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TESTAMENTARY FORMALITIES IN THE TIME OF PANDEMIC

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ABSTRACT

The formalism in testamentary law is a result of the need to protect the freedom of testamentary disposition and the authenticity of the last will of the testator. Proposed formalities are supposed to serve multiple purposes in testamentary law: evidentiary, cautionary and protective. Having in mind the level of modern society development and technologies, as well as the new challenges we face with today (such as pandemics, natural disasters, etc.), the question arises: whether the prescribed formalities in testamentary disposition are justified in terms of purposes they are supposed to serve?

Modern testamentary law is characterized by the trend of liberalization of testamentary forms, mitigation of formalities, abolition of certain obsolete forms of testament, but also introduction of new forms dictated by new social and economic, political circumstances and new requirements of legal trade mortis causa. The experience with the Covid pandemic confirmed the importance of these issues. The state of the pandemic indisputably restricts the freedom of testation in several directions: limited contacts prevent the presence of notaries or judges as representatives of public authorities as a mandatory element of form in public testamentary forms, and the possibility of their composition; it is impossible or difficult to ensure the presence of testamentary witnesses in allographic testament and thus difficult to implement the principle of unitu actu as a key feature of the testamentary form; finally, illiterate people and people with disabilities remain deprived of the opportunity to exercise their constitutionally guaranteed freedom of testing due to being unable to make an holographic legacy, as their sole option available within the extraordinary circumstances of a pandemic, due to above mentioned restrictions.

As the basic purpose of the testamentary right is to enable a testamentarily capable person to manifest his last will in whatever circumstances he finds himself, extraordinary circumstances during a pandemic indisputably restrict the freedom of testing. The new pandemic circumstances have prompted the legal public to think in the following directions: whether there is a need to introduce new forms of testament during a pandemic (as was done in Spain, which regulated testament during a pandemic); should certain elements of the form of the will be modernized (e.g. allow the possibility of the participation of the witness of the will in the pro-

cess of making the will online via audio-video link) ?; and finally, should the door be opened to the digitalization of the will and the possibility of compiling an electronic will and mark the beginning of a new era of testamentary law?

These and related issues are the subject of analysis in this paper, and will be viewed through the prism of comparative legislation, with special emphasis on the legislation of the countries of the Roman legal tradition that precedes the form of bequest during a pandemic. In order to determine the guidelines for further development of testamentary law and its rationalization, the situation in common law countries will be pointed out, and some examples from their case law will be analyzed, considering that a significant step towards digitalization of testamentary law has already been made in these legal systems. Based on this comparative analysis, which implies the application of primarily comparative law and dogmatic methods, as well as axiological through a new approach to the testamentary form, we try to determine whether testamentary forms and formalities are harmonized with the needs of modern society, especially in pandemics.

Finally, at the end of the paper, the author tries to give proposed solutions in the direction of reforming the testamentary formalities de lege ferenda, trying to establish a balance between legal certainty and freedom of testing.

Keywords: *Succession law, last will, testamentary formalities, pandemic, digitization*

1. INTRODUCTION

Outbreak of COVID-19 pandemics has influenced the law in many various aspects. Pandemic has highlighted many challenges the law is facing with nowadays, one of which appears to be also the purposefulness of testamentary formalities in the law of inheritance. The requirement of formality in testamentary disposition lies on a deep-rooted legal tradition, with the form of testament having the constitutive meaning (*forma legalis, forma essentialis*). From the moment of death, it becomes effectively possible for a testator to confirm the authenticity of the last will, or to solve any other dispute relating to the will content. Hence, these formalities, ensuring its authenticity, are necessary in order for the testator's last will to be executed after his death. Although being provided for the purpose of the execution of the last will, the formalities also limit the freedom of testamentary disposition, which is justified as long as there is proportionality between the provided formal limitation and the purpose for which the limitation has been prescribed. This proportionality has been brought into the question particular in the time of pandemic crises, since many obstacles regarding compliance with testamentary formalities and their practical implementation have been set, thus bringing into the question accomplishment of the freedom of testation.

The problem that arises relating to prescription of formal requirements for valid will is that all conditions relevant for will making process haven't been taken into

consideration (practical needs of the testator who acts in certain place, with certain abilities, in the specific circumstances.), in the context of specific social, economic, technologic, environmental circumstances, on the global level. These weak points of the law of testament have been emphasized by COVID-19 in the most significant way. Namely, the exercise of testamentary freedom has been jeopardized in numerous aspects, due to the restrictive social measures and stay-at-home orders. In these specific circumstances the fulfillment of some testamentary formalities has become increasingly difficult, or even impossible for certain categories of people (elder persons, persons with disabilities, or those who live alone). This brings into question not only formal effectiveness of a traditional testament, but also purposefulness of testamentary formalities due to difficulties in implementation. Peculiarly, concern should be taken about risks from possible discrimination of those testamentary capable persons being not able to exercise testamentary freedom, due to formal and social boundaries, which further raises the question of possible infringement of constitutionally guaranteed right on testamentary disposition. Therefore, traditional testamentary formalities and their legal purposes need to be thoroughly explored.

2. FORMALISM IN TESTAMENTARY LAW

Freedom of testamentary disposition has been based on the constitutional guarantees of the right to property and the right to inherit.¹ Law of wills derives from the premise that an owner is entitled to dispose of his property in contemplation of death (as it is the case for a life)², being limited in this disposition in various ways.³ This rule is in accordance with European standards of inheritance law where equal legal protection has been granted to the right of disposal, as well as to the right to bequest.⁴

As a main instrument of estate planning, a testament can be defined as unilateral, personal, revocable disposition *mortis causa*, that has to be exercised in *ad solemnitatem* form.⁵ In comparison to the contract law where principle of consensualism

¹ See art. 58 (1) and 59 (1) of Constitution of the Republic of Serbia („Official Gazette RS“, no. 98/2006).

² Langbein, J. H., *Substantial Compliance with the Wills Act*, Harvard Law Review, Vol. 8, No 3. 1975, p. 496.

³ For limitations of freedom of testation see Đurđić-Milošević, T., *Ograničenje slobode zaveštajnih raspolaganja*, doctoral dissertation defended at the Faculty of Law of the University of Kragujevac, 2018, p.50-348.

⁴ Art. 17 (1) of Charter of Fundamental Rights of the European Union (2010/C 83/02); [https://www.europarl.europa.eu/charter/pdf/text_en.pdf], Accessed 15 March 2020.

⁵ Đurđević, D., *Institucije naslednog prava*, Beograd, 2017, p. 120; Stojanović, N., *Nasledno pravo*, Niš, 2011, pp. 193-195.

is a rule, in testamentary law formalism prevails.⁶ Testamentary formalities are at the core of what makes a last will valid and trace back centuries.⁷ They reflect a legal tradition of a society, and as social, economic, political circumstances have been changing through history, so did the formal requirements for valid testament.⁸ Freedom of testamentary disposition (bequest) stem from one of property rights - the authority of the owner to dispose of his or her own property in contemplation of death (i.e. *mortis causa*).⁹

The compliance with will formalities are supposed to guarantee the authenticity of the last will, its provability and certainty, as well as seriousness and finality of the will making process.¹⁰ Testamentary formalities are supposed to serve their purposes prescribed by the law: (a) evidentiary (enable a court to decide, without the benefit of live testimony from the testator, whether a purported will is authentic); (b) cautionary (warning upon the testator with regard to the significance of making a will and that his/her actions cause legal effects); (c) channeling (providing a “tool” to permit the parties to give legal effect to their intentions), and protective function (protect the testator from manipulative imposition).¹¹

3. TESTAMENTARY FORMS AND FORMALITIES IN INTERNATIONAL COMPARATIVE PERSPECTIVE

Forms of testaments available in continental legal systems of EU countries are numerous, and can be classified on the basis of different criteria into following categories: public and private testaments; ordinary and privileged testaments (*testamentum solemne* and *testamentum minus solemne*); handwritten and oral testaments (i.e. nuncupative will)¹². As far as private testamentary forms are concerned, holographic will is prevailing in continental legal systems (with the exception of Netherlands

⁶ About the form of contract and other legal bequests see Perović, S., *Formalni ugovori u građanskom pravu*, Beograd, 1964, p. 26.

⁷ Langbein, *op. cit.*, note 2, p. 490.

⁸ Đurđić-Milošević, *op. cit.* note 3, p.111.

⁹ Đurđević, D., *Sloboda testiranja i formalizam olografskog testamenta*, Pravni život, no. 11, 2009, p. 849.

¹⁰ Lange, H., Kuchinke, K., *Erbrecht - Ein Lehrbuch*, C.H.Beck, München, 2001, p. 333.

¹¹ Crawford, B. J., *Wills Formalities in the Twenty-First Century*, Wisconsin Law Review, 2019, p. 287. [<https://ssrn.com/abstract=3264683>], Accessed 10 March 2021; Critchley, P., *Privileged Wills and Testamentary Formalities: A Time to Die?*, Cambridge Law Journal, Vol 58, Issue 1, 1999, p. 51; Langbein, *op. cit.*, note 2, pp. 492-497; *Developments in the law - What is an electronic Will?* (chapter four), Harvard Law Review, vol. 131, No. 6, 2018, p.1793. [https://harvardlawreview.org/wp-content/uploads/2018/04/1790-1811_Online.pdf], Accessed 28 Februar 2021; Lange; Kuchinke, *op. cit.*, note 9, p. 332.

¹² Marković, S., *Nasledno pravo*, Beograd, 1981, pp. 268, 269.

where it is not prescribed)¹³, while the prevailing public form of the last will is notarial testament. Concerning privileged testamentary forms, there are various represented in continental legal systems, such as: military testament, last will made during a journey (whether on the ship or aircraft), privileged will made during natural disasters, or in isolated geographical areas (as a result of, crises, operations of war, calamities, contagious diseases or other extraordinary circumstances and accidents), etc.¹⁴ Privileged forms of will could be used in extraordinary circumstances when the ordinary forms of will are not available. These are usually of public legal nature and should be made before a notary, or other representative of public authority (the local reconciliator, the mayor or a person authorized by the mayor, or a clergyman), in the presence of two witnesses.¹⁵ In comparison to an ordinary public will, the formal requirements are to some extent decreased,¹⁶ which should extend the availability of this testamentary form. On other hand, there are some legal systems that recognize an oral will as the only type of extraordinary will that is of private legal nature, and should be performed before at least two witnesses.¹⁷

The formal procedure for execution of the will in the time of epidemic has been even more simplified in Spanish law, where this type of will has been qualified as an open will¹⁸ (not special will, as it is the case in other roman countries.)¹⁹ It should be executed in front of three witnesses, being over the age of sixteen. The presence of notary public is not required (or other public representative), as it is the case in other roman countries.²⁰ Nevertheless, it is necessary for this type of will in order to take effect to be raised the public deed within three month after testator's death.²¹

¹³ See Pintens, W., *Testamentary Formalities in France and Belgium*, in: Reid, K.G.C, *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities*, Oxford, 2011, p. 57; Wekas, L., *Testamentary Formalities in Hungary*, in: Reid, K.G.C, *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities*, Oxford, 2011, p. 261; Braun, A., *Testamentary Formalities in Italy*, in: Reid K. G. C. *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities*, Oxford, 2011, pp. 125, 140.

¹⁴ Arts. 609-616 Italian Civil Code, [<https://www.trans-lex.org/601300/italian-codice-civile/>], Accessed 03 March 2021; Art. 701 (Section five on the open will) of Spanish Civil Code [<http://derecho-civil-ugr.es/attachments/article/45/spanish-civil-code.pdf>], Accessed 03 March 2021; Art. 985 of French Civil Code [https://www.legifrance.gouv.fr/liste/code?etatTexte=VIGUEUR-&etatTexte=VIGUEUR_DIFF], Accessed 01 March 2021.

¹⁵ Art. 609(1) Italian Civil Code.

¹⁶ It has been qualified as “simplify version of public will” (Braun, *op. cit.*, note 13, p. 134).

¹⁷ Art. 37 of the Inheritance Act of the Republic of Croatia, National Gazette, no. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019;; Art. 506 of Swiss Civil Code. [<https://lawbrary.ch/law/210/ZGB/v3/de/schweizerisches-zivilgesetzbuch/>], Accessed 07 May 2021.

¹⁸ Art. 701 (Section five on the open will) of Spanish Civil code.

¹⁹ See Braun, *op. cit.*, note 13 p. 134.

²⁰ See art. 609 of Italian Civil Code; art. 985 of French Civil Code.

²¹ Art. 703 (1) of Spanish Civil Code.

At a first glance, it seems that these relaxed formalities of “pandemic will” in terms of possibility of execution only before three witnesses (and without presence of a public authority representative required), make this testamentary form more accessible in the specific pandemic circumstances. Some authors are taking a view that simplified testamentary formalities could jeopardise legal certainty creating more risks of misuse.²² This may be the case with the agreed articulation of the contents of the last will between the witnesses who are attesting particular process of will making.²³ On the other hand, the required number of three witnesses for the testament to be valid provides a kind of guarantee of the authenticity of testator’s will and legal certainty when it comes to determining the content of the last will of the testator.²⁴ The question is, whether it serves enough the protective testamentary function?

Another problem that arises regarding testamentary formalities is the difficulty of securing simultaneous presence of testamentary witnesses, in the limited pandemic circumstances, due to social distance measures and other restrictions on human contacts. The whole range of statutory limitations regarding persons allowed to attest the last will, additionally aggravates the problem. According to the Spanish law, “in an open testament, heirs and legatees named therein, their spouses or the relatives of the former within the fourth degree of consanguinity or the second degree of affinity, may not be witnesses”.²⁵ This means that during social restrictions the fulfillment of these formal requirements is even harder to provide, due to a narrowed circle of persons that could take a role of testamentary witnesses.

Serbian legislation does not recognize specific testamentary form provided for pandemic or similar situations (calamity, accident, crises). There are just two specific forms of wills reserved for extraordinary circumstances: military testament (reserved for war time or mobilization)²⁶ and testament made on the ship (during a voyage)²⁷. The only testament available in emergency situations is an *oral testament*. An oral testament has to be performed before three witnesses, but only under exceptional circumstances: when there is a sudden and imminent danger for the testator to lose his life, or testamentary capacity.²⁸

²² Antić. O., Balinovac. Z., *Komentar Zakona o nasleđivanju*, Beograd, 1996, p. 358.

²³ *Ibid.*

²⁴ Đurđić-Milošević, *op. cit.*, note 3, p. 158.

²⁵ Art. 682 (1) Spanish Civil Code.

²⁶ Art. 109 (2) Inheritance Act of Republic of Serbia (Official Gazette of the Republic of Serbia No. 46/95 and 101/2003 – decision of the Constitutional Court of the Republic of Serbia).

²⁷ Art. 108 Inheritance Act of Republic of Serbia.

²⁸ Đurđević, *op. cit.*, note 5, p. 145.

However, in a term of last will accessibility, a useful analogy could be made between an oral testament in Serbian legislation and a fore mentioned pandemic will in Spanish law, concerning the witnesses. Namely, for all testamentary forms in Serbian law for which validity the presence of testamentary witnesses is required, the similar limitation concerning the cycle of testamentary witnesses has been prescribed, as it is the case in Spanish law (even broader).²⁹ However, taking into consideration specific circumstances in which oral will is allowed to be created, a kind of relaxation regarding testamentary witnesses has been made in Serbian law, in a way that this limitation does not apply on oral testament (because of its extraordinary legal nature).³⁰ This actually means that broader cycle of persons could be found in the role of testamentary witness in case of oral will: the testator's spouse, descendants and other of his close relatives (that are not allowed by ordinary testamentary forms).³¹ This relaxation regarding testamentary witnesses could apply on the last will in pandemic, resulting in its greater accessibility.

Another question regarding a will in pandemic arises concerning the circle of the persons to be allowed to take advantage from the testamentary disposition. To those who take the role of testamentary witnesses, should not be allowed to benefit from these testamentary dispositions. For example, there are a huge number of persons close to the testator that are deprived of this possibility, as far as oral will in Serbian law is concerned.³² Thus, execution of the last will during a pandemic raises a lot of doubts that are finally resulting with the confrontation between testamentary formalities and legal certainty.

4. LOOSENING FORMAL REQUIREMENTS IN PANDEMIC

Continental legal systems are more rigid when it comes to the testamentary formalities, than common law. Non-compliance with the formal prerequisites results in invalidity of the last will (nullity or voidness), even if there is an evidence that it expresses the legally relevant will of the testator.³³ There is no possibility in continental law for court to intervene in the case of minor formal testamentary

²⁹ Art 13 (1) Inheritance Act of Republic of Serbia: „A testamentary witness cannot be a person who is a blood relative in the direct line to the testator, a collateral relative up to the fourth degree of kinship, an in-law relative up to the second degree of kinship, a relative by adoption, a spouse, ex-spouse, extramarital partner, ex-extramarital partner, guardian, ex-guardian, ward or former ward.“

³⁰ Art 13 (2) Inheritance Act of Republic of Serbia: „This does not apply to oral bequests.“

³¹ Đurđević, *op. cit.*, note 5, p. 150.

³² “The provisions of oral testament relating to some benefits for testamentary witnesses, their spouses, ancestors, descendants and relatives in the collateral line up to the fourth degree of kinship, as well as to the spouses of all those persons, are null and void.“ Art. 160 Inheritance Act of Republic of Serbia.

³³ Đurđić-Milošević, *op.cit.*, note 3, p. 146.

deficiencies, in order to keep the last will in force.³⁴ On the other hand, due to the more flexible approach towards formalities in common law, some steps towards de formalization of the law of testament have been taken, that could be helpful in time of pandemic. The possible emerging solutions could be as follows: providing holographic will in legislation (where it has not been acknowledged), adoption of the harmless-error doctrine (or doctrine on substantial compliance); enacting electronic will legislation, or temporarily suspending certain elements of the Inheritance Act during public health emergencies.³⁵

The holographic testament could be considered as a good formal instrument for executing the last will during pandemic. This testamentary form is allowed in half of the states of USA, as well as in several Canadian provinces, while England and the Australian states do not recognize holographs³⁶. In comparison to attested (i.e. formal or witnessed) will,³⁷ the advantage of this form is relaxed formalism, since handwriting substitutes attestation³⁸ (therefore it also called “unwitnessed” will).³⁹ The problem might arise regarding illiterate persons or the persons with some disabilities who are unable to make holographic will, as their sole option available within the extraordinary circumstances of a pandemic. The presence of public authority representative is also difficult to secure due to the social restrictions, thus the process of making a public will is aggravated. Since there is no other specific testamentary form available in pandemic situation, the following question arises: are these formal prerequisites for the last will execution unjustified and discriminatory in relation to a fore mentioned category of people, who are, over all, deprived of the right of testamentary disposition in certain extraordinary circumstances?

As far as Anglo-American jurisdiction is concerned, writing, a signature and attestation are the essential formal elements of a last will (with some variations regarding further formal requirements).⁴⁰ A significant step towards streamlining the testamen-

³⁴ See Wedenshorts, C.C., *Testamentary Formalities in Austria, Testamentary Formalities in Italy*, in: Reid, K. G. C. *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities*, Oxford, 2011, p. 250.

³⁵ Horton, D., Weisbord, R. K., *COVID-19 and Formal Wills*, *Stanford Law Review*, Vol.73, No. 18, 2020, p.19.

³⁶ Langbein, J. H., *Excusing Harmless Errors in The Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, *Columbia Law Review*, Vol. 87, No. 1, 1987, pp. 2, 3.

³⁷ *Ibid.*

³⁸ “The testator may execute his will without witnesses, but it must be “materially” (or in some states “entirely”) in his handwriting.” Langbein, *op. cit.*, note 36, p. 3.

³⁹ Crawford, *op.cit.*, note 11, p. 280.

⁴⁰ For example: annulment of the signature already in place; requirement for the signature to be in specific place in document etc., Langbein, *op. cit.*, note 36, p. 2.

itary formalities has been made within Uniform Probate Code,⁴¹ through more liberal provision in favor of holographic testaments.” If a will that does not comply with subsection § 2-502(a) UCP is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.”⁴²

It is undisputed that each of the formal elements of holographic will serve certain formal purposes. Until the moment of making a will, the signature has a warning purpose because it warns the testator on the seriousness of the act of making.⁴³ It is also evidence of finality of testator’s intention (separating draft from final will),⁴⁴ and the evidence of will’s authenticity, as well.⁴⁵ If there is no signature on testament, suspicion arises about the genuineness of the testament.⁴⁶ Concerning handwriting, it serves evidentiary purpose, securing reliable evidence of testator’s intent to make the last will, proving its authenticity. In common law it is considered that handwriting and signature are “indispensable formal elements “of the last will and that abolishing the attestation requirement for formal wills would even “modernize” wills formalities.⁴⁷

As far as attestation as a formal element of a last will is concerned, its protective function is undisputable, since it protects the testator against undue influence at the time of the will execution.⁴⁸ It’s cautionary and the evidentiary function is also very important, and there is a doubt in legal doctrine whether these functions

⁴¹ The Uniform Probate Code was promulgated by the National Conference of Commissioners on Uniform State Laws in 1969. It underwent substantial revisions in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, 2003, 2010. The Uniform Probate Code and its revisions have been adopted in Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin. It was introduced for adoption in Massachusetts in 2008.

⁴² § 2-502(b) Uniform Probate Code; Langbein, *op. cit.*, note 36, p. 491.

⁴³ Reid, K.G.C. *et al.*, *Testamentary Formalities in Historical and Comparative Perspective*, in: Reid K.G.C. *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities*, Oxford, 2011, p. 455.

⁴⁴ Langbein J. H., *Absorbing South Australia’s Wills Act Dispensing Power in the United States*, *Adelaide Law Review*, Vol. 38, No. 1, 2017, p. 4.

⁴⁵ Reid *et al.*, *op. cit.*, note 43, p. 455; Langbein, *op. cit.*, note 36, p. 3; ”There may be rare cases where it would be appropriate to admit to probate an unsigned will, except in some unique cases” - Langbein, *op. cit.*, note 2, p. 518.

⁴⁶ Langbein, *op. cit.*, note 44, p. 4.

⁴⁷ Lindgren, J., *Abolishing the Attestation Requirement*, *North Carolina Law Review*, Vol. 68. No. 3, 1990, pp. 541, 542.

⁴⁸ Scalise, R.J., *Testamentary Formalities in the United States of America*, in: Reid K.G.C. *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities*, Oxford, 2011, p.362; Langbein, *op. cit.*, note 33, p. 3.

could be substituted by other formal means.⁴⁹ On the other hand, there are some authors that express certain doubts as to this element of testamentary form, considering that the attestation requirement “sets the level of caution and the evidence functions unreasonably high”.⁵⁰ The competency of witnesses is also disputable in theory, and it is questionable whether their presence may or may not have served a prevention of malfeasance by others.⁵¹

It can certainly be debated whether the attestation is justified or not from the point of view of the function of the testamentary form, but this formal element also has to be considered from the point of view of the possibility for its realization. It is considered that social distancing measures make it difficult or even impossible for some persons to find the requisite witnesses (especially for the persons who are living alone), and to realize last will using this testamentary form.⁵² At the same time, public testamentary forms are even less possible to exercise since the presence of the public authority representatives is hard to provide due to social distance measures.⁵³ It seems that before the question of whether a certain testamentary formality fulfills its purposes, the question should be posed whether these formalities are achievable in specific circumstances (such as pandemic), and therefore, whether different approach toward testamentary formalities has to be taken?⁵⁴

Due to the difficulties with testamentary formalities implementation, in common law compliance requirement had been rather criticized and substantial compliance doctrine arose as a criticism to this strict formal compliance.⁵⁵ It was debated that a substantial compliance doctrine could be acceptable solution for execution of the last will in pandemic time⁵⁶, and that this “old pattern” could even help to legiti-

⁴⁹ Langbein, *op. cit.*, note 2, p. 521.

⁵⁰ “The legislature which refuses to permit holographic wills forecloses the substantial compliance doctrine in cases of total failure of attestation. On the other hand, partial failure of attestation ought to be remediable under the substantial compliance doctrine. Attestation by two witnesses where the statute calls for three, or by one where it asks for two, is a less serious defect, because the execution of the will was witnessed and the omission goes to the quantity rather than the quality of the evidence. Other evidence of finality of intention and deliberate execution might then suffice to show that the missing witness was harmless to the statutory purpose”. Langbein, *op. cit.*, note 2, pp. 489, 490.

⁵¹ Crawford, *op. cit.*, note 11, p. 288.

⁵² Horton; Weisbord, *op. cit.*, note 35, p. 22.

⁵³ Załucki, M., *Preparation of Wills in Times of COVID-19 Pandemic – selected observations*, The Journal of Modern Science, vol. 22, issue 2, p. 5.

⁵⁴ „The formalities do not in fact provide adequate evidence that some theoretical purposes of wills formalities have been served.” Crawford, *op. cit.*, note 11, p. 271.

⁵⁵ *Developments in the law - What is an electronic Will?* (chapter four), Harvard Law Review, vol. 131, No. 6, 2018, p. 1793. [https://harvardlawreview.org/wp-content/uploads/2018/04/1790-1811_Online.pdf], Accessed 07 May 2021.

⁵⁶ Załucki, *op. cit.*, note 53, p. 5.

mate an electronic will⁵⁷. Substantial compliance doctrine means that a testator's last will could be enforced if it is in substantial compliance with the US Wills Act formalities, and if there is a clear evidence that testator had intention for certain document to represent his last will.⁵⁸ In comparison to the doctrine of substantial compliance, the harmless error doctrine is more focused on the decedent's intention, and not on Wills Act formalities. It is important that testator intended his last will to be effective, and on this ground and under statutory dispensing power, the court could validate the last will that does not meet necessary requirements pertaining to their form (i.e. not formally comply Wills Act).⁵⁹ The harmless error rule has been incorporated into Uniform Probate Code: a "document or writing is treated as (compliant with formalities) if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute [a new will or an adjustment to a previous will]."⁶⁰ The absence of formal compliance is justified as long as formal purposes of the will are satisfied.⁶¹ The same was the case in Australian law, where courts had excused noncompliance with testamentary formalities, in the cases where it was determined with the certainty that the testator 'intended the document to constitute his or her will' (when there was clear and convincing evidence of the testator's intent to have the document in question serve as her will).⁶² There are lots of cases in Australian judicial practice where a number of electronic wills had been sustained under the dispensing power of courts (last will recorded on DVD medium⁶³, last will typed and stored on a lap top⁶⁴ or tablet device⁶⁵, even those created and stored on mobile phone⁶⁶).

⁵⁷ *Ibid.*

⁵⁸ Under the substantial compliance doctrine, the court deems the defective instrument to be in compliance. Under a statutory dispensing power, the court validates the will even while acknowledging that the will did not comply., Langbein, *op. cit.*, note 36, p.6; On the other hand, harmless error allows a judge to enforce a writing that does not comply with the Wills Act if there is clear and convincing evidence that the testator intended it to be effective", Horton; Weisbord, *op. cit.*, note 35, pp. 24-25.

⁵⁹ *Ibid.*

⁶⁰ § 2-503 of Uniform Probate Code.

⁶¹ "The substantial compliance doctrine permits the proponent of the defective change of beneficiary designation to prove that in the circumstances of the particular case these formal purposes were served without formal compliance". Langbein, *op. cit.*, note 2, p. 528.

⁶² Langbein *op. cit.*, note 44, p. 3.

⁶³ Mellino v Wnuk & Ors [2013] QSC 336; [<https://archive.sclqld.org.au/qjudgment/2013/QSC13-336.pdf>], Accessed 15 February 2021.

⁶⁴ Alan Yazbek v Ghosn Yazbek & Anor [2012] NSWSC 594; [<https://www.caselaw.nsw.gov.au/decision/54a637ad3004de94513d9a45>], Accessed 19 February 2021.

⁶⁵ Re Estate of Javier Castro (Ohio Ct Com Pl, No 2013ES00140, 19 June 2013).

⁶⁶ JASON YU & KARTER YU;Re: Yu [2013] QSC 322; : [<https://www.sclqld.org.au/caselaw/QSC/2013/322>], Accessed 18 February 2021.

On the other hand, in some jurisdictions some statutory changes regarding testamentary formalities have been made, providing testamentary disposition to be more accessible through loosening formal requirements for last will preparation. This was the case with Australia⁶⁷, New Zealand,⁶⁸ Canada⁶⁹, where it was allowed during pandemic the testament to be sign and witnessed via audiovisual links, or as it is case in Canada concerning notarial will (and other notarial acts), where a notaries are authorized to act remotely. This has already been the case in some USA-a states (Arizona, Florida, Indiana, and Nevada), that had brought the electronic –will legislation before outbreak of Covid pandemic.⁷⁰

5. DIGITIZATION OF A LAW OF TESTAMENT

5.1. Digitized Testamentary Formalities and Holographic Testament in Continental Law

As mentioned above,⁷¹ the holographic testament is the most common private testamentary form in continental law. It has to be handwritten and signed declaration of a testator (in several legal systems date of making a will is of mandatory nature).⁷² These formal prerequisite for making a valid holographic will are based on the individual characteristics of the testator's handwriting that should confirm the authenticity of the last will. For these reasons, some authors are taking a view that holographic will as handwritten one, may not be created (written) by electronic means (computer, tablet etc.).⁷³

For example, in German legal doctrine it has been debated whether the last will written by stylus on tablet, meets the requirements of Section 2247 (1) of German Civil code in a term to be considered as handwritten and signed declaration

⁶⁷ COVID-19 Emergency Response Act 2020, Queensland (Current as at 4 December 2020), COVID-19 Emergency Response Act 2020 (legislation.qld.gov.au).

⁶⁸ Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020 (from 16th of April 2020); This order modifies requirements imposed by the Wills Act 2007; [<https://www.legislation.govt.nz/regulation/public/2020/0065/latest/whole.html>], Accessed 25 February 2021.

⁶⁹ Order 2020-010 of the Minister of Health and Social Services, as of 1 April 2020, [https://cdn-contentu.quebec.ca/cdn-contentu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_numero_2020-010-anglais.pdf?1585487531], Accessed 10 March 2021.

⁷⁰ Horton; Weisbord, *op. cit.*, note 35, fn. 8.

⁷¹ See *infra* 3.

⁷² Art. 688 (2) of Spanish Civil code.

⁷³ H. Brox, Grundprinzipien, Erbrecht, Köln-Berlin-München, 2004, p. 106.

of testator's last will?⁷⁴ Baumann believes that due to the numerous possibilities of technical misuse, a testament made on a computer should not be allowed, as long as the digital drawing up of a will does not meet security standards for determining authorship that fulfills a holographic will.⁷⁵ In order for these type of formal requirements to be subsumed under the Art. 2213, para. 1, subpara. 2 of German Civil code, certain changes of the existing regulation shall be made in order to prevent forgery of a last will, while accompanying rules relating to the storage of digital wills shall be provided.

The opposite view has been taken by Hergenröder⁷⁶ who considers that it is possible to make a holographic will using a stylus and tablet, if there has been an assurance that any subsequent fraudulent abuse of manifested last will has been excluded. The most open to this form of testation is Grziwotz who considers as follows: "If there is no doubt about the handwritten recording of the last will and if the flat-screen computer is considered as 'material' available for writing, it is therefore questionable whether, with regard to the constitutionally protected testamentary freedom and the further development of the technical possibilities of the creation of written documents, an analogy to handwriting can still be denied"⁷⁷

According to Serbian Inheritance Act, holographic testament can be created by a literate person, who has to write and sign the last will with his own hand.⁷⁸ Such a legal formulation is imprecise and introduces vagueness in terms of technical means that can be used to make a holographic will. A literal interpretation of this legal provision leads to a conclusion that the testator must write the will in his own hand, but that he remains free to choose the technique and means of writing, because they are irrelevant from the point of view of testamentary form.⁷⁹ For a last will to be valid, it is only important that it is written by the testator person-

⁷⁴ "In previous literature, this is largely understood as a question, the answer to which is decided according to whether a certain degree of technical protection against forgery can be guaranteed and thus the formal purposes of Section 2247 BGB can be preserved (sub I). This understanding, however, ignores the system of legal formal requirements, which - particularly due to the recent history of legislation - generally forbids to understand digital documents as handwritten", Scholz, P., *Digitales Testieren. Zur Verwendung digitaler Technologien beim eigenhändigen und Nottestament de lege lata et ferenda*. Archiv für die civilistische Praxis, 219, 2019, p. 104.

⁷⁵ See Art. 26 of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, pp. 73-114), [<https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32014R0910&from=HR>], Accessed 3 April 2020.

⁷⁶ Baumann, W., in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 2018, § 2247, Rn. 35.

⁷⁷ Scholz, *op. cit.*, note 74, p. 104.

⁷⁸ Art. 84 Inheritance Act of Republic of Serbia.

⁷⁹ Đurđić-Milošević, *op. cit.*, note 3, p. 151.

ally, in such a way that the authenticity of the manuscript can be established. It hasn't been explicitly stated in the text of the law whether written letters have to be shaped by testator's own hands and whether pre-printed letters are forbidden. Hence arises that the possibility of writing a will using various digital means of writing (computer, tablet, etc.) is not excluded by law, and that any way of composing text of the last will is allowed, as long as the testator personally composes the text, using his hands.⁸⁰ Since interpretation of this provision leads to a vagueness it should be rephrased *de lege ferenda*, and clarify that electronic means can be used for will creation. In this particular form of testament, handwritten signature serves the function of authentication of the last will.⁸¹ This form of will would be a kind of transition between a traditional holographic will, on one side, and electronic testament, on the other, and could be considered as an introduction into a "new era" of testamentary law.

As far as alographic (witnessed) will is concerned, the main formal elements are: written declaration of testator's last will; document recognition; and presence of testamentary witnesses.⁸² Alographic testament could be written either by hand, or by any electronic means (computer, tablet etc), by the testator himself, or a third person (usually a lawyer).⁸³ In some legal systems, such as Hungarian, this type of will has been considered as a substitute for notarial will, since the procedure of execution is simpler, more economic, and the content of the testament is not revealed to testamentary witnesses (regarding its private nature).⁸⁴ The formal flexibility of this testamentary form speaks in favor of extended testamentary freedom, and recognition of the remote witnessing would definitely contribute to the easier accessibility, with beneficial effect in pandemic time.

5.2. Concepts of Electronic Will

An interesting classification of electronic will has been made in American electronic will related legal doctrine, although probate courts are still reluctant as to the recognition of "electronic wills". There are three types of electronic wills: offline electronic will; online electronic will; qualified custodian electronic will. Each of this form of electronic will could be observed through the prism of the formal function they are able to serve, in order to justify or not each of electronic wills.

⁸⁰ *Ibid.*

⁸¹ See Reid *et al.*, *op. cit.*, note 43, pp. 443, 444.

⁸² The number of required witnesses varies in legal systems: in Serbian law two testamentary witnesses are required (art. 85 of Inheritance Act of Serbia), as it is the case in Hungarian law (see R. Wékás, *op. cit.* 263; in Austrian law, three testamentary witnesses are requested (see Par. 595 of Austrian Civil Code).

⁸³ See Judgement of Supreme Court of Serbia, Rev. 2413/2004, 20th October, 2004.

⁸⁴ Wékás, *op. cit.*, note 13, p. 264.

Offline electronic will is considered to be „the modern version of holographic wills”⁸⁵. It is a will typed on the electronic device and signed by testator by typing her/his name and saved on the hard drive. The main functional difficulties with this form is possible fraudulent actions that might be taken, with regard to the possibility that someone else with access to the testator’s computer could simply create and hide a document purporting to be a last will and testament.⁸⁶ Another problem that arises with this offline testament relates to the possibility of its permanent storage in electronic format since, through the decades after creation of the testament and its storage on the CD (or other medium), the CD could become obsolete and out of use, and the content lost. Taking into consideration all of these specifics, it is under a doubt weather this offline electronic will could satisfy the evidentiary, cautionary, protective and channeling function it is supposed to serve. For these purposes “metadata” protection (i.e. data about data) associated with an electronic document could be useful, since they could offer information on when testament was created, whether it has been altered and who can access it. However, it is disputable which level of security in the sense of last will authenticity could be provided, due to the insufficient technological protection, but it cannot be denied that it is though still some evidence on will making process, in comparison to holographic will.⁸⁷

As far as online electronic will is concerned, it is a will that testator type into some storage of communication medium, likely expecting the will to be available when she later needs it.⁸⁸ The problem that might occur with this type of electronic will is of evidentiary nature: how to provide availability of the evidence relating to the wills authenticity, considering regulation on the personal data management and storage of this information on internet, as well as the terms and conditions of the agreement between testator and service provider?⁸⁹ Taking into consideration all specifics of on-line electronic testament, it is obvious that cautionary and protective purposes of testamentary form, as well as channeling function are less fulfilled by online electronic will, than by offline one.⁹⁰

Qualified custodian electronic wills are those wills created by a company which act as a “qualified custodian” of a testator entitled to create, execute and store the

⁸⁵ Developments in the law- What is an Electronic Will?, *op. cit.*, note 11, p. 1796.

⁸⁶ *Ibid.*

⁸⁷ There are some decisions where on the basis of meta-data evidence, the court admitted offline testament to probate. Developments in the law- What is an electronic Will?, *op.cit.*, note 11, pp. 1800-1805.

⁸⁸ *Ibid.* p. 1802.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* p. 1805.

testators will in more simplified way. The company would streamline will creation and execution (by providing witnesses or notary services via webcam) and also guarantee to store the testator's will in an accessible format for a certain period into the future.⁹¹

The conclusion that arises from these considerations is that the question of ensuring the testament authenticity by electronic will is closely related to data protection policy, and should be considered only in interdependence with the data protection regulation.⁹² Therefore, the issue of the digitization of testamentary law opens a broader topic of digital inheritance (“successione digitale”) and *post mortem* data protection.⁹³ Finally, it is important not only to guaranty testamentary freedom, but also to extend through new testamentary forms, and new tools for estate planning, as well.⁹⁴

5.3. Statutory Electronic Will

Statutory electronic will is defined a last will “written, created and stored in electronic record that contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator.”⁹⁵ It is interesting to consider the meaning of a term “authentication characteristic”. This is characteristic unique to that person that is capable of measurement as a biological aspect of a physical act performed by that person (fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature or other commercially reasonable authentication using a unique characteristic of the person.).⁹⁶

⁹¹ *Ibid.*

⁹² See Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), [<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0058&from=EN>], Accessed 03 April 2021.

⁹³ According to the case law of European Court of Human Rights, Article 8 grants protection only to the living, see judgments: *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X; *Estate of Kresten Filtenborg Mortensen v. Denmark* (dec.), no. 1338/03, ECHR 2006-V; *Koch v. Germany* no. 497/09, ECHR 19/07/2012.

⁹⁴ Patti F.P.; Bartolini, F., *Digital Inheritance and Post Mortem Data Protection: The Italian Reform*, European Review of Private Law, No 5, 2019, Kluwer Law International BV, The Netherlands, pp. 1185,1186.

⁹⁵ Nevada revised Statue (2017)-Chapter 133 –Wills NRS 133.085-Electronic Will- [<https://www.leg.state.nv.us/NRS/NRS-133.html#NRS133Sec085>], Accessed 22 March 2021.

⁹⁶ For the statutory regulation of electronic will in six common law jurisdiction, see Anand, N.; Arora, D., *Where there is will, there is no way: COVID-19 and a case for the recognition of E-wills in India and other Common Law jurisdictions*, ILSA Journal of International & Comparative Law, Vol. 27., 2020, pp. 78-94.

There are also some special rules proscribed concerning the will making process. The last will is supposed to be created and stored in such a manner that only one authoritative copy exists, and other precautionary measures must be taken to prevent the misuse of the will.⁹⁷ Therefore the argument that e-will disadvantage would be the lack of safeguard against future alteration by another person who is not a testator,⁹⁸ are by these statutory provisions refuted. Since electronic will imply new formal categories such as “digitized signature”, “authoritative copy”, “authentication characteristic”, this means that a new approach towards testamentary formalities and their comprehension has to be taken. New terminology also arises from remote witnessing, such as a term “electronic presence”. This means “the relationship of two or more individuals in different locations communicating by means of audio-video communications (as if the individuals were physically present in the same location). The digitization of testamentary formalities would undoubtedly facilitate the realization of testamentary freedom, in so many levels. It would definitely make it easier for the testator to exercise the last will during pandemic or other isolations.

6. CONCLUSION

The purpose of freedom of testation is to enable each testamentary capable person to manifest his last will in whatever circumstances he finds himself, and plurality of testamentary forms should serve this purpose. However, Covid -19 pandemic broth into question achievability of testamentary freedom in the specific pandemic circumstances, thus traditional comprehension of formalism and formalities in testamentary law.

Formalism in testamentary law arose as a result of the need to protect the free will of the testator, but at the same time it sets some boundaries, when it comes to exercising of subjective (personal) civil rights, such as the right of disposition of property *mortis causa*.⁹⁹ On these grounds, formal restrictions of testamentary freedom are determined by the basic legal and political goals for which fulfillment they were established, and these are protective, evidentiary and cautionary functions of the form. Only within this framework, it is possible to find justification for limitation of testamentary freedom. At the same time, one should have in

⁹⁷ “The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will; Any attempted alteration of the authoritative copy is readily identifiable and each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy. Nevada revised Statute (2017)-Chapter 133 –Wills NRS 133.085-Electronic Will.

⁹⁸ Horton, D, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, Boston Collage Law Review, Vol. 58, Issue 2, 2017, pp. 539, 573.

⁹⁹ Stojanović, D. , *Uvod u građansko pravo*, Beograd, 2004, p. 10.

mind that the scope of testamentary freedom has been determined affirmatively, by the plurality of testamentary forms available for its manifestation. Therefore, the scope of freedom of testation should be observed from the perspective of this ambivalent effect of testamentary formalities.

In the light of new challenges of modern society, more comprehensive and flexible approach towards testamentary formalities has to be taken. For that purpose, some jurisdictions, mostly of common law tradition, took some steps towards loosening formalities in the law of testament, on the ground of harmless theory and dispensing power; in some legal systems, temporary looseness of the formalities had been taken, that only apply during pandemic (for example, permiton to use electronic will for estate plans only under emergency conditions); in some other legal systems have taken a concrete measures through statutory reform of law of testament.

In comparison to common law, which is more flexible and adaptable, continental legal systems are more rigid, sticking firmly to a traditional notion of testamentary form and its elements. Regardless of that fact, ongoing tendency in continental testamentary law is mitigation (relaxing) of testamentary formalities, as a result of social, economic, technological development. This pandemic situation has shown all weak points of testamentary formalities, emphasizing the importance of their accessibility (since it is often difficult to comply with traditional testamentary formalities), in order to provide all formal functions they are supposed to serve. From this perspective, some of the testamentary formalities in order to be more assessable in the specific circumstances (such a pandemic), might be loosened at some levels. On the other hand, liberalization of testamentary formalities should not jeopardize the legal certainty regarding testament formation. Therefore, the main assignment of a legal doctrine and practitioners is to find (establish) a balance between these important legal principles.

The relevance of some traditional formal elements is undisputable. Testator's signature is of crucial importance for proving testament's authenticity. Relating to the question of digitization of testamentary law, there are concerns weather electronic signature would be adequate substitute for handwritten signature, in the term of functionality? Generally speaking, it should be assumed that the signature fulfills its purpose if, based on its characteristics, the testator can be identified and the authenticity of the testament itself can be confirmed. Electronic signing seems justifiable from the point of view of the basic characteristics of a signature and its purposefulness. Taking into consideration the technology of creating an electronic signature, its authentication function is indisputable. Even with much greater reliability, the authenticity of a written text can be confirmed than a handwritten signature on paper, and its affiliation with a signed person can be confirmed with

a high degree of certainty.¹⁰⁰ Thus, we are of the opinion that the same legal effect should be recognized to a qualified electronic signature, as it is the case with handwritten signature in testamentary law. It is up to the testator to choose which of the testamentary forms is the most suitable concerning his interests and the ability of comply with certain testamentary formalities.

As far as attestation is concerned, the presence of testamentary witnesses, as a formal element of testament, is justifiably from the prism of formal purposes, and its relevance should not be diminished, as it is a tendency in common law. Finally, there is no doubt that digitization of testamentary forms is ongoing process, and that the “remote witnessing” “electronic presence” “electronic signing”, as well as usage of a real-time audiovisual platform such as Zoom, Skype or Viber for the execution of last will, are about to become a „new normal”¹⁰¹, i.e. new formal.

For the persons with some disabilities who are incapable of making a private form of wills, notarial and other ordinary public testamentary forms are supposed to be available. In order to provide accessibility and compliance with will formalities, some changes have to be made, due to social restrictions and home stay orders. For the purpose, a remote witnessing has to be allowed by these forms, and even remote acting of notaries (or other public officers), in order to enable everyone to exercise the constitutionally guaranteed right of testation.

As far as privileged testamentary forms are concerned, it is undisputable that urgent legal reform has to be made. Some of the existing privileged testamentary forms have been overcome (for example, a military will), some other has to be introduced where needed (for example, the will in time of pandemic). This should be considered in the respect of certain specifics of each legal system. The most acceptable in pandemic and other extraordinary circumstances would be a privileged will with high level of flexibility, that could be adapted to the specific circumstances (for example, that a testator may opt for an oral form or the form of an allograph testament, that should be exercised before two testamentary witnesses).

Finally, solemnization of the last will has been provided for the purpose of strengthening the freedom of testation. However, legal solutions in terms of testamentary forms should correspond to the realities and practical needs of a human; otherwise, the freedom of testation has only a formal significance. It is up to the

¹⁰⁰ Art. 25 (2) of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, pp. 73-114), [<https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32014R0910&from=HR>], Accessed 3 April 2021.

¹⁰¹ Purser, K, *et al.*, *Wills Formalities Beyond Covid 19: An Australian-United States Perspective*; UNSW Law Journal Forum., No 5, 2020, p. 2.

legislator to establish a system of testamentary forms, which will correspond to these modern needs of society, and enable every person in the testamentary capacity to achieve (exercise) guaranteed freedom of testation on every occasion, even exceptional ones, such as a pandemic. Only with this attitude, formalism in law of testament would justify its purpose, and the freedom of testation would be fully realized.

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