORIJU I PRAKSU

Naučni časopis Kopaoničke škole prirodnog prava *Revija Kopaoničke škole prirodnog prava* izlazi od 2019. godine. Časopis objavljuje naučne članke, teorijska istraživanja i studije iz srpskog i uporednog prava, analize izabranih sudskih i arbitražnih odluka, komentare zakonskih rešenja, prikaze knjiga i druge naučne priloge istaknutih domaćih i inostranih autora. Tematska sadržina priloga prilagođena je Heksagonu Kopaoničke škole prirodnog prava: *Pravo na život, Pravo na slobodu, Pravo na imovinu, Pravo na intelektualnu tvorevinu, Pravo na pravdu i Pravo na pravnu državu,* a objavljeni radovi raspoređuju se prema odgovarajućim katedrama Kopaoničke škole. Kao glasilo Kopaoničke škole prirodnog prava – Slobodan Perović, časopis prati naučni rad i aktivnosti Škole i o njima obaveštava čitaoce.

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA
– SLOBODAN PEROVIĆ

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REČ UREDNIKA

Ovo izdanje *Revije Kopaoničke škole prirodnog prava* okuplja četiri naučna rada raspoređena u četiri sekcije: Radno pravo (I), Pravo EU (II), Ugovor (III) i Filozofija prava (IV). Sa aspekta sistematike Heksagona prirodnog prava, radovi po svojoj tematskoj sadržini ulaze u oblast katedara *Pravo na imovinu*, *Pravo na pravdu* i *Pravo na pravnu državu* Kopaoničke škole prirodnog prava – Slobodan Perović.

U prvoj sekciji, članak LABOUR LAW AND EFFECTIVENESS OF EU ANTI-DISCRIMINATION LEGISLATION ON THE GROUNDS OF DISABILITY DURING THE RECRUITMENT PROCESS: THE CASE OF THE GENETIC FEATURES čiji su autori *prof. dr Marta Giaconi*, *prof. dr Lorenzo Giasanti* i *prof. dr Simone Varva* ukazuje, posebno u svetlu tehnološkog i naučnog razvoja veštačke inteligencije, na vezu između invaliditeta i genetskih karakteristika, kao činilaca diskriminacije u pravnom okviru EU, naročito u postupku zapošljavanja. Istraživanje je zaokruženo analizom zaštite genetskih karakteristika na osnovu Opšte uredbe EU o zaštiti podataka (2016) i Zakona EU o veštačkoj inteligenciji (2024).

Članak THE EVOLUTION AND REFORM OF THE PRELIMINARY RULINGS PROCEDURE: HISTORICAL DEVELOPMENT, 2024 IMPROVMENTS, AND CRITICAL ASSESSMENT autorke *dr Maje Lukić Radović*, u drugoj sekciji ovog broja, analizira istorijski razvoj, najnovije reforme i kritičke implikacije postupka po prethodnom pitanju prema članu 267 UFEU. Rad se posebno fokusira na reforme iz 2024. godine koje su nadležnost za odlučivanje o prethodnom pitanju u šest tehničkih oblasti prenele na Opšti sud i uvele značajne proceduralne i digitalne inovacije. Rad pruža kritičku ocenu ovih promena, ističući njihove potencijalne koristi i rizike i daje preporuke za očuvanje jedinstva i delotvornosti prava EU.

U trećoj sekciji, u radu OTKAZNI ROKOVI ZA RASKID UGOVORA O TRGOVINSKOM ZASTUPANJU U SRPSKOM PRAVU autorke *Ljubice Tomić* analizirano je pitanje otkaznih rokova za raskid ugovora o trgovinskom zastupanju. Najpre je razmotren redovni otkaz koji nije uslovljen povredom ugovornih obaveza. Dalje je, sa aspekta srpskog i uporednog prava, analiziran institut vanrednog raskida bez otkaznog roka, koji je dozvoljen kada za to postoje ozbiljni uzroci. Autorka sugeriše da je potrebno da ugovorne strane, u okvirima autonomije volje, ugovornim

klauzulama konkretizuju pitanja vezana za otkaz i otkazni rok, uvek uz poštovanje načela savesnosti i poštenja, ravnopravnosti stranaka i zabrane zloupotrebe prava.

Četvrta sekcija posvećana je filozofiji prava. Autor *prof. dr Dragan Mitrović*, u radu VREME I PRAVO – APODIKTIČKI I ASERTORIČKI POJMOVI I VEZE ističe da, uprkos postavci o postojanju svesnog i razumnog bića – Posmatrača, niko do danas nije uspešno odgovorio na ono što prethodi razmatranju veza prava i vremena, a to su pre svega apodiktička pitanja – šta je vreme, a šta pravo. Prema autoru, tek po odgovoru na ova pitanja mogu se razmatrati asertoričke teme vremena u pravu i prava u vremenu. U radu, akcenat je stavljen na dva pitanja. Prvo se odnosi na vremensko važenje normi, a drugo na preobražavanje prava kroz ljudske epohe.

Poseban prilog ovom izdanju učinio je dr *Alfredo Ferrante* putem članka LAST WILL AND ARBITRATION IN SPAIN: A CRITICAL OVERVIEW ON SPANISH ARBITRATION ACT, originalno objavljenom na španskom jeziku pod naslovom „Arbitraje testamentario, disposición testamentaria, legítima y legitimarios" u *Actualidad Jurídica Iberoamericana*, No. 22, 2025. godine. U radu je analiziran član 10 španskog Zakona o arbitraži koji reguliše arbitražnu klauzulu u testamentu.

Prateći naučni rad i aktivnosti Kopaoničke škole prirodnog prava – Slobodan Perović, izdanje zaključujemo objavljivanjem usmene reči koju je predsednica Kopaoničke škole, *prof. dr Jelena S. Perović Vujačić* održala na otvaranju Trideset sedmog Susreta Kopaoničke škole *Pravo na pravdu – izazovi savremenog doba* održanom 13. decembra 2024. godine.

* * *

Redakcija izražava nadu da će i ovo izdanje *Revije Kopaoničke škole prirodnog prava* ispuniti očekivanja naših čitalaca i upućuje zahvalnost autorima koji su za nju pisali.

Prof. dr Jelena S. Perović Vujačić
Glavni i odgovorni urednik

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MARTA GIACONI
LORENZO GIASANTI
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LABOUR LAW AND EFFECTIVENESS OF EU ANTI-DISCRIMINATION LEGISLATION ON THE GROUNDS OF DISABILITY DURING THE RECRUITMENT PROCESS: THE CASE OF THE GENETIC FEATURES

The jurisprudence of the EU Court of Justice on non-discrimination law emphasises the importance of the notion of "non-deprivation", a concept derived from the interpretation of the effectiveness (i.e. "effet utile") in the Directive 2000/78/EC. In the context of discrimination on the grounds of disability in employment and occupation, this perspective is particularly relevant. The paper points out, also in the light of the technological and scientific development of AI, the link between disability and genetic characteristics as discriminatory factor in the EU legal framework, focusing particularly on the recruitment process. The study is complemented by the analysis of the protection of genetic features provided by the EU General Data Protection Regulation (2016) and by the EU Artificial Intelligence Act (2024).

Key words: *discrimination, employment, effectiveness, disability, genetic features, artificial intelligence, machine learning, recruitment, privacy*

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INTRODUCTION

In "Gattaca", a late '90s dystopian movie, a flashback leads us to the moment of the main character's childbirth. In the background he says: "my destiny was mapped out before me, all my flaws, predispositions and susceptibilities most untreatable to this day. Only minutes old, the date and cause of my death was already known"; meanwhile, the midwife reads the report: "early fatal potential probability 99% [...] life expectancy 33 years".[1]

This contribution analyses the impact of digital technology and AI machine learning in the context of anti-discrimination legislation. In particular it focuses on the relevance of the connection between genetic features and disability: it argues that specific genetic features can be protected using anti-discrimination legislation on the grounds of disability.[2]

We deepen the peculiar situation in which the weakness of the subordinate worker is greatest due to the lack of effectiveness of legal protection: the phase of the selective process. Within this framework we adopt a three prongs analysis, taking into account not only the anti-discrimination perspective, but also the European legislation on privacy (namely, the EU General Data Protection Regulation 2016 "GDPR") and the European regulation on the limits of the use of personal data (namely the EU Artificial Intelligence Act 2024 "EU AI Act").

THE NOTION OF DISABILITY WITHIN EU LEGAL FRAMEWORK

The Directive 2000/78/EC establishes a general framework for combating discrimination on different grounds:[3] disability is among of the limited hypotheses included in its exhaustive list (art. 1).

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[1] Andrew Niccol, *Gattaca*, Sony Pictures Releasing, 1997.

[2] In the similar perspective see Prof. Aisling De Paor's research and, in particular: Aisling De Paor, *Genetics, disability and the law. Towards an EU legal framework*, Cambridge University Press, Cambridge, 2017; Aisling De Paor, "Genetic Discrimination in Employment: The Relevance of the United Nations Convention on the Rights of Persons with Disabilities", *The United Nations Convention on the Rights of Persons with Disabilities. Comparative, regional and thematic perspectives* (eds. Charles O'Mahony, Gerard Quinn), Intersentia, London, 2015; Aisling De Paor, "Disability and genetics: new forms of discrimination?", *Routledge handbook of disability law and human rights* (eds. Peter Blanck, Eilionóir Flynn), Routledge, London, 2016.

[3] The bibliography on EU anti-discrimination and equality law is extensive. For a general overview and further bibliographical references see, among other recent contributions: Lucia Serena Rossi, Federico Casolari (eds.), *The principle of equality in EU law*, Springer, Heidelberg, 2017; Evelyn Ellis, Philippa Watson, *EU anti-discrimination law*, Oxford University Press, Oxford, 2012; Sandra Fredman, *Discrimination law*, Oxford University Press, Oxford, 2022; Ljubinka Kovačević,

The meaning of disability is shaped by the CoJ case-law; in one of the most recent judgements the Court confirms that "according to the case-law, the concept of 'disability' within the meaning of that directive has to be understood as referring to a limitation that results in particular from long-term physical, mental or psychological impairments, which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers"[4].

The Directive stresses the link between non-discrimination and equal treatment, based on the principle of effectiveness: "the purpose of this Directive is to lay down a general framework for combating discrimination [...] with a view to putting into effect in the Member States the principle of equal treatment' (art. 1). From an operational perspective it means that, to reach the final goal (the equality), the non-discrimination legislation had to be interpreted in the most efficient way. A confirmation of this general approach arises from art. 5 on reasonable accommodation for person with a disability, which states that 'in order to guarantee compliance with the principle of equal treatment [...] employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer."[5]

The CoJ jurisprudence is inspired by the above-mentioned "effectiveness approach". A clear example is represented by the recognition of the notion of discrimination by association, in a case on discrimination on the grounds of disability

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"Gender Perspective of Development of Labour Law", *Gender perspectives in private law* (eds. Gabriele Carapezza Figlia, Ljubinka Kovačević, Eleonor Kristoffersson), Springer, Heidelberg, 2023; Uladzislau Belavusau, Kristin Henrard (eds.), *EU anti-discrimination law beyond gender*, Bloomsbury Publishing, London, 2018.

[4] EU Court of Justice, C-485/20, *XXXX* v. *HR Rail SA*, 10 February 2022; similarly see: EU Court of Justice, C-335/11, *HK Denmark*, 11 April 2013; EU Court of Justice, C-397/18, *Nobel Plastiques Ibérica*, 11 September 2019. The "European" definition of disability derives from the art. 1 of the UN Convention on the Rights of Persons with Disabilities which states that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

[5] In the preamble of the Directive, recitals n. 16 and n. 20 enlighten that "the provision of measures to accommodate the needs of disabled people plays an important role in combating discrimination on grounds of disability" and these accommodations can consist in "effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources".

where the CoJ underlines that the Directive interpretation has to avoid depriving the directive of an "important element of its effectiveness".[6]

In line with this approach based on the effectiveness of non-discrimination legislation, we propose to extend protection by establishing a link with non-discrimination on the grounds of genetic features. It is known that the ground of "genetic features" is listed only in the art. 21 (on non-discrimination) of the Charter of fundamental rights of the European Union.[7] Therefore, there is no direct legal basis at EU level to protect against discrimination based on genetic characteristics.[8] Nevertheless, we argue that it is possible to adopt a broad interpretation, in the light of principles above mentioned: so, a particular genetic heritage can definitely be considered a potential element of disability.

GENETIC FEATURES, TECHNOLOGIC EVOLUTION, BIG DATA

In the light of the GDPR, biometric data constitute a "special category of personal data" to classify as "high-risk", underlying also that "technical inaccuracies of AI systems intended for the remote biometric identification of natural persons can lead to biased results and entail discriminatory effects". In addition, in the light of data protection legislation, people with a disability are protected as members of a vulnerable group.

There are various overlaps between privacy and AI legislation on the use of biometric data. On the one hand, the problem arises because of the lack of legislative effectiveness and, on the other hand, because these disciplines do not provide specific protection under labour law. Moreover, the regulatory structure for privacy and for AI legislation appears to be based on a checks and balances approach and the implementation of the precautionary principle (see *infra*). These legal techniques leave gaps in terms of efficiency. For these reasons, we believe that anti-discrimination legislation, with its high level of effectiveness and its approach

[6] EU Court of Justice, C-303/06, *Coleman*, 17 July 2008; see also EU Court of Justice, C-83/14, *Chez*, 16 July 2015.

[7] On art. 21 of the Charter see, e.g. Hanna Eklund, Claire Kilpatrick, "Article 21. Non-Discrimination", *Charter of Fundamental Rights of the European Union* (eds. Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward), Bloomsbury Publishing, London, 2021, 615; Mariana Canotilho, Sergio Maia Tavares Marques, "Article 21. Non-discrimination", *The Charter of Fundamental Rights of the European Union. A commentary* (eds. Alessandra Silveira, Larissa Araújo Coelho, Maria Inês Costa, Tiago Sérgio Cabral), UMinho Law School, Braga, 2024, 212.

[8] Art. 51 of the Charter states clearly that "this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".

based on targeting vulnerable groups, is a key to ensure a real and effective protection for workers, also during the recruitment process.

As we have mentioned *supra*, a relevant example of discrimination based on disability in the light of genetic features is the (ab)use of genetic data. A "European definition" of biometric data is contained in art. 3 of GDPR which states that "biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, such as facial images or dactyloscopy data"[9].

In the foreseeable future genetic data will be increasingly easier and cheaper to obtain by employers, even remotely, including through biometrics.[10] Once obtained, data can be stored and transferred,[11] waiting for more developed technologies or for more sensitive machine learning processes: we are facing not only an ongoing risk, but also massive (event unlimited) potential risks in the future.[12]

As we argued, biometric data can be easily linked with discrimination on the grounds of disability; but it is possible to outline a link with various forms of intersectional discrimination: disability and gender (some diseases are statistically more prevalent among a particular gender)[13], disability and ethnicity (some diseases are

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[9] The article also distinguishes between "real time" and "post" remote biometric identification systems.

[10] With reference to mental illness, it has already been correctly observed that "it is evident that mental illness is an important issue in the workplace and that employers may ultimately seek to use genetic testing (and genetic information) as a tool in the recruitment and retention of employees" and that "in the absence of legal protections, employers may ultimately use genetic technologies as a (predictive) tool of discrimination to identify or avoid those with mental illness and those with predisposition to mental illness". Aisling De Paor, Charles Patrick O'Mahony, "The need to protect employees with genetic predisposition to mental illness? The UN Convention on the Rights of Persons with Disabilities and the case for regulation", *Industrial Law Journal*, No. 4, Vol. 45, 2016, 554–555.

[11] For instance, an iris scan can be detected for a specific use, but there is a real risk that it can be archived for other aims in future: see Italian Data Protection Authority, "Cryptocurrencies: on iris in exchange for data, privacy watchdog warns Worldcoin", provision on 21 March 2024, *www.garanteprivacy.it*.

[12] European Union Agency for Fundamental Rights, *Preventing unlawful profiling today and in the future: a guide*, Publications Office of the European Union, Luxembourg, 2018.

[13] See, e.g., Vera Regitz-Zagrosek, Catherine Gebhard, "Gender medicine: effects of sex and gender on cardiovascular disease manifestation and outcomes", *Nature Reviews Cardiology*, Vol. 20, 2023, 236; Ranjani Somayaji, James D. Chalmers, "Just breathe: a review of sex and gender in chronic lung disease", *European Respiratory Review*, Vol. 31, 2022, 163; Guillermo García García, Arpana Iyengar, François Kaze, Ciara Kierans, Cesar Padilla-Altamira, Valerie A. Luyckx, "Sex and gender differences in chronic kidney disease and access to care around the globe", *Seminars in Nephrology*, No. 2, Vol. 42, 2022, 101.

statistically more likely to occur in particular ethnic groups)[14], disability and age (some diseases, especially chronic ones, are statistically more prevalent among older people – or sometimes even among younger people)[15].

THE IMPACT OF INNOVATIVE TECHNOLOGIES

Employers' use of big data is a source of risk and concern for workers, especially in the light of anti-discrimination legislation and at stages where legal protection effectiveness is weaker (namely, during the recruitment process).[16]

The use of biometrics poses a particular and exemplary problem. Recent scientific research strongly confirms, for instance, that the eyes are not only the mirror to the soul, but also to the body and to the brain, especially when they are examined by artificial intelligence through a learning machine procedure. Besides, it is observed that "the eye is the only organ allowing direct, non-invasive, *in vivo* observation of microvasculature and neural structures"[17]. The prediction or diagnosis

[14] See, e.g., Thomas Alexis LaVeist, Lydia A. Isaac, *Race, ethnicity, and health. A public health reader*, Wiley, Hoboken, 2012; Mark R. Cullen, Adina R. Lemeshow, Leo J. Russo, David M. Barnes, Yaa Ababio, Aida Habtezion, "Disease-specific health disparities: A targeted review focusing on race and ethnicity", *Healthcare*, No. 4, Vol. 10, 2022, 603; Su-Min Jeong, Dong Hoon Lee, Leandro F.M. Rezende, Edward L. Giovannucci, "Different correlation of body mass index with body fatness and obesity-related biomarker according to age, sex and race-ethnicity", *Scientific Reports*, Vol. 13, 2023.

[15] Studies on diseases and ageing are numerous: see, *inter alia*, the recent Ye Ella Tian, Vanessa Cropley, Andrea B. Maier, Nicola T. Lautenschlager, Michael Breakspear, Andrew Zalesky, "Heterogeneous aging across multiple organ systems and prediction of chronic disease and mortality", *Nature Medicine*, Vol. 29, 2023, 1221. Sometimes also with differences among genders: Vivan Castro Lemos, Marilisa Berti de Azevedo Barros, Margareth Guimarães Lima, "Chronic diseases and health conditions in adolescents. Sex inequalities", *Revista brasileira de epidemiologia*, Vol. 26, 2023.

[16] Sharona Hoffman, "Big data and the Americans with Disabilities Act", *Hastings Law Journal*, No. 4, Vol. 68, 2017, 777.

[17] Li Zhongwen, Yin Shiqi, Wang Shihong, Wang Yangyang, Quiang Wei, Jiang Jiewei, "Transformative applications of oculomics-based AI approaches in the management of systemic diseases: A systematic review", *Journal of Advanced Research*, 2024; Zhu Zhuoting *et al.*, "Oculomics. Current concepts and evidence", *Progress in Retinal and Eye Research*, Vol. 106, 2025, where it is stressed clearly how "oculomics offers an opportunity to enhance our understanding of the interplay between the eye and the body, while supporting development of innovative diagnostic, prognostic, and therapeutic tools. These advances have been further accelerated by developments in AI, coupled with large-scale linkage datasets linking ocular imaging data with systemic health data. Oculomics also enables the detection, screening, diagnosis, and monitoring of many systemic health conditions. Furthermore, oculomics with AI allows prediction of the risk of systemic diseases, enabling risk stratification, opening up new avenues for prevention or individualized risk prediction and prevention, facilitating personalized medicine".

of the presence of systemic diseases through the analysis of ophthalmic features is a branch of medical science called "oculomics"[18] and this connection has been theorised for many decades, starting with pioneering studies that revealed the link between diabetes and the retina biomarkers or between Alzheimer's disease and optic-nerve degeneration.[19]

Retinal analysis can thus provide a wide range of information about a person's health and clinical outlook, with connections with generalised diseases such as hypertension, cancer, autoimmune disorders.[20] Information that may potentially be collected by the employer when a person applies for a job and is subjected to a selection procedure.

Nowadays, optical coherence tomography is already an extremely economical technique. But there are also some applications for mobile devices which guarantee a remote health screening using AI through a "retina selfie".[21] At clinical level, innovative medical tech firms shape quite cheap "handheld non-contact optical instruments for use in healthcare screening and monitoring [that enables the monitoring of] general health conditions such as diabetes and Alzheimer's disease".[22]

Many papers, in general terms, stress how the hunt for ocular "biomarkers" is a promising area of research (e.g. diabetes, multiple sclerosis, high blood pressure, attention deficit and hyperactivity disorder, Alzheimer's disease, autism, schizophrenia, Parkinson's disease).[23] Some other papers, notably, focus on the contribution

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[18] Among the most recent contributions see e.g.: Emily J. Patterson, Alistair D. Bounds, Siegfried K. Wagner, Richard Kadri-Langford, Robin Taylor, Dan Daly, "Oculomics: a crusade against the four horsemen of chronic disease", *Ophthalmology Therapy*, Vol. 13, 2024, 1427; Alistar Bounds, "Oculomics: a window to the health of the body", *Pysiscsword.com*, 2 July 2024.

[19] See: E.M. Kohner, A.M. Hamilton, S.J. Saunders, B.A. Sutcliffe, C.J. Bulpitt, "The retinal blood flow in diabetes", *Diabetologia*, No. 1, Vol. 11, 1975, 27; D.R. Hinton, A.A. Sadun, J.C. Blanks, C.A. Miller, "Optic-nerve degeneration in Alzheimer's disease", *The New England Journal of Medicine*, No. 8, Vol. 315, 1986, 485. For further bibliographical references on the subject, Alicia J. Jenkins, Mugdha V. Joglekar, Anandwardhan A. Hardikar, Anthony C. Keech, David N. O'Neal, Andrzej S. Januszewski, "Biomarkers in Diabetic Retinopathy", *Review of Diabetic Studies*, No. 1–2, Vol. 12, 2015, 159.

[20] L. Zhongwen, Y. Shiqi, W. Shihong, W. Yangyang, Q. Wei, J. Jiewei, op. cit., where a wide analysis of the efficiency of oculomics is focused on cardiovascular and cerebrovascular system, nervous system, endocrine system, blood system, digestive system, urinary system.

[21] See the US app "Together by Renee", discussed in Bill Siwicki, "AI innovator talks personalized treatment, telehealth enhancement and ethics", *Healthcare IT news*, 22 January 2024, *https://www.healthcareitnews.com*, 29. 4. 2025.

[22] From website *www.occuity.com*.

[23] Matthew R. Land, Parth A. Patel, Tommy Bui, Cheng Jiao, Arsalan Ali, Shadman Ibnamasud, Prem N. Patel, Veeral Sheth, "Examining the role of telemedicine in diabetic retinopathy", *Journal of*

of AI for eye health.[24] It is stressed how the use of AI machine learning technology to shape oculomics-based models reaches high performance in predicting systemic diseases such as neurodegenerative disorders, cardiovascular and metabolic conditions.[25] A study examines the analysis of eyes by smartphone, and it considers this technique "a cheap and safe method, thus contributing to public policies on population screening"; the research provides "an update on the use of this resource and its future prospects, especially as a screening and ophthalmic diagnostic tool".[26]

GDPR AND AI ACT: SOME LEGAL LIMITATIONS DURING RECRUITMENT PROCEDURE

Since we would like to try to investigate the possibility of fighting discrimination on the grounds of disability in recruitment procedure, it is worthy to stress that nowadays one of the most relevant legal perspectives is the use of new technologies, as well as artificial intelligence tools and machine learning. Although this body of legislation is not analysed in detail in this article, it is necessary to briefly illustrate some of its main provisions.[27]

The major problem from a juridical point of view in using an automatic machine system to help the employer to recruit new employees is to avoid "unfair

Clinical Medicine, No. 12, 2023, 1; John Bedolla, Jess M. Pines, "Diagnosis in telemedicine", *Evidence-based emergency care: Diagnostic testing and clinical decision rules* (eds. Jess M. Pines, Fernanda Bellolio, Christopher R. Carpenter, Ali S. Raja), Wiley, Hoboken, 2023, 699.

[24] Nicholas Sawers, Nigel Bolster, Andrew Bastawrous, "The contribution of artificial intelligence in achieving the sustainable development goals what can eye health can learn from commercial industry and early lessons from the application of machine learning in eye health programmes", *Frontiers in Public Health*, No. 9, 2021, 1.

[25] L. Zhongwen, Y. Shiqi, W. Shihong, W. Yangyang, Q. Wei, J. Jiewei, op. cit.

[26] Manuel Augusto Pereira Vilela, Alessandro Arrigo, Maurizio Battaglia Parodi, Carolina da Silva Mengue, "Smartphone eye examination. Artificial intelligence and telemedicine", *Telemed Journal and e-Health*, No. 2, 2024, 341.

[27] The literature on the topic is massive and we have to limit ourselves to a reduced number of bibliographical references: Ifeoma Ajunwa, Daniel Greene, "Platforms at work. Automated hiring platforms and other new intermediaries in the organization of work", *Work and Labor in the Digital Age*, Vol. 33, 2019, 61; Eva Lacková, "Fragility of pre-contractual labour relations in the light of algorithmic recruitment", *Diritti lavori mercati*, No. 2, 2022, 71; Henni Parviainen, "Can algorithmic recruitment systems lawfully utilise automated decision-making in the EU?", *European Labour Law Journal*, No. 2, Vol. 13, 2022, 225; Raphaële Xenidis, Linda Senden, "EU non-discrimination law in the era of artificial intelligence. Mapping the challenges of algorithmic discrimination", *General principles of EU law and the EU digital order* (eds. Ulf Bernitz *et al.*), Kluwer Law International, Alphen aan den Rijn, 2020, 151.

hiring algorithms": namely, algorithms that use arbitrary criteria or result in inconsistent output; a procedure that can become more opaque and more pervasive than human selection.

As it is well known in literature,[28] there are different reasons why an algorithm might give rise to discriminatory outcomes.

If the very structure of the algorithm could be designed to unfairly penalise certain people on the basis of legally protected discriminatory factors, in many cases, where artificial intelligence systems are more complex and have machine learning features, the programmer has no way to completely predict from the outset the content of the algorithm, which will depend on the algorithm's self-learning process. Consequently, since learning takes place through statistical analysis of data sets provided by programmers, possible discrimination may result from poor quality of the data themselves, which could reflect the biases of the context in which they originate and disadvantage underrepresented groups. Through the algorithm's self-learning processes, it is thus possible to give rise to dangerous forms of large-scale consolidation and replication of biases still rooted in social reality.

In any case, due to the very functioning of algorithms, and in particular those used for personnel selection, a frequent mode of discrimination is so-called proxy discrimination. Proxy discrimination is the use, in automated decision-making, of data that are in themselves neutral and yet strongly correlated from a statistical point of view with the protected characteristics of workers.

Albeit sparse Italian case law on the subject of automated discrimination in the workplace seems to confirm this hypothesis. The reference, in particular, is to the well-known decision of the Court of Bologna[29] in the case involving three labour organizations[30] that started an action against the home delivery platform Deliveroo in a case of discrimination against riders on union grounds, described as a ruling that "has been welcomed by most of the literature notably because of its unprecedented nature at European level and, above all, due to the conclusions reached and the reasons leading to the latter".[31]

In the case in question, the company employed an algorithm, called Frank,[32] that automatically processed a reputational score based on riders' cancellations of

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[28] Ifeoma Ajunwa, *The quantified worker. Law and technology in the modern workplace*, Cambridge University Press, 2023, 75.

[29] Trib. Bologna 31. 12. 2020, in *Rivista Italiana di Diritto del Lavoro*, 2021, No. 2, II, 175.

[30] The local trade unions of Cgil transport federation (Filt), Filcams and Nidil of Bologna.

[31] Ilaria Purificato, "Behind the scenes of Deliveroo's algorithm: the discriminatory effect of Frank's blindness", *Italian Labour Law E-journal*, No. 1, Vol. 14, 2021, 170.

[32] It was a system used by the Deliveroo platform to manage the delivery riders' workflows.

slots booked with little notice: on this score depended the allocation of the rider's time slots, as riders with the highest score had granted access to the first of the time slots provided by the platform and this allowed them to register themselves into all preferred schedules. Therefore, in concrete terms, the score influenced the work possibilities for workers without distinguishing between absence reasons.

According to the Court, which largely accepted the unions' reconstruction, there had been discrimination on union grounds, since delivery drivers, who had participated in a strike, exercising their constitutionally guaranteed right,[33] would have been unfairly penalized. According to the judge, in particular, the cause of discrimination was found precisely in the "algorithm's blindness" to different situations, which may therefore require different treatment by the platform.

As it was described above, anti-discrimination discipline of the European Union is capable of providing an effective form of protection for all cases of less favourable treatment based on factors such as disability.

There are, however, other normative instruments which, although not designed for the context specific to algorithmic selection, can be applied in this area and studied as tools to prevent discrimination and protect the right to work.

One of the main legal tools to consider is the GDPR. The most relevant provisions for our aim are art. 15 on the right to access, art. 16 on the right to rectification, art. 17 on the right to erasure (or "to be forgotten") and art. 22 on the right not to be subject to automated decisions.

According to art. 15 "the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him are being processed and, where that is the case, access to the personal data" and to some specific information, including the categories of personal data concerned, the recipients to whom the personal data have been or will be disclosed, and the existence of automated decision-making, including profiling. The data subject has also the right to receive meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. If any relevant personal information is inaccurate art. 16 give the data subject the right to have incomplete personal data completed and art. 17 assures that data subject data could be erased, when specific grounds apply.

The main important rule in automated individual decision-making, "profiling" included, is surely contained in art. 22; according to this provision "the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling which produces legal effects concerning him or her

[33] Art. 40 of the Italian Constitution grants every worker the right to strike.

or similarly significantly affects him or her". It is an important legal principle also described in recital n. 71 of GDPR, which precises that "profiling" consists of any form of automated processing of personal data evaluating the personal aspects relating to a natural person as, for instance, to analyse or predict aspects concerning the data subject's performance at work. Even if there are who proposes that "article 22(1) is better characterized as conferring upon data subjects a right that they may exercise at their insistence, rather than establishing a general ban on individual decisions based solely on automated processing",[34] various arguments, such as the general logic of GDPR, the human intervention safeguard and the specific risks related to recruitment processes suggest that art. 22 introduces a real prohibition, with some specific exceptions provided by the GDPR. Consequently "employers can employ automated decision-making if some exceptions listed in GDPR Article 22(2) apply and if safeguards required in GDPR Article 22(3) are implemented"[35].

The main question that is necessary to understand is what could be the exact meaning of decision based "solely on automated processing" in algorithmic recruitment systems. Literature discussions were generally divided into a narrow and a broad approach. By adopting the narrow approach, it could be possible to define a "solely automated" processing only where there is no human involvement whatsoever in any phase of the process. As it was well-explained "systematic and teleological arguments seem to support the broad approach".[36] By adopting this broader approach, decisions could be defined as "purely automated" even if humans are only nominally involved, as is often the case with many algorithmic recruitment systems.

Some Italian juridical decisions as well as the interpretation of the Italian authority of private data suggest that a broad approach of the definition of "solely automated" process could be the right one. According to the Court of Palermo a "solely automated" process exists even when humans are involved at the beginning phase or during the process, when the final decision is taken by the algorithm.[37]

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[34] Luca Tosoni, "The right to object to automated individual decisions. Resolving the ambiguity of article 22(1) of the General data protection regulation", *University of Oslo Faculty of Law Research Paper*, No. 7, 2021, 25..

[35] H. Parviainen, op. cit., 232.

[36] *Ibidem*, 236.

[37] Trib. Palermo 20. 6. 2023, in *Rivista giuridica del lavoro e della previdenza sociale*, No. 3, II, 2023, 415, commented by Annamaria Donini, "La tutela del diritto di informazione collettiva sui sistemi automatizzati attraverso il procedimento di repressione della condotta antisindacale". According to the Court *'sistemi automatizzati utilizzati dalla resistente [Foodinho s.r.l.] risultano sistemi integralmente automatizzati, atteso che in essi l'intervento umano dedotto (e non dimostrato) comunque non interverrebbe*

Very similar were the decisions taken by the Court of Torino[38] and by the Italian authority on private data.[39]

The EU Court of Justice in late 2023 made his very first decision on art. 22 GDPR.[40] According to its statement art. 22 "lays down a prohibition in principle, the infringement of which does not need to be invoked individually by such a person" (pt. 52), and consequently "the adoption of a decision based solely on automated processing is authorised only in the cases referred to in that Article 22(2)" (pt. 53); according to the Court the concept of decision "refers not only to acts which produce legal effects concerning the person at issue but also to acts which similarly significantly affect him or her" (pt. 44).

The broad scope of the concept of decision is confirmed by recital n. 71 of GDPR that the Court considers essential for the interpretation of art. 22: the purpose pursued consists of protecting individuals against the particular risks to their rights and freedoms represented by the automated processing of personal data, including profiling. Those particular risks are, under the recital n. 71, likely to weigh on the legitimate interests and rights of the data subject, in particular considering of discriminatory effects on natural persons on the basis of racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation. It is therefore important, still according to that recital, to provide suitable safeguards and to ensure fair and transparent processing in respect of the data subject, in particular through the use of appropriate mathematical or statistical procedures for the profiling and the implementation of technical and organisational measures appropriate to ensure that the risk of errors is minimised. According to the EU Court of Justice "constitutes automated individual decision-making within the meaning of that provision, where a third party, to which that probability value is transmitted, draws strongly on that probability value to establish, implement or terminate a contractual relationship with that person" (pt. 73).

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nella fase finale, bensì eventualmente solo in quella dell'inserimento dei dati o dell'attivazione del sistema medesimo, in cui la successiva elaborazione e trattamento dei dati ed eventuale decisione finale sono affidati integralmente ad automatismi algoritmici o informatici' ("the automated systems used by the defendant, Foodinho S.r.l., are fully automated, because any alleged human intervention does not occur in the final phase, but only during data entry or system activation; the subsequent processing and treatment of the data, and any final decisions, are entirely entrusted to algorithmic or computerised automatisms" [English translation by the authors]).

[38] Trib. Torino 12. 3. 2024, in *Foro italiano*, No. 4, I, 2024, 128.

[39] Garante per la protezione dei dati personali, registro dei provvedimenti n. 675 del 13. 11. 2024, provvedimento n. 10074601 "Foodinho s.r.l".

[40] EU Court of Justice, C-634/21, *Schufa*, 7 December 2023.

Even if the decision was made in a case concerning a credit information agency, this concept could be easily applied to the algorithmic recruitment systems, since both are included in recital n. 71, and the main principle of the "Schufa decision" is that art. 22 must be necessarily interpreted with a broad approach.

The EU AI Act, which was approved for regulating artificial intelligence systems in the European Union, contains a few more tools useful for monitoring algorithmic recruitment systems. According to recital n. 57 "AI systems used in employment, workers management and access to self-employment, in particular for the recruitment and selection of persons […] should also be classified as high-risk, since those systems may have an appreciable impact on future career prospects, livelihoods of those persons and workers' rights".

According to art. 5 on prohibited AI practices in the European Union the use of an AI system that exploits any of the vulnerabilities of a natural person or a specific group of persons due to their age, disability or a specific social or economic situation, with the objective, or the effect, of materially distorting the behaviour of that person or a person belonging to that group in a manner that causes or is reasonably likely to cause that person or another person significant harm must be forbidden (art. 5(1) lett. b).

Art. 6 (together with the annex III) describes on which conditions an AI systems shall be considered to be high-risk. The annex III clarifies that "AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates" have to be considered as high-risk AI systems, since those systems may have an appreciable impact on future career prospects, livelihoods of those persons and workers' rights.

It is important to remember that the AI EU regulation specified as AI systems could, in some circumstances as when biometric data are used, can lead to biased results and entail discriminatory effects and the risk of such biased results and discriminatory effects is particularly relevant regarding age, ethnicity, race, sex or disabilities.

In the EU AI Act framework, high-risk systems are subject to a risk management system, which is a 'planned continuous iterative process' that covers the entire life of the product, from its design to its placing on the market and, subsequently, its use in different contexts. To comply with this obligation, the supplier (the entity that develops causes the AI system to be developed and places it on the market) must identify and analyse known and reasonably foreseeable risks to the health, safety, and fundamental rights of citizens, both when the system is used in accordance with its intended purpose and under conditions of improper but reasonably foreseeable use.

What is more important, it is required that the human supervisor must be aware of the so-called "automation bias" or the tendency to rely on the output of an AI system without discussing its contents, particularly in relation to "high-risk AI systems used to provide information or recommendations for decisions to be made by natural persons".

The EU AI Act implements a clear distribution of responsibilities between the provider and deployer of AI systems. The deployer must ensure that the input data are relevant and sufficiently representative. This is the more relevant provision in the context of algorithmic personnel selection. It is an important employer's duty to ensure that only data that may be relevant to the job aptitude of the candidate are processed and taken into account, preventing, on the contrary, the system from receiving input data that are unrepresentative, distorted or in any case refer to irrelevant characteristics of the worker.

Even if the GDPR and EU AI Act contain some important legal issues to try to avoid automated discriminatory decisions, what is still missing is the possibility to get inside the algorithm to be able to specifically assess how directly or indirectly discriminatory references are being processed.

In fact, national and European patent laws do not provide specific rights of access to the algorithm to protect workers from discrimination in selection processes; and even if national legislation (or national jurisprudence) allows an employee to know the code that concerns him or her, it is very difficult to understand it without the possibility of knowing the entire algorithmic code (usually covered by the secret patent).

In other words, despite these relevant bodies of law, anti-discrimination legislation provides a useful and effective toolbox to protect applicants from the unlawful use of biometric data during the recruitment process.

DISCUSSION

We asked a popular system of AI assistant: "Can you perform early detection and monitoring of systemic diseases if I upload an optical coherence tomography (OCT) image of my eye?" This is the answer: "I can now analyse and describe OCT images, identifying visible features such as retinal layer structure, thinning or swelling, and signs that may be associated with certain eye diseases (e.g. macular degeneration, diabetic retinopathy, glaucoma). I can help interpret general findings in a way that aligns with what is known in current ophthalmology. [...] systemic disease indicators in the eye are subtle and complex, and interpreting them safely requires collaboration with healthcare professionals. [so] I can: describe what's

visible structurally; point out any notable abnormalities or patterns that could warrant further evaluation; suggest if what's visible is commonly associated with particular eye or systemic conditions (based on medical literature). If you're interested in the future of this field, tools like those mentioned in the study (oculomics plus AI) are actively being developed, and retina-based health screening could become a common tool in personalized medicine! Would you like to upload an OCT image for a general interpretation?"

One of the main issues related to the right to justice is the efficiency of legal protection: in other words, the effectiveness of guaranteed rights. The notion of disability has to be interpreted broadly, as the aim of the anti-discrimination legislation is to extend its effects as far as possible. In the light of a purposive and teleological interpretation, genetic features and genetic heritages are elements that enrich the meaning of non-discrimination on the grounds of disability, a way of ensuring the "effet utile" of the Directive 2000/78/EC. GDPR and EU AI Act are undoubtedly supporting elements to achieve the protection of workers with disabilities: but none of them is a labour law body and they are not designed to guarantee specific protection to workers. Additionally, the effectiveness of anti-discrimination legislation, which is based on a "purposive judicial approach",[41] presumptions, statistical data and a partial reversal of the burden of proof, is crucial to workers' access to justice. It must be considered that, in most countries, workers have access to anti-discrimination proceedings in labour courts with judges experienced in labour law: and the legal context is often quite different when it comes to issues of privacy or the misuse of artificial intelligence. These are the main reasons for the focus on anti-discrimination legislation, which has been shaped to take into particular account the needs of the workers; for this reason, the Directive covers also the most delicate phase of the recruitment selection.

The development of technology and machine learning may have serious implications for the protection of genetic features. Particularly if it is possible to predict a high risk of developing chronic diseases and disabilities by examining biometric data, even remotely, especially when this analysis is carried out with the support of artificial intelligence.

The threat posed by the collection and use of biometric data is already significant, and the outlook is certainly not encouraging. The threat posed by the collection

[41] An implication of the purposive approach is, e.g., an adoption of a particularly broad interpretation of the notion of reasonable accommodation: not only in light of the provision in art. 5, Dir. 2000/78/EC, but also of the UN Convention on the Rights of Persons with Disabilities (2006). For a purposive approach to EU social legislation see, e.g., Nicola Countouris, Mark Freedland (eds.), *Resocialising Europe in a time of crisis*, Cambridge University Press, Cambridge, 2013.

of biometric data is irreversible, as irreversible are the effects of the collection. It is a threat to the protection of the human person, and to the protection of the working person in particular, which will therefore spread like a wave into the future: unless effective and lasting barriers are put in place in time.

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RADNO PRAVO I DELOTVORNOST ANTIDISKRIMINACIONOG PRAVA EU U POGLEDU DISKRIMINACIJE NA OSNOVU INVALIDITETA U POSTUPKU ZAPOŠLJAVANJA: SLUČAJ GENETSKIH KARAKTERISTIKA

Rezime

Sudska praksa Suda pravde EU u oblasti zabrane diskriminacije ističe značaj koji za Direktivu 2000/78/EZ ima koncepcija "nelišavanja" važnog elementa njene delotovnosti (*effet utile*). Ova perspektiva je posebno bitna u kontekstu diskriminacije na osnovu invaliditeta u zapošljavanju i zanimanju. Članak ukazuje, takođe u svetlu tehnološkog i naučnog razvoja veštačke inteligencije, na vezu između invaliditeta i genetskih karakteristika, kao činioca diskriminacije u pravnom okviru EU, naročito u postupku zapošljavanja. Istraživanje je zaokruženo analizom zaštite genetskih karakteristika na osnovu Opšte uredbe EU o zaštiti podataka (2016) i Zakona EU o veštačkoj inteligenciji (2024).

Ključne reči: diskriminacija, zapošljavanje, delotvornost, invaliditet, genetske karakteristike, veštačka inteligencija, mašinsko učenje, postupak zapošljavanja, privatnost

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MAJA LUKIĆ RADOVIĆ

THE EVOLUTION AND REFORM OF THE PRELIMINARY RULINGS PROCEDURE: HISTORICAL DEVELOPMENT, 2024 IMPROVMENTS, AND CRITICAL ASSESSMENT

This paper examines the historical development, recent reforms, and critical implications of the preliminary rulings procedure under Article 267 TFEU, a cornerstone of the European Union's judicial system. Tracing its evolution from the ECSC Treaty through successive treaty amendments, the study analyzes the 2024 reforms that transferred preliminary ruling jurisdiction in six technical areas to the General Court and introduced significant procedural modernization. While these reforms aim to address the Court of Justice's workload and enhance efficiency, they also raise concerns regarding legal fragmentation, jurisdictional complexity, and the dilution of judicial dialogue between national courts and the EU's highest court. The paper provides a critical assessment of these changes, highlighting both their potential benefits and risks, and offers recommendations for ensuring the continued uniformity and effectiveness of EU law.

Key words: *Preliminary ruling procedure, Court of Justice of the European Union (CJEU), General Court, Judicial cooperation, EU law interpretation*

INTRODUCTION

The preliminary ruling procedure, enshrined in Article 267 of the Treaty on the Functioning of the European Union (TFEU), is widely recognized as the "keystone of the Union's judicial system" and a fundamental driver of European

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integration.[1] By enabling national courts to refer questions concerning the interpretation and validity of EU law to the Court of Justice of the European Union (CJEU), this mechanism ensures the uniform application of EU law across all Member States. It has played a pivotal role in the development of core doctrines such as the supremacy and direct effect of EU law, and in fostering a unique "judicial dialogue" between national courts and the European judiciary.[2]

Since its inception in the 1950s, the preliminary ruling procedure has evolved in response to the changing needs of the European project. The increasing scope and complexity of EU law, coupled with successive enlargements of the Union, have led to a dramatic rise in the number of preliminary references submitted by national courts. By the early 2020s, this surge in caseload placed significant strain on the CJEU, raising concerns about delays, efficiency, and the accessibility of justice.[3]

Against this backdrop, the 2024 amendments to the Rules of Procedure of the CJEU represent the most significant reform of the preliminary ruling system in decades. These reforms include the transfer of preliminary ruling jurisdiction in certain technical areas to the General Court, the introduction of new procedural and digital tools, and enhanced transparency measures. The reforms are intended to streamline judicial processes, reduce bottlenecks, and modernize the administration of justice at the EU level.

However, these changes also raise important questions about the future of the preliminary ruling procedure. While the reforms promise greater efficiency and specialization, they introduce new complexities, such as the risk of legal fragmentation, uncertainty with respect to applicable jurisdiction, and potential shifts in the constitutional balance of the EU judicial system.[4]

This paper provides a comprehensive analysis of the evolution and reform of the preliminary rulings procedure. It traces the historical development of the mechanism, examines the key features and intended benefits of the 2024 amendments, and offers a critical assessment of their potential implications for the coherence and effectiveness of EU law. Ultimately, the study seeks to evaluate whether

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[1] Paul Craig, Grainne de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed., Oxford University Press, 2021, 453.

[2] Koen Lenaerts, José A. Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law", *Common Market Law Review*, No. 6, Vol. 47, 2010, 1629–1669.

[3] CJEU *Annual Report* 2022, Statistical Overview.

[4] Lorenzo Grossio, Davor Petrić, "EU Procedural Law Revisited: The Reformed EU Judicial Architecture between the Statute of the Court of Justice and the Rules of Procedure", *European Papers*, No 2, Vol. 10, 2025, 293-326.

the recent reforms can successfully balance the demands of judicial efficiency with the foundational objective of ensuring the uniform application of EU law across the Union.

HISTORICAL DEVELOPMENT OF THE PRELIMINARY RULINGS PROCEDURE PRIOR TO 2024

Origins in the ECSC Treaty (1951–1957) and the Rome Treaty Foundation (1957)

The preliminary ruling procedure traces its origins to Article 41 of the 1951 Treaty establishing the European Coal and Steel Community (ECSC).[5] This provision established a limited form of preliminary reference procedure, granting the Court exclusive jurisdiction to declare acts of the High Authority invalid. However, Article 41 was rarely used and represented only a nascent form of what would later become the comprehensive preliminary ruling mechanism.[6]

The modern preliminary ruling procedure was established under Article 177 of the 1957 Treaty of Rome.[7] This provision introduced two fundamental innovations compared to the ECSC model: first, it granted the Court jurisdiction over interpretation of Community legislation, and second, it did not confer sole jurisdiction on the European Court. Article 177 established the basic framework that would endure for decades, allowing national courts to refer questions concerning both the interpretation and validity of Community law.[8]

Early Foundational Cases and Procedural Development

The procedure's transformative potential was realized through landmark cases in the 1960s. The *Van Gend & Loos* case (1963) established the doctrine of direct effect, while *Costa v. ENEL* (1964) introduced the principle of EU law supremacy.[9] The *Da Costa en Schaake* case (1963) further established the binding authority of

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[5] Treaty establishing the European Coal and Steel Community, Article 41.

[6] Anthony Arnull, *The European Union and its Court of Justice*, 2nd ed., Oxford University Press, 2006, 92.

[7] Treaty of Rome, Article 177.

[8] Takis Tridimas, *The General Principles of EU Law*, 3rd ed., Oxford University Press, 2018, 35.

[9] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64, *Costa v ENEL* [1964] ECR 585.

ECJ judgments, creating a system whereby preliminary rulings provide authoritative interpretations of EU law generally, not just for the specific case at hand.[10]

The Court emphasized in *Rheinmühlen-Düsseldorf* (1974) that "Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances the law is the same in all States of the Community".[11] This statement crystallized the procedure's fundamental purpose: ensuring uniform interpretation and application of EU law across all Member States.[12]

Treaty Amendments and Procedural Evolution

By virtue of the Maastricht Treaty of 1993, Article 177 was renumbered as Article 234 and expanded to include acts of the European Central Bank within the Court's preliminary ruling jurisdiction.[13] This represented the only substantive amendment to the provision for decades, demonstrating the stability of the foundational framework.

The Treaty of Nice introduced Article 225(3) TEC (now Article 256(3) TFEU), creating the theoretical possibility for the General Court to exercise preliminary ruling jurisdiction in specific areas. However, this provision remained dormant for over two decades due to concerns about legal complexity, potential delays from appeals, and questions about national courts' acceptance of General Court decisions.[14]

The only change introduced by the Lisbon Treaty (2009) was that the preliminary ruling procedure was renumbered as Article 267 TFEU without substantive changes, maintaining the same basic structure established in 1957.[15]

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[10] Joined Cases 28-30/62, *Da Costa en Schaake NV v Nederlandse Belastingadministratie* [1963] ECR 31.

[11] Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, para. 2.

[12] About the significance of the preliminary ruling procedure for the interpretation of EU law, see more in: Maja Lukić Radović, "Prethodni postupak i vrhovni autoritet Suda Evropske unije u odnosu na pravo EU i pojedinačne akte njenih tela" [Preliminary reference procedure and the supreme authority of the Court of the Justice of the European Union wth respect to EU law and individual acts of EU bodies], *Savremeni problemi pravnog sistema Srbije, prilozi projektu 2022* (ur. Miloš Živković, Maja Lukić Radović), Univerzitet u Beogradu – Pravni fakultet, Centar za izdavaštvo, Beograd, 2023, 161–173.

[13] Treaty on European Union (Maastricht), Article 234.

[14] Treaty of Nice, Article 225(3) TEC; Peter J. Wattel, "The Transfer of Preliminary Ruling Jurisdiction to the General Court of the EU", *CJEU – Recent Developments in Value Added Tax 2023* (eds. Georg Kofler *et al.*), Linde Verlag, Wien, 2024, 2-3.

[15] Treaty of Lisbon, Article 267 TFEU.

Growing Workload Crisis

By the 2000s, the CJEU faced mounting pressure from an ever-increasing caseload. Preliminary rulings comprised approximately seventy percent of all cases before the Court of Justice by 2022.[16] The expansion of EU membership, the extension of EU competences into new areas, and the success of the procedure itself created an unsustainable workload. Statistics show that the Court received over five hundred preliminary references annually by the 2010s, with processing times averaging from sixteen to eighteen months.[17]

IMPROVEMENTS BROUGHT BY THE 2024 AMENDMENTS TO THE RULES OF PROCEDURE

Transfer of Preliminary Ruling Jurisdiction to the General Court

The most significant reform introduced by the 2024 amendments is the transfer of preliminary ruling jurisdiction to the General Court in six specific areas: the common system of value added tax, excise duties, the Customs Code and tariff classification of goods, compensation and assistance to passengers in transport, and the greenhouse gas emission trading scheme.[18] This transfer affects approximately twenty percent of all preliminary references.

A screening and allocation mechanism was also put in place. All preliminary ruling requests continue to be submitted to the Court of Justice, which conducts an initial screening to determine jurisdiction. Cases falling exclusively within the six designated areas are transmitted to the General Court, while those raising broader questions of principle remain with the Court of Justice. This mechanism is designed to ensure that complex constitutional issues and matters affecting the unity of EU law remain under the Court of Justice's jurisdiction.

The reform includes important safeguards to maintain legal consistency across the EU, i.e. EU law. The Court of Justice retains jurisdiction over cases raising "independent questions relating to the interpretation of primary law,

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[16] CJEU *Annual Report* 2022, Statistical Overview, *https://curia.europa.eu/jcms/jcms/p1_4339717/en/*, 9 June 2025.

[17] CJEU, "Preliminary Ruling Procedure: Statistics and Trends", 2023, *https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_cour_stats_web_bat_22042024.pdf*, 9 June 2025.

[18] Regulation (EU) 2024/1234, amending the Rules of Procedure of the Court of Justice and the General Court.

public international law, general principles of Union law or the Charter of Fundamental Rights".[19] Additionally, if a General Court case raises issues of principle likely to affect the unity or consistency of EU law, it can be referred back to the Court of Justice.

Structural and Organizational Improvements

The General Court has established specialized chambers for preliminary ruling cases, with judges elected to serve as Advocates General for renewable three-year terms.[20] This mirrors the Court of Justice's structure and ensures specialized expertise in the designated areas.[21] A new Intermediate Chamber of nine judges has been introduced between the traditional five-judge chambers and the fifteen-judge Grand Chamber, providing greater flexibility in case assignment.[22]

Procedural Modernization and Transparency

The amendments introduced enhancements to the digital infrastructure, by formalizing videoconferencing for hearings, building on practices developed during the COVID-19 pandemic. Electronic filing and service of documents have been standardized, with provisions for qualified electronic signatures and secure digital storage.

Another emphasis was put on enhancing transparency. Written observations submitted in preliminary ruling cases will be published online after case closure unless objections are raised. The broadcasting of hearings, including judgment delivery, is now explicitly provided for, increasing public access to proceedings.

Finally, the rights of participation of the EU institutions have been broadened. The European Parliament, Council, and European Central Bank may now submit observations in preliminary ruling cases where they have a particular interest, expanding the range of institutional input available to the courts.[23]

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[19] *Ibidem.*

[20] On the role of Advocates General in the procedure before the CJEU, see more in Maja Lukić, "Razumevanje uloge opštih pravobranilaca u okviru pravosudnog sistema Evropske unije" [Understanding the role of Advocates General within EU judiciary system], *Zbornik radova Pravnog fakulteta u Nišu*, br. 74, tom 55, Niš, 2016, 129–144.

[21] General Court Rules of Procedure, as amended 2024, Article 29a.

[22] *Ibidem.*

[23] Regulation (EU) 2024/1234, Article 17.

Administrative and Cost Efficiency Measures

Registry charges for extracts, copies of procedural documents, and authenticated copies have been abolished, reducing costs for parties. Simplified procedural measures allow certain actions to be taken by simple decision rather than formal order, streamlining case management.[24]

POTENTIAL NEGATIVE IMPLICATIONS OF THE 2024 REFORMS

Fragmentation and Consistency Concerns

The division of preliminary ruling jurisdiction between two courts creates inherent risks of inconsistent interpretations, even within the designated subject areas.[25] While safeguards exist, the practical delineation between "routine" cases suitable for the General Court and "principled" cases requiring Court of Justice intervention may prove difficult to implement consistently.

The requirement that cases fall "exclusively" within the six designated areas creates potential for jurisdictional disputes and delays when cases span multiple legal domains. The complexity of the task of determining exact jurisdictional boundaries may undermine the efficiency gains the reform seeks to achieve.

Institutional and Procedural Challenges

Historical concerns about national courts' willingness to engage with the General Court rather than the Court of Justice are being exacerbated by the subject reform. The perception that General Court rulings carry less authoritative weight could affect the quality of the judicial dialogue that underpins the preliminary reference system.[26]

The possibility of referrals between courts, combined with the limited review mechanism for General Court preliminary rulings, may actually extend rather than reduce proceedings duration in complex cases. The screening process itself adds an additional procedural layer that could cause delays.[27]

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[24] CJEU Rules of Procedure, as amended 2024, Article 38.

[25] L. Grossio, D. Petrić, op. cit., 302.

[26] T. Tridimas, op. cit., 53.

[27] Emmanuel Coulon, "Summer 2024 reforms; A radical overhaul of the Statute of the Court of Justice of the EU and the rules of procedure of the Court of Justice and the General Court", *Legal Practices – Concurrences, Revue des Droits de la Concurrence*, No. 4, 2024, 4.

Finally, the jurisdictional division creates a layer of uncertainty for legal practitioners and parties about which court will ultimately decide their case. This uncertainty may complicate case preparation and strategic decision-making in national proceedings.

Systemic Risks to EU Law Unity

The preliminary ruling procedure has traditionally been characterized as a dialogue between national courts and the Court of Justice. Introducing the General Court as an additional interlocutor may complicate this relationship and potentially weaken the direct connection between national judges and the EU's highest court,[28] leading to the erosion of the "judicial dialogue" paradigm.

Some scholars argue that preliminary rulings serve a quasi-constitutional function in the EU legal order. Delegating this function to a court traditionally focused on administrative review may alter the constitutional balance within the EU judicial system in favor of national constitutional courts.[29]

Resource Allocation and Specialization Concerns

The General Court must rapidly develop expertise in areas previously handled exclusively by the Court of Justice. This transition period may result in less sophisticated preliminary rulings until institutional knowledge develops. Furthermore, while the reform aims to rebalance caseloads, the restriction to six specific areas may create uneven distribution of work between the courts, particularly if case volumes in these areas fluctuate significantly.[30]

CRITICAL ASSESSMENT AND FUTURE PERSPECTIVES

Balancing Efficiency and Legal Unity

The 2024 reforms represent a carefully calibrated attempt to address the CJEU's workload crisis while preserving the essential characteristics of the preliminary ruling procedure. The restriction to well-defined technical areas with established case law minimizes risks of inconsistent interpretation. However, the long-term success of this

[28] P. Craig, G. de Búrca, op. cit., 479.

[29] A. Arnull, op. cit., 122.

[30] CJEU *Annual Report* 2024, Statistical Overview, *https://curia.europa.eu/jcms/jcms/Jo2_7032/en/*, 9 June 2025.

approach will depend on the practical implementation of jurisdictional boundaries and the development of effective coordination mechanisms between the two courts.

Implications for European Integration

The preliminary ruling procedure has been instrumental in advancing European integration through judicial constitutionalization. The 2024 reforms may signal a shift toward a more technocratic approach to EU law development, potentially affecting the procedure's role as an engine of integration.[31] This evolution reflects the maturation of the EU legal system but may also represent a limitation on judicial activism in advancing integration. Notable authors argue, based on sound reasoning, that the reform paves the way for the Court of Justice to grow into a constitutional court of the EU.[32]

Recommendations for Implementation

To maximize the benefits while minimizing the risks of the 2024 reforms, several recommendations could be put forth: that guidelines on determining jurisdictional boundaries be set, i.e. that detailed practice directions clarifying the boundaries between Court of Justice and General Court jurisdiction should be developed; formal procedures for information sharing and coordination between the courts should be introduced; systematic monitoring of the reform's impact on case duration, legal consistency, and national court satisfaction should be implemented; as well as a substantial investment in comprehensive training for General Court judges and staff in preliminary ruling procedures should be made.

CONCLUSION

The 2024 amendments to the CJEU Rules of Procedure represent the most significant reform of the preliminary ruling procedure since its establishment in 1957.[33] These changes address genuine efficiency concerns while introducing important modernization measures that enhance transparency and accessibility. However, the reform also introduces new complexities and potential risks to legal unity that must be carefully managed.

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[31] K. Lenaerts, J. A. Gutiérrez-Fons, op. cit., 1644.

[32] Daniel Sarmiento, "On the Road to a Constitutional Court of the European Union: The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court (Editorial Note)", *Croatian Yearbook of European Union Law and Policy,* No. 19, 2023, 7-17.

[33] P. Craig, G. de Búrca, op. cit., 453.

The success of this reform will ultimately be measured not merely by statistical improvements in case processing times, but by its ability to maintain the preliminary ruling procedure's essential function as the guarantor of EU law's uniformity and effectiveness. The coming years will be crucial in determining whether the 2024 reforms achieve their ambitious goals while preserving the constitutional foundations of the European legal order.

The transformation of the preliminary ruling procedure reflects broader challenges facing the EU as it balances institutional efficiency with legal coherence in an increasingly complex and diverse Union. As such, the 2024 reforms serve not only as a response to immediate practical pressures but also as a test of the EU's capacity for institutional adaptation while maintaining its fundamental legal principles.

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EVOLUCIJA I REFORMA POSTUPKA ODLUČIVANJA O PRETHODNOM PITANJU: ISTORIJSKI RAZVOJ, UNAPREĐENJA IZ 2024. GODINE I KRITIČKA OCENA

Rezime

Ovaj rad analizira istorijski razvoj, najnovije reforme i kritičke implikacije postupka po prethodnom pitanju prema članu 267 UFEU, koji predstavlja temelj pravosudnog sistema Evropske unije. Prateći evoluciju ovog mehanizma od osnivanja Evropske zajednice za ugalj i čelik do najnovijih izmena, rad se posebno fokusira na refome iz 2024. godine koje su nadležnost za odlučivanje o prethodnom pitanju u šest tehničkih oblasti prenele na Opšti sud i uvele značajne proceduralne i digitalne inovacije. Iako su ove reforme usmerene na rasterećenje Suda EU i povećanje efikasnosti postupaka pred sudovima EU, one istovremeno otvaraju pitanja fragmentacije prava, složenosti nadležnosti i potencijalnog slabljenja dijaloga između nacionalnih sudova i najvišeg suda EU. Rad pruža kritičku ocenu ovih promena ističući njihove potencijalne koristi i rizike, i daje preporuke za očuvanje jedinstva i delotvornosti prava EU.

Ključne reči: postupak o prethodnom pitanju, Sud Evropske unije, Opšti sud, sudska saradnja, tumačenje prava Evropske unije

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LJUBICA TOMIĆ

OTKAZNI ROKOVI ZA RASKID UGOVORA O TRGOVINSKOM ZASTUPANJU U SRPSKOM PRAVU

Rad analizira pitanje otkaznih rokova za raskid ugovora o trgovinskom zastupanju. Najpre se razmatra redovni otkaz koji nije uslovljen povredom ugovornih obaveza, ali je vezan za zakonom predviđene otkazne rokove kao zaštitni mehanizam koji treba da obezbedi izvesnost za poslovanje ugovornim stranama. Srpsko pravo predviđa otkazne rokove koji zavise od dužine trajanja ugovora o trgovinskom zastupanju i koji su načelno dispozitivni, osim minimalnog otkaznog roka od mesec dana, pravila da se otkaz ne može dati u nevreme i da se otkaz daje uvek krajem kalendarskog tromesečja. Dalje se razmatra institut vanrednog raskida bez otkaznog roka, koji je dozvoljen kada za to postoje ozbiljni uzroci, i tumači se ovaj pravni standard u uporednom i u srpskom pravu. Istraživanje pokazuje da Zakon o obligacionim odnosima, za razliku od Nacrta srpskog Građanskog zakonika, nije u potpunosti usklađen sa pravom Evropske unije po pitanju otkaza i otkaznih rokova za ugovor o trgovinskom zastupanju. Ugovorne strane treba da u okvirima autonomije volje konkretizuju ugovornim klauzulama pitanja vezana za otkaz i otkazni rok, a sudska praksa treba da razvije kontrolu punovažnosti ovih klauzula primenom načela savesnosti i poštenja, ravnopravnosti stranaka i zabrane zloupotrebe prava.

Ključne reči: *ugovor o trgovinskom zastupanju, otkaz, otkazni rok, vanredni otkaz bez otkaznog roka*

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U V O D

U srpskom pravu, kao i u većini uporednopravnih evropskih zakonodavstava, ugovor o trgovinskom zastupanju jeste imenovan ugovor koji se zbog prirode i dužine trajanja prestacija svrstava u ugovore sa trajnim izvršenjem,[1] jer se između nalogodavca i trgovinskog zastupnika uspostavlja poslovni odnos koji se kontinuirano odvija i konkretizuje kroz pojedinačne pravne poslove.[2] Smatra se, u pretežnom delu pravne teorije, da ugovor o trgovinskom zastupanju po svojim karakteristikama nosi breme ekonomske neravnoteže između ugovornih strana, jer je nalogodavac ekonomski jača strana u odnosu na trgovinskog zastupnika, koji se tokom trajanja ovog pravnog odnosa nalazi u određenoj ekonomskoj zavisnosti od nalogodavca.[3] Ekonomska i poslovna zavisnost trgovinskog zastupnika je po prirodi stvari i poslovnoj povezanosti sve veća što ugovorni odnos duže traje.

Navedena dva svojstva ugovora o trgovinskom zastupanju – trajnost prestacija i ekonomska neravnoteža ugovornih strana – uticala su na razvoj posebnih pravila o otkaznim rokovima i raskidu ovog ugovora u uporednom pravu[4] i u srpskom zakonodavstvu.

Na ovom mestu vredi napomenuti jednu izuzetnost srpskog prava, sadržanu u odredbama 357–358 Zakona o obligacionim odnosima, koja se sastoji u tome da je prestanak trajnih dugovinskih odnosa uređen i na opšti način. Opšte uređenje prestanka trajnih dugovinskih odnosa preuzeto je iz Konstantinovićeve skice,[5]

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[1] Ugovor o trgovinskom zastupanju je u Republici Srbiji uređen pravilima Zakon o obligacionim odnosima Republike Srbije, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/03 – Ustavna povelja i *Službeni glasnik RS*, br. 18/20 (čl. 790–826) i predstavlja ugovor između zastupnika i nalogodavca u kojem se zastupnik obavezuje da se stalno stara da treća lica zaključuju ugovore sa njegovim nalogodavcem, da posreduje između tih lica i nalogodavca, i da na osnovu posebno izdatog ovlašćenja zaključuje ugovore sa trećim licima u ime i za račun nalogodavca, dok se nalogodavac obavezuje da isplati određenu proviziju za svaki zaključeni ugovor. Uporednopravno posmatrano ugovor o trgovinskom zastupanju u velikom broju zemalja je imenovan ugovor, v. detaljno pregled po pojedinim zemljama Dennis Campbell, *International Agency and Distribution Law*, Juris, New York, 2022; Christoph Reithmann, Dieter Martiny, *Internationales Vertragsrecht*, Otto Schmidt, Köln, 2022, 1749–1752.

[2] Slobodan Perović, *Komentar Zakona o obligacionim odnosima*, Savremena administracija, Beograd, 1995, 1316; Klaus Hopt, Hanno Merkt, *Handelsgesetzbuch*, C.H. Beck, München, 2003, 312–313.

[3] Eckhard Flohr, Ulf Waschkuhn, *Vertriebsrecht*, C.H. Beck, München, 2018, 757.

[4] Michael Martinek, Franz-Joerg Semler, Eckhard Flohr, *Handbuch Vertriebsrecht*, C.H. Beck, München, 2024, 563; Larry A. DiMatteo, Andre Janssen, *International Sales Law*, Beck, Hart, Nomos, 2021, 955–958.

[5] Mihailo Konstantinović, *Obligacije i ugovori – Skica za Zakonik o obligacijama i ugovorima*, Pravni fakultet Univerziteta u Beogradu, Beograd, 1969, čl. 312–314.

a treba imati u vidu da rešenja uporednog prava toga vremena, koja su Konstantinoviću služila kao uzor (primera radi: austrijsko, nemačko,[6] francusko, švajcarsko i italijansko pravo) nisu sadržala opšte pravilo ovog tipa.[7]

Iz ovog razloga se na otkaz ugovora o trgovinskom zastupanju u srpskom pravu, pored posebnih pravila o prestanku ovog imenovanog ugovora (koja su sadržana u čl. 810–812 Zakona o obligacionim odnosima), na pravne praznine primenjuju i navedena opšta pravila o prestanku trajnih dugovinskih odnosa. Ispravno se ističe da su opšta pravila o otkazu trajnih dugovinskih odnosa u sistematici Zakona o obligacionim odnosima pogrešno svrstana u način prestanka obaveze, jer se zapravo radi o pravilima jednostranog raskida ugovora sa trajnim izvršenjem.[8]

Redovan način prestanka ugovora o trgovinskom zastupanju zaključenog na određeno vreme je protek vremena na koje je zaključen, dok je redovan način prestanka ugovora o zastupanju zaključenog na neodređeno vreme otkaz kao naročito pravno sredstvo koje stoji na raspolaganju obema ugovornim stranama. Radi se o posebnoj vrsti jednostranog raskida ugovora koji nije vezan za neizvršenje ugovora, a za koji su u srpskom, kao i u brojnim uporednopravnim rešenjima, predviđena posebna pravila raskida i otkazni rokovi.[9] Za razliku od jednostranog raskida ugovora zbog neispunjenja obaveze dužnika[10] koji deluje *ex tunc*, a upravljen je na raskid ugovora koji imaju jednokratne razmene činidbi, ovde se radi o drugačijoj vrsti jednostranog raskida, o otkazu[11]. Otkaz ugovora o trgovinskom zastupanju zaključenog na neodređeno vreme mogu izjaviti obe ugovorne strane, iako nije bilo povrede ugovora,[12] jer se radi o zakonom predviđenom pravu na jednostrani

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[6] Tek je sa početkom 2002. godine, primera radi, u nemačko pravo uvedeno opšte pravilo o otkazu trajnih dugovinskih odnosa iz važnih razloga. BGBl. I S. od 26. 11. 2001, *https://dejure.org/gesetze/BGB/314.html.*

[7] Ivan Tot, „Prestanak trajnih obveznih odnos", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, br. 3, Vol. 39, 2018, 1172; Christian Grüneberg, *Bürgerliches Gesetzbuch*, C.H. Beck, München, 2023, 540–542.

[8] Marija Karanikić Mirić, *Obligaciono pravo*, Službeni glasnik, Beograd, 2024, 884–889.

[9] Zakon o obligacionim odnosima, čl. 810, 812. Isto tako i harmonizovana prava država članica Evropske unije na osnovu Direktive Evropske unije br. 86/653 EEZ od 18. 12. 1986. o usklađivanju prava država članica u vezi samozaposlenih trgovačkih zastupnika, Službeni list Evropske unije od 31. 12. 1986. *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31986L0653*

[10] Jelena Perović, *Međunarodno privredno pravo*, Centar za izdavačku delatnost Ekonomskog fakulteta u Beogradu, Beograd, 2010, 296–305; Zakon o obligacionim odnosima, čl. 124.

[11] Termini raskid i otkaz nisu dosledno terminološki razdvojeni u Zakonu o obligacionim odnosima. Otkaz se uzima kao sinonim za jednostrani raskid trajnih dugovinskih odnosa.

[12] Katarina Jovičić, „Osnovi prestanka trgovinskih ugovora u srpskom pravu", *Pravo i privreda*, br. 3, Vol. 61, 2023, 790; I. Tot, op. cit., 1172; M. Karanikić Mirić, op. cit., 887.

raskid ugovora sa trajnim prestacijama, koji ima dejstvo *ex nunc*,[13] pa nema povraćaja datog niti načelno prava na naknadu štete[14] zbog redovnog otkaza. Za opisan otkaz ugovora o trgovinskom zastupanju na neodređeno vreme nije potrebno neizvršenje ugovora, već se ovde radi o redovnom načinu prestanka ugovora. Ispravno se u pogledu ovog pitanja izjasnila sudska praksa u Srbiji kada je utvrdila da se strane ne mogu ugovorom unapred odreći prava na raskid zbog neizvršenja obaveze druge strane, ali mogu u trajnom dugovinskom odnosu urediti pravo na otkaz ugovora, način davanja otkaza i otkazni rok.[15] Ukoliko otkaz ugovora o trgovinskom zastupanju na neodređeno vreme ne bi bio strankama na raspolaganju, takav ugovor bi mogao beskonačno dugo da važi, a nijedna ugovorna strana ne bi mogla da utiče na njegov prestanak sve dok se ne bi stekli posebni uslovi za raskid usled neizvršenja. Takozvani „večni ugovori", zaključeni na neodređeno vreme, smatraju se neprihvatljivim za pravni promet, a ugovorne klauzule koje isključuju – ili pak znatno otežavaju – pravo na otkaz u uporednom pravu smatraju se suprotne načelu savesnosti i poštenja, te su ih sudovi oglašavali ništavim.[16]

Za redovan otkaz ugovora o trgovinskom zastupanju zakonom su predviđeni otkazni rokovi, kao svojevrsni mehanizam zaštite trgovinskog zastupnika koji se nalazi u slabijem položaju i u odnosu ekonomske zavisnosti od nalogodavca. Otkazni rok je zakonom ili ugovorom određeno vreme, koje počinje da teče od dana dostavljanja[17] izjave o otkazu drugoj ugovornoj strani, a čijim isticanjem nastupaju pravne posledice prestanka ugovora o trgovinskom zastupanju.

Pitanje otkaznog roka biće u radu razmotreno prvo za ugovore o trgovinskom zastupanju zaključene na neodređeno vreme, a potom za one koji su zaključeni na određeno vreme. Posebna pažnja biće posvećena jednostranom raskidu

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[13] S. Perović (2010), op. cit., 1342–1344; Borislav Blagojević, Vrleta Krulj, *Komentar Zakona o obligacionim odnosima*, Savremena administracija, Beograd, 1983, 1113; Slobodan Perović, *Obligaciono pravo*, Službeni list SFRJ, Beograd, 1990, 213.

[14] Odvojeno je pitanje prava na naknadu za *goodwill* (engl.) / *Ausgleichsanspruch* (nem.), koje je takođe predmet Direktive Evropske unije br. 86/653 EEZ od 18. 12. 1986. i koje nije tema ovog rada. O harmonizaciji srpskog prava sa pravom Evropske unije u tom delu Mirjana Radović, „Pravo trgovinskog zastupnika na posebnu naknadu zbog prestanka ugovora o trgovinskom zastupanju", *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije* (ur. Vuk Radović), Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo i informisanje, Beograd, 2016, 354–369.

[15] Rešenje Privrednog apelacionog suda, Pž 4963/2024/1/ od 2. 4. 2015.

[16] Presuda nemačkog Vrhovnog suda BGH VII ZR 224/12, 21. 3. 2013, *https://openjur.de/u/622509.html*; isto je nemački Vrhovni sud odlučio još 26. 4. 1995, BGH VIII ZR 124/94, NJW 1995, 2350, prema M. Martinek, F-J. Semler, E. Flohr, op. cit., 547; I. Tot, op. cit., 1178.

[17] Pravilo o dostavljanju otkaza sadržano je u opštim pravilima ZOO o prestanku trajnog dugovinskog odnosa.V. Zakon o obligacionim odnosima, čl. 358, st. 2.

ugovora o trgovinskom zastupanju bez otkaznog roka, takozvanom vanrednom otkazu, koji je u izuzetnim situacijama moguć ukoliko za to postoje ozbiljni razlozi.

RASKID UGOVORA O TRGOVINSKOM ZASTUPANJU ZAKLJUČENOG NA NEODREĐENO VREME

Pravila o raskidu ugovora o trgovinskom zastupanju zaključenog na neodređeno vreme u srpskom pravu sadržana su u okviru opštih pravila o prestanku trajnog dugovinskog odnosa i posebnih pravila predviđenih za ovu vrstu imenovanog ugovora.[18] Ugovor o trgovinskom zastupanju koji je zaključen na neodređeno vreme može raskinuti svaka od ugovornih strana, dakle, i nalogodavac i trgovinski zastupnik, ali samo u određenom kalendarskom intervalu – krajem svakog kalendarskog tromesečja.[19] Ovakvim pravilom zakonodavac stvara vremenski period u kojem postoji zaštita od otkaza,[20] tokom kojeg načelno ne postoji mogućnost jednostranog raskida ugovora. Svrha ovakvog pravila jeste da omogući ugovornim stranama da se pouzdaju u trajanje ugovora tokom navedenog perioda, tako da svoje poslovne odluke mogu donositi uz predvidivo trajanje ugovora koji je zaključen na neodređeno vreme. Međutim, mogućnost raskida ugovora postoji i u toku navedenog zaštitnog vremenskog perioda, ukoliko nastupe ozbiljni razlozi za raskid ugovora, o čemu će kasnije u radu biti više reči.[21]

Pored navedenog pravila o periodu tokom kog raskid načelno nije moguć, postavljeno je i jedno dodatno pravilo za raskid ugovora o trgovinskom zastupanju zaključenog na neodređeno vreme. Radi se o otkaznim rokovima koji se moraju poštovati, a u okviru prethodno navedenog pravila o kalendarski određenom vremenskom intervalu u kojem se ugovor može raskinuti. Pravila o otkaznim rokovima za raskid ugovora o trgovinskom zastupanju jesu specijalna pravila za ovu vrstu ugovora, uz koja se dodatno primenjuje i opšte zakonsko pravilo za trajne dugovinske odnose, a to je da se otkaz može dati u svako doba, samo ne u nevreme.[22] Smatra se da je u nevreme otkaz izjavljen u slučajevima kada je to očigledno nepravično prema drugoj ugovornoj strani, ili joj se time nanosi velika šteta, ili bi bila izložena

[18] Zakon o obligacionim odnosima, čl. 357–358, čl. 810–812.

[19] Zakon o obligacionim odnosima, čl. 810, st. 2.

[20] U literaturi se ovaj vremenski period naziva i opštim otkaznim rokom u odnosu na posebne otkazne rokove koji zavise od dužine trajanja ugovora. S. Perović (1995), op. cit., 1342–1343.

[21] Pouzdanje ugovornih strana u opstanak ugovora je načelne prirode i podrazumeva da nisu nastupili ozbiljni uzroci za raskid ugovora bez otkaznog roka, kao što predviđa Zakon o obligacionim odnosima čl. 811, st. 1, o čemu će kasnije u članu biti reči.

[22] Zakon o obligacionim odnosima, čl. 358, st. 3.

neugodnostima, ili ukoliko bi otkaz bio protivan načelu savesnosti i poštenja, što u slučaju spora sud razmatra u svakom konkretnom slučaju.[23] Ukoliko je otkaz dat u nevreme, on ostaje bez pravnog dejstva. Zanimljivo je da je srpski Zakon o obligacionim odnosima predvideo još davne 1978. godine pravila o otkaznim rokovima zasnovanim na ideji da dužina trajanja ugovora o trgovinskom zastupanju treba da utiče i na dužinu samog otkaznog roka. Ovo pravilo ima za cilj da zaštiti ekonomski zavisnu ugovornu stranu (a smatra se da je to trgovinski zastupnik) od iznenadnog otkaza koji mu ne bi ostavio dovoljno vremena da uspostavi ekonomsku stabilnost i nastavi svoje poslovanje posle prestanka ugovora sa nalogodavcem. Imajući istu ideju vodilju, 1986. godine doneta je Direktiva Evropske unije br. 861/653 EEZ,[24] koja takođe reguliše pitanje otkaznih rokova, doduše, sa nešto drugačijim pravilima o broju meseci otkaznog roka, ali sa istom formulom u osnovi – trajanje ugovora utiče na dužinu otkaznog roka. Na konkretna pravila ove Direktive ćemo se osvrnuti kasnije u radu.

Prema srpskom pravu, ukoliko je ugovor o trgovinskom zastupanju zaključen na neodređeno vreme i trajao je manje od tri godine, otkaz mora biti saopšten drugoj strani najmanje mesec dana pre isteka kalendarskog tromesečja. Ukoliko je takav ugovor trajao tri godine ili duže, otkaz mora biti saopšten dva meseca pre isteka kalendarskog tromesečja.[25] Navedeno zakonsko pravilo u srpskom pravu nije imperativne prirode i ugovorom se mogu odrediti drugačiji otkazni rokovi, ali uz jedno imperativno ograničenje – otkazni rok ne sme biti kraći od mesec dana.[26] Sudska praksa je potvrdila dispozitivnu prirodu zakonske norme o dužini otkaznog roka, ukoliko isti nije ugovoren na kraće od mesec dana, kao i slobodu ugovornih strana da postave i dodatne uslove za otkaz; primera radi, da otkaz mora imati obrazloženje.[27]

Opšte je pravilo, u skladu sa teorijom prijema koja je prihvaćena u Zakonu o obligacionim odnosima, da se otkaz kod trajnih dugovinskih odnosa mora dostaviti drugoj ugovornoj strani,[28] pa se ovo pravilo o dostavljanju primenjuje i na otkaz

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[23] S. Perović (1995), op. cit., 767; B. Blagojević, V. Krulj, op. cit., 1113; M. Karanikić Mirić, op. cit., 888.

[24] Direktiva Evropske unije br. 86/653 EEZ od 18. 12. 1986. o usklađivanju prava država članica u vezi samozaposlenih trgovačkih zastupnika, Službeni list Evropske unije od 31. 12. 1986. *eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31986L0653.*

[25] Zakon o obligacionim odnosima, čl. 810, st. 2.

[26] Zakon o obligacionim odnosima, čl. 810, st. 3.

[27] Rešenje Privrednog apelacionog suda Pž 4963/2014 od 2. 4. 2015, tako i S. Perović (1995), op. cit., 1343.

[28] Zakon o obligacionim odnosima, čl. 358, st. 2.

ugovora o trgovinskom zastupanju. Otkazni rok se ima računati u skladu sa opštim pravilima o računanju rokova,[29] od dana dostavljanja izjave o otkazu drugoj ugovornoj strani, kada rok počinje da teče, do dana isteka roka, kada prestaje ugovor o trgovinskom zastupanju.

Izjava o otkazu ne mora biti data u pisanoj formi, osim ukoliko samim ugovorom o trgovinskom zastupanju nije drugačije predviđeno.[30] Međutim, treba imati u vidu da je teret dokazivanja da je otkaz izjavljen na ugovornoj strani koja želi da raskine ugovor, tako da je pisana forma kao *forma ad probationem* u svakom konkretnom slučaju za preporuku u cilju dokazivanja da su nastupile pravne posledice prestanka ugovora. Podsećamo i ovde na opšte ograničenje u pogledu davanja otkaza kod trajnih dugovinskih odnosa, a to je da se otkaz može dati uvek, osim u nevreme,[31] pa je dokaz o vremenu dostavljanja otkaza bitan i za ovo pravno pitanje koje može dovesti do ništavosti otkaza.

Pitanje otkaznih rokova za ugovor o trgovinskom zastupanju je na nivou Evropske unije prepoznato kao važno za harmonizaciju prava i uspostavljanje trgovine robom u okviru jedinstvenog tržišta i uslova tržišne utakmice unutar Evropske unije. To je ishodovalo donošenjem Direktive Evropske unije još 1986. godine u ovoj materiji, koja se velikim delom oslanja na do tada važeće nemačko pravo.[32] Iz ovog razloga ćemo u radu analizirati sudsku praksu nemačkih sudova u pogledu razumevanja i primene pravnih standarda vezanih za otkaz i otkazne rokove ugovora o trgovinskom zastupanju, a koje predviđa i srpsko pravo, ali ih sudska praksa u Srbiji još nije konkretizovala. Otkazni rokovi koje Direktiva Evropske unije br. 86/653 EEZ predviđa za raskid ugovora o trgovinskom zastupanju su, kao i u Zakonu o obligacionim odnosima, vezani za dužinu trajanja ugovornog odnosa nalogodavca i trgovinskog zastupnika. Međutim, Direktivom Evropske unije br. 86/653/EEZ određeni su duži otkazni rokovi u poređenju sa onim rokovima koje predviđa srpski zakonodavac. Tako je određen otkazni rok od jednog meseca za prvu godinu trajanja ugovora o trgovinskom zastupanju. Ukoliko je započela druga godina trajanja ugovora, otkazni rok je dva meseca, dok je isti tri meseca ako je započela i treća ili sledeća godina ugovora.[33] Direktiva Evropske unije br. 86/653/EEZ ostavlja mogućnost da države članice svojim zakonodavstvom predvide i duže otkazne rokove za raskid

[29] Zakon o obligacionim odnosima, čl. 77, st. 1.

[30] S. Perović (1995), op. cit., 1323–1343.

[31] Zakon o obligacionim odnosima, čl. 358, st. 3.

[32] Direktiva Evropske unije br. 86/653 EEZ v. Preambula i čl. 14-16. O oslanjanju Direktive na do tada važeće nemačko pravo, v. Ch. Reithmann, D. Martiny, op. cit., 1749.

[33] Direktiva Evropske unije br. 86/653 EEZ, čl. 15, st. 2.

ugovora o trgovinskom zastupanju, i to najviše do šest meseci, ali uvek uzimajući u obzir kriterijum da otkazni rok zavisi od dužine trajanja ugovora.[34]

Direktiva postavlja i jedno dodatno pravilo, koje srpski zakonodavac nije postavio, a to je da se ugovorom ne smeju ugovoriti otkazni rokovi koji bi nalogodavcu ostavljali mogućnost raskida ugovora sa kraćim otkaznim rokom od onog otkaznog roka koji je ostavljen ugovorom u korist trgovinskog zastupnika. Pri postavljanju ovog pravila pošlo se od toga da je nalogodavac jača ugovorna strana i da bi ovakva vrsta poslovne povlastice dovela do neravnopravnosti ugovornih strana.[35] Zakon o obligacionim odnosima ne sadrži ovakvo ograničenje za ugovorne strane prilikom ugovaranja dužine otkaznog roka, te se postavlja pitanje pravne sudbine ovakve ugovorne klauzule u srpskom pravu. Smatramo da bi sud u svakom konkretnom slučaju morao prilikom ocene punovažnosti ugovorne klauzule o otkaznom roku imati u vidu sve okolnosti slučaja, pa imajući u vidu prirodu ugovora o trgovinskom zastupanju primeniti načela Zakona o obligacionim odnosima u preispitivanju ugovora – pre svega moguću povredu načela ravnopravnosti stranaka, načela savesnosti i poštenja kao i zabrane zloupotrebe prava.[36] Nacrt srpskog Građanskog zakonika je pravilo o jednakosti otkaznih rokova za obe ugovorne strane izričito predvideo za prestanak ugovora o trgovinskom zastupanju.[37]

Raskid bez otkaznih rokova

Ugovor o trgovinskom zastupanju se može raskinuti pod određenim okolnostima i bez poštovanja ugovorenih ili zakonskih otkaznih rokova i bez obzira na kalendarski period i vreme u kojem se izjavljuje raskid. Zakon o obligacionim odnosima predviđa da obe ugovorne strane, dakle i nalogodavac i trgovinski zastupnik, mogu raskinuti ugovor o trgovinskom zastupanju i bez otkaznog roka ukoliko za to postoje ozbiljni razlozi, a u izjavi o raskidu moraju se navesti razlozi koji se smatraju ozbiljnim i omogućavaju zakonom predviđen raskid bez otkaznog roka. Pojam ozbiljnog uzroka je u zakonu određen kao pravni standard,[38] bez daljih zakonskih odrednica u tom pogledu. Dejstvo otkaza bez otkaznog roka je takođe *ex nunc*. Tumačenje pravnog standarda koji je srpski zakonodavac postavio za raskid ugovora

[34] Država članica može predvideti otkazni rok od četiri meseca za četvrtu godinu, pet meseci za petu godinu i šest meseci za šestu i sledeće godine. Direktiva Evropske unije br. 86/653 EEZ, čl. 15, st. 3.

[35] Direktiva Evropske unije br. 86/653 EEZ, čl. 15, st. 4.

[36] Zakon o obligacionim odnosima, čl. 11–13.

[37] Nacrt srpskog Građanskog zakonika ovo pravilo predviđa u prvoj alternativi pravila za prestanak ugovora, v. čl. 1222, st. 4.

[38] S. Perović (1995), op. cit., 1343; Zakon o obligacionim odnosima, čl. 811, st. 1.

o trgovinskom zastupanju bez otkaznog roka, a to je *ozbiljnost uzroka* za otkaz, mora se ceniti na osnovu svih okolnosti slučaja u svakoj konkretnoj situaciji. Tako se u nemačkoj sudskoj praksi navodi da se postojanje važnog razloga koji bi opravdao otkaz bez otkaznog roka ceni prema tome da li se prema svim okolnostima konkretnog slučaja može od ugovorne strane, koja je izjavila otkaz, očekivati nastavak ugovornog odnosa, a uz odmeravanje interesa obe strane za nastavak ugovorna o trgovinskom zastupanju.[39] Kao mogući razlozi za otkaz bez otkaznog roka od strane nalogodavca javljaju se: zanemarivanje obaveze unapređenja prodaje, povreda zabrane konkurencije, likvidacija ili stečaj trgovinskog zastupnika, krivična dela trgovinskog zastupnika od značaja za izvršenje ugovora. Kao ozbiljni razlozi za otkaz bez otkaznog roka od strane trgovinskog zastupnika javili su se: povreda ugovornih obaveza od strane nalogodavca, pogrešni obračuni provizija, smanjenje provizije ili neisplaćivanja provizije. Ozbiljnim razlozima se smatraju i okolnosti kao što su narušavanje odnosa poverenja, opasnost od nastanka znatne štete, osujećenje svrhe ugovora.[40]

Ukoliko je izjava o raskidu ugovora o trgovinskom zastupanju data bez važnih razloga, na otkaz se primenjuju redovni otkazni rokovi.[41] Ukoliko nalogodavac neosnovano otkaže ugovor bez ostavljanja otkaznog roka, zastupnik koji je prekinuo svoju delatnost ima pravo na naknadu štete zbog izgubljenih provizija. U obrnutoj situaciji, kada zastupnik neosnovano otkaže ugovor bez otkaznog roka, naknada štete pripada nalogodavcu.[42]

RASKID UGOVORA O TRGOVINSKOM ZASTUPANJU ZAKLJUČENOG NA ODREĐENO VREME

Ugovor o trgovinskom zastupanju koji je zaključen na određeno vreme prestaje istekom ugovorom predviđenog vremena njegovog trajanja.[43] Međutim, ukoliko se ugovorne strane i nakon isteka roka na koji je zaključen ponašaju kao da je ugovor još uvek na snazi i prećutno produže ugovor, smatraće se da je ugovor o trgovinskom zastupanju produžen, i to na neodređeno vreme.[44] Zakon ne sadrži izričita pravila o raskidu i otkaznim rokovima ovako konkludentno produženih ugovora.

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[39] Tako presuda OLG Düsseldorf 16 U 61/16, 26. 5. 2017, *https://openjur.de/u/2142619.html*.

[40] M. Martinek, F-J. Semler, E. Flohr, op. cit., 555–558; I. Tot, op. cit., 1190.

[41] Zakon o obligacionim odnosima, čl. 811, st. 2.

[42] Zakon o obligacionim odnosima, čl. 811, st. 3.

[43] Zakon o obligacionim odnosima, čl. 357, st. 1; čl. 812, st. 1.

[44] Zakon o obligacionim odnosima, čl. 812, st. 2, isto i Direktiva Evropske unije br. 86/653/EEZ, čl. 14.

Treba uzeti u obzir *ratio legis* otkaznog roka i njegove zaštitne funkcije kod ove vrste ugovora, te bi trebalo primeniti pravila o raskidu koja su predviđena za ugovor o trgovinskom zastupanju zaključenom na neodređeno vreme. Prilikom shodne primene ovih pravila u vreme trajanja ugovora trebalo bi uračunati i vreme koje je prethodilo konkludentnom produženju ugovora. Smatramo da bi izričito regulisanje ovog pravila pružilo ugovornim stranama veću pravnu sigurnost u pravnom prometu. Nacrt srpskog Građanskog zakonika je ovo pravilo predvideo za prestanak ugovora o trgovinskom zastupanju, kao što je Direktiva Evropske unije br. 86/653/EEZ izričito predvidela gorenavedeni mehanizam.[45]

Postoji pravna praznina u srpskom pravu u pogledu pravila o mogućnosti otkaza ugovora o trgovinskom zastupanju zaključenog na određeno vreme pre isteka vremena na koje je zaključen. Dakle, postavlja se pitanje može li se ovakav ugovor jednostrano raskinuti pre isteka vremena na koji je zaključen. Opravdano je stanovište da stranke imaju slobodu da ugovorom predvide mogućnost otkaza ugovora i pre isteka vremena na koji je ugovor zaključen,[46] ali uvek u granicama autonomije volje i imperativnih pravila o minimalnim otkaznim rokovima koji se primenjuju na ugovore o trgovinskom zastupanju zaključenim na neodređeno vreme. U pogledu mogućnosti otkaza ugovora o trgovinskom zastupanju zaključenog na određeno vreme iz ozbiljnih razloga, smatramo da se ova pravna praznina ima popuniti analognom primenom pravila koja su propisana za one ugovore o trgovinskom zastupanju koji su zaključeni na neodređeno vreme,[47] i tiču se jednostranog raskida takvih ugovora bez otkaznog roka, kada za to postoje ozbiljni uzroci. To znači da i ugovorne strane ugovora o trgovinskom zastupanju zaključenom na određeno vreme mogu raskinuti takav ugovor i pre isteka roka trajanja ugovora, ali samo pod uslovom da za to postoje ozbiljni uzroci, o čemu je bilo ranije reči. Ukoliko bi se pribeglo suprotnom tumačenju Zakona o obligacionim odnosima, te pravna praznina popunila tumačenjem *a contratio* pravilima koja važe za ugovor zaključen na neodređeno vreme, došli bismo do toga da se ugovori zaključeni na određeno vreme ne mogu raskidati iz ozbiljnih razloga. Takvo tumačenje bi značilo da se ugovor o trgovinskom zastupanju na određeno vreme jednostrano raskida jedino po pravilima za jednokratne ugovorne obaveze, dakle, jednostranim raskidom ugovora zbog neizvršenja sa dejstvom *ex tunc*, što prema našem mišljenju ne odgovara pravnoj prirodi ugovora sa trajnim izvršenjem,[48] a takođe daje uže polje razloga za otkaz ovog trajnog dugovinskog odnosa.

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[45] Nacrt srpskog Građanskog zakonika, čl. 1222, st. 6, isto i Direktiva Evropske unije br. 86/653/EEZ čl. 15, st. 6.

[46] I. Tot, op. cit., 1180.

[47] Zakon o obligacionim odnosima, čl. 811.

[48] Ovo stanovište zastupa i detaljno obrazlaže I. Tot, op. cit., 1191.

ZAKLJUČAK

Otkaz ugovora o trgovinskom zastupanju zaključenog na neodređeno vreme jeste redovan način njegovog prestanka. Otkaz mogu izjaviti obe ugovorne strane i bez povrede ugovornih obaveza, sa dejstvom *ex nunc*. Nakon izjavljenog otkaza i proteka ugovorenog ili zakonskog otkaznog roka, ugovor o trgovinskom zastupanju prestaje da ima pravna dejstva *pro futuro*. Otkaz ugovora se može dati u svako vreme, osim u nevreme. Preporučljivo je da ugovorne strane razrade ovaj pravni standard ugovornim odredbama i definišu šta će se u konkretnom ugovornom odnosu smatrati nevremenom za otkaz. Ugovor o trgovinskom zastupanju koji je zaključen na neodređeno vreme može se raskinuti krajem svakog kalendarskog tromesečja, uz poštovanje ugovorenih ili zakonom propisanih otkaznih rokova. Zakonski otkazni rokovi su dispozitivne prirode, uz postavljeni minimalni otkazni rok od mesec dana. U ugovoru o trgovinskom zastupanju koji je zaključen na određeno vreme, ugovorne strane mogu takođe predvideti redovni otkaz poštujući imperativne norme o minimalnom otkaznom roku i periodima kada se otkaz ne može izjaviti.

Treba napomenuti da ugovorne strane, u granicama autonomije volje, precizno treba ugovorom da definišu postupak za redovan otkaz kao posebno sredstvo za jednostrani raskid ugovora o trgovinskom zastupanju koji se može izjaviti i u odsustvu povrede ugovornih obaveza. Osim toga, treba odrediti formu otkaza i otkazne rokove, kako bi ugovornici imali potpunu izvesnost u pogledu trajanja njihovog ugovornog odnosa i načina prestanka ugovora. Iako nema izričite norme u Zakonu o obligacionim odnosima, smatramo da bi dužina ugovorenih otkaznih rokova trebalo da bude u srazmeri sa trajanjem ugovornog odnosa i da bi trebalo da je jednaka za obe ugovorne strane, imajući u vidu načela savesnosti i poštenja, ravnopravnosti strana i zabrane zloupotrebe prava predviđena zakonom. Na sudskoj praksi je da primenom ovih načela u svakom konkretnom slučaju ceni klauzule o otkaznim rokovima i ispituje njihovu punovažnost odnosno ništavost po službenoj dužnosti.[49]

Pored redovnog otkaza, srpsko pravo poznaje i otkaz bez otkaznog roka ugovora o trgovinskom zastupanju, u slučaju kada za to postoje važni razlozi ili, kako ih zakon naziva, *ozbiljni uzroci* za otkaz. Imajući u vidu i to da srpski zakonodavac ne daje bliže smernice o tome kako će se ceniti da li postoje ozbiljni uzroci za otkaz,

[49] U tom smislu presuda nemačkog Vrhovnog suda BGH od 21. marta 2013. – VII ZR 224/12: Standardna klauzula o otkaznom roku od dvanaest meseci do kraja godine za trgovinskog zastupnika je ništava jer nesrazmerno šteti trgovinskom zastupniku, i to suprotno načelima dobre vere – *https://openjur.de/u/622509.html*. Isto i nižestepeni sudovi, kao OLG Nürnberg, 30. 3. 2022 – 12 U 3303/19 u kojoj se navodi da je potrebno odmeriti interese obe ugovorne strane i proceniti šta je primeren rok u konkretnom slučaju, imajući u vidu slobodu ugovornih strana sa jedne strane, i zaštitu ugovornih strana sa druge – *https://openjur.de/u/2395750.html*.

mišljenja smo da ovaj pravni standard treba ugovorom precizirati, kao i da se povreda ugovora uvek ima smatrati ozbiljnim uzrokom za otkaz.[50]

Srpsko pravo je neusklađeno sa pravom Evropske unije u pogledu dužine otkaznog roka za raskid ugovora o trgovinskom zastupanju. Takođe, srpskom pravu nedostaju norme o tome da ugovorom ostavljeni otkazni rok mora biti isti za nalogodavca i trgovinskog zastupnika. Ovo pravilo bi se u srpskom pravu moglo izvesti primenom načela savesnosti i poštenja, kao i načela zabrane zloupotrebe prava, koje bi se cenilo u svakom konkretnom spornom slučaju ponaosob. Ipak, smatramo da je bolje da se izričito zakonskom normom uredi ovo bitno pitanje, jer se tako ugovornim stranama pruža pravna sigurnost u pogledu pravne sudbine opstanka ili ništavosti njihovih ugovornih klauzula o otkaznom roku, kao i vremena koje treba da protekne kako bi ugovor prestao da važi.

Analizom je utvrđeno da je Nacrt Građanskog zakonika uskladio odredbe koje se odnose na otkaz i otkazne rokove za ugovor o trgovinskom zastupanju sa pravom Evropske unije, a buduća harmonizacija se može smatrati značajnom za pravni i poslovni promet sa Unijom kao najvećim spoljnotrgovinskim parterom Republike Srbije.[51]

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NOTICE PERIOD FOR TERMINATION OF COMMERCIAL AGENCY AGREEMENTS IN SERBIAN LAW

Summary

This paper examines the issue of notice periods for the termination of commercial agency agreements in Serbian law. It focuses on termination which is not conditioned on a breach of contractual obligations, but is subject to legally prescribed termination periods as a protective mechanism intended to ensure business certainty for the contracting parties – especially for the commercial agent as the weaker party. Serbian law provides for termination periods dependent on the duration of the commercial agency agreement, which are generally dispositive, except for the minimum termination period of one month, the rule that termination cannot be given at an inopportune time, and the requirement that termination is always issued at the end of a calendar quarter. Furthermore, the paper explores the concept of immediate termination. The research indicates that the Serbian Law on Obligations is not fully harmonized with European Union law regarding termination and termination

[50] U tom smislu i preporučene stavke ugovornih klauzula za međunarodne ugovore o trgovinskom zastupanju daje Burghard Piltz, *Internationales Wirtschaftsrecht*, C.H. Beck, München, 2017, 726.

[51] Izveštaj – Spoljnotrgovinski robni promet – april 2025, Republički zavod za statistiku RS *https://publikacije.stat.gov.rs/G2025/Pdf/G20251128.pdf,_8.*

periods for commercial agency agreements, whereas the Draft Serbian Civil Code is aligned with these standards. It is emphasized that contracting parties should specify in the contractual clauses matters related to the notice period, the form and procedure of termination, as well as the reasons for immediate termination to ensure legal certainty regarding the legal effects of the agreement.

Key words: Commercial agency agreement, termination, notice period, immediate termination, Serbian law

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VREME I PRAVO – APODIKTIČKI I ASERTORIČKI POJMOVI I VEZE

Ljudski rod je od pamtiveka postavljao sebi pitanja na koja do danas nije uspeo konačno da odgovori (npr. šta su život, svest, razum, volja, priroda, svet, stvarnost, sadašnjost itd.). U takva pitanja spadaju još dva, pored brojnih drugih: šta je vreme i šta je pravo. Iako izgleda da između pojmova vremena i prava nema nikakvih susretanja, ne može se osporiti da pravo postoji kao i vreme. Samo se ne vide, već osećaju. I ne samo to: pravo može da postoji u vremenu, ali i vreme u pravu. To znači da je postojanje vremena za pravo conditio sine qua non. Jedino, postojanje prava nije uslov za postojanje vremena. Vreme može da postoji bez prava i pre prava, ali ne može da postoji bez sveta i pre sveta. Uprkos postavci o postojanju svesnog i razumnog bića – Posmatrača, niko ni danas nije uspešno odgovorio na ono što prethodi razmatranju veza prava i vremena, a to su pre svih pomenuta apodiktička pitanja šta je vreme, a šta pravo. Tek zatim se mogu razmatrati asertoričke teme vremena u pravu i prava u vremenu. Izdvajaju se dve teme. Prva se odnosi na vremensko važenje normi (npr. na vrste važenja i vrste rokova u pravu), a druga na preobražavanje prava kroz ljudske epohe.

Ključne reči: *vreme, stvarnost, sadašnjost, svet, pravo, preobražaji prava, važenje normi*

VREME I PRAVO KAO APODIKTIČKE POJAVE

Iako konačni odgovori na pitanja šta je vreme a šta pravo ne postoje, te činjenice nisu omele istraživače – filozofe i naučnike da odgovaraju na ta dva važna pitanja, pre kada se radi o asertoričkim (empirijskim) nego o apodiktičkim (metafizičkim)

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stranama vremena i prava. Njihovi napori da se dođe barem do ispravnog ako ne i do istinitog rešenja pokazuju da pravi izazov nije postavljati sebi ciljeve nisko već visoko.[1] Samo dok jedni otkrivaju, drugi mere i premeravaju. Ta podela zadataka se susreće u gotovo svim naučnim i duhovnim disciplinama u kojima je ona moguća: od fizike do prava.

Primer predstavlja izjednačavanje pojma vremena sa trajanjem vremena ili sa merenjem vremena. Trajanje je svojstvo vremena, a merenje postupak za utvrđivanje vremenskih vrednosti. Uzgred, niti se tačno zna šta je vreme niti se pouzdanim može smatrati merenje nečeg što nije poznato. Prema Anriju Bergsonu (*Henri Bergson*) trajanje je „stvarno iskustvo vremena", dok to nije slučaj sa rezultatom matematičkog merenja vremena[2] kao što je tvrdio Albert Ajnštajn (*Albert Einstein*). Trajanje podrazumeva kontinuitet i neprekidnost, dok merenje ne mora. Da je reč o netačnosti u pogledu merenja pokazuje ovo: kada bi planeta usporila svoju rotaciju za 1/24 – dan (obdanica i noć) trajao bi jedan čas duže. Vreme bi se uvećalo za jedan čas po starom načinu merenja, dok bi kazaljke časovnika pokazivale da se dan umesto u ponoć završava u jedan čas posle ponoći. I sve dok bi se merenje izvodilo prema starom baždarenju, dobijao bi se netačan rezultat. Novo rešenje sastojalo bi se ili u dodavanju jednog časa na postojeća 24, ili u produženju trajanja jednog časa tako da ih i dalje bude 24 ali uvećanog trajanja za 1/24. Do danas se smatra da takvi odgovori na ove „umno zasnovane" pojave imaju opštevažeći značaj uprkos svojoj netačnosti ili nedovoljnosti.[3] Možda je najiskreniji i najtačniji odgovor dao Sv. Avgustin. Kada su ga pitali šta je vreme, odgovorio je: „Kada ne pitate: znam; kada pitate: ne znam!"[4]

Mnogo pre Avgustina, Heraklit je vreme odredio kao „čisto menjanje tako da ono, u svojoj suštini, i jeste i nije". Aristotel je tvrdio da je vreme „broj kretanja prema onome što je bilo ranije i što će biti kasnije". Jedanaest vekova posle Avgustina, Blez Paskal (*Blaise Pasqual*) je problem vremena rešio tako što je vreme ubrajao u „jednostavne reči" koje se ne mogu i koje ne treba pokušavati definisati. Gotovo vek posle Paskala, Imanuel Kant (*Immanuel Kant*) je vreme shvatao kao temeljnu misaonu kategoriju. Tvrdio je da vreme ima „empirijski realitet", ali u isto vreme i „transcendentalni idealitet". Takođe, tvrdio je da se vreme ne može neposredno iskusiti budući da se radi o apriornim uslovima svekolikog iskustva.

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[1] V. Slobodan Perović, „Vremenske dimenzije pozitivnog i prirodnog prava", *Besede sa Kopaonika*, Beograd, 2018, 734–738.

[2] V. #Philosophy #DeepThinking #HenriBergson, Time Doesn't Exist? Unlocking Bergson's Mysterious Theory, think Deep, YouTube, 21. 9. 2024.

[3] Toma Živanović, *Sistem sintetičke filozofije prava*, III, Beograd, 1959, 742–747, 1d, 2a i 2b.

[4] Aurelije Avgustin, *Ispovesti*, Beograd, 2009, I, 8.

U prvoj polovini XX veka Anri Bergson je vreme proglasio „neposrednom činjenicom svesti" koja postoji samo u sadašnjosti, dok je Edmund Huserl (*Edmund Husserl*) razlikovao kosmičko vreme od fenomenološkog vremena koje je odredio kao unutrašnji vremenski doživljaj koji se ne može meriti jer je vreme „neprekidno i doživljeno".[5] Najnovija je hipoteza o tzv. negativnom vremenu. Prema Efraimu Štajnbergu (*Aephraim Steinberg*) i Danijeli Angulo (*Daniela Angulo*), njenim tvorcima, vreme u kvantnoj fizici može da se „kreće" i od budućnosti ka prošlosti jer su prilikom izvođenja laboratorijskog eksperimenta fotoni izlazili iz materijala pre nego što su u njega ušli, što je logički protivrečno.

Kakogod, sigurno je da vreme nije fizički entitet. Vreme je tvorevina svesti: prvo univerzalne – „Svetog duha", a zatim partikularne – „Ljudskog duha". To znači da tzv. prirodno vreme po sebi i za sebe ne postoji. Možemo se zapitati da li i priroda postoji pre i izvan vremena. Verovatno je da bi u tom slučaju postojao samo obezboženi i obezljuđeni krš, haos gravitacione i elektromagnetnih sila. U takvom „praneredu" („supi haosa")[6] tzv. priroda bila bi neraspoznatljiva i nesaznatljiva. Ako bi u takvom stanju i postojala nekakva stvarnost ona ne bi bila učvršćena (fiksirana) već savitljiva (fleksibilna) sve dok se „ne posmatra". Tek kada otpočne posmatranje, a to je trenutak kada se pojavljuje Posmatrač (koji takođe može da bude „Stvaralac", „Pokretač" ili „Učesnik") sa „alatom za vizuelizaciju" (Donald Hofman / *Donald D. Hoffman*), stvarnost se učvršćuje, prestaje da bude savitljiva, opredmećuje se, a vreme u njoj misaono se razdvaja na sadašnjost, prošlost i budućnost. Do toga se dolazi selekcijom i pojednostavljivanjem stvarnosti koja je suštinski nesaznatljiva i „nepodnošljiva" ljudskom umu.[7] To znači da tek od tada prirodni i društveni zakoni mogu da se otkrivaju i mere prema izabranim merilima i vremenskim jedinicama, naročito kada postoje pravilnosti u ponavljanju pojava, njihovom ritmičkom kretanju, ispravnom odvijanju procesa itd. (npr. u astronomiji rotacije zvezda, planeta, kretanja kometa – recimo Halejeva kometa).[8] Treba naglasiti da Posmatrač može da bude bilo koje ljudsko biće obdareno svešću, ali je samo jedan Veliki Stvaralac Svih Svetova („Neka bude svetlost") i prvobitni Posmatrač

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[5] V. *www.svafizika.org*, šta-je-to-vrijeme, od 8. 6. 2018; *Enciklopedijski leksikon*, Mozaik znanja, Beograd, 1973; Branko Pavlović, *Filozofski rečnik*, Beograd, 1997; *Enciklopedija živih religija*, Beograd, 2004; *Kembridžova ilustrovana istorija religije*, Novi Sad, 2006.

[6] V. Vilem Fluser, „Kašika stvaranja iz supe haosa", *Treći program*, sv. I, br. 84, Beograd, 1990, 280.

[7] V. Donald D. Hoffman, *The Case Against Reality, How evolution hid the truth from our eyes*, Penguin, 2020.

[8] V. Dragan Mitrović, *Put prava. Holistička paradigma sveta i prava u svetlu teorije haosa i pravne teorije*, Beograd, 2000, 192, 201, 203–204, 214–220.

svoga dela („I vide Bog da je dobro").[9] U različitim svetskim religijama on se različito naziva i opisuje, ali se uvek smatra primordijalnim ili vrhunskim božanstvom. To uverenje podržavaju reči u Svetom jevanđelju po Jovanu: „U početku bješe riječ, i riječ beše u Boga, i Bog bješe riječ."[10] Antička grčka filozofija je koristila izraze „apejron" (Anaksimandar, Parmenid, Heraklit itd.) i „logos" (Platon, Aristotel, stoici itd.). U Svetom jevanđelju po Jovanu se susreće izraz „božanski logos". Oba izraza – apejron i logos, koriste se i danas.

Prema novijim teorijama, sadašnjost (ako postoji) više nije uporište ljudskog Posmatrača koji se nalazi između prošlosti i budućnosti (ako i one postoje). Umesto tradicionalnog shvatanja sadašnjosti od koje sve potiče sada se zagovara da ljudsko biće prvobitno samo fizički postoji u sadašnjosti. Ono se nalazi u takvom stanju „neznanja" sve dok ne postane svesno sadržaja koji u virtuelnom obliku ideje, odluke, procedure, zapovesti itd. dobija iz neposredne prošlosti. Slična nedoumica postoji i kada se radi o budućnosti, kada se ona shvati kao beskrajni niz mogućnosti od kojih se samo jedna (ona u „najsnažnijoj" atraktorskoj tački)[11] ovaploćuje u prošlosti u svom virtuelnom obliku. Možda je ovo jedna od dve najizazovnije zamisli, barem kada je reč o tradicionalnoj podeli vremena. A ona je upravo nagoveštena. Radi se o ljudskom konstruktu da vreme postoji i da u operativnom smislu može da se razdeli i linearno rasporedi na pomenutu sadašnjost, prošlost i budućnost. Taj konstrukt se susreće npr. kod Platona ili u hrišćanskom i judaističkom učenju o linearnom „napredovanju bez kružnog ponavljanja pojava i događaja".[12] Najnovija otkrića u fizici pokazuju da nije tako, da postoji međudelovanje (interakcija) između sadašnjosti, prošlosti i budućnosti koje nije plod linearnosti vremena već postojanja tzv. vremenskih petlji (Džon Viler / *John Whiler*). Njima je najsrodniji pojam „samsara" u budizmu, hinduizmu i đainizmukoji označava promenljivost i nestvarnost sveta, ali i ciklični tok, večni tok rađanja, umiranja i ponovnog rađanja. Nevolja je u tome što se linearnost vremena odvija „prirodno" i u jednom smeru, dok to nije slučaj sa vremenskim petljama. Linearnost vremena je empirijska činjenica, a vremenske petlje naučna i filozofska hipoteza.

Interesantna zamisao – da sadašnjost postoji, ali kao „zakasneli" virtuelni sadržaj ljudske svesti koji u obliku značenja pristiže iz najbliže prošlosti – zaslužuje dodatnu pažnju. Prema toj zamisli, sadašnjost nije temeljna odrednica, kao što je

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[9] *Sveto pismo Starog zaveta, Stvaranje sveta i čoveka* (1, 1), Beograd, 1993, 1.

[10] *Sveto pismo Novog zaveta, Sveto jevanđelje po Jovanu* (1, 1), 95.

[11] D. Mitrović (2000), op. cit., 102, 116, 121, 125–127, 150–151, 169, 197.

[12] V. Obrad Samardžić, „Hrišćansko poimanje vremena i istorije", *Sociološka luča*, br. 2, god. III, 2009, 88 i dalje.

tvrdio Bergson koji je osporavao postojanje prošlosti i budućnosti tvrdeći da je reč o iluzijama. Sadašnjost nije ni neposredno saznatljiva ljudskom umu. Naime, između trenutka kada npr. ljudsko oko primi podatke iz okruženja do obrade tih podataka u mozgu protekne najmanje 1/10 sekunde ili nešto više od tog kratkog vremena (do 7 sekundi). To znači da kada mozak primljene podatke obradi i preobrazi u trenutak „sada", taj trenutak više nije „sada". On već pripada prošlosti (zbog vremenskog razmaka između prijema sadržaja, njegovog značenjskog uobličavanja i isporučivanja u sadašnjost). Takva sadašnjost ne može da bude samostalna, izolovana i samodovoljna. Najzad, može se zapaziti kako ljudi iz najbliže prošlosti (koju pogrešno nazivaju sadašnjost) utiču i na budućnost. To bi značilo da se izvesnost nalazi u budućnosti (da će se neka mogućnost ostvariti), a sigurnost u prošlosti (da se neki sadržaj već značenjski uobličio u svesti ili da se posledično materijalizovao, tj. ostvario). Rečju, sadašnjost može da postoji samo kao sekundarni deo iste stvarnosti. U njoj značenje naknadno stiče svoj aktuelni oblik. Proizilazi da jedino sadašnjost ne može da se sazna iz sadašnjosti (Aleks Volf / *Alex Wulff*).[13] To dozvoljava da se zapitamo na koje se to vreme odnosi poznata izreka Rene Dekarta (*René Descartes*): *Cogito ergo sum*. Da li bi ona trebalo da glasi: „Mislim – dakle, jesam bio!" (*Dico – sic essem*). Da je Bergson mogao da zna za ovaj vremenski razmak od barem 1/10 sekunde, on prošlost i budućnost ne bi smatrao iluzijama.

Postoji i druga, najizazovnija zamisao: da vreme uopšte ne postoji. Samim tim, ne postoji prostor sa prirodom i svetom u njemu. Ne postoje ni prošlost, ni sadašnjost, ni budućnost. Ali postoji stvarnost pre ili izvan vremena bez prošlosti, sadašnjosti i budućnosti prožeta haotičnim delovanjem nematerijalnih sila. I ne samo to: ne postoji večnost kao vremenska oznaka za beskonačni protok vremena u prostoru. Ne postoji ni beskonačnost kao oznaka za beskraj prostora u vremenu. To znači da ne postoje izvesnost i sigurnost koje pripadaju budućnosti ili prošlosti. Srećom, to važi za središnji deo kvantne teorije gravitacije, po kojoj samo kada bi sve bilo savršeno poznato na nivou svakog atoma, tada ne bi postojao osećaj proticanja vremena. Stvarnost bi postala „večna sadašnjost". Prema Karlu Roveliju (*Carlo Rovelli*), vreme je „posledica našeg nepoznavanja pojedinosti u svetu. Postojanje u kome se svi nalazimo, težeći za logikom koja nas potvrđuje, stvorili su postojeći koncept vremena",[14] a time i njegovu uslovnu podelu na prošlost, sadašnjost i budućnost. Proizilazi da je vreme konstrukt nastao kao posledica oskudnosti ljudskog znanja. Ta oskudnost nalaže da se uspostavi misaoni red između pojava i procesa u prirodi i društvu. Dakle, večna sadašnjost ne postoji, ali postoji večna stvarnost.

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[13] V. Aleks Vulf, *Tačno ili netačno: istina o nauci*, Beograd, 2022.

[14] Carlo Rovelli, *The Order of Time*, New York, 2018, 18. V. Karlo Roveli, *A šta ako vreme ne postoji?*, Smederevo, 2019.

Budući da je i pravo jedna vrsta konstrukta to se može zapitati da li i pojam prava može apodiktički da se odredi? Očigledno je da ne može, čak i kada bi se umesto pojma sadašnjosti koristio pojam prošlosti. Zbog vremenskog zaostatka u ljudskoj svesti od barem 1/10 sekunde ta razlika bi prošlost trebalo da učini primarnim a sadašnjost sekundarnim delom večne stvarnosti. Dakle, ni pojam prava ne može tačno i u celosti da se odredi, a ne samo pojam vremena. Ali, može da se pokuša. Ta manjkavost istraživačima pruža slobodu da pružaju interesantne odgovore bez straha od odgovornosti zbog izrečenog. To pokazuju rasprave koje se vode povodom određivanja pojma prava. One su potrebne i neizbežne, jer je čoveku svojstveno da može da postavlja pitanja na koja nikada ne može konačno da odgovori.

Evo nekoliko razloga koji potkrepljuju tvrdnju da pravo nikad ne može uspešno apodiktički da se odredi, ali može asertorički.[15] Da na pitanje šta je pravo nikad ne bude konačno odgovoreno utiče pre svega ljudska *nesavršenost*, koja čini da potpuno saznanje i konačno definisanje prava ostanu izvan ljudskih mogućnosti. Postoji pravo i postoje tvrdnje o tome šta je pravo. To znači da se *pojam prava ne podudara sa pravom kao pojavom, kao ni sa definicijom prava.* Definicije su uvek siromašnije od pojma i pojave. Kada se određuje pojam prava, kreće se od pojave, a kada se definiše pravo, od njegovog pojma. I, zbilja, nikada se ne dešava da se pojava, pojam i definicija prava potpuno podudare. Glavni uzrok je pomenuta nesavršenost ljudskih pojmova i jezika.[16] Očigledno, stvarne ljudske mogućnosti za saznavanje, određivanje i definisanje prava su ograničene, a granice nepouzdane. U stvari, pravo je čudo kako se ljudi uopšte sporazumevaju. Izgleda da je ljudsko sporazumevanje moguće zahvaljujući značenju koje, budući vrsta holograma, osiromašenjem gubi svoju jasnost i preciznost ali i dalje ostaje suštinski isto.[17] Takođe, *pojam prava je relativan, zbog čega su sve definicije prava relativne.* Pojam prava je i *promenljiv*, jer je naše znanje o pravu uvek nedovoljno i nepouzdano. I sve definicije prava su relativne i promenljive jer se koriste nedovoljnim i nepouzdanim pojmovima koji zavise od toga šta se smatra odlučujućim u pravnoj pojavi, a ona ima veliki broj obeležja koja je stalno preobražavaju. Ali, to još ne znači da pravo uopšte ne može da se odredi i da ne mogu da se pruže sve bolje definicije prava koje će sve više nalikovati na njegovu zamišljenu idealnu, potpunu i konačnu definiciju. Zbog toga se kaže da su *pojam i definicija prava uvek subjektivni.* Oni su naše misaono projektovanje onog što smatramo pravom. To projektovanje se sučeljava

[15] U ovom pasusu su u obliku teza izloženi problemi sa određivanjem apodiktičkog pojma prava koji su opširnije obrađeni u: Dragan Mitrović, *Uvod u pravo*, Beograd, 2017, 115–130.

[16] Ludvig Vitgenštajn, *Filozofska istraživanja*, Beograd, 1980, 39 i dalje.

[17] A. N. Whitehead, *Process and Reality*, New York, 1978, 28–29, 190, 215 i dalje; D. Bohm, *Wholeness and the Implicit Order*, London, 1980, 12.

sa neizbežnim – uvek je subjektivno. Rečju, radi se o još jednom konstruktu i simulakrumu: konstruktu, jer on ne nastaje samostalno i spontano, izvan svesti ljudi, a simulakrumu jer je netačan kao neka vrsta svesne obmane. Ta saznanja dozvoljavaju da se ustvrdi kako *pojam i definicija prava nikada nisu istiniti.* Oni su samo manje-više uverljivi i proverljivi. Kada se za nešto tvrdi da je istinito, samo se kaže kako se za to nešto pretpostavlja da je istinito. Ipak, ljudima je prihvatljivije da se koriste pretpostavljenom ličnom istinitošću nego opovrgljivim stepenima objektivizovane istinitosti.[18] Zbog toga osnovno istraživačevo rukovodno načelo, ali u asertoričkom i operativnom smislu, treba da bude *pogodnost za rad*, a ne istinitost dobijenih iskaza u apodiktičkom smislu. To je nužno jer je čovek tako „srećno udešen da nema nikakvog tačnog merila istinitosti" dok ima „više izvrsnih merila netačnosti".[19] Pomenuta nemogućnost da se pojam prava do kraja istinito odredi i definiše ipak ne ukida mogućnost da se pravo *ispravno* odredi i definiše. Tu se, dakle, istinitost pojavljuje samo kao mogući cilj ili poželjan rezultat. I to je to „istinito" viđenje stvari. Može se sažeti u sledećem: pravo je „solidno" kada je ispravno.[20] Najzad, uvek kada su ispravni, *pojam i definicija prava su korisni.* Korisnost potiče iz nužde, majke najvažnijih tekovina civilizacije. Tako je i sa pravom. I ono postoji zbog toga što je korisno. Nekorisno pravo ne postoji jer nikome ne treba.[21] Zato što je korisno, *pravo može konvencionalno da se odredi i definiše*, pri čemu se obično upotrebljava samo nekoliko najkorisnijih pojmova i definicija. Proizlazi da pravo može slobodno da se odredi, kao i vreme. Merilo su pouzdanost i korisnost. U različitim situacijama čak mogu da se koriste različiti pojmovi prava (npr. kao skupa normi, odnosa, elemenata, vrednosti itd.) ili vremena (npr. apsolutnog, relativnog, mehaničkog, astronomskog, fizičkog, filozofskog, fenomenološkog, psihološkog, religijskog itd.). To podseća na božansku kreativnost. Ali, takva sloboda nije samovolja jer je samovolja nedosledna i nepouzdana.

Kakogod, paradigma vremena i njegove veze sa pravom mogu da dovedu do interesantnih rezultata i do jednog novog gledanja na pravo kao dinamičku, procesualnu, topičku i holističku pojavu. Razdvajanje tih strana iste pravne pojave bilo bi iluzija. Možda je tu ideju najbolje izrazio Dejvid Bom (*David Bohm*) sledećim zapažanjem: „Svaki aktualni entitet ponavlja na mikrokosmičkom ono što univerzum jeste na makrokosmičkom planu… Svaki entitet prodire i učestvuje u celini sveta, štaviše, u izvesnom smislu, sve se u svakom trenutku nalazi svuda…"[22]

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[18] Ludvig Vitgenštajn, *O izvesnosti*, Novi Sad, 1988, 16, t. 61.

[19] Blez Paskal, *Misli*, Beograd, 1988, 72, t. 82.

[20] Harold Jeffreys, *Theory of Probability*, Oxford, 1948, 17–18.

[21] Alf Ros, *Pravo i pravda*, Beograd – Podgorica, 57 i dalje.

[22] D. Bohm, op. cit., 12.

Taj novi pristup je ograničen samo time što mi sami posmatramo i istražujemo svet ili njegove epifenomene, „što takoreći posmatramo same sebe".[23] Takvo ukrštanje omogućava da se „najplodonosniji razvoj često odigrava upravo na onim tačkama gde se susreću različite misaone linije ... odatle, ukoliko se one zaista sretnu, što će reći, ako su barem toliko međusobno povezane da među njima može da dođe do istinske interakcije, onda se možemo nadati da će iz toga proizaći nova i zanimljiva otkrića".[24]

VREME I PRAVO KAO ASERTORIČKE POJAVE

Kada je reč o ličnom uviđanju istraživača, tu je situacija operativno i tehnički jednostavnija jer se pojmovi vremena i prava odnose na iskustvom uslovljen sadržaj svesti, tj. na njihov „iskustveni" (empirijski) ili „*asertorički* (od *assere*)" sadržaj.[25] Ovaj drugi pristup je praktično usmeren i odnosi se na pojmove vremena i prava kao nekih vrsta korisnih konstrukta i simulakruma. Očigledno, on računa sa svesno prihvaćenom netačnošću. Ima samo subjektivan i ograničen značaj jer se koristi za izvođenje različitih vrsta praktičnih postupaka merenja i zaključaka u astronomiji, matematici, fizici, hemiji, ekonomiji, psihologiji, pravu itd., saglasno sa izrekom da treba meriti sve što se može izmeriti. Zasniva se na merenju pravilne učestalosti, ritmičkog pulsiranja, urednom odvijanju procesa između pojava ili unutar pojava itd. Kao takav, asertorički pojam vremena ne može da bude uspešno određen, ali je koristan isto kao asertorički pojam prava. Apodiktički pojam vremena, pak, pokazuje da je krajnji pojam vremena nesaznatljiv i nedostižan ljudskom umu, što je slučaj i sa odgovorima na pitanje šta je pravo.

Uprkos pomenutim tvrdnjama da vreme i pravo stvarno ne postoje – da je reč o veštačkim, determinisanim, relativnim i promenljivim tvorevinama, može se tvrditi suprotno: da vreme i pravo postoje. Samim tim, postoje njihovi operativni konvencionalni pojmovi između kojih se uspostavljaju tačke dodira. Ali, postoje i tačke razdvajanja. To dozvoljava da se govori o vremenu u pravu i pravu u vremenu.

Kada je reč o *vremenu u pravu*, ova tema se odnosi na sastavne delove pozitivnog „nesavršenog i nezavršenog" prava, jer npr. neki pravni odnosi nastaju, menjaju se ili nestaju.[26] Radi se o različitim vrstama važenja pravnih normi i različitim

[23] Džon Barou, Frenk Tipler, „Antropički kosmološki princip", *Kulture Istoka*, br. 27, god. VIII, Beograd, januar–mart 1991, 4–5.

[24] V. Werner Heisenberg, *Physics and Philosophy*, London, 1963, 173; Fritjof Kapra, *Tao fizike. Istraživanje paralela između savremene fizike i istočnjačkog misticizma*, Beograd, 1989, 9.

[25] T. Živanović, op. cit.

[26] S. Perović (2018), op. cit., 738.

vrstama materijalnih i procesnih vremenskih rokova (npr. suspenzivni, raskidni [rezolutivni], prekluzivni [zakonski], rok za tužbu, žalbu ili za ulaganje nekog vanrednog pravnog leka). Druga strana iste teme, *pravo u vremenu*, odnosi se na preobražaje prava kroz epohe, jer je očigledno da oblici društvenog, državnog i pravnog organizovanja smenjuju jedni druge od najstarije zapamćene prošlosti.

Kada se radi *o važenju pravnih normi*, očigledno je da one moraju da važe vremenski. Bez te dimenzije pravo uopšte ne bi moglo da postoji. Možda je ta vremenska dimenzija važenja pravnih normi najvažnija i najizazovnija. Naime, *važenje vremena u pravu* predstavlja izuzetno važnu hronometrijsku i hronološku pravnu kategoriju. Tačno određeno vreme u pravu može da predstavlja odlučujući trenutak za nastanak, menjanje ili prestanak pravnih odnosa (npr. vreme rođenja, sticanja punoletstva, zaključenje ugovora, isporuka kupljene robe itd.). Vreme u pravu može da se posmatra i drugačije, sa stanovišta aktivnog i retroaktivnog važenja normi, njihovog zbirnog i pojedinačnog važenja ili važenja zavisno od toga da li se radi o opštim i pojedinačnim ili uslovnim i bezuslovnim normama.[27]

Pravilo je da norme važe aktivno, od trenutka donošenja, u budućnost (*et pro futuro*), na neodređeno vreme, dok je izuzetak da od trenutka donošenja važe unatrag, u prošlost (retroaktivno – lat. *retro agere*). To je jedini izuzetak od pravila da vremenska strela ide samo u jednom smeru, linearno ka budućnosti. Samo i taj izuzetak nije ništa drugo nego jedan mentalni okvir ili ljudska fikcija. Vremenska strela samo prividno može da ide unazad. Taj privid dovodi do pogrešnog zaključka da vreme može da se „kreće" retroaktivno, makar kao pravni izuzetak. Ipak, i tu postoje izvesna ograničenja. Pre svega, norma koja ima povratnu snagu može da se primeni samo pod uslovom da postupak primene pravnih normi nije potpuno okončan, tj. da pravni akti nisu postali pravosnažni. Zatim, pravne norme ne mogu da imaju retroaktivnu snagu ako to u njima nije izričito određeno. Najzad, dejstvo takvih normi za odnosne subjekte mora da bude povoljnije od dejstva prethodne norme po kojoj su se ponašali. Iz rečenog jasno proizlazi zašto nije opravdano davati pravnim normama retroaktivnu snagu, osim izuzetno. Čak i kada postoje ozbiljni razlozi za to, treba voditi računa da se povratnom snagom ne ugrozi pravna sigurnost. Retroaktivna snaga se najčešće daje onim normama kojima se popunjavaju pravne praznine. Rečju, retroaktivna snaga pravne norme ima kao posledicu da se pravni karakter i pravne posledice radnji koje su se desile u prošlosti, za vreme važenja nekadašnjih normi, ne cene po tim već po novim normama kojima je data povratna snaga, a te norme postoje u sadašnjosti.[28]

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[27] Pasus o retroaktivnom važenju pravnih normi je sažeto izložen na osnovu teksta u: D. Mitrović (2017), op. cit., 258.

[28] Opširnije o retroaktivnosti zakona v. Slobodan Perović, *Retroaktivnost zakona i drugih opštih akata: teorija sukoba zakona u vremenu*, Beograd, 1987.

O vremenu u pravu u smislu vremenske relativnosti pozitivnog prava može se razmišljati još na nekoliko načina: kao o sukobu zakona u vremenu („vremenske granice važenja zakona, principu neretroaktivnosti, teoriji o stečenim pravima, teoriji društvenog interesa, oblasti primene retroaktivnosti"); kao o krizi pravnog sistema u vremenu („pojmu i elementima krize, nedostacima u kvalitetu i količini prava, neprimeni i neobjektivnoj primeni prava, pravnoj nesigurnosti konstatovanoj opštim mišljenjem"); o vremenu kao pravnoj činjenici („pojmu i vrsti rokova, sticanju i gubljenju prava putem proteka vremena, zastarelosti, naturalnim obligacijama, vremenskom trajanju određenih subjektivnih prava, vremenu i nominalizmu i valorizmu kod novčanih obligacija"); o vremenu kao osnovu odgovornosti za prouzrokovanu štetu; o vremenu i kodifikaciji prava.[29]

Kada je reč o *preobražajima prava kroz epohe,* tj. *o kretanju prava u vremenu*, na početno pitanje kada su nastali prvi država i pravo uopšte ne može tačno da se odgovori, osim iznošenjem manje-više uverljivih pretpostavki zasnovanih na pronađenim i protumačenim artefaktima. Dakle, na to logično pitanje ne može logično da se odgovori. Verovatno se razlog sastoji u tome što istorija ne mora da bude logična, dok istoričari i arheolozi moraju da budu logični.[30]

Možda je najinteresantniji najmanje poznati period ljudske istorije, onaj koji ponajviše prekriva tama zaborava. Ona prekriva i zaboravljene misterije drevnih naroda. Tek sačuvani najstariji mitovi ljudskog roda, poneki artefakt i zapis, nagoveštavaju mogućnosti uzbudljive potrage za nepoznatim u ovom najstarijem i najmanje poznatom periodu ljudske istorije. Najuzbudljiviji pravac te potrage odnosi se na pitanje da li su bogovi zbilja vladali od samog početka? Neki savremeni pisci smatraju da jesu (npr. faraon reformator Akenaten iz 18. dinastije, poslednji božanski vladar u drevnom Egiptu koji „nema nikakvih predaka, koji se jednostavno pojavio"), dok drugi pisci smatraju da nisu i da je reč o oboženim ljudima, a ne o bogovima.

Vladavinu bogova i polubogova zatim zamenjuje vladavina božjih namesnika koji se prvenstveno staraju o sprovođenju božanskih zakona. Iako su bogovi podstakli i nadahnuli vladare da donose zakonike, vladar više nije božanstvo na zemlji. Karakterističan je primer vavilonskog vladara Hamurabija koji je više od svojih osvajanja poznat po donošenju zakonika pred kraj svog života. Naime, drevni stanovnici Vavilona („Kapija bogova") verovali su kako su ovozemaljska država i pravo samo odbljesak i odraz nebeske države i božanskih,

[29] S. Perović (2018), op. cit., 739. Opširnije: S. Perović (2018), op. cit., 741 i dalje.

[30] U narednih pet kratkih pasusa su sažeto izloženi preobražaji vlasti i prava kroz epohe koji su opširnije obrađeni u: Dragan Mitrović, „Božanstvo i pravo", *O pravu. Izabrani eseji*, Beograd, 2017, 267–288.

neizmenljivih i večnih zakona i prava. Zbog toga je kršenje zakona smatrano ogrešenjem o same bogove i njihovu volju.[31]

Ublaženu varijantu vladavine božjih namesnika sa podarenim božanskim zakonima predstavlja kasnija vladavina miropomazanih svetovnih vladara i njihovih zakona. Autoritet tih zakona učvršćuje i uzdiže sama činjenica da ih donose miropomazani vladari. Ipak, razlika je jasna: u slučaju božjih namesnika, bogovi neposredno odlučuju koje će ih ljudsko biće predstavljati i njemu, kao svom izabranom namesniku, predaju svoje već sročene zapovesti u obliku zakonika (Hamurabi) ili zakona (Mojsije). Tu je veza vladara s Bogom neposredna. U slučaju miropomazanih vladara, vladar je ljudsko biće koje u ime Boga miropomazanjem podržava božji zastupnik na zemlji, a taj zastupnik je Crkva. Dakle, tu je veza s Bogom posredna, a sa Crkvom neposredna.

Najzad, suština neverovatnog preobražaja – uspostavljanja vladavine prava umesto vladavine bogova, polubogova, božjih namesnika i miropomazanih ljudskih vladara – sastoji se u uspostavljanju vladavine svetovnih zakona i prava. Ta važna ideja jasno je izložena u Platonovom (*Plato*) poznom spisu *Zakoni*. Na istu Platonovu ideju podsetio je rimskog cara Trajana u prvoj deceniji II veka pisac Plinije Mlađi (*Gaius Plinius Secundus*), izjavivši da „Princeps nije iznad zakona, već je zakon nad njim" (*Leges supra principem*).[32] Treba dodati da su neki savremeni istoričari, kao Urlih Bek (*Urlich Beck*), istu tu ideju prepoznali u Justinijanovom zakoniku, u *Digesta*, i zaključili da je već u njemu zapisan moderan pojam pravne države.[33] Ipak, trebalo je da prođe više od dva milenijuma da bi se Platonova ideja početkom XIX veka ovaplotila u svesti i praksi novog građanskog društva.

U najkraćim mogućim crtama prikazan razvoj od hipotetičke vladavine bogova i božanskih zakona do vladavine ljudi i ljudskih zakona koji nisu hipotetički, pokazuje da u tom periodu nije evoluirao samo pojam božanstva, odnosno vladara, već i pojam zakona, odnosno prava. Umesto vladavine ljudi, suština najnovije zamene sastoji se u uspostavljanju vladavine depersonalizovanih svetovnih zakona i prava lišenih svih ljudskih mana osim mana njihovih sastavljača. Osvrne li se na zapamćenu istoriju ljudskog roda, vladavina svetovnih zakona i prava izgleda kao istorijska epizoda kakvu je svojevremeno predstavljalo trajanje atinske demokratije.[34] Malo se toga suštinski promenilo za proteklih šest milenijuma.

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[31] Marko Višić (prev. i prir.), *Zakonici drevne Mesopotamije*, Beograd, 1985, 105–106 i dalje.

[32] Verner Delhajm, *Svet u Isusovo doba*, Beograd, 2016, 253–254.

[33] Urlih Bek, *Vizantijski milenijum*, Banja Luka, 1998, 53.

[34] V. Dragan Mitrović, „Globalizam, pravo i vladavina prava (Božanstvo i pravo II)", *O pravu. Izabrani eseji*, Beograd, 2017, 289–304.

Ropstvo, taj smrtni neprijatelj ljudske slobode, i danas postoji, samo u obliku koji nameće tehnološko-tehnokratska totalitarna država u usponu.

JOŠ NEKOLIKO STARIH I NOVIH ZAPAŽANJA O POJAVAMA VREMENA I PRAVA

Za ljudska bića obdarena svešću i razumom karakteristično je da su sposobna da postavljaju pitanja za koja unapred znaju da na njih nikad neće moći konačno da odgovore. Takav je slučaj sa pitanjem šta je vreme. Na to pitanje niko do sada nije uspešno odgovorio. Neki pisci smatraju da vreme uopšte ne postoji. Ta zamisao o vremenu može se prihvatiti tek kada se zapazi da vreme ne može da postoji pre ili bez Posmatrača. U slučaju njegovog odsustva postojao bi samo obezboženi i obezljuđeni krš, haos bez vremena i pre vremena, dakle pre sveta. I obratno, tek pojavom božanskog a zatim i ljudskog Posmatrača stvara se konstrukt vremena kojim se otkriva, objašnjava i meri poredak prirode i stvari u svetu i društvu. To je nužno kako bi se u amorfnom (grč. *a* – „bez" i *morphé* – „oblik", „forma") stanju haosa pronašli obrasci reda. Taj red se otkriva, kao što je pomenuto, na osnovu pravilnosti u ponašanju pojava, ritmičnog odvijanja procesa i merenja svega što se može izmeriti. Zahvaljujući primeni teorije haosa pravilnosti i red mogu da se otkriju i tamo gde ih nema, zbog sklonosti haosa ka samouređivanju.[35] Može se reći da je svet nastao i bljesnuo onog časa kada ga je obasjala svetlost svesti i razumnosti prvobitnog Posmatrača, a ne ljudsko premeravanje vremena. Ali, tek je pojavom svesnog i umnog ljudskog bića započeto doba u kome istraživanje vremena kao pojave stiče sve veći hronometrijski i hronološki značaj. Taj uvećani značaj pruža istraživačima podlogu za izvođenje merenja, upotrebu i zloupotrebu dobijenih rezultata.[36] Danas je zbog različitih interesa raširena hronološka zloupotreba vremena o događajima iz prohujalih epoha ili bliske prošlosti. Ti interesi dozvoljavaju da paradoks više ne bude prepreka. To se dogodilo kada je forma mišljenja postala važnija od sadržine pojave koja se meri i koristi. Tako su stvorene makulature, jer ko ne zna kako se meri ne može ništa da izmeri, a time ni da dođe do aplikativnih zaključaka u asertoričkom smislu. Na sličan način je u lingvističkoj filozofiji rešena nedoumica koja glasi: da li onaj ko ne zna da misli ne zna ni da govori ili onaj ko ne zna da govori ne zna ni da misli. Ta nedoumica je rešena u korist govora kao forme izražavanja nad sadržinom ispunjenom, ili ne, značenjima. Njeno prihvatanje je dovelo do pojačane logoreje među istraživačima.

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[35] V. Dragan Mitrović, *Teorija haosa i pravna teorija*, Novi Sad, 1993.

[36] V. Anatoly T. Fomenko. *Statistička hronologija. Matematički pogled na istoriju. U kom smo veku?*, Beograd, 1997.

Stvaranje konstrukta vremena je dovelo do podele mišljenja oko sledećeg pitanja: da li vreme uopšte može da postoji izvan svesti Posmatrača, dakle objektivno, a ne samo subjektivno. Ako vreme može da postoji objektivno, kao što je tvrdio Ajnštajn, tada je konstrukt vremena sa manjim ili većim uspehom izveden iz tog prethodno postojećeg objektivnog pojma vremena. To bi značilo da vreme može da postoji pre prvobitnog Posmatrača ili nezavisno od ljudskog Posmatrača. Ako vreme ne može da postoji objektivno, kao što je tvrdio Bergson, onda je konstrukt vremena puki simulakrum, plod ljudske praktične potrebe da se snađe u haosu sveta i vlastitom haosu korišćenjem alata za vizuelizaciju i premeravanje stvarnosti. To je putanja kojom istraživači dolaze do asertoričkog određenja pojma vremena.

Možda je najvažniji rezultat asertoričkog istraživanja vremena podela stvarnosti na budućnost, sadašnjost i prošlost. A možda i nije, ako se prihvati Ajnštajnova misao da je razlika između prošlosti, sadašnjosti i budućnosti samo „tvrdoglavo uporna iluzija" („stubbornly persistent illusion"). Kakogod, verovatno se još jedan razlog za pomenuto razlikovanje nalazi u činjenici da se stvarnost menja, tj. da se u njoj ritmički smenjuju konstruisane odrednice budućeg, sadašnjeg i prošlog. Prema toj zamisli, sadašnjost postoji, ali kao „zakasneli" virtuelni sadržaj ljudske svesti koji u obliku značenja (ideje, odluke, procedure, zapovesti itd.) sa određenim vremenskim razmakom pristiže iz najbliže prošlosti. Rečju, kada se kaže „sada" to je već „juče", jer sadašnjost nije neposredno saznatljiva. Slična nedoumica postoji i kada se radi o budućnosti, kada se ona shvati kao beskrajni niz mogućnosti od kojih se samo jedna ovaploćuje u prošlosti u svom virtuelnom obliku. Koja je to mogućnost – ne zna se tačno sve dok se ne ostvari. Predviđati – to ne znači uvek tačno pogađati, već uvek biti svestan mogućnosti.

Budući da na pitanje šta je pravo takođe nije moguće konačno odgovoriti, to se i u ovom slučaju nužno koristi asertorički pristup. Tako se došlo do jedino mogućeg – da se pravo određuje i koristi samo u konvencionalnom smislu, jer niko ne može tačno i u celosti da odredi njegov pojam. Ali i nekakav odgovor je bolji ni od kakvog odgovora. Rečju, ako pravo ne može da se odredi i objasni u konačnom smislu, to još ne znači da pravo uopšte ne može da se odredi i da ne mogu da se pruže sve bolje definicije prava koje će sve više da nalikuju na njegovu idealnu, potpunu ili konačnu definiciju. U tome je smisao naučnog i svakog drugog razvoja. Ni fizičari u navedenom smislu ne mogu da odgovore na pitanje šta je struja niti filozofi šta je svet, ali to ih ne sprečava da koriste struju i objašnjavaju svet. Najinteresantnije je to što je pojam prava manje sporan kao sadržaj svesti ljudi nego kao objekt naučnog istraživanja. Možda je zbog toga pravo lakše intuitivno osetiti nego racionalno objasniti, kao kada su Avgustina pitali šta je vreme.

Najzad, iako izgleda kao da između pojmova vremena i prava nema nikakvih susretanja, ne može se osporiti da vreme postoji kao i pravo. I ne samo to: vreme postoji u pravu i pravo postoji u vremenu. Postojanje vremena u pravu se npr. odnosi na elemente prava i vremensko važenje pravnih normi koje je određeno različitim vrstama vremenskih rokova, a prava u vremenu na preobražaje prava kroz epohe. Zahvaljujući vremenu u pravu kao merilu može se razlikovati pozitivno (važeće) od istorijskog (nevažećeg) prava. Tom prilikom treba skrenuti pažnju na dva odstupanja od rečenog. Prvo odstupanje je karakteristično za retroaktivno (povratno) važenje pravnih normi. To je jedini izuzetak od pravila da vremenska strela mora da se kreće samo u jednom smeru, ka budućnosti. Ali, ona se u pravu samo naizgled (prividno) kreće unazad, što dovodi do pogrešnog zaključka da vreme može da se „odvija" retroaktivno. U stvari, radi se o ispravljanju ili ublažavanju strogosti prava tako što se u stvarnosti novoproizvedene povoljnije posledice primenjuju na prošlost. Tu je veza pre virtuelna, u smislu jednog misaonog okvira ili fikcije, nego što je retroaktivna. Drugo odstupanje pokazuje da vreme i Posmatrač mogu da postoje pre prava i bez prava, ali ne pre sveta.

Kada je reč o preobražajima prava kroz epohe, jedno je sigurno: razvoj vlasti i prava se odvijao od hipotetičke vladavine bogova i božanskih zakona do vladavine ljudskih zakona i prava koji nisu hipotetički. Do takvog razvoja je došlo pod uporednim uticajem prirodnog prava koje je smatrano univerzalnim (ili barem opštim) i apsolutnim. Prema Slobodanu Peroviću, za razliku od pozitivnog prava koje je „nesavršeno i nikad završeno, prirodno pravo je u filozofskom smislu apsolutno dato. Pozitivno pravo je promenljivo i nestalno u vremenu i prostoru, dok je prirodno pravo večno. Dakle, pozitivno pravo je neopšte, ono je nacionalno, a nije univerzalno. Pozitivno pravo je često nepravedno (podnošljivo nepravedno ili nepodnošljivo nepravedno), dok je prirodno pravo pravedno po sebi. Prirodno pravo nikad i nigde nije bilo postavljeno kao celovit sistem po metodu pozitivnog prava. Zato ono deluje kao neka vrsta modela ili uzora pozitivnom pravu. Očigledno, „umna priroda, racionalna u svom biću gradi evoluciju prava, dok ona druga fizička i nasilna izvodi revoluciju prava."[37]

To su dve putanje kojima su se „kretali" apodiktički i asertorički pojmovi prava. Može se zaključiti da rezultati apodiktičkog istraživanja ne pružaju zadovoljavajući odgovor na pitanje šta je vreme ili šta je pravo. Rezultati asertoričkog istraživanja pružaju operativne i tehničke odgovore na pitanja šta je vreme ili šta je pravo. Oni uvode u aparaturu simulakrume sadašnjosti, prošlosti i budućnosti. Samo, dobijeni odgovori nisu tačni već korisni.

[37] S. Perović (2018), op. cit., 792.

UMESTO ZAKLJUČKA

Možda je izabranu temu u ovom radu trebalo započeti odgovorima na pitanje šta je svest, a šta razum. Samo, to bi izlaganje udaljilo od odgovora na pitanja šta je vreme, a šta pravo. Neki pisci, kao Bernardo Kastrup (*Bernardo Kastrup*), u svom analitičko-idealističkom učenju svest određuju kao „jedinu realnost" ili kao „krajnju realnost".[38] Takvo shvatanje pokazuje da dolazi do obnove idealizma u nauci. Ono umesno odbacuje dualističko i materijalističko-mehanicističko učenje Renea Dekarta (*René Descartes*).[39] Zahvaljujući takvom izboru, može se tvrditi da je svest Posmatrača tvorac vremena, a vreme tvorac prostora sa svetom i njegovim epifenomenima. Ta danas moderna ideja, da je vreme tvorac prostora, veoma je stara. Susreće se u antičkom mitu o primordijalnom bogu vremena Hronu. On stoji naspram neba i drži točak na kome su ispisani znaci zodijaka. Ispod njega je obično ležala Geja (Majka Zemlja).[40] Time je naznačen redosled događanja koji antičkim narodima nije bio nepoznat. I u prvoj knjizi Mojsijevoj koja se zove *Postanje* (stihovi 1, 2 i 3) govori se o Tvorcu koji je stvorio Nebo i Zemlju, jer je Zemlja pre toga bila „prazna i pusta" (bez oblika). Beše „tama nad bezdanom, i duh Božji lebdeo je nad vodama". Takvu prvobitnu božansku povezanost svesti, vremena i prostora dopunjava razum tvrdnjom da svet nije besmislen i da je sklon samouređivanju (ektropiji), a ne samorazgrađivanju (entropiji). Ektropija svezuje sva tri vremenska stanja u pojmu večne stvarnosti, dok je zakon povećanja entropije jedini zakon fizike koji omogućava razlikovanje prošlosti od budućnosti. Prema Lorencu Gavasinu (*Lorenzo Gavassino*), entropija je jedini razlog zašto se pamte prošli događaji, dok budući događaji ne mogu da se predvide. U stvari, i oni mogu da se predvide, ali samo predviđanje nije moguće naučno objasniti. Kakogod, može se tvrditi da je svet koji pripada toj stvarnosti opredmećen zahvaljujući svesti i vremenu, a uobličen zahvaljujući razumu.

Kada je reč samo o ljudskom biću kao Posmatraču, dozvoljava se mogućnost njegovog uticaja kao Učesnika na taj svet. Jedan od prvih zahvata Učesnika jeste stvaranje konstrukta vremena, a zatim njegova podela na sadašnjost, prošlost i budućnost. Cilj tog veštačkog razdvajanje je unošenje u ljudsku predstavu sveta smisla i reda, da se zna šta je bilo, šta jeste i šta će biti. Taj cilj podržava pravo svojim

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[38] V. Bernardo Kastrup, *Why Materialism Is Baloney: How True Skeptics Know There Is No Death and Fathom Answers to Life, the Universe, and Everything*, Winchester, 2014; Bernardo Kastrup, *The Idea of the World: A Multi-Disciplinary Argument for the Mental Nature of Reality*, Iff Books, 2019.

[39] V. Rene Dekart, *Reč o metodi dobrog vođenja svoga uma i istraživanja istine u naukama* i *Praktična i jasna pravila rukovođenja duhom u istraživanju istine*, Beograd, 1952.

[40] V. Robert Grevs, *Grčki mitovi*, Beograd, 1987.

pravilima. Drugi zahvat predstavlja prožetost vremenom svega što postoji. Ništa što postoji u prostoru ne može da bude izvan nekog svog vremena. To dozvoljava da se govori o vremenu u pravu i pravu u vremenu. Treći zahvat, koji se nadovezuje na pomenuti drugi, odnosi se na preobražavanje prava kroz epohe i vremena.

Sva tri zahvata pokazuju glavne veze između vremena i prava. Te veze podstiču postavljanje pitanja zašto se pribegava konstruktima i simulakrumima vremena i prava. Odgovor je jednostavan: nije moguće dopreti do njihovog potpunog apodiktičkog značenja. U takvoj iznudici se koriste asertorički pristupi. Nevolja je u tome što dobijeni rezultati, kao što je rečeno, nisu pouzdani zbog svoje netačnosti ili nedovoljnosti. Ali, postoje i složenija pitanja postavljena sa istim ciljem. Na njih odgovara gnoseologija, filozofska grana koja se bavi prirodom, suštinom ljudskog saznanja do koga se dolazi nadiskustvenim putem. Njena glavna pitanja tiču se nedoumica da li ljudsko biće uopšte može da sazna svet i pravo kao epifenomen sveta, da li to saznanje može da bude istinito, a ako može – koliko istinito, upotrebom kojih metoda može da se dođe do takvog istinitog saznanja itd. Gnoseologija se u širem smislu (kao teorija saznanja) odnosi na saznanje iskustvenog sveta, prvenstveno zbog njegovih veza s nadiskustvenim svetom.[41] Nevolja sa ovom vrstom odgovora sastoji se u tome što u njih može samo da se veruje, jer ne mogu da se dokažu. A to znači da ni ovim putem nije moguće dopreti do potpunog apodiktičkog saznanja pojmova vremena i prava. Nedostaci oba pristupa pokazuju kako je čovek kao Posmatrač ili kao Učesnik jedno nesavršeno i tragično biće, prisiljeno da se služi obmanama da bi se održalo u svetu čija mu je potpuna istina nedostižna.

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TIME AND THE LAW

Apodictic and Assertoric Concepts and Relationships

Summary

Since time immemorial, humankind has asked itself questions that it has not been able to answer definitively to this day (e.g. what is life, consciousness, reason, will, nature, world, reality, present, etc.). In addition to numerous others, two more questions are included herein: what is time and what is the law? Although it seems that there is no meeting point between the concepts of time and the law, it cannot be denied that the law exists as well as time. It is just that they are not seen, but felt.

[41] V. Radomir Lukić, *Metodologija prava*, Beograd, 1977, 59, 62–63.

Moreover, as the law can exist in time, so can time exist in the law, too. This means that the existence of time is a *sine qua non* condition for the law. However, the existence of the law is not a condition for the existence of time. Time can exist without the law and before the law, but it cannot exist without the world and before the world, i.e. without the Observer. The trouble is that even today no one has successfully answered what precedes the consideration of the connections between the law and time, and these are, first of all, the aforementioned apodictic questions of what time is and what the law is. It is only then that the assertoric themes of time in the law and the law in time can be considered. Two themes stand out. The first refers to the temporal validity of legal norms (e.g., types of validity and types of deadlines), and the second to the transformations of the law through human epochs. When it comes to transformations, one thing is certain: the development of power and the law took place from the hypothetical rule of gods and divine laws to the rule of human laws and rights which are not hypothetical. The shortcomings of both approaches show that human being, as an Observer or as a Participant, is an imperfect and tragic being, forced to use deception to maintain oneself in a world whose complete truth is unattainable for one.

Key words: time, reality, present, world, law, transformation of law, validity of norms

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ALFREDO FERRANTE

LAST WILL AND ARBITRATION IN SPAIN: A CRITICAL OVERVIEW ON SPANISH ARBITRATION ACT

The art. 10 of the Spanish Arbitration Act regulates expressly the testamentary arbitration. The paper is dedicated to interpreting specifically the phrase "herederos no forzosos o legatarios" (no-forced heirs or legatees) of that disposition and, at the same time, it wants to give some instructions to draft properly a testamentary arbitration disposition that does not suffer of pathologies at the time of its application.

Key words: *arbitration, last will, reserved shares, forced heirs, testamentary arbitration*

INTRODUCTION AND APPROACH

The art. 10 of the Spanish Law of Arbitration (LA)[1] states that "Arbitration established by testamentary disposition shall also be valid for resolving disputes

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[1] Ley No. 60/2003, of 23 December, *Boletín Oficial del Estado*, No. 309, of 26th December.

among non-forced heirs or legatees regarding matters related to the distribution or administration of the estate".[2] So, it states expressly the possibility for the testator to prevent an arbitration proceeding relating to his estate, to be based on a unilateral disposition of the testator.[3]

Although legal doctrine has been devoted to interpreting testamentary arbitration[4], there is not an excessive number of court rulings on testamentary arbitration. In fact, it is the judges themselves who acknowledge the "virtually nonexistent jurisprudential treatment[5]" regarding the scope of application of Article 10 of the Law on Arbitration, and they use this as justification for considering that the defendant may not be ordered to bear the costs of the trial[6].

The fact that there is no copious cases on the matter does not mean that it is not of considerable importance in the legal field of reference, especially given that it is used to find solutions in the extrajudicial phase, although it is necessary to

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[2] Art. 10 LA, op. cit. Literally: "también será válido el arbitraje instituido por disposición testamentaria para solucionar diferencias entre herederos no forzosos o legatarios por cuestiones relativas a la distribución o administración de la herencia."

[3] In this sense this disposition has some peculiarities see: Rafael Colina Garea, "El negocio jurídico constitutivo del arbitraje testamentario", *Los nuevos retos del arbitraje en una sociedad globalizada* (dir. por A.-J. Pérez-Cruz Martín: coord. por A. Neira Pena), Thomson Reuters-Civitas, Madrid, 2011, 194.

[4] For the state of art see Alfredo Ferrante, "El Arbitraje Testamentario del art. 10 de la Ley 60/2003: necesidad de nuevo enfoque legislativo", *Sucesión testada. Voluntad del causante e interpretación* (dir. por Marta Carballo Fidalgo, Marta Madriñán Vázquez), Thomson Reuters Aranzadi, Cizur Menor, 2025, in print.

[5] The nullity of the testamentary disposition had been requested, but the appeal was dismissed: STSJ Madrid No. 6/2021, de 2 marzo 2021, 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2021:23. In this case, the existence of a necessary passive joint litigation was upheld with the Notary who executed the will and the Institution to which the arbitration had been referred; another aspect was the inadequacy of the amount, both aspects of which were rejected. Reference is made more broadly to the doctrine that has commented on the judgment in: Rafael Hinojosa Segovia, "Estimación de la anulación de un laudo arbitral por haber resuelto el árbitro cuestiones no sometibles en un arbitraje testamentario. Sentencia del Tribunal Superior de Justicia de Extremadura de 1 de febrero de 2021", *La Ley: Mediación y Arbitraje*, No. 8, julio–septiembre 2021, 445 ff.; Ignacio Gomá Lazón, "Improcedencia de la invalidez de la cláusula de sumisión a arbitraje predispuesto en testamento. Sentencia del Tribunal Superior de Justicia de Madrid CP 1ª 2 de marzo de 2021", *La Ley: Mediación y Arbitraje*, No. 8, julio–septiembre 2021, 474 ff.

[6] Thus, it is established that "there is no reason to agree to the express award of costs, despite having dismissed the claim in its entirety, because it is understood that the case presents serious legal doubts (art. 394.1 Spanish Civil Procedural Act)": STSJ Madrid, No. 6/2021, op. cit. See also Rafael Hinojosa Segovia, "El arbitraje testamentario en las Leyes de Arbitraje de 22 de diciembre de 1953 y 36/1988, de 5 de diciembre", *El notario del siglo XXI: revista del Colegio Notarial de Madrid*, No. 100, 2021, 20 ff.

promote its application, an impulse which, however, is not encouraged by the cryptic wording of the current regulations.

For this reason, the aim of this paper is not to provide an overview or a study of all aspects of the institution, but rather to highlight some of those that are considered relevant or critical.

Thus, first of all, a better understanding of the clause "non-forced heirs or legatees" ("heredero no forzoso o legatarios") and specifically – and *a contrario* – of the role played in this context by the reserved share[7] and the forced heirs, is desirable. It is also appropriate to identify some useful parameters for the drafting of the arbitral testamentary disposition and to validate its independence and autonomy.

THE RESERVED SHARE: A POTENTIALLY RELATIVE CONCEPT. TESTAMENTARY ARBITRATION: A CLEAR CONCEPT THAT MUST BE ADEQUATELY REFLECTED IN AN APPROPRIATE DISPOSITION

There is no doubt that family law and inheritance law have a close relationship, the most obvious manifestation of which is the protection of the reserved share. However, in this context, personal law also comes into play, since the testator has the freedom to testate his estate. In this context, in the model that traditionally characterises continental law countries – albeit with some differences[8] – the reserved share acts, in part, as a brake on the freedom to testate, which is not the case in the common law model, which is based, rather than on a mechanism of the reserved share, on a system based on the trust.[9]

This last aspect can create problems in the case of successions where private international law is involved.[10] Thus, the reserved share – depending on the context

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[7] In this paper legitime and reserved share are used as synonyms.

[8] See schematically Marius J. De Waal, "Comparative Succession Law", *The Oxford Handbook of Comparative Law* (eds. Mathias Reimann, Reinhard Zimmermann), 2nd ed., Oxford University Press, Oxford, 2019, 1073 ff.

[9] With nuances, for example, between Italian, French and German law. See *v.gr.* Alessandro Semprini, "La successione necessaria nella prospettiva comparativa", *Comparazione e Diritto Civile*, No. 1, 2022, 89 ff.; Andrea Fusaro, "Linee evolutive del diritto successorio europeo", *Giustizia Civile*, 2014, 509–563; Paolo Gallo, "Successioni in diritto comparato", *Digesto delle Discipline Privatistiche Sezione Civile*, XIX, Utet, Torino, agg. 2011, 851 ff. Andrea Zoppini, *Le successioni in diritto comparato*, Utet, Torino, 2002; Anne-Marie Leroyer, "Réforme des successions et des libéralités", *Revue trimestrielle de droit civil*, No. 3, 2006, 617 ff.

[10] See *v.gr.* Daniele Muritano, "Trust and succession", *EU Cross-Border Succession* (eds. Stefania Bariatti, Ilaria Viarengo, Francesca Villata), Edward Elgar, Cheltenham, 2022, 33 ff.

in which it is applied – may be somewhat elastic and its scope considerably reduced, even if the national law of the person entitled to a reserved share provides for it as a matter of public order. In certain cases, therefore, it can give way to a trust mechanism, where the deceased has predisposed it and died in a country that recognizes this mechanism. In this respect, the European Court of Human Rights is clear in a couple of French cases,[11] concerning the application of California law. Thus, it is established that Art. 8 of the Convention on Human Rights does not impose the recognition of the right to receive a share of the parents' estate,[12] and that therefore children can be excluded from the estate – with the relative exclusion of the share of the legitime portion – by means of a trust. It is thus established that this does not violate the right to due process under Art. 6.1 of the Convention on Human Rights.[13] It is noted that the right to a reserved share is not an internationally recognised right, which is all the more relevant in view of the fact that this right is not unconditional.[14]

Therefore, the right to a legitimate right is not a human right, given that each state can assess the means that allow each person to lead a family life, and in this sense, there is no violation of public order.[15]

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[11] It should be remembered that, according to the current article 914 of the French Civil Code, the reserved share ("réserve héréditaire") is excluded for ascendants and is maintained for children and the surviving spouse who is not divorced (after the *Loi no 2006-728 du 23 juin 2006 portant réforme des successions et des libéralités*) Cfr. arts. 912, 721, 734, 736, 738, French Civil Code.

[12] European Court of Human Rights, February 15, 2024, case *Colombier v. Francia* No. 14925/18, *https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7877083-10950823&filename=Judgments%20and%20decisions%20of%2015.02.2024.pdf.* The French photographer Colombier settled in California, establishing a trust for his third wife and two of his daughters, excluding three other sons. The three sons claimed the "right of abduction and detraction" ("droit d'aubaine et de détraction") under Article 2 of the Law of June 14, 1819 (*Dans le cas de partage d'une même succession entre des cohéritiers étrangers et français, ceux-ci prélèveront sur les biens situés en France une portion égale à la valeur des biens situés en pays étranger dont ils seraient exclus, à quelque titre que ce soit, en vertu des lois et coutumes locales*) which essentially aimed to grant French heirs treatment similar to what they would have received if French law had been applied. See Armelle Gosselin-Gorand, "La Convention européenne des droits de l'Homme face au droit de prélèvement compensatoire français", *L'essentiel. Droit de la famille et des personnes*, No. 4, 1st of April 2024, 4 ff.

[13] A judgment similar to the previous one is that of the musician Maurice Jarre, which also involves a trust and the legal system of California: European Court of Human Rights, 15 February 2024: case *Jarre v. France*, No. 14157/18, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-230875%22]}*.

[14] See point no. 51 case *Colombier y otros v. Francia*, op. cit., also point no. 64 case *Jarre v. France*.

[15] In fact, according to Article 35 of Regulation (EU) No. 650/2012, a regulation can be excluded only if, for the State, this regulation is not manifestly incompatible with the public policy of the Member State of the forum. See Regulation (EU) No 650/2012 of the European Parliament

Therefore, the testamentary freedom of the deceased prevails over that of the heirs, at least in the European Union, with the result that in some cases there is a tmesis between the conceptualisation of national and international public order. Indeed, in this case, the law of the last habitual residence of the deceased applies (unless the testator has not provided otherwise).[16] In this way, the testator can freely exclude (and/or perhaps cheat) the system of wanting to 'shield' the protection of the forced heirs and the reserved share by fixing his residence outside a country where the latter is not protected. This possible exclusion demonstrates a binding force of the reserved share, which is potentially weakened by the testator's possible future choices regarding his change of residence, especially in those cases where he would fix his residence in a common law system. If the reserved share is weakened by the mutation of the system, the arbitral testamentary disposition, on the other hand, is not, since there is no objection to the admission of these[17] in common law systems.[18] In fact, perhaps the best known example is the one,[19] in George Washington's holographic will.[20]

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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 L* 201, 27. 7. 2012, 107–134.

[16] See arts. 20 ff Regulation (EU), No. 650/2012, op. cit.

[17] For example, in relation to the United States, reference is made to the interesting study by Jakob Gleim, *Letztwillige Schiedsverfügungen. Geltungsgrund und Geltungsgrenzen*, Mohr Siebeck, Tübingen, 2020, 59 ff.

[18] In this paper we will not analyze the common law model nor the German model, which also widely recognizes the model in its civil procedural code and specifically through the interpretation of the § 1066 ZPO. It is essential here to consult J. Gleim, op. cit.

[19] This is the disposition: "But having endeavored to be plain, and explicit in all Devise so even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

The text of the holographic will signed on June 6, 1799, by George Washington six months before his death can be found at: *https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/george-washingtons-last-will-and-testament-july-9-1799.*

[20] See John C. Fitzpatrick, *The Last Will and Testament of George Washington and Schedule of his Property, to which is appended the Last Will and Testament of Martha Washington*, The Mount Vernon Ladies' Association of the Union, Mount Vernon, 1939.

Although it is true that this paper does not intend to go into the problems of application of foreign law that interact under the rules of international law, it can be affirmed that what has just been analysed is useful to show that the freedom of the testator, when he is still alive, plays a key role in the aspects of inheritance law relating to his estate. Indeed, if he wanted to exclude the reserved share, he could even act in a more extreme way, deciding to 'spend it all', even going on a trip with his forced heirs. In this case, would he be spending his own money or that of his forced heirs? Evidently, the answer is clear and further validates the power of the testator's freedom in his choices.[21] Reserved share becomes a relative concept, as well as its protection a fortiori, in an international context, despite the fact that it is highly protected in the national legal system. This does not mean, however, that certain issues relating to the reserved share and the forced heirs remain open at the national level as well. If, for some, the legitimate share itself is in question, what is certain is that this relationship plays a fundamental role in testamentary arbitration and, therefore, requires an adequate and specific analysis.

In this context, therefore, once a testamentary arbitration has been stipulated, the role played by the reserved share and the reserved heirs must be analysed and given the appropriate validity for the sake of the due recognition of the freedom of testament.

The reserved share becomes a relative concept, as does its protection *a fortiori*, in an international context, even though it is highly protected in national legal systems. However, this does not mean that some issues relating to the reserved share and the forced heirs remain open at the national level as well. While for some the reserved share itself is in question,[22] what is certain is that this relationship

[21] However, the legal protection of the forced heir (as *heredero forzoso*) must also be considered, as he, as a forced heir (as *legitimario*), has a different position from the voluntary heir and therefore can challenge simulated transfers for the benefit of third parties and contextual impairment of his "potential" right, given that said right does not become effective until the death of the testator: see Antonio Jose Vela Sánchez, "La libertad del causante de disponer inter vivos de todos sus bienes", *Revista de Derecho Civil*, No. 2, 2022, 227 ff.

[22] The doctrine is widely debating the issue of the pros and cons of maintaining, excluding or modifying the legitime. See: Manuel Espejo Lerdo de Tejada, *Tendencias reformistas en el Derecho español de sucesiones: especial consideración al caso de las legítimas*, Bosch, Wolters Kluwer, Madrid, 2020, Victorio Magariños Blanco, *Libertad para ordenar la sucesión. Libertad de testar*, Dykinson, Madrid, 2022; Rafael Verdera Server, *Contra la legítima*, Marcial Pons, Madrid, 2022; M.ª Patricia Vives Velo de Antelo, *Razones para mantener la legítima y propuesta de regulación*, Fundación Notariado, Madrid, 2024. This phenomenon has also been reflected in a rethinking by the Spanish Ministry of Justice: see Ministerio de Justicia español: *Orden de 4 de febrero de 2019 por la que se encomienda a la Sección de Derecho Civil de la Comisión General de Codificación el estudio de los regímenes sucesorios de legítimas y de libertad de testar*, in *https://www.mjusticia.gob.es/es/AreaTematica/*

plays a fundamental role in the testamentary arbitration and, therefore, requires an adequate and specific analysis. In this context, therefore, once a testamentary arbitration disposition has been stipulated, the role played by the reserved share and the forced heirs must be analyzed, and it must be granted the appropriate validity for the sake of due recognition of the freedom of will-making.

In this sense, testamentary arbitration is an instrument in which the will to make a will is complete and independent, and there can be no interference by other parties who may have a legitimate interest or be forced or non-forced heirs. The limits that will apply will be only those established by public order and mandatory dispositions. Therefore, it is the unilateral will of the testator that establishes and decides the method of dispute resolution through arbitration, which will be subject to the free will of the successors to accept or reject the estate (and arbitration). When speaking of testamentary arbitration in the presence of a disposition established by the testator, it cannot be considered that, after the death of the testator, it is the heirs who, conventionally and tacitly, enter into an arbitration agreement by exchanging statements of claim and defense, justifying this based on the interpretation of Arts. 6 and 9.5 of the Spanish Arbitration Act,[23] therefore, the lack of opposition to arbitration should not be considered as a tacit expression of said will (art. 9.5 LA), given that the waiver of the right to challenge (*facultad de impugnación*: art. 6) will have its effects on the impossibility of the action of nullity of the award, but it cannot be interpreted as a will to stipulate even tacitly a new arbitration agreement between forced and non-forced heirs, but rather to grant full legitimacy and effects to the testamentary arbitration contemplated by the testator. In this sense, as has been observed, this could not be considered as a "new conventional arbitration, different from what was ordered"[24] by the testator.

Another clear example of what is stated is the nullity of an agreement between testator and heirs whereby it was decided to stipulate an arbitration disposition on future inheritance. Not only is this prohibited by Art. 1271 Spanish Civil Code,[25]

ActividadLegislativa/Documents/1292430803576-Orden_de_4_de_febrero_de_2019__por_la_que_se_encomienda_a_la_seccion_de_derecho_civil_de_la_comisio.PDF.

[23] This seems to be the reinterpretation of what happened where the arbitrators addressed some forced heirs (*legitimarios*) by burofax, sending them the testamentary arbitration provision and inviting them to adhere to the requested arbitration "by virtue of the arbitration agreement invoked", under penalty of receiving the minimum forced legitimate in case of opposition according to the Fifth Provision of the Testament; see STSJ Madrid, No. 6/2021, op. cit.

[24] I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[25] On the prohibition of future agreements and art. 1271 Spanish Civil Code *v.gr.* see schematically Carlos De Prada Guaita, "El arbitraje testamentario", *Anales de la Academia Matritense del Notariado*, Vol. LIV, 2014, 447–449.

but it has also been established that the Court can, even *ex officio*,[26] assess the nullity of the disposition, since the arbitrator cannot decide on questions no "sometibles",[27] the behaviour of the subscribers being completely irrelevant here, and in these cases, the nullity of the award can be sanctioned.[28]

In this way, a certain relativity can be observed in the concept of reserved share, in the sense that its protection is not absolute depending on the context. Likewise, it can be affirmed that arbitration of disputes under a will, in those cases where it is recognised by the legal system, is a clear concept whose genesis is linked to the exclusive freedom of testament, although it may subsequently be subject to the free will of the successor to accept or not the inheritance, who, consequently, will assume and validate that the eventual method of dispute resolution is arbitration, with the nuances that will be seen throughout the text. It is true, however, that testamentary arbitration must be embodied in an appropriate testamentary disposition, which must be drafted carefully to avoid potential pathologies.

RESERVED SHARE IS *DE FACTO* INVOLVED IN THE ARBITRATION, BUT IT MUST REMAIN PROTECTED

At the time of making a will, the testator is limited in the shares of the reserved share, but this does not mean that this cannot be submitted to arbitration. This is affirmed because Art. 2.1 LA states that "Disputes concerning matters that are freely disposable under the law are subject to arbitration".[29] This has led to the assertion that conflicts between reserved shares,[30] do not fall within the scope of

[26] Thus, it is established that the judge *ex officio* may declare the nullity of the arbitration where it is about future estate, prohibited by art. 1271 Spanish Civil Code: STSJ Extremadura, No. 1/2021, of 1st feb. 2021, *Sala de lo Civil y Penal*, ECLI:ES:TSJEXT:2021:231.

[27] Cfr. arts. 2.1 and 41 LA 2003. In the specific case, the Court considers that it should rather refer to Article 41(1)(e) than to Article 41(1)(a), as invoked by the plaintiff.

[28] Thus, it has been established that the Chamber must examine ex officio, regardless of whether the claimant signed said clause or failed to invoke the issue of "non-arbitrability" before the arbitrator': STSJ Extremadura No. 1/2021, op. cit. For a commentary see R. Hinojosa Segovia, "Estimación de la anulación…", op. cit., 445 ff.

[29] "Son susceptibles de arbitraje las controversias sobre materias de libre disposición conforme a derecho."

[30] This is affirmed by for a scholar that also supports a broad application of testamentary arbitration: Adolfo Calatayud Sierra, "El arbitraje testamentario desde el derecho aragonés", *Revista de derecho civil aragonés*, No. 18, 2012, 183.

arbitration of disputes under a will. In this sense, part of the doctrine, based on this rule, considers that the reserved share,[31] is not a matter of free disposition and, consequently, is not arbitrable.[32] However, it should be emphasised that Art. 2.1 LA has an important nuance in its final paragraph, since, although it is true that it identifies matters of free disposal as those subject to arbitration ("sometibles" a arbitraje), it also states that arbitration must be carried out "in accordance with the law" ("conforme a derecho"). This disposition must therefore be interpreted in accordance with the law expressed in Art. 10 LA, in the sense that the legislator has expressly provided that the estate can be arbitrated in relation to its division and administration.

However, if since the creation of the figure of testamentary arbitration in 1953, this aspect was more consistent with the full protection of the reserved share of the estate, given that Article 5 of the LA of that year expressly referred only to disputes between "non-forced heirs" – presumably identified and thus opposed to the definition of "forced heir" in Art. 806 CC[33] – there has been a radical change

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[31] As regards the areas of regional law ("derecho foral"), legal doctrine holds that the limitations of Art. 10 should not apply in Navarre, given that the forced heirship there is purely formal, nor in those other areas where the reserved share can be freely distributed among a specific category of heirs – if the disputes concern them – such as in the case of descendants in Aragon". I. Gomá Lazón, "Art. 10", *Comentarios a la Ley de Arbitraje* (coord por C. González-Bueno), Consejo General del Notariado, Madrid, 2014, 242 and 243.

Moreover, it is argued that in Aragon the limitation "does not apply when the only beneficiaries designated by the testator are descendants, because, since the reserved share is collective, no conflicts can arise among them": A. Calatayud Sierra, op. cit., 182.

[32] Fátima Yáñez Vivero, "Arbitraje y derecho de sucesiones: El arbitraje testamentario", *El arbitraje en las distintas áreas del derecho* (dir por Jorge L. Collantes González), Vol. II, Palestra, Estudio Mario Castillo Freyre, Lima, 2007, 91.

[33] Now then, as a forced heir, Art. 807 of the Spanish Civil Code expressly identifies, in addition to children and descendants, and in their absence, the ascendants, also the widower or widow.

There has been debate on whether the surviving spouse should be excluded from Art. 10 LA for being a non-forced heir. Doctrine is divided, and for some scholars, testamentary arbitration "does not include the forced share of the surviving spouse" ("legítima del cónyuge viudo") (Xavier O'Callaghan Muñoz, "El arbitraje en derecho sucesorio", *Ley del Notariado*, No. 47/48, 2007, 64), so thus, he/she is considered a forced heir of a fractional share in usufruct, and therefore the same doctrine applicable to forced heirs may be applied to him/her. (I. Gomá Lazón, "Art. 10", op. cit., 242). In this regard, "the surviving spouse is also a forced heir, but not an heir in the strict sense – just as a descendant or ascendant is not, unless they have been expressly granted that status": I. Gomá Lazón , "Art. 10", op. cit., 242. However, legal doctrine does not consider this person to be an heir in the strict sense: Manuel Albaladejo García, "El arbitraje testamentario", *Actualidad Civil*, No. 1, 1990, 82 and 88 ff.

since the amendment made by the 1988 reform, since it provides for the extension to legatees, who can be both forced and non-forced heirs.

I therefore consider that the correct interpretation of the clause "in accordance with the law", in the context analysed, must be interpreted by differentiating between what is the protection of the reserved share and what concerns the forced heirs within the arbitration process. Thus, the fact that disputes of the reserved share should remain safe from arbitration does not mean that the forced heirs should abstain from participating in the arbitration. The reserved share, as an unavailable share,[34] must always be safeguarded and should thus be considered as a 'non-arbitrable' matter ("no susceptible de arbitraje"): in all circumstances it will be the task of the arbitrator to safeguard it.

Consequently, it is necessary to clarify that the expression "susceptible" (according to Art. 2.1 LA) is not synonymous with "subject to" ("sometible a") arbitration, but marks the delimitation of the content in which the arbitrator cannot intervene. The arbitrator must ensure that the reserved share is safeguarded, insofar as it is not governed by the arbitrator's decision-making margin, which must be safeguarded in any case. On the other hand, it is a different matter if the forced heirs can participate in the arbitration (with their share being preserved, regardless of whether the arbitration is in law or in equity).[35] To state that "matters relating to the reserved share cannot be submitted to arbitration" does not mean that "the forced heirs share cannot be submitted to arbitration".[36] Their part of the reserved share must be taken into consideration in the arbitration proceedings in order to be protected at all times, because it cannot be infringed and because a violation of this aspect would lead to a possible nullity of the award.

On the will executed by an executor ("testamento por comisario") and Art. 831 of the Spanish Civil Code, which allows the testator to delegate certain testamentary powers to their surviving spouse, see R. Colina Garea, op. cit., 228 ff.

[34] On the traditional concept of availability in arbitration matters see Elías Campos Villegas, *Aspectos del convenio y del laudo arbitral vistos por un notario. Cuestiones en la nueva ley: discurs d'ingrés de l'acadèmic de número Sr. Elías Campo Villegas i contestació de l'acadèmic de número Sr. José Juan Pintó Ruiz, 3 de juny de 2004*, Acadèmia de Jurisprudència i Legislació de Catalunya, Barcelona, 2004, 32 ff.

[35] In this regard, although the arbitration is based on equity, the interpretation of the will "must comply with the mandatory provisions of Art. 675 of the Spanish Civil Code": Carmen García Pérez, *El arbitraje testamentario*, Tirant lo Blanch, Valencia, 1999, 458.

[36] Literally "no se pueden someter a arbitraje las cuestiones relativas a la legítima". See Francisco José León Sanz, "Art. 10", *Comentarios a la Ley de Arbitraje de 2003* (coord. David Arias Lozano), Pérez-Llorca Abogados-Thomson Aranzadi, Cizur Menor, 97.

THE FORCED HEIRS: THEY MAY BE EXCLUDED BY THE ARBITRATION DISPOSITION, BUT IN PRACTICE IT IS APPROPRIATE THAT THEY BE INVOLVED TO PROTECT THEIR RIGHTS

The reserved share *per se* is protected by Art. 806 and Art. 1056 of the Spanish Civil Code,[37] but it has not been proven that Art. 10 LA wants to exclude the forced heirs from arbitration, as the forced heirs can also be considered legatees or non-forced heirs, depending on the case. This, rather, stems from a terminological problem (which could become substantial) from which Art. 10 LA suffers. It must be borne in mind that the decision of the Spanish legislator is flawed, given that it decides to refer to two terms that have traditionally suffered from extreme relativity: "heredero" and "herencia" ("heir" and "estate/inheritance"). The interconnection of these with the will further complicates matters.

Indeed, as has been said,[38] it should be remembered that the original justification of the freedom to testate was given in the absence of descendants, given that the will was not justified where there were descendants by proceeding to a forced mechanism of transmission, and it is only since Justinian that the co-presence in a will of both the "voluntary" ("heredero voluntario") and the "forced' heir" ("heredero forzoso")[39] began to be observed.

The reference to the "forced" ("forzoso") character and the use of the expression "non-forced heir" ("no forzoso") in Art. 10 LA distorts the correct understanding of these aspects, which would have been easily understood by using the reference, on the one hand, to "heredero voluntario" and, on the other hand, to "legitimario". Thus, it would have been possible to understand the three cases that may exist, i.e.: "1) voluntary heir who is not a forced heir; 2) forced heir who is not a voluntary heir and 3) voluntary heir who is a legitimate heir."[40]

The reference to "forzoso", on the other hand, denaturalised the classification, since if the terminology were to be replaced,[41] the new terminology would

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[37] A part of scholars refer in this sense to a "sobreprotección para la legítima" (A. Calatayud Sierra, op. cit., 172).

[38] Francisco Virgili Sorribes, "Herederos forzoso y heredero voluntario: su condición jurídica (El llamado heredero forzosos no es heredero)", *Revista Crítica de Derecho Inmobiliario*, No. 185, 1943, 481.

[39] Thus, it is observed that the freedom to make a will originally served its purpose where there was no offspring, and when there was offspring, such freedom was not justified, thereby ensuring transmission through the mechanism of forced heirs: F. Virgili Sorribes, op. cit., 481.

[40] Literally "1) *Heredero voluntario que no es legitimario*; 2) *Legitimario que no es heredero voluntario* and 3) *Heredero voluntario que es legitimario*": Para esta clasificación: F. Virgili Sorribes, op. cit., 487.

[41] Replacing "heredero voluntario" with "heredero no forzoso".

cancel out the third case,[42] since it would have to be said that there is a "heredero no forzoso que es legitimario",[43] an aspect which, intuitively and semantically, is not very comprehensible, although this is what happens when the testator expressly names in the will the subjects identified by Art. 807 CC. The misunderstanding arises from the fact that "forced heirs" can be identified by both the expressions *legitimarios* and *herederos forzosos* which nonetheless do not have the same meaning. Thus, the references in Art. 10 LA to "forzoso" and "herencia" are misleading.[44]

Therefore, the limitation provided for by Art. 10 LA, by using the expression "herederos no forzosos" (non-forced heirs), must be understood as a synonym for the protection of the part of the reserved share as such, and not as a limitation to the subjective participation of the forced heirs.[45] There are several reasons for this.

The first is that the status of forced heir and legatee can overlap, since legacies can be a means for the payment of the reserved share,[46] and "the reserved share can be left by any lucrative title".[47] In this sense, although the reserved share must be guaranteed at all times, a forced heir may *de facto* participate in the arbitration.

The second reason is that the exclusion of a forced heir from the arbitration process would not give him greater protection than if he had not participated in the arbitration process; on the contrary, it might even offer him better protection.

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[42] The first two cases would indeed make sense: a) "Heredero no forzoso que no es legitimario"; b) "Legitimario que no es heredero no forzoso".

[43] Even more complicated if the term *legitimario* were replaced by *heredero forzoso*, resulting in this classification: a) *heredero no forzoso que no es heredero forzoso*); b) *heredero forzoso que no es heredero no forzoso*; c) *heredero no forzoso que es heredero forzoso*.

[44] There has been a debate in the mid 1940s in Spanish doctrine, which can be summarised in three publications in the *Revista crítica de Derecho inmobiliario*. Against a position that assumes an incompatibility between the statuses of de *heredero* and *legitimario* ("donde hay herencia, no hay legítima"), there is another that advocates the possible compatibility of these statuses, and a third that considers that the forced heir ("heredero forzoso") should not be considered as heir. See more broadly, respectively Julián Dávila García, "Herederos y legitimarios (Donde hay herencia no hay legítima)", *Revista Crítica de Derecho Inmobiliario*, No. 185, 1943, 661 ff.; Pedro Sols García, "El heredero: ideas para su estudio", *Revista Crítica de Derecho Inmobiliario*, No. 196, 1944, 568 ff.; F. Virgili Sorribes, op. cit., 479 ff.

[45] Art. 10 LA, by referring to "heredero no forzoso" ("non-forced heir"), intends to give protection to the "legittima" (reserved share) of art. 806 Spanish Civil Code by means of an indirect reference, *a contrario*, to the "herederos forzosos" ("forced heirs") expressed in art. 807 Spanish Civil Code.

[46] As observed by F. Yáñez Vivero, op. cit., 92.

[47] This in Aragon in relation to, for example, art. 487.1 *Código del derecho Foral de Aragón* and art. 490: A. Calatayud Sierra, op. cit., 173. Cfr. F. J. León Sanz, op. cit., 97 and 98.

It must be assumed that "submission to arbitration does not entail disposition or infringement of the legitimation"[48] also on the assumption that "the legitimated parties who believe that their rights have been infringed by the award could bring an action for annulment of the award"[49], by bringing an action for the annulment of the award, for example, by resorting to Art. 41 (f) LA, i.e. on the grounds that it is contrary to public order.[50] However, there is more: in order to ask for such annulment, one must have an interest to ask for it. In this sense, it is useful to rely on a pronouncement which – taking up an earlier position,[51] that referred to the annulment of arbitration (not under a will) – considers that according to Art. 41. 1 LA "the award can only be annulled when the party requesting the annulment alleges and proves", that is to say, it must refer to "those who were party to the arbitration proceedings, and [...] to those who, not being party to the arbitration proceedings, can nevertheless justify an interest in the exercise of the annulment action, because they should have been party, or who, being able to have been, have been unduly denied their intervention".[52]

Non-participation in the arbitration by the forced heir, or a passive attitude towards it, would considerably reduce the possibility of lodging an action for annulment on the grounds that there would be a tacit waiver to contest (cf. Art. 6 LA), where the forced heirs in title have been notified of the arbitration and do not activate themselves accordingly. This could implicitly validate the willingness to submit to arbitration through subsequent conclusive conduct (according to Art. 9 Paragraph 5 LA).[53]

Therefore, it is important to make the parties aware of the arbitration proceedings by notifying them of the arbitration disposition, even if it does not expressly refer to the forced heirs. In this sense, the notification of the arbitration procedure to the forced heirs will be a suitable occasion to validate or verify that throughout the arbitration procedure the legitimate rights are not undermined

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[48] A. Calatayud Sierra, op. cit., 182.

[49] A. Calatayud Sierra, op. cit., 182; C. De Prada Guaita, op. cit., 458.

[50] C. De Prada Guaita, op. cit., 459.

[51] STSJ Madrid, No. 73/2016, 28 November 2016, 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2016:13751; STSJ de Madrid, No. 21/2018, 24 April, Sala Civil y Penal, Sección Primera, ECLI:ES:TSJM:2018:3982; STSJ Madrid, No. 40/2019, 29 October 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2019:11974; STSJ Madrid, No. 65/2016, 13 October 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2016:11921. The position is also confirmed later *v.gr.* STSJ Madrid, No. 27/2024, 28 May 2024, 1ª, Sala de lo Civil y Penal, ECLI:ES: TSJM:2024:6579.

[52] STSJ Madrid, No. 6/2021, op. cit.

[53] See STSJ Madrid, No. 6/2021, op. cit.

and, if they are, they can and should[54] be activated. Therefore, once the notification has been received, the most effective thing to do is to participate in the arbitration process in order to actively verify that everything is proceeding in accordance with the appropriate protection of the reserved share. In particular, the forced heirs must be active in order to avoid the application of Art. 6 LA, so that their behavior can be interpreted as a tacit waiver of objection. It could be argued that the forced heirs should not participate in the arbitration and would have to assume a passive position waiting for an award in the hope that it would be in accordance with the protection of the reserved share. In that sense, even if there is a testamentary disposition that does not expressly refer to the forced heirs (for example, talking about disputes of 'non-forced heirs and legatees') and therefore does not impose *a priori* their participation, it will be in their interest to participate in the arbitration voluntarily. Otherwise, it could be concluded that they have no direct interest in the challenge. The same jurisprudence considers that, if the validity of the testamentary arbitration disposition is not challenged within the arbitration proceedings, Article 6 of the LA is activated, and the right to challenge the existence or the validity of the agreement shall be deemed tacitly waived.[55]

Therefore, the possible activation of Article 6 of the LA becomes a key element in understanding that there is a clear tmesis between the subjective and objective scope of the regulations (since the protection of the reserved share is one thing and the participation of the forced heirs in the arbitration process is another) and is configured as a "serious incentive for the parties to promptly and immediately report violations of the dispositive rules".[56] Therefore, the forced heir who does not participate in the arbitration process would be left in an inferior legal position compared to the one (heir) who activated his protection from the moment he learned of the existence of the arbitration procedure.

Instituting a testamentary disposition that provides for the participation of forced heirs does not mean that the reserved share would be violated. A legatee who believes it is their right to be excluded from testamentary arbitration (because of the article 10 LA refers to "non-forced heirs") would be grammatically and syntactically coherent, but would not be substantively so, as they would be making a dangerous mistake, given that it is only in their interest to be able to participate in said arbitration. Hence, it is essential to notify them, as is required in all cases:

[54] Thus, it can be seen that, whoever does not oppose arbitration at the appropriate procedural moment, will be subject to arbitration: A. Calatayud Sierra, op. cit., 175.

[55] In this regard see STSJ Madrid, No. 6/2021, op. cit.

[56] R. Colina Garea, op. cit., 199.

whether they are expressly mentioned in the testamentary arbitration disposition or not. Ultimately, in those cases where the testamentary disposition does not refer to forced heirs, it will be in their interest to participate in the arbitration in order to be actors in the protection of their rights and interests.

Where the testamentary disposition makes express reference to the forced heirs, the doctrine has defended its validity based on the observation that the reserved share would be available after the death of the testator.[57] Therefore, the acceptance of the arbitration disposition by the forced heirs does not prejudice the reserved share,[58] and if it existed, the acceptance of the inheritance would lead to accepting the disposition, otherwise, the subject will always be free to renounce the inheritance.[59] Thus, the inheritance right will be configured as "the right to accept or reject the inheritance (...) or transfer the resolution of conflicts to the arbitrator",[60] since "from the moment of the death of the testator, the reserved share is renounceable and from the moment the inheritance is accepted, it is perfectly available, alienable, taxable and, therefore, susceptible to being submitted to arbitration".[61]

Furthermore, it should be remembered that the acceptance and rejection of an inheritance are entirely voluntary and free acts, pursuant to Article 988 of the Civil Code.[62] Therefore, in cases where the estate is linked to an arbitration of disputes under a will, the party may carry out the necessary considerations before accepting it; otherwise, they are free not to do so.

However, some legal doctrine has sought to consolidate the validity of testamentary arbitration associated with forced heirs through financial compensation and the *Socini* caution (*cautela socini*), as will be seen later.

THE IMPORTANCE AND DIFFICULTY OF ARBITRATION EMBODIED IN AN APPROPRIATE TESTAMENTARY DISPOSITION

One way to understand the potential role of the reserved share and the forced heirs within a testamentary arbitration disposition is based on the possibilities

[57] X. O'Callaghan Muñoz, op. cit., 64. The position is also validated by STSJ Madrid, No. 6/2021, op. cit.

[58] I. Gomá Lazón, "Art. 10", op. cit., 237.

[59] *Ibidem.*

[60] X. O'Callaghan Muñoz, op. cit., 60.

[61] I. Gomá Lazón, "Art. 10", op. cit., 241.

[62] This is also noted by R. Colina Garea, op. cit., 197.

of drafting the disposition itself and on the analysis of some of its hypothetical variants. Indeed, Article 10 of the Spanish Arbitration Law posits the institution, although it does not offer a "model" to serve as a basis for drafting the disposition. The interpretative complexity of the disposition makes it difficult to formulate a disposition that could be defined as "standard". An example of this problem can be found, for example, if one observes that some institutions – while suggesting generic mediation and arbitration dispositions on their websites – do not propose one relating to arbitration of disputes under a will,[63] an aspect that demonstrates that the drafting of such a disposition is neither simple nor obvious. In this regard, a proposed variant has even been removed from one website,[64] or the existing one has been modified.[65] It follows from this that it is not only important that the legal system recognises or regulates arbitration of disputes under a will, but that professionals also carefully prepare for a non-pathological arbitration disposition.

Art. 10 LA, for example, limits itself, from the subjective point of view, to identifying the "non-forced heirs" and the "legatees" without making direct and express reference either to the reserved share or to the forced heirs. As a consequence, this opens up the possibility for the free drafting of various types of dispositions, and, in this sense, some of them could be (in increasing order): 1) The parties agree to submit any inheritance disputes to arbitration "pursuant to Article 10 of the Spanish Arbitration Act" or similar expressions; 2) to draft a disposition that essentially takes up or transcribes the content of Art. 10 LA; 3) to draft a more extensive disposition interpreting the content of Art. 10 LA and, therefore, providing for other aspects.

In the following, some reflections will be made in relation to the typologies mentioned above.

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[63] This is the cases, for example, of the *Fundación Notarial Signum*'s website: See *https://fundacionsignum.org/el-arbitraje/#documentacionabitraje* (Consultation date: 25 November 2024).

[64] A reproduction of a variant proposed by the *Fundación Notarial Signum* can be found in María del Pilar De Prada Solaesa, "El arbitraje testamentario. Estudios de derecho privado", *Estudios de derecho privado en homenaje a Juan José Rivas Martínez* (dir. por Antonio Pérez-Coca Crespo, Leonardo B. Pérez Gallardo; Juan Antonio Pérez Bustamante de Monasterio; coord. por Ángel Fernández-Reyes (coord.), Vol. 1, Dykinson, Madrid, 2013, 533 ff. A different variant that has been present on the *Fundación Notarial Signum's* web site can be found in C. De Prada Guaita, op. cit., 454.

[65] Currently, the Valencia Court of Arbitration and Mediation in the current version eliminates the part relating to the caution *socini*, which was initially foreseen. A comparison of the current version available is at: *https://www.cortearbitrajeymediacionvalencia.com/reglamento/anexo-i-modelos-indicativos-de-clausulas-arbitrales/* (Consultation date: 25 November 2024) – with an earlier model of the Valencia Chamber of Commerce which can be consulted in F. Yáñez Vivero, op. cit., 101–102.

BRIEF REMISSION TO ART. 10 LA

Surely, a testamentary disposition that makes a mere and concise reference to the regulations that govern this institution should be integrated together with the dispositions present in the current arbitration regulations. For example, this can be done as a holographic testamentary disposition by which the testator states: "I provide that the disputes relating to my estate be resolved in accordance with article 10 of the Spanish Arbitration Law" or other similar expressions, with the general regulations to be applied, *mutatis mutandis*.[66] In this sense, the dispute will be judged by an arbitration in law[67] by a single[68] jurist[69] in the full exercise of his civil rights,[70] who may choose the place of arbitration,[71] and will be appointed by the competent Court at the request of any designated successor or one considered as such (although not expressly designated in the will).[72]

A disposition that referred exclusively to Article 10 of the LA would therefore be absolutely valid and operational, although it would raise all the interpretive issues generated by the current wording of Article 10 of the LA.

If, on the other hand, there were only one disposition that expressly prohibited judicial intervention, this should not be interpreted as referring to arbitration,[73] since the desire to resort to arbitration must be expressly stated and also because such a prohibition could refer only to a specific aspect, such as division.[74] In any case, what is certain is that, although recourse to the courts cannot be imposed, recourse to arbitration can be imposed.[75]

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[66] It is clear that the other provisions of the Spanish Arbitration Act (LA) will apply, specifically those relating to the acceptance of arbitrators (Art. 16), their abstention or challenge (Arts. 17 and 18), the absence or inability to perform their duties (Art. 19), and the appointment of their possible replacement (Art. 20).

[67] Arg. art. 34 LA.

[68] Arg. art. 12 LA.

[69] Arg. art. 15 LA.

[70] Arg. art. 13 LA.

[71] Arg. art. 26 LA.

[72] Arg. arts. 8.1 y 15.2 letra a) LA.

[73] Julio Gavidia Sánchez, Eduardo Corral García, "Art. 10", *Comentario a la Ley de Arbitraje* (coord. por Alberto De Martín Muñoz, Santiago Hierro Anibarro), Marcial Pons, Madrid, 2006, 1028 ff., also R. Colina Garea, op. cit., 222.

[74] For example, a prohibition on judicial intervention in the inheritance division process may be introduced *ex* art. 792.1. 2º Spanish Procedural Civil Law: R. Colina Garea, op. cit., 209.

[75] As highlighted by A. Calatayud Sierra, op. cit., 167.

DRAFTING AN *AD HOC* DISPOSITION

The other two cases raised (see above) fall within this context, and therefore, it is possible to draft a disposition that essentially recaptures or transcribes the content of Article 10 of the Spanish Arbitration Act, or to draft a broader disposition interpreting the content of Article 10 and, consequently, providing for other aspects.

Next, some reflections will be made regarding: a) the express reference to the legal disposition that institutionalizes arbitration of disputes under a will; b) the regulation of preparatory aspects to avoid a pathological arbitration disposition; c) the regulation of the objective scope of application; d) the regulation regarding the reserved share and/or forced heirs and e) the caution *Socini*.

THE EXPRESS REFERENCE TO THE LEGAL DISPOSITION THAT INSTITUTIONALIZES ARBITRATION OF DISPUTES UNDER A WILL

A different aspect from the one analyzed a few lines above is the inclusion of an express reference to the disposition that legitimizes the arbitration of disputes under a will, for example, if one chooses to write "availing itself of the power granted by arts. 10 and 14 of the current Spanish Arbitration Act".[76] This reference could lead to difficulties in some interpretative aspects in cases where the drafted disposition reproduces, in part, the literal meaning of art. 10 (think of the reference to non-forced heirs) and, at the same time, introduces references to aspects that could be considered antithetical (such as the reference to forced heirs). In this context, it is evident that art. 10 LA, when regulating arbitration of disputes under a will, grants the testator a clear discretionary right to choose arbitration as a method of resolving disputes relating to their estate.[77] Therefore, where the legal system regulates the institution, as is the case in Spain, debates that consider testamentary arbitration as a modal disposition,[78] as a negative resolutive condition,[79] or as

[76] This was the incipit of the provision suggested by the Valencia Chamber of Commerce that chose an institutional arbitration.: see F. Yáñez Vivero, op. cit., 101–102.

[77] In this sense, it would not be appropriate to state that it is a type of mandate. This is stated because some testamentary arbitration provisions have used the expression "it is the mandate of the testator that..." as in some of the models proposed by Fundación notarial Signum. You can find it in M. del P. De Prada Solaesa, op. cit., 533 ff. Another different variant that has been present on the Fundación notarial Signum's web page at C. De Prada Guaita, op. cit., 454.

[78] C. García Pérez, op. cit., 132 ff.

[79] J. V. Gavidia Sánchez, E. Corral García, op. cit., 1023.

a positive potestative condition with resolutive effects,[80] are considered superfluous. Therefore, in relation to testamentary arbitration provided for in art. 10, it must be shared the view according to which its nature should not be framed within a modal disposition or a condition, because the art. 10 institutionalizes the testamentary arbitration and grants a clear potestative right to the testator, without imposing on the subjects who are directly bound any obligation to do or not to do.[81] In this sense, there would be no "obligation of voluntary successors consisting of refraining from going to the courts of Justice to settle their disputes"[82] or "submitting to arbitration to resolve those same disputes".[83]

Through the arbitration of disputes under a will, the testator does not impose the obligation to formalize an arbitration agreement between them, but rather gives full effect to their right, which expressly arises from the legal disposition of Article 10 LA.[84] The foregoing is, at least, valid with respect to subjects who fall under the concept of "non-forced heirs or legatees". However, the debate could perhaps be opened in relation to forced heirs, where financial compensation is introduced. In this case, another complementary disposition would be introduced (relating to the caution *Socini*). What is certain is that arbitration must be carried out.

However, aside from a reference or an incipit regarding the express reference to Article 10 LA, it must be noted that a technical draft of the testamentary arbitration disposition would undoubtedly be advisable and would also be justified by the principle *permissum videtur id omne quod non prohibitur*, that is, that "everything that is not prohibited is considered permitted".[85]

However, how far could this scope of action be extended?

THE REGULATION OF PREPARATORY ASPECTS TO AVOID A PATHOLOGICAL ARBITRATION DISPOSITION

Certainly, it would be desirable to appoint arbitrators, determine the type and venue of arbitration, determine the method to be followed for allocating

[80] R. Colina Garea, op. cit., 231.

[81] See the attentive and acute considerations of C. De Prada Guaita, op. cit., 437.

[82] J. V. Gavidia Sánchez, E. Corral García, op. cit., 1023 interpreted by R. Colina Garea, op. cit., 231.

[83] R. Colina Garea, op. cit., 231.

[84] We fully share what was stated by I. Gomá Lazón, "Art. 10", op. cit., 244.

[85] Fernando Reinoso-Barbero, "*Permissum videtur id omne quod non prohibitur*", *Diccionario del Español Jurídico*, Real Academia Española, Madrid, 2016, 1199.

administrative costs and arbitration fees, and clearly define the applicable rules. In this regard, referral to institutional arbitration,[86] and above all, appropriate advice when drafting the arbitration disposition would greatly facilitate the future conduct of arbitration.

THE REGULATION OF THE OBJECTIVE SCOPE OF APPLICATION

A testamentary disposition that expressly expands the scope of arbitration would certainly be possible. In this sense, while it is true that legal doctrine broadly embraces the reference to the distribution and administration of the estate,[87] a disposition that broadly externalizes the objective scope would be welcome and appropriate, given that Article 10 LA does not prohibit anything in this regard. Thus, in addition to the references to distribution and administration, it could be expressly added that arbitration will refer to disputes relating to the interpretation, validity, or effectiveness of the will and to the actions of the executors or the partitioner. Although these aforementioned aspects should be considered to fall within a broad concept of the assessment of disputes relating to the distribution and administration of the estate (even if they are not indicated in the disposition), their inclusion would clear up any doubt.

THE REGULATION REGARDING THE RESERVED SHARE AND/OR FORCED HEIRS

The real and possible limit of the principle *permissum videtur id omne quod non prohibitur* could be raised in relation to the reserved share and the forced heirs.

This criticality stems from the fact that, on the one hand, the reference to "non-forced heirs and legatees" is not necessarily antithetical to "forced heirs", and, on the other hand, at the same time, it must be kept in mind that "disputes regarding matters of free disposition in accordance with the law are subject to arbitration"[88] "and that the testator cannot dispose of the reserved share except in favor of the forced heirs".[89] It follows from this that the drafting of the testamentary arbitration disposition must take care to ensure that it does not conflict with the dispositions of Article 10 LA.

[86] The doctrine that suggests entrusting arbitration to an institution and determining that arbitration is by law is shared: C. De Prada Guaita, op. cit., 459.

[87] It refers to the reconstruction carried out in A. Ferrante, op. cit.

[88] Art. 2.1 LA.

[89] Cfr. arts. 806 and 807 Spanish Civil Code.

To understand the possible limitation arising from the clause "non-forced heirs or legatees", two possibilities arise: that is, this limitation excludes other subjects – and, therefore, exists within the subjective scope (and, therefore, within the forced heirs: that is, the legitimate heirs) – or it refers, rather, and indirectly, to the objective scope of application of the rule. In this sense, it would mean that the law seeks to protect the reserved share and, therefore, exclude it from arbitration. As has been duly noted,[90] adhering to one position or the other would mean including or excluding the *tercio de mejora* in the limitation provided for in the law.

Faced with this theoretical scenario, in practice it is clear that, despite the literal wording of Article 10 LA, there is a desire to expand the scope of arbitration action and, consequently, several possibilities arise, some of which will be examined in this article. In this sense, when drafting the testamentary disposition, one can operate from two perspectives. From a first perspective, reference will be made to the subjects, with some variations. Therefore, on some occasions, reference has been made to "the heirs or legatees, whether non-forced or forced, in the portion exceeding the strict reserved share",[91] or using the expression "even involving forced heirs".[92]

From a second perspective, the procedure will be applied from the perspective of the scope of application, making no reference to forced heirs or legitimate heirs (*herederos forzosos* or *legitimarios*), but rather through a testamentary disposition that establishes arbitration, thereby "protecting the reserved share". [93]This possibility – apart from the plaintiff's argument regarding its nonexistence in that specific case[94] – has been deemed valid by the court,[95] despite the fact that the disputes resolved by the arbitrator affected forced heirs, when determining the assets and liabilities of the estate.[96] To validate the effectiveness of the testamentary

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[90] I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[91] This, specifically, was the model provided by the Chamber of Commerce of Valencia, which can be consulted at F. Yáñez Vivero, op. cit., 101–102.

[92] See I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[93] Literally "a salvo las legítimas". This model for example can be found in STSJ Madrid, No. 6/2021, op. cit.

[94] The nullity was based on letter d) of article 41.1 LA, stating that failure to specify the subject matter of the arbitration would have prevented the issuance of its defenses. However, as has been emphasized by legal doctrine, the Court should not have resorted to letter d) but rather to letter b) of article 41.1 LA, which refers to aspects relating to the notification of the appointment of the arbitrator: R. Hinojosa Segovia, "Estimación de la anulación…", op. cit., 445 ff.

[95] The appeal for annulment of the award is rejected: STSJ Madrid, No. 6/2021, op. cit.

[96] As keenly observes R. Verdera Server, "Interpretando testamentos", op. cit., 89 and 90.

disposition, where it refers to forced heirs or reserved share, a compensation mechanism is simultaneously introduced that, *mutatis mutandis*, operates according to the caution Socini (see below).

THE CAUTION *SOCINI*

Doctrine, together with the significant and appreciable driving force of notaries,[97] has strived to strengthen the potential participation of forced heirs in the arbitration process, advising the possibility of including a compensatory option. In this regard, whenever the will provides a share higher than the minimum reserved share (*Legitima estricta*)[98] – that is, for example, in those cases where the subject has been allocated a portion of the *tercio de mejora* – a caution *Socini* would be applied, *mutatis mutandis*. So this means that the forced heirs could oppose the arbitration instituted by the testator only if they saw their share reduced to the minimum reserved share (*Legitima estricta*).[99]

In this way, it is considered appropriate to notify the forced heir (*legitimario*), by means of an *interrogatio in iure*, within the corresponding deadlines according to arts. 1004 and 1005 Spanish Civil Code,[100] so that he can decide whether "he accepts the inheritance under the arbitration proceeding or prefers to be reduced to his minimum reserved share (*Legitima estricta*)".[101] This possibility is based on the consideration that the reserved share is available once the testator has died,[102] and, in this sense, no doubts would arise regarding the validity of the caution Socini.[103] Silence is considered as tacit acceptance of the arbitration procedure that may eventually arise.[104]

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[97] See *v.gr.* M.ª del P De Prada Solaesa., op. cit., 533 ff.; Thus, it is stated that "we, the notaries, must be who are the ones who, studying this figure and (...) should begin to propose to the testators (...) a testamentary arbitration, based on a caution Socini": C. De Prada Guaita, op. cit., 453 ff.

[98] In this regard, it is suggested that "it may be added to the testamentary arbitration clause that the forced heir who does not accept the established testamentary arbitration loses all attribution in his inheritance in favor of the others forced heirs who do accept it; and, if any forced heir accepts it, they will be reduced to the minimum reserved share, with the remainder of what was initially attributed to them". A. Calatayud Sierra, op. cit., 175.

[99] A. Calatayud Sierra, op. cit., 182.

[100] I. Gomá Lazón, "Art. 10", op. cit., 241.

[101] *Ibidem*.

[102] Thus, it is stated that "from the moment of the death of the testator, the reserved share is renounceable and when the inheritance is accepted, it is perfectly available, alienable and susceptible to being encumbered with usufruct". I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[103] C. De Prada Guaita, op. cit., 454.

[104] I. Gomá Lazón, "Art. 10", op. cit., 241.

Although testamentary arbitration disposition models do not always include the caution *Socini*[105] caution in their wording, this instrument is considered "the appropriate instrument to guarantee the effectiveness of an arbitration of disputes under a will"[106] and the current trend is to incorporate that type of disposition that introduces a compensatory option in favor of the forced heirs. However, when incorporating it, due care should be paid, since if the clause "protecting the reserved share"[107] also appears in the testamentary disposition, it would make little sense to subsequently introduce a disposition that foresees the caution Socini, since, as has been argued, it would not be a full compensatory option, since, in that case, the reference to the legitime should be interpreted broadly by the arbitral tribunal.[108]

The proposed solution, which combines the testamentary arbitration with a compensatory option, is valid for those forced heirs who have received more than the minimum reserved share,[109] and it is observed that this mechanism is promoted in some regional legal systems (*ordenamientos forales*).[110] However, the propelling effect of the caution Socini would not work with the same effectiveness in the case of those forced heirs who have received only the minimum legitimate portion, since the impetus would be to give them the *quid* that the testator granted them and not deprive them of the minimum share that is due to them by law.

However, here, although the forced heirs who receive a minimum reserved share would not have an incentive to refer to the caution Socini, they will nevertheless have an interest in participating in arbitration to verify that their interests are

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[105] Like the model of the Valencia Court of Arbitration and Mediation: see *https://www.cortearbitrajeymediacionvalencia.com/reglamento/anexo-i-modelos-indicativos-de-clausulas-arbitrales/* (accessed November 25, 2024). Some legal doctrine, even if it favors the caution *Socini* in these cases, considers that arbitration between forced heirs who receive more than their reserved share would be possible without resorting to the compensatory option.: see I. Gomá Lazón, "Art. 10", op. cit., 238.

[106] C. De Prada Guaita, op. cit., 454.

[107] Literally "a salvo las legítimas".

[108] This is based on the observation that "ultimately, the clause has not put a risk on and does not offer any compensatory option because the heirs do not actually have to accept any encumbrance on their reserved shares, given that the arbitrator must respect the clause's wording": I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[109] "If the 'forced heir' in question did not accept it, his share in the inheritance would be reduced to his minimum reserved share without receiving any other benefit from it". R. Colina Garea, op. cit., 231.

[110] This is the case of Aragon, based on Article 500 of the *Código del Derecho Foral de Aragón*: A. Calatayud Sierra, op. cit., 175.

adequately protected, or to take action to avoid the application of Art. 6 LA, with the understanding that the right to challenge has been tacitly waived.[111]

CONCERNING THE INDEPENDENCE OF THE TESTAMENTARY DISPOSITION ON ARBITRATION FROM THE POTENTIAL INVALIDITY OF THE WILL

The independence of the arbitration agreement from the main contract is indisputable and undisputed as it is regulated.[112] On the other hand, the problem arises, given that the testator's will is expressed by means of a unilateral act associated with the will, and it could be concluded that the former cannot be independent of the latter, since the above regulations do not refer to non-negotiable acts. However, it will be seen that this is not the case, at least this is the thesis that is maintained in this paper.

Some authors – noting that "the legal transaction constituting testamentary arbitration can only be implemented in a testamentary disposition"[113] – defend the position that there is a "lack of autonomy and independence of the arbitration transaction with respect to the testamentary disposition that implements it".[114] This leads to the assertion,[115] that art. 9.1 LA would not be applicable to arbitration of disputes under a will, given that if this disposition allows the arbitration agreement to take the form of a clause incorporated into a contract (and therefore allows it to be configured as an independent agreement), this would not be valid for the arbitration of disputes under a will, since – it is maintained – "the juridical act giving rise to testamentary arbitration shall comply with the formal requirements

[111] See STSJ Madrid, No. 6/2021, op. cit.

[112] Art. 9.1 LA.

[113] R. Colina Garea, op. cit., 200.

[114] For more details see R. Colina Garea, op. cit., 201–203.

[115] Now, in this sense, this doctrine seems to mix two aspects that can be handled differently (the fact that arbitration is necessarily included in a testamentary disposition and that art. 9.1 LA does not apply to it), given that, subsequently, it is in favor of the provision being able to be made through another different will in which only the business of submission to arbitration is included and validates the possibility of several wills existing simultaneously with the existence of a single clause: cfr. R. Colina Garea, op. cit., 200 ff. and 217 ff.

However, there is another that flatly denies the separability between the arbitration clause and the will and, therefore, the application, *mutatis mutandis*, of art. 22 LA to the testamentary provision that institutes testamentary arbitration: José Ángel Martínez Sanchiz, "Función notarial y arbitraje. Convenio y laudo arbitral", *Cuadernos de Derecho y Comercio*, No. 60, 2014, 40.

prescribed by law for the testamentary disposition that contains it".[116] However, there are arguments to defend the autonomy and independence of the arbitration disposition with respect to the will, just as the arbitration agreement is with respect to the main contract.

Indeed, it should be remembered that Spanish law allows a testator to make more than one will and may dispose of only part of his or her assets in these wills, not all of them.[117] Thus, Article 739 of the Spanish Civil Code allows, *a contrario*, the existence of several valid wills, provided that this is duly recorded. In this sense, it is understood that the testamentary disposition establishing a testamentary arbitration is completely independent, just as in an arbitration instituted by an arbitration agreement. The rationale for arbitration should not be confused with the disposition or agreement that institutes it. While it is true that the disposition establishing a testamentary arbitration has a *mortis causa* nature, it may be drafted independently. This independence is justified *a fortiori* by the fact that Spanish law allows for holographic wills (with minimal formal requirements). Consider, for example, the subsequent drafting of a holographic testamentary disposition instituting testamentary arbitration by referring to a previously drafted will (which does not contain it).[118] Therefore, the validity of the testamentary arbitration disposition does not depend on the validity of the will (or one of the wills) drafted; instead, it depends on its own validity requirements. Therefore, there may be a valid testamentary arbitration disposition and a void will contain it. Furthermore, in the case of the existence of more than one will, as can actually be verified, this is even more intuitive, given that, in some of them, this disposition will not be present. The nullity or invalidity of one of these does not prevent the disposition from being applied to the others, and systematic and interpretive work must be carried out.

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[116] This is the position of R. Colina Garea, op. cit., 201. He also supports it through the arguments of Raquel Bonachera Villegas, *Los arbitrajes especiales*, Marcial Pons, Barcelona, 2010, 217.

[117] See *v.gr.* Resolución de 28 de julio de 2016, of the Dirección General de los Registros y del Notariado (*Boletin Oficial del Estado*, No. 228, of 21st September).

[118] 514 / 5.000.

If, in addition, the person concerned were over 16, in the case in which the previous will was validly drafted (not in holographic form), the testamentary disposition would not be valid pursuant to art. 688 Spanish Civil Code, while the original will would remain valid. On the contrary, the validity of the arbitrary testamentary disposition and the validity of the will are seen to be independent. Thus, if it is true that the nullity of a testamentary disposition also implies the nullity of the arbitrary testamentary that incorporates it (José Fernando Merino Merchán, José María Chillón Medina, *Tratado de Derecho Arbitral*, Thomson Civitas, Madrid-Cizur menor, 2006, 424), This nullity is independent of the nullity of the will to which it refers or to one of these wills if there are more.

Otherwise, we would end up in a paradoxical situation where the arbitrators would not be competent to assess the invalidity of the will (and the consequences this would entail) under the mistaken premise,[119] that the invalidity of the will would also imply the invalidity of the testamentary arbitration. Instead, the arbitrator may decide on the invalidity of the will,[120] this being legitimized by the principle *Kompetenz-Kompetenz.*[121] The opposing position, which denies this latter possibility on the grounds that challenging the will is not within the testator's discretionary powers, should therefore not prosper.[122] This aspect would affect arbitration and the arbitrator's competence only when the invalidity of the will has been previously declared.[123]

The independence of the testamentary disposition establishing the will to resolve disputes through arbitration therefore opens the possibility of its being instituted separately.[124] Indeed, while it is true that the purpose of the rule is to resolve disputes relating to estate where a will exists. This does not mean that Art. 10 LA requires that the will to solve disputes by arbitration already exist at the same time of the will. In this case, it will be a disposition that will be fulfilled, provided the will is drawn up. It would be a somewhat bizarre hypothesis, but it is not legally invalid.

CONCLUSIONS

Art. 10 LA grants the testator a discretionary right, within the scope of his or her will-making rights, to submit disputes relating to his or her estate to arbitration whenever there are incompatibilities between the successors. The latter have the right to accept or reject the inheritance, and if they do so, they will automatically

[119] See R. Verdera Server, "Art. 10", op. cit., 546.

[120] A systematic reconstruction can also be seen in Brian Buchhalter-Montero, "Arbitraje instituido por disposición mortis causa", *Revista Boliviana de Derecho*, No. 34, 2022, 524.

[121] We agree here with I. Gomá Lazón, "Art. 10", op. cit., 219.

[122] *Arg. ex* art. 675.2. See Francisco Capilla Roncero, "Art. 7", *Comentarios a la Ley de Arbitraje. Ley n. 36/1988, de 5 de diciembre* (coord. por Rodrigo Bercovitz Rodríguez-Cano), Tecnos, Madrid, 90.

[123] Declared pursuant to art. 675.2 CC cfr. F. Yáñez Vivero, op. cit., 97 and 98. For another doctrine, Art. 675.2 CC limits itself to 'prohibiting the prohibition': Elías Campos Villegas, "La partición hereditaria arbitral", *La partición de la herencia* (dir. por Xavier O'Callaghan Muñoz), Fundación Ramón Areces, Madrid, 2006, 257.

[124] The independence of the testamentary disposition by which arbitration may be instituted is also facilitated and justified by the possibility of issuing this will through an oral will that, for example, seeks to supplement a previous will devoid of such a disposition. In favor of the possibility of a testamentary disposition instituting testamentary arbitration in an act that does not provide for disposition of assets: C. García Pérez, op. cit., 192.

defer to this eventuality if a dispute arises. In this sense, inheritance possesses an inseparable element whenever the testator has acted in accordance with Art. 10 LA.

"Forced heirs" can be identified by both the expressions *legitimarios* and *herederos forzosos* which nonetheless do not have the same meaning.

Art. 10 use the reference at "herederos no forzosos o legatarios" (no-forced heirs, non-forced heirs or legatees) that is ambiguous and does not help to clarify the legal content of that article. Anyway, although art. 10 LA does not refer to forced heirs, this does not prevent the development of the arbitration proceeding (among the other subjects), the arbitration process will continue with or without their consent.

Therefore, and regardless of the literal meaning of Art. 10 LA and the dispositions of the testamentary arbitration disposition, it is in the forced heir's best interest to be able to participate in arbitration, not only to ensure and verify that their reserved shares are respected by the arbitrators, but also to avoid, in the event of a challengeable award, the inability to file a claim for annulment due to lack of interest pursuant to Art. 41 LA. However, they must be notified appropriately. In any case, it is true that any challenge to any disposition must be made at the appropriate time and not *a posteriori*, otherwise it may be understood that the right to challenge pursuant to art. 6 LA has been tacitly waived. In this sense, the reference to art. 6 LA is not a pretext for the inadmissibility of the arbitration. Art. 10 LA makes non-forced heirs must be interpreted, not in opposition to forced heirs (*legitimarios* or *herederos forzosos*), but to the figure of reserved share itself (*legitima*), since it is this that must be respected for reasons of public order.

However, based on the availability of the latter (the *legittima*) from the death of the testator, mechanisms such as the caution *socini* can also be introduced to encourage the participation of forced heirs in the arbitration process, where the subject has been awarded more than the minimum reserved share.

Despite the possibility of a holographic will, it is advisable to properly draft the testamentary arbitration disposition under the supervision of an expert. This can avoid future pathological aspects in the arbitration process, avoiding possible substantial inconsistencies when drafting the disposition, even more so where there is more than one will. Finally, it should be remembered that the conceptualization of the reserved share is not only a relative concept in the international sphere, but its disbursement methods, its redefinition, or reconceptualization are arguments that will need to be debated in the future, including in the Spanish context, especially when there may currently be grounds for disinheritance for emotional reasons, as is the case with Art. 451-17 of the Civil Code of Catalonia, which provides in its letter e) the possibility of depriving forced heirs of their right to a reserved

share in the event of "a manifest and continued absence of a family relationship between the deceased and the forced heir, if it is for a cause exclusively attributable to the forced heir".[125] This conceptual flexibility of the reserved share clearly affects and will affect a new understanding of the testamentary disposition which fixes an arbitration proceedings related to estate.

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TESTAMENT I ARBITRAŽA U ŠPANIJI: KRITIČKI OSVRT NA ŠPANSKI ZAKON O ARBITRAŽI

Rezime

Član 10 španskog Zakona o arbitraži izričito reguliše testamentarnu arbitražu. Rad je posvećen tumačenju formulacije „herederos no forzosos o legatarios" (bez prinudnih naslednika ili legatara) sadržane u pomenutoj zakonskoj odredbi. Istovremeno, autor nastoji da pruži sugestije za pravilno formulisanje odredbe o arbitraži u testamentu.

Ključne reči: arbitraža, testament, rezervisani deo, prinudni naslednici, testamentarna arbitraža

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[125] Literally: "ausencia manifiesta y continuada de relación familiar entre el causante y el legitimario, si es por una causa exclusivamente imputable al legitimario". Without being exhaustive, see on this subject see Rut González Hernández, "La ausencia de relación familiar como causa de desheredación de los descendientes", *Revista Crítica de Derecho Inmobiliario*, 2019, No. 775, 2603 ff. More broadly, in connection with the cessation of maintenance obligations: Begoña Ribera Blanes, "La falta de relación afectiva entre padres e hijos mayores de edad como causa de extinción de la pensión de alimentos", *Actualidad jurídica Iberoamericana*, 2020, No. 13, 482 ff; Pablo Chardí Torajada, "Extinción de la obligación de alimentos en particular por desafección de los hijos" *Actualidad Jurídica Iberoamericana*, No. 17-bis, 2022, 306 ff. Regarding the Spanish Supreme Court 's evolving approach to matters involving abuse *v.gr.* see Javier Barceló Doménech, "Abandono de personas mayores y reciente doctrina del Tribunal Supremo español sobre la desheredación por causa de maltrato psicológico", *Actualidad Jurídica Iberoamericana*, No. 4, 2014, 289 ff; Clara Gago Simarro, Pablo Antuña García, "La ausencia de relación familiar ¿justa causa de desheredación de hijos o descendientes?", *Revista Crítica de Derecho Inmobiliario*, 2021, No. 785, 1208 ff.

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KOPAONIČKA ŠKOLA PRIRODNOG PRAVA – SLOBODAN PEROVIĆ

UVODNA REČ

PRAVO NA PRAVDU – IZAZOVI SAVREMENOG DOBA

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Predsednik Kopaoničke škole prirodnog prava – Slobodan Perović

Poštovane kolege,
Odazvanici pravdenog prava i filozofije pravde,
Vi, koji činite Trideset sedmu godinu života Kopaoničke škole prirodnog prava,
Poštovani gosti koji dolazite sa različitih strana sveta,
Uvaženi učesnici,
Dame i gospodo,

Dozvolite mi da vam, sa osećanjem najvišeg poštovanja, poželim srdačnu dobrodošlicu i uputim reči velike časti i profesionalne odgovornosti pred ovim Skupom pravničkog znanja i savesti, pred ovim Atrijumom naučnog dostojanstva i slobode misli.

Sa ovim rečima, otvaram rad Kopaoničke škole koja je već 37 godina smeštena pod opštim svodom koncepcije racionalnog prirodnog prava. Uverena sam da će ovaj Susret, zajedno sa rezultatima naših prethodnih okupljanja potvrditi naučni i praktični značaj Heksagona prirodnih prava ove Škole koga čine: pravo na život, pravo na slobodu, pravo na imovinu, pravo na intelektualnu tvorevinu, pravo na pravdu i pravo na pravnu državu.

* * *

Opšta tema ovogodišnje Kopaoničke škole glasi PRAVO NA PRAVDU – IZAZOVI SAVREMENOG DOBA.

U fokusu ovogodišnjeg skupa je pitanje **kako ostvariti pravdu u kontekstu izazova savremenog doba.** Pitanje kompleksno, pitanje delikatno i pitanje koje je aktuelno uvek, a posebno danas, u uslovima duboke nesloge, sukoba i agresija koji potresaju savremeni svet.

Svesna značaja i težine postavljenog pitanja, predlažem da odgovor utemeljimo na Uvodnoj usmenoj reči koju je akademik prof. dr Slobodan Perović, Osnivač Kopaoničke škole prirodnog prava, održao na Devetnaestom susretu Kopaoničke škole prirodnog prava posvećenog opštoj godišnjoj temi „PRAVO I HUMANA BUDUĆNOST" održanom od 13–17. decembra 2006. godine.

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Savremeni međunarodni standardi usvojeni u dokumentima Ujedinjenih nacija i drugih međunarodnih organizacija, predstavljaju široko zakonodavstvo insprisano legitimnom pravdom. Putem internacionalizacije ljudskih prava kodifikovanih u međunarodnim dokumentima, kultura prirodnog prava dobila je toliko mesta da bi se moglo govoriti o začecima jednog univerzalnog, kosmopolitskog, svetskog prava. Ovo pravo ulivalo je nadu i očekivanje da će osnovna prirodna prava čoveka biti jednom zauvek ostvarena, bez obzira na razlike koje među ljudima postoje po rođenju ili ubeđenju.

Međutim, umesto ostvarenja takve vizije prava, nastupilo je vreme nesloge, nasilja, ratnih pohoda i terorizma, tako da je došlo do ogromne razlike između proklamovanih i ostvarenih ljudskih prava, što je sudbinsko pitanje naše civilizacije. Tim putem dolazimo do odlučujuće suprotnosti – visok stepen kulture prirodnog prava u brojnim međunarodnim dokumentima i visok stepen nekulture u njihovom ostvarenju.

Uzroci ovakvog stanja su brojni i raznovrsni. Oni zavise od geografskog i ideološkog faktora, religijske i filozofske svesti, ekonomske konstitucije, opšte kulture jedne zajednice.

Ipak, kada je reč o neostvarenju ljudskih prava u najopštijem smislu, čini se da bi ove uzroke mogli svesti na sledeće: politizacija ljudskih prava u praktičnoj primeni; ekstremno siromaštvo u mnogim zemljama sveta; postojanje velikog broja antipravnih država; zloupotreba ljudskih prava.

Na taj način se prirodna prava čoveka, kodifikovana u brojnim međunarodnim dokumentima, pretvaraju u svoju suprotnost, u volju i samovolju trenutno jačih.

OSNOVNI IZAZOVI SAVREMENOG DOBA

U tim okvirima, slobodna sam da izdvojim one faktore koji, prema mom mišljenju, predstavljaju osnovne izazove savremenog doba u kontekstu prava na pravdu. Izložiću ih sa stanovišta Heksagona prirodnih prava Kopaoničke škole:

1. **PRAVO NA ŽIVOT**: ratovi, ratni sukobi, terorizam i ekstremno siromaštvo u pojedinim delovima sveta. Kad je reč o zdravlju i ekologiji, nužno je podvući da nekontrolisano korišćenje i prekomerna eksploatacija prirodnih resursa, masovna upotreba pogona pomoću različitih vrsta energija i nekontrolisana upotreba različitih tehnologija, dovode do ozbiljnih rizika po životnu sredinu i ugroženosti biosfere, gde je čovek prva žrtva.

2. **PRAVO NA SLOBODU**: u savremenom trenutku, u mnogim delovima sveta, a posebno u našoj državi, prisutno je ugrožavanje slobode, a pre svega slobode misli, slobode izražavanja i slobode kretanja. U tom kontekstu konstatujemo da je sfera prava sfera slobode, ali one slobode koja je u međuzavisnom odnosu sa slobodom drugih, čime se postiže proporcija sloboda. Upravo takva sloboda treba da bude cilj svakog pravnog ustrojstva. U tom smislu konstatujem: nema slobode pod nasiljem i nema slobode bez odgovornosti. Nasilje, kao način ophođenja ili kao sistem vladavine, pretvara slobodu drugog u ropsku poslušnost.

Ono što naročito zabrinjava, posebno u kontekstu okolnosti savremenog trenutka, jeste osnovana sumnja u odsustvo odgovornosti: pravne, političke i moralne, onih za koje postoje indicije da su učinili teške i ozbiljne povrede zakona.

3. Pravo na imovinu: i pored garancija predviđenih međunarodnim dokumentima i najvišim unutrašnjim pravnim aktima i dalje se uočavaju česte povrede imovinskih, a pre svega svojinskih prava. Podsetiću: **svako ima pravo da poseduje imovinu, sam ili u zajednici sa drugima, i niko ne sme biti samovoljno lišen svoje imovine**. Titular imovinskog prava ima pravo na neometano uživanje svoje imovine i u tome može biti ograničen isključivo u javnom interesu i isključivo pod uslovima predviđenim zakonom i opštim načelima međunarodnog prava.

Kad je reč o ugovoru, potrebno je podvući da poštovanje ugovora u velikoj meri zavisi od usklađenosti pravnog i moralnog poretka. Kad jedan društveni sistem obezbedi visok stepen pravne, ekonomske i socijalne stabilnosti, onda se i princip »pacta sunt servanda« nalazi na tom istom stepenu. Naprotiv, kada te sigurnosti nema, onda ni ugovor ni njegovo izvršenje ne mogu biti sigurni. U tom smislu, pravna sigurnost u domenu ugovornih odnosa prati sudbinu celine.

U pogledu ugovora međunarodnog karaktera, na međunarodnom planu već dugo vremena su prisutne težnje za unifikacijom materijalnog prava, pre svega

u građanskopravnoj i privrednopravnoj oblasti. Ove težnje rezultirale su usvajanjem brojnih međunarodnih dokumenata koji sadrže uniformna pravila ugovornog prava.

Da li je unifikacija poželjna? U odgovoru na to pitanje, čini se da je potrebno poći od svrhe koja se unifikacijom nastoji ostvariti. Svaki uspešno sproveden međunarodni unifikatorski akt treba da doprinese prevazilaženju preperka koje postavljaju razlike u nacionalnim pravnim sistemima. Istovremeno međutim, neophodno je da uniformna pravila, kvalitetom svojih rešenja i njihovom adekvatnom primenom, doprinesu povećanju stepena pravne sigurnosti u oblasti na koju se odnose.

4. Pravo na intelektualnu tvorevinu: za ovu oblast karakterističan je neslućeni razvoj tehnologije a posebno tzv. veštačke inteligencije, koji nosi kako dobrobiti, tako i visoke rizike za čovečanstvo kao celinu.

5. Pravo na pravnu državu: ugroženost načela sudijske nezavisnosti kao neminovne pretpostavke ustanove sudstva. Sudijska nezavisnost i nepristrasnost neminovna je pretpostavka ustanove sudstva. Pitanje nezavisnosti sudije nije samo pravno pitanje. To je pitanje opšte kulture jedne zajednice. U uslovima nepravne države, gde je legitimitet i letalitet prava ispod dozvoljenog stepena društvene tolerancije, gde vladavinu prava zamenjuje vladavina samovoljnog fakta – vlasti ili interesa, pojedinačnog ili grupnog, gde se eliminiše načelo podele vlasti, tu se sudijska nezavisnost svodi na zavisnost od partijske, a ne zakonske odluke. **Nezavisnost sudije, kao neminovni atribut njegove funkcije, predstavlja imperativ pravne države**.

6. Pravo na pravdu: nepoštovanje ili nedosledno poštovanje načela legitimiteta i legaliteta. **Svako ima pravo da živi u takvoj državi koja je u stanju da obezbedi vladavinu načela legitimiteta i legaliteta**. **U pravnoj državi državna vlast i samovolja zaustavljena je ustavom i zakonom i to tako da se time neprikosnoveno štite osnovna ljudska prava i slobode putem trodelne podele vlasti – zakonodavnu, izvršnu i sudsku.** Onog trenutka kada se legalitet zameni načelom celishodnosti, kada se bilo čiji interesi stave iznad prirodnih prava čoveka, tada država gubi epitet pravne države. Nasuprot tome, kada se pravo shvati i ostvari u sklopu pravde, kada opšta konstitucija jedne zajednice prihvati pravdu kao »stožernu vrlinu«, tada pravo te zajednice postaje legitimno u svom izvoru i legalno u svojoj primeni.

KAKO PREVAZIĆI POMENUTE IZAZOVE

Kako prevazići pomenute izazove?

U pokušaju odgovora na ovo pitanje, potrebno je na prvom mestu notirati osnovne faktore koji utiču na ostvarenje ljudskih prava. U prvom redu, to su:

– stepen ostvarenja legitimiteta u nastanku i legaliteta u primeni prava;

– tolerancija (međukulturna tolerancija, politička, klasna, rasna i verska tolerancija, nacionalna, jezička, materijalna, svojinska i ugovorna, tolerancija u svim oblicima poštovanja dostojanstva čoveka i njegovih neprikosnovenih prava);

– ekonomska konstitucija;

– stanje političke zrelosti i prosvećenosti;

– pravna, ekonomska i socijalna sigurnost na osnovu koje se formira poverenje u institucije sistema;

– opšte stanje razvoja nauke, stanje opšteg obrazovanja, umetnosti i intelektualne kulture uopšte;

– zaštita životne sredine i ekološka etika;

– zaštita zdravlja kao uslova života i prirodnog prava svakog čoveka;

– stanje porodice kao osnovne ćelije društva;

– stanje javnog mnjenja posebno u kontekstu medijske informisanosti;

– stepen tehničko-tehnološke obrazovanosti.

Ako pomenute faktore posmatramo u njihovoj ukupnosti, proizilazi zaključak da u svetskim okvirima ovo vitalno pitanje ne može biti rešeno u bliskoj budućnosti. Reč je o dugotrajnom i kontinuiranom procesu u kome se mora težiti ka potpunom ostvarenju ljudskih prava proklamovanih u međunarodnim dokumentima, kao izrazu zajedničke savesti i pravde kao stožerne vrline.

Prema tome, naša je dužnost da doprinesemo približavanju proklamovanih ljudskih prava njihovom ostvarenju. To je naša zajednička odgovornost pred generacijama koje dolaze.

NAŠE PRAVO

Kad je reč o našem pravu, i ranijih godina na Kopaoničkoj školi, počev od prve godine njenog zasedanja, dakle punih 36 godina, isticano je da se naše pravo nalazi u stanju duboke krize. Danas, ove 37. godine, u svetlu savremenih okolnosti, izražavam bojazan da se ishodište te krize ogleda u njenom produbljavanju i još višem stepenu pravne nesigurnosti.

Polazeći od toga, dozvolite mi da na samom kraju moje Uvodne reči naglasim šta, prema mom uverenju, pretpostavlja izlazak iz postojeće krize prava.

Na prvom mestu, napuštanje političkog jednoumlja kao izvora prava i napuštanje dogmatske netolerancije. To, između ostalog, znači osloboditi se pojave da se zakon gazi, nesmetano i nekažnjeno, onda kada to odgovara trenutnoj volji ili interesu nosilaca vlasti;

Nadalje, koncept našeg prava mora biti duboko ukorenjen u filozofiji pravde ispoljene u kodifikacijama ljudskih prava u okviru Ujedinjenih nacija. To ne može biti samo trenutna politička kampanja već koncept prava koji zahteva trajno i kontinuirano opredeljenje;

Još jednom ističem **neophodnost doslednog poštovanja principa trodelne podele vlasti u kojoj je sudska vlast nezavisna u odnosu na druge dve vlasti – pre svega izvršne vlasti, kako je to i predviđeno ustavom i drugim pravnim aktima**; reč je pre svega o sudijskoj nezavisnosti, koja predstavlja osnovni atribut sudijske funkcije i imperativ pravne države.

Tek ostvarenjem ovih elementarnih uslova možemo smatrati da se naše pravo nalazi na putu izlaska iz krize i obezbeđenja potrebnog stepena pravne sigurnosti. Samo takvo pravo može uspešno odgovoriti izazovima koje nosi savremeno doba i samo takvo pravo može da služi pravdi kao temeljnoj vrlini.

* * *

Poštovane koleginice i kolege,

Ovim završavam svoje uvodno izlaganje.

Želim Vam uspešan rad i nadam se da će nas naučni argumenti opusa Kopaoničke škole učiniti korak bližim ostvarenju sveukupne Pravde.

KONKURSI

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA – SLOBODAN PEROVIĆ

38. godina

obaveštava pravničku i drugu naučnu i stručnu javnost da raspisuje

K O N K U R S

Za prijem i objavljivanje referata povodom 38. Susreta Kopaoničke škole koji će se održati na Kopaoniku od 13. do 17. decembra 2025. godine pod stalnim naslovom „Pravda i pravo – Posvećeno osnivaču Kopaoničke škole prirodnog prava akademiku prof. dr Slobodanu Peroviću".

Opšta tema ovogodišnjeg skupa je

KRIZA PRAVA – STARA PITANJA I NOVE OKOLNOSTI

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Beograd, 09. 05 2025.

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA – SLOBODAN PEROVIĆ

obaveštava pravničku i drugu naučnu i stručnu javnost da raspisuje

K O N K U R S

za Nagradu „Profesor Slobodan Perović“

povodom 38. Susreta Kopaoničke škole koji će se održati na Kopaoniku
13-17. decembra 2025. godine.

Nagrada se dodeljuje za najbolji rad mladih učesnika Kopaoničke škole prirodnog prava na temu

KRIZA PRAVA – STARA PITANJA I NOVE OKOLNOSTI

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Porodica osnivača Kopaoničke škole prirodnog prava, akademika prof. dr Slobodana Perovića obezbeđuje sredstva za novčani deo nagrade po ovogodišnjem konkursu. Nagradni fond za novčani deo nagrade iznosi 1.000 evra u dinarskoj protivvrednosti.

Konkurs je otvoren do 20. oktobra 2025. godine do 18 časova.

Proglašenje dobitnika i uručenje nagrade održaće se u okviru svečane plenarne sednice 38. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović, 13. decembra 2025. godine.

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Beograd, 09. maj 2025.

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