CURRENT ISSUES
AUTHENTICATION AND VALIDATION OF WILLS

Peter H. Sand
Faculty of Law, Haile Sellassie I University

The power of free testamentary disposition implies, according to Sir Henry Sumner Maine, "the greatest latitude ever given in the history of the world to the volition or caprice of the individual."[1] A legislator who grants this power to the individual — as the Ethiopian Constitution does in Article 44[2] — must also guarantee that an individual's will can be preserved and ascertained after the death of its author. However, formal safeguards for the authenticity and clarity of wills not only serve the interests of the individual testator, or the interests of his heirs — they also set a standard of legal certainty reflecting the interests of the community at large.

I. Authentication of Wills: A Procedural Comparison

At the beginning there is a problem of legislative technique: In order to "authenticate" the will of an individual for legal purposes — a process compared by Ihering to the official coinage whereby a piece of metal is authenticated as legal currency[3] — certain formal procedures are prescribed by law, sometimes called the "procedural law of succession."[4] This does not imply that the forms prescribed must be part of the law of civil procedure; the legislator may decide to achieve his objective by substantive rules of civil law, or by a combination of procedural and substantive rules.[5]

(a) Civil Law

The *testamentum* is not a creation of Roman law — certain forms of testamentary disposition were recognized in many other legal systems, including early Ethiopian law[6] — but it was Roman jurisprudence which turned the will into one of the most refined instruments of individual volition or even "private law-making." While providing an optional public procedure of authentication, the so-called "public will,"[7] Roman law at the same time permitted the making of

1 H.S. Maine, *Village Communities in the East and West* (3rd ed., New York 1876), p.42.

2. "Everyone has the right, within the limits of the law, to own and dispose of property." This article would seem to cover dispositions *mortis causa*.

3 R. von Ihering, *Der Geist des römischen Rechts* ("The Spirit of Roman Law") (7th ed. Leipzig 1923), vol. 2, sec. 45, pp. 480 ff.; for an English translation see L. Fuller, *Basic Contract Law* (St. Paul, Minn., 1947), p. 300.

4 T. Kipp, *Erbrecht* ("Law of Succession") (12th ed. by H. Coing, Tübingen 1965), p. 139.

5 Significantly, the 1961 French draft civil code refers to the civil procedure code for certain parts of the law of succession; see *Avant-projet de code civil*, pt. 2, book 2. ("Des successions et des libéralités") (Paris 1962) pp. 189-91; see also (for Louisiana) L. Oppenheim, "Substance and Procedure: The Civil Code as Affected by the Code of Civil Procedure in Matters of Succession," *Tulane Law Review*, vol. 35 (1961), p. 475.

6 In the chronicle of King Malac Sagad, in the 16th century, there is the story of a chief who upon his death nominated the King as his heir; see F. Ostini, *Trattato di diritto consuetudinario dell'Eritrea* (Asmara 1956), p. 85.

7 The "public will" (*testamentum apud acta conditum*), which probably found its way into post-classical Roman law under Greek influence, was entered in the records of a court or other government authority, or consigned to the emperor (*testamentum principi oblatum*). Note that the so-called "public will" of the Ethiopian Civil Code (Arts. 881-83) may be either a "notarial will", or a mere private will attested by a certain number of witnesses. As distinct from holograph and oral wills, a public will does not "lapse" after a certain period of limitation (Arts. 902-03), a distinction made by Professor René David in order to encourage the use of "public wills"; see Ethiopian Codification Commission, Minutes of Meeting Held on January 13, 1958 (Document C. Civ. 70), p. 4.

"private wills," which were valid *ipso facto* and without any stamp of official approval, provided certain formalities (particularly, the presence of a certain number of witnesses[8]) were observed by the testator.

Modern civil law has retained these alternative ways of authentication. While further developing the institution of the "public will" (i.e., the will declared in court or in a notary's office) and while offering official authentication by means of an optional "certificate of heir" (*certificat d'hérédité, Erbschein*), it still recognizes the full legal validity of private wills made without participation of state authorities. Private documents are thus recognized as "pre-appointed evidence," to use Bentham's term,[9] provided they comply with certain rigid standards of form.

This system has obvious advantages and disadvantages. On the one hand, it greatly facilitates the execution of wills by private individuals, without professional assistance from lawyers and without official approval from courts. On the other hand, it offers no remedy for deficient wills: once a form requirement is not observed, the will is invalid *ab initio* — regardless of extraneous evidence as to the true intentions of the testator — and no court can "repair" it.

(b) Common Law

The Anglo-American law of wills is generally considered as less formal, leaving a greater degree of discretion to individual testators. What is usually overlooked, though, is the *probate* procedure, without which the beneficiaries under a will cannot establish their rights. This procedural method of authentication (which ordinarily requires special witness testimony in addition to the will itself) originated with the ecclesiastical courts in England, and originally was not required, nor even permitted, for wills concerning devises of land.[10] Since 1857, however, the English law has required all wills to be probated in the newly created "court of probate"[11] (also called "courts of ordinary," "surrogate's," "orphans'" or "prerogative courts" in some American states[12]). Not the private will, but the court-stamped probate copy, constitutes the recognized legal evidence of the right of succession. The formalities thus required are no less rigid than in the civil law, but they are sanctioned by procedural — rather than substantive — rules of authentication.

This system, too, has its advantages and disadvantages. On the one hand, it offers a remedy for deficient drafting of private wills, which in many cases can be "repaired" on probate with the help of other evidence. On the other hand, the lack of absolute form requirements and the considerable discretion left to probate

8 The making of an ordinary will under Roman law (C 6.23.21) required seven witnesses, a number which is also found in ancient Ethiopian law according to Ostini, work cited above at note 6. The post-classical holograph will (*testamentum per holographam scripturam*), which required no witnesses, was confined to the western part of the Roman Empire, from where it found its way into modern French law, and subsequently into the Ethiopian Civil Code (Art. 884).

9 *The Works of Jeremy Bentham* (J. Bowring ed., Edinburgh 1843), vol. 6, pp. 508-585. ("Rationale of Judicial Evidence," ch. IV).

10 T.A. Atkinson, *Handbook of the Law of Wills* (2d ed. St. Paul, Minn., 1953), p. 481.

11 20 & 21 Vict., c. 77, sec. 13.

12 L.M. Simes and P.E. Basye, "The Organization of the Probate Court in America," *Michigan L. Rev.*, vol. 42 (1943-44), p. 965; vol. 43 (1944-45), p. 113.

courts combine to increase uncertainty, burden the courts with non-contentious business, and turn the simple act of will-making into an "art" for legal experts and professional estate-planners.

(c) Mixed Systems

In the Canadian province of Quebec, the English and French law of wills has been combined in the Civil Code of 1866. While notarial or "authentic" wills (i.e. wills made in a notary's office, under rigid formalities) are valid *ipso facto*, holograph wills and "those made in the form derived from the laws of England" (i.e., in writing and in the presence of witnesses) must be probated (Quebec Civil Code, Art. 857). The probate procedure (*vérification*) was imported from England in 1774.[13] Since there are no special probate courts in Quebec, wills are probated by the ordinary civil courts.[14] Although there are certain differences as to the evidentiary effects of probate in Quebec,[15] it fulfills essentially the same purpose as in a common law country: on the one hand, it makes the right of succession dependent on formal court approval; on the other hand, the Code allows for subsequent "repair" of deficient private wills at a court's discretion.[16]

The Ethiopian Civil Code of 1960 follows the civil law system of authentication. An heir *may* obtain from the court a "certificate of heir" in order to have a will officially authenticated,[17] but neither the Civil Code nor the Code of Civil Procedure requires him to do so. In practice, however, courts in Addis Ababa appear to treat the certificate of heir as a general prerequisite at least for testate succession, thus following a quasi-probate procedure which originated in the years *before* the Civil Code was enacted.[18] Yet the right of testate succession under the Civil Code clearly does not depend on such subsequent judicial authentication, but on the will, and only on the will; consequently, lost or destroyed wills cannot be authenticated by other means of evidence, such as witnesses (Art. 897(2)). In this respect Ethiopian law differs sharply from Anglo-American and Quebec law.[19] While there is no need for an heir to obtain court approval of a will which complies with the formal requirements of the Civil Code, there is also no discretion for a court to "repair" and salvage a will which is deficient in form.

---

13 E. Fabre-Surveyer, "Un cas d'ingérence des lois anglaises dans notre Code Civil," *Rev. du Barreau*, vol. 13 (1953), p. 245.

14 41 Geo. III, c. 452 (1801).

15 Mignault v. Malo, (Eng. 1872), *Law Reports* (*Privy Council*), 4. A.C. 123, at 139; see L. Baudouin, *Le droit civil de la province de Québec* (Montreal 1953), p. 1151; J.G. Castel, *The Civil Law System of the Province of Quebec* (Toronto 1962), p. 101.

16 See particularly Article 862 Quebec Civil Code (probate of lost or destroyed wills by witness testimony), and G.S. Challies, "Conditions de validité du testament au Québec et en France," *Rev. du Barreau*, vol. 20 (1960), pp. 373, 385 (citing cases).

17 Art. 996; compare Art. 2353 German Civil Code, Art. 557 Russian Civil Code and Art. 1956 Greek Civil Code. The "certificate of heir" (which is available both for testate and for intestate succession) offers a higher degree of *bona fides* protection to third parties than the French *acte de notoriété* or the Swiss *attestation de la qualité d'héritier* (Art. 559 Swiss Civil Code). See C.H. Beecher, *Wills and Estates Under German Law: A Comparative Treatise of Civil and Common Law* (Berlin 1958), pp. 33-34; and P. Drakidis, "Des problèmes nés de l'application du certificat d'héritier," *Revue Internationale de Droit Comparé*, vol. 18 (1966), p. 593.

18 Succession cases are still kept in "Probate and Administration Files," and the third schedule attached to the Civil Procedure Code (1965), p. 42, contains a Form No. 20 entitled "Petition for Probate of Will and Order of Partition."

19 See note 16 above.

II. Validation of Deficient Wills: A Survey of Judicial Attitudes

Any legal system which establishes rigid form requirements is bound to encounter "hardship cases." As Ihering says,

> "It stands with formalism as with so many other arrangements — everyone feels its pinch, no one its benefits, because the latter are purely negative in nature, that is to say, consist in avoiding evil. A single case in which the disadvantages of form are presented in dramatic form to the public (as for example, when a testament is declared void for a defect in form or a suit is lost because of some formal neglect) causes more talk than the thousands of cases in which the course of events was a normal one, and form fulfilled its beneficial purpose."[20]

The Ethiopian case of *Avakian v. Avakian* is a good illustration of this problem, which confronted the judges of many other countries before: A public will made in the presence of three witnesses was held invalid by the High Court of Addis Ababa, because Civil Code Article 881 clearly requires four witnesses. The Supreme Imperial Court reversed the decision on the ground that, in spite of the formal defect, the indubitable intention of the testator was clear, and "It is more the intention of the testator than the form of the will that is the real aim of the legislator"[21].

As McDougal and Haber put it, the issue is one of "individual volition vs. community control."[22] Should the law always honour the wishes of individual testators — however deficiently expressed — or are there legitimate interests of the community at large, demanding strict and general compliance with standards of form?

(a) *Benigna Interpretatio*

Quite early in the history of the law of wills we notice a tendency of judges towards liberal interpretation. Whereas in classical Roman law wills had to be interpreted strictly in conformity with the objective meaning of their wording,[23] the influence of Greek rhetoric theory led to a gradual recognition of "subjective" interpretation relying mainly on the presumed intentions of the testator. In the "Causa Curiana," a famous succession case decided during Cicero's times, the Roman Centumviral Court followed the subjective theory — against the opinion pleaded by one of the best-known jurists of the time, Q. Mucius Scaevola.

In post-classical Roman law the principle of *benigna interpretatio* or *favor testamenti* gained general recognition, establishing the true intention of the testator as the principal guideline for interpretation.[24] Medieval canon law had further reason to interpret wills liberally (in order to facilitate donations *mortis causa*

20 Ihering, work cited above at note 3.

21 *Chake Avakian v. Artim Avakian*, (Sup. Imp. Ct., 1963, Civil Appeal 1114/55), *J.Eth.L.*, vol. 1, (1964) p. 26; for the High Court decision see *Estate of Setrak Avakian* (1963, Probate and Administration Case 107/55), *J. Eth. L.*, vol. I, (1964), p. 32.

22 M.S. McDougal and D. Haber, *Property, Wealth, Land: Allocation, Planning and Development* (Charlottesville, Va., 1948), pp. 246-49.

23 *"Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio"* (D 32.25.1).

24 *"In testamentis plenius voluntates testantium interpretamur"* (D 50.17.12). *"Cum in testamento ambigue aut etiam perperam scriptum est, benigne interpretari et secundum id quod credibile est cogitatum, credendum est"* (D 34.5.24). See also D 50.17.192 and D 28.4.3.

made for the benefit of the church), resulting in the maxim "*veritas praevalet solemnitati*", i.e., truth is more important than solemnity of form. The subjective theory of interpretation thus found its way into civil law codifications, such as the civil codes of Germany (Art. 2084) and Ethiopia (Art. 910(1)).

Nor was this trend limited to civil codes. It found expression in cases decided by courts in both civil law and common law countries, as the following examples may show:

— "There is one rule of construction ... viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce — that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule."

(*In re Harrison*, English Court of Appeal, 1885)[25]

— "It is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless."

(*In re Gluckman's Will*, New Jersey Court of Errors and Appeals, 1917)[26]

— "The form requirements [of a public will] have not been made for their own sake, but in order to secure the last will of the deceased. They must not, therefore, become traps; the intention of the testator, provided it is somehow compatible with the content of the form requirements, must be assured of recognition."

(Appellate Decision of the Berlin *Kammergericht*, October 1, 1936)[27]

"Considérant qu'il incombe aux tribunaux d'interpréter libéralement les dispositions légales concernant la forme des testaments, en vue de respecter et de donner effet aux dernières volontés évidentes du testateur."

(*Larose v. Eidt*, Supreme Court of Canada, 1945)[28]

These decisions characteristically reflect judicial attitudes: First, the judges' concern with the equitable decision of individual cases, even in spite of a general rule; second, their belief that a will always is a better way to settle a succession than the schematic rules of intestacy; third, the tendency to "validate" a legal transaction wherever possible.

Lord Atkin once made the revealing statement: "I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills may be considerably diminished."[29] The traumatic judicial maxim never to frustrate a dead man's wishes has given the

25 *Chancery Div.*, vol. 30, p. 390, *L.J. Chancery*, vol. 55, p. 799, *L. Times*, vol. 53, p. 799 (per Lord Esher, M.R.)
26 *New Jersey Equity*, vol. 87, p. 638, 641, *Atlantic Rep.*, vol. 101, p. 295, 296.
27 *J.F.G.*, vol. 14, p. 165, 167.
28 *Sup. Ct. Reps.* (1945), p. 276 (per Duranleau, J.).
29 In Perrin v. Morgan (Eng. 1943), A.C. 399, 415.

law of wills its distinctly "individualistic character."[30] The question is whether such a "subjective" approach adequately takes into account the general interests of the community.

(b) *Limits of Judicial Discretion*

Excessive concern with "equitable" decisions inevitably leads to casuistic interpretation, with its concomitant "erosion effect" on general rules of law. By interpreting form provisions liberally, a judge undermines the certainty of the original standard without substituting a better one[31] — thus neglecting the omnipresent "social interest" in the security of legal transactions, as formulated by Cardozo: "The finality of the rule is in itself a jural end."[32] If the judicial attitude toward compliance with form is too lenient, testators will be encouraged to take a chance with the hope that an indulgent judge will uphold their will in spite of its defects. As Chafee illustrated, "on the same principle, if trains habitually left late, more people would miss trains than under a system of rigid punctuality."[33] The predictable result of a general judicial discretion to repair would be an increase in the incidence of litigation.[34]

The liberal principle of *benigna interpretatio* in Roman law did not extend to the execution of wills, i.e., their external formalism (as opposed to their internal content): The violation of external requirements of form invalidated the whole will, even though the testator's intention which was directed to a will having a specific content was certain.[35] Similarly, courts of common law countries have held that

> "A will must be executed in accordance with the statutory requirements or it is entirely void. Courts cannot supply defects, nor can they hold statutory requirements to be mere formalities which may be waived. The rule that the intention must govern, which rule applies to the interpretation of wills, does not apply to their execution."[36]

There appears to be general agreement at least with respect to one principle: Even the most "liberal" judicial interpretation cannot depart from clear legislative provisions. Cicero's classical statement to this effect — "*Cum scriptum est aperte tum judicem legem parere, non interpretare legi oportet*"[37] — has been followed by both the civil law and the common law.[38] Even those continental jurists who advocated a maximum of judicial discretion within the framework of the codes,

30 A.W. Scott, "Control of Property by the Dead," *University of Pennsylvania L. Rev.*, vol. 65 (1917), p. 656.

31 See F. von Hippel, *Formalismus und Rechtsdogmatik* ("*Formalism and Legal Dogmatics*") (Berlin 1935), where the casuistic interpretation of wills by German courts is analyzed. Similar Swiss cases are cited in P. Tuor, *Le code civil suisse* (2d ed. of the French transl. by H. Deschenaux, Zürich 1950), pp. 335 (n. 23) and 337 (n. 25).

32 B. Cardozo, *The Paradoxes of Legal Science* (New York 1928), p. 67; see also Ihering, work cited above at note 3.

33 Z. Chafee, "Acceleration Provisions in Time Paper," *Harvard L. Rev.*, vol. 32 (1919), p. 750.

34 R.W. Power, "Wills: A Primer of Interpretation and Construction," *Iowa L. Rev.*, vol. 51 (1965), p. 104.

35 M. Kaser, *Roman Private Law* (3d ed., Hamburg 1964, English transl. by R. Dannenbring, Durban 1965), p. 294.

36 In re Taylor's Estate (Ross v. Taylor), (Sup. Ct., South Dakota, 1917), *South Dakota Reps.*, vol. 39, p. 608, *North Western Rep.* vol. 165, p. 1079.

37 Cicero, *De Inventione*, Book II, 12,13.

38 M. Radin, "A Short Way with Statutes," *Harvard L. Rev.*, vol. 56 (1942), p. 403, mentions one medieval English exception: Egerton's discourse on "Construction de Statute Conter les Parolls."

such as Gény in France and the "free law" movement in Germany, never supported interpretation *contra legem*.[39] Although the Ethiopian Civil Code, regrettably, does not contain rules on statutory interpretation,[40] we may legitimately draw an analogy from Article 910(2) (concerning the interpretation of wills) to the interpretation of the Code itself: Where the terms of the legislation are clear, they may not be departed from to seek by means of interpretation the true intention of the legislator. This brings us close to the famous maxim formulated in the French *Project of the Year VIII*: *"Quand une loi est claire, il ne faut point en éluder la lettre sous prétexte d'en respecter l'esprit."*[41]

It is one thing for a judge to fill gaps in a code by progressive interpretation — it is another thing to disregard or discard clear code provisions. Article 881 of the Ethiopian Civil Code is clear: Where four witnesses are required for the making of a will, three just are not enough.[42] And a judge is under a constitutional duty to follow the law.[43] By departing from a clear code provision he actually infringes on the prerogatives of the legislator.

Conclusion

It has been suggested by a learned commentator that the Supreme Court's decision in *Avakian v. Avakian* "should rank among those which would ease the contact between modern legislation and an unsophisticated society," and that the flexibility thus introduced "could be the best way of overcoming the difficulties in the introduction of modern codes into underdeveloped countries."[44] I respectfully take exception to this view. There is at least one warning foreign example where such a "flexible" judicial approach ultimately led to total failure: the Chinese Civil Code of 1929-1931, which was based on modern European models and rated as a most successful codification,[45] but was applied by the courts only so far as it did not hurt their traditional sense of equity.[46] The result was that in practice judges continued to follow Confucian equity concepts instead of the written code.

39 See F. Gény, *Méthode d'interprétation et sources en droit privé positif* (2nd ed., Paris 1954), vol. 1, pp. 300 ff. (Eng. transl. by Louisiana State Law Institute, 1963, pp. 206 ff.); and H. Kantorowicz, *Rechtswissenschaft und Soziologie* (Karlsruhe 1962), pp. 3-4 ("Die *Contra Legem* Fabel").

40 Title XXI (The Application of Laws) proposed by Professor René David (Document C.Civ. 86, of February 15, 1958) was not adopted by the Ethiopian legislature.

41 In Fenet, *Recueil complet des travaux préparatoires du code civil* (Paris 1827); see M. Planiol & G. Ripert, *Treatise on the Civil Law* (12th ed. Paris 1939, English transl. by Louisiana State Law Institute, 1959), vol. 1, pt. 1, p. 159.

42 This rule is no more rigid than that of chapter 41, section 1, of the *Fetha Negast*: "If possible, [the witnesses] should be seven or five in number; if not, three or two witnesses will suffice." According to the Supreme Imperial Court's interpretation in *Estate of Beyenech Aba Nebro* (1964, Civil Appeal 227/56), *J.Eth.L.*, vol. 2 (1965), p. 247, this means that "no less than five witnesses were required by our customary law, *unless the times were such that one could not gather* that many witnesses" (emphasis supplied). There is no indication in the facts of the *Avakian* case (supra, note 21) that the will was made under such emergency conditions.

43 See Revised Constitution of Ethiopia (1955), articles 108 and 110.

44 J. Vanderlinden, "Civil Law and Common Law Influences on the Developing Law of Ethiopia," *Buffalo Law Review*, vol. 16 (1966), pp. 264, 265.

45 See R. Pound, "Comparative Law and History as Bases for Chinese Law," *Harvard Law Review*, vol. 61 (1948), p. 749; R. Pound, "The Chinese Civil Code in Action," *Tulane Law Review*, vol. 29 (1955), p. 277.

46 See R. David, *Les Grands Systèmes de Droit Contemporains* (Paris 1964), p. 527.

which therefore never took a real hold in the conscience of the people and was readily abandoned after the Communist take-over.[47]

There may well be a temptation for Ethiopian judges to regard the Civil Code as an utopian "ideal law" to which, as to the *Fetha Negast*, one ought to aspire, but which cannot always be followed in practice.[48] However, "a modern Code is not destined to remain indefinitely in an ideal sphere."[49] If Ethiopian citizens are expected to conform with rules governing the authentication of wills, Ethiopian judges must be expected to enforce them, too — or else they will neglect what Professor Fuller has called "the most complex of all the desiderata that make up the internal morality of the law: congruence between official action and the law."[50]

47 David, work cited above, p. 530; cf. Wang Tze-chièn, "Die Aufnahme des europäischen Rechts in China" (The Reception of European Law in China), *Archiv für die Civilistische Praxis*, vol. 166 (1965), p. 351.

48 According to R. David, "Le code civil éthiopien de 1960," Rabels Zeitschrift, vol. 26 (1961), p. 668, the *Fetha Negast* represents "scarcely more than the ideal one ought to follow if one were perfectly virtuous — but then who is?" (translation supplied).

49 G. Krzeczunowicz, "The Ethiopian Civil Code: Its Usefulness. Relation to Custom and Applicability," *Journal of African Law*, vol. 7 (1963), p. 176.

50 L. Fuller, *The Morality of Law* (New Haven 1964), p. 81.