

Ethical Wills – a Continental Law Perspective

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Abstract

Ethical wills are testaments, or planning instruments *mortis causa* alike, that contain provisions regarding the deceased's (non-economic) values rather than his (economic) valuables. The authors define and analyse the substance and form of ethical wills from a comparative Continental law perspective, drawing on Belgian, Dutch, French and German law. The focus primarily is on charges or conditions in restraint or constraint of (non-) denominational or family choices by testamentary beneficiaries; and in this context it is contended that both the doctrine of public policy ("*ordre public*") and the horizontal application of the ECHR extensively restrict testamentary freedom. Nevertheless, the analogous application of estate planning techniques increasingly allows benevolent testators to plan their ethical legacy.

Key words

Ethical wills; personality rights; estate planning; public policy; human rights; testamentary freedom

Resumen

Los testamentos éticos son testamentos, similares a instrumentos de planificación *mortis causa*, que contienen disposiciones relativas a los valores (no económicos) del difunto, en lugar de sus objetos de valor (económico). Los autores definen y analizan el contenido y la forma de los testamentos éticos desde una perspectiva comparativa de derecho continental, basada en la legislación belga, holandesa, francesa y alemana. Se centra principalmente en los cargos o las condiciones de restricción o limitación de las opciones (a)confesionales o familiares de los herederos; y en este contexto se afirma que tanto la doctrina de política pública ("*ordre public*") como la aplicación horizontal del Tribunal Europeo de Derechos

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Humanos, restringen ampliamente la libertad testamentaria. Sin embargo, la aplicación análoga de técnicas de planificación y gestión patrimonial y sucesoria, permite cada vez más a los testadores de últimas voluntades planificar su legado ético.

Palabras clave

Testamentos éticos; derechos de personalidad; planificación y gestión patrimonial y sucesoria; políticas públicas; derechos humanos; libertad testamentaria

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1. Definition and topic breakdown

In its wording, the concept “ethical will” concerns the *subject-matter* of a testament, or comparable planning instrument *mortis causa*. It does not – as one might expect – refer to one’s opinion or claim about a testator’s will as containing right and good dispositions. The term ethical will thus refers to any planning instrument containing the deceased’s last will regarding his *values* rather than his *valuables* (Baines 2006, Swennen 2011), even if the provisions of such instrument might be considered ethically objectionable (or even contrary to public policy (“*ordre public*”) or human rights). For the sake of brevity, we use the term ethical will for such instruments. Our perspective is not to encourage or discourage ethical will writing; we take an ethically neutral position. Our aim is to survey the law and to point at the legal pitfalls of ethical will writing.

Inheritance law in Continental law systems concerns the transfer *mortis causa* of an estate to appointed or default heirs. Civil Codes thereby often explicitly limit the scope of inheritance law to one’s *economic* rights and duties (i.e. the transfer of *estate* or *valuables*).¹

Specific (inheritance) provisions only exceptionally concern the transfer of *non-economic* rights, such as the deceased’s moral rights in copyright law² or the right to access to his or her medical file³. In this respect, the Continental Civil Codes still mirror the conception of the 18th C. Nation States as secular States, from whose State law are excluded all (non-)denominational matters as “non-law” (Carbonnier 2013), which are left to the competence of Civil Society only and legal intervention is considered undesirable.

Belonging to this realm of non-law, ethical wills are thus usually presented as documents with no legal relevance (Baines 2006). They are defined as any document written by the deceased and containing his personal beliefs, values, emotions, wishes and messages, based on his life-lessons.

Ethical wills thus are a way of transcending one generation of a family, by bridging past to future generations (Frank 2003, Wheeler and Farnsworth 2000, Szydlak 2011). The tradition of certain family values may thus crystallise into a family *heritage*. So defined, ethical wills are in line with a long-standing Jewish tradition (Goldin 2006).

The planning of one’s *ethical* legacy – as apposed to one’s estate – has nevertheless attracted growing legal scholarly interest during the last decades (Baines 2006, Swennen and Barbaix 2013). Both liberalism and the emergence of the post-secular society (Habermas 2008) seem to pave the way (again) for the *legal* recognition of one’s non-patrimonial, ethical legacy.

This is *first* witnessed by the increasing importance of self-determination in personal matters, through the attribution of subjective rights (Swennen 2011). Many provisions thus allow the advance planning of end-of-life decisions, in particular in view of one’s convictions, e.g. the choice between palliative sedation and euthanasia under Belgian law (Swennen 2014). We will not further elaborate on so-called “living wills” in this article.

Second, the transfer *mortis causa* of values becomes increasingly legally relevant and earlier legal debates seem to re-emerge. The delineation of power between the State and the Civil Society indeed was already questioned in the late 19th C.; in 1899, the Belgian Supreme Court decided that the choice of the (non-)denominational character for one’s funeral in a so-called philosophical

¹ Article 711 Belgian Civil Code; article 4:182 Dutch Civil Code; article 711 French Civil Code; § 1922 German Civil Code.

² E.g. article 1-2 & art. 7 Belgian Copyright Act of 30 June 1994.

³ E.g. article 9 Belgian Patient Right Act of 22 August 2002.

testament amounted to a subjective right, enforceable before State courts (*Pas.* 1899, I, 321, advice prosecutor-general Mesdach de ter Kiele.).

Ethical wills have thus attracted the attention of legal (estate planning) professionals during the last decades. The planning of the ethical heritage seems to gain importance over estate planning concerning the valuables (Whiting 2001, Frank 2003).

In this paper, we will research how and to what extent the planning of one's values, as non-patrimonial legacy, may be *legally binding* rather than non-committal towards his heirs *anno* 2013. We will first address the possible content of ethical wills, with a focus on legal restrictions based on public policy or human rights protection. We then elaborate the forms of ethical wills and subsequently address the enforcement of ethical wills.

Contrary to some Anglo-Saxon systems (Jaconelli 2012), wills are private documents in Continental law systems. Even if there exists an official register for testaments in some countries,⁴ the content of testaments always remains private between the heirs and the notary public. Testaments in particular need not be presented to a court in order to enforce them (in other words they do not require 'probate' to be granted)⁵. In the absence of sociological research into the occurrence of ethical wills in Continental law systems, our research into the Belgian, Dutch, French and German systems is based on statutory documents, some published case law⁶ and doctrine (for alternative methodologies see Monk 2013 and Hafner 2010).

Our legal focus does not withstand the "non-legal" importance of ethical documents as moral recommendations and as catalysts for bereavement (Pagano 2006).

2. *Negotium*: Substance of Ethical Wills

2.1. Introduction

Values are intangible and their transmission cannot be planned *as such*. Ethical wills may therefore *indirectly* concern the transmission of values in four ways:

- by explaining the distribution of tangibles;
- by allocating certain tangibles that may be considered to symbolise values;
- by exercising one's *post mortem* personality rights; and
- by restraining or constraining beneficiaries' behaviour in the context of charges and conditions to allocation of tangibles.

With regard to the latter, attention must be had to the enforceability of the charge or condition. It must concern measurable behaviour by a beneficiary, rather than immeasurable values of a beneficiary.

An example of the latter practice is a mother who wished that one of her daughters would abandon her Scientologist *beliefs*. A condition for a testamentary restriction to end was that the daughter would not only terminate her membership of the *Church of Scientology*, but also, "*become detached externally and internally from any sect*" (OLG Stuttgart, *NJW* 1988, 2615). Internal detachment of course can hardly be measured.

It is more effective with a view of enforcing a will to impose behaviour that may witness religious beliefs rather than to impose such belief as such. The Founder of a Private Foundation under Belgian law therefore tried to keep the remembrance to his deceased wife alive by granting the children and some other persons a free

⁴ Belgium, France and The Netherlands, not Germany.

⁵ See however art. 976 Belgian Civil Code, in case of an international will or a holographic will.

⁶ Not all case law is published in the researched legal systems.

faculty to spend vacation time in a seaside apartment (also see Lee 2006), on the behavioural condition of

“accepting the engagement of:

- visiting Virginia’s grave [follows the address], and placing a small floral grave arrangement ;
- visiting Mary’s Chapel in the St Mary’s Church and burn a candle there, after having contemplated some minutes;
- visiting the Great War Museum in Ypres, or the Yser Tower, or Tyne Cot Cemetery in Passendaele, or La Coupole in St Omer; and the War Museum in Péronne for those guests staying more than two weeks” (by-laws of former private foundation “Virginia’s Lodge” [renamed to “Theo’s Refuge”] in the foundations database on www.just.fgov.be).

Only the condition of contemplation seems unverifiable and it would have been advisable to impose “spending” some minutes inside the Chapel instead of “contemplating”.

2.2. Explanatory preambles

The legally least intense form of ethical legacy planning is to add a preamble to an estate-planning instrument. Such preambles are recommendable for two reasons.

On the one hand, explicating one’s values in a document may be leverage for holistic estate planning. Knowing the client’s values will help the professional counsel to better understand his wishes vis-à-vis his valuables so to be able to deliver tailor made instruments (Wheeler and Farnsworth 2000, Frank 2003, Alexander 2005). Evidently, the professional may – or should – also have knowledge about his client’s values otherwise than through such document.

More importantly on the other hand, the preamble will serve as an explanatory tool for certain gifts and exclusions (Monk 2013). This is relevant with regard to the assessment of the validity of certain clauses. The resolute condition of re-marriage to a bequest from a late spouse to the surviving spouse may thus be upheld in case the objective of the bequest was only to provide maintenance awaiting a new marriage rather than to impose widowhood (see 2.5.4 post).

It may also help (disappointed) heirs to understand and accept a certain division of property, if their predecessor explains the emotions and affections upon which the division is based (Bernheim and Severinov 2003). The predecessor may thus avoid familial disharmony (Whiting 2001).

2.3. Allocation of family heirlooms

A second subject-matter for ethical wills is the allocation of special objects belonging to the estate, and that symbolically represent the deceased’s or the family’s spirit: the family Bible (or Torah or Qur’an), family jewels, a diary or other documents, such as photos, letters, decorations or diplomas (also see Frank 2003). Szydlik (2011) explains the emotional importance of allocating these tangibles. It enables the deceased to allocate the family heirlooms to the heir that will best continue his values after his death.

Legal scholars disagree on the legal regime of family heirlooms (Popu 2009). Some authors argue that they are subject to a specific legal regime, different from the general inheritance rules (Maurie 2006, Delnoy 2010). There is some case law to that effect, e.g. of the French Supreme Court.⁷ Other case law – in our opinion unjustly – refers to a legal exception applicable only to securities. According to Article 842 Belgian Civil Code, securities relevant for the estate as a whole are

⁷ Supreme Court (F), *DP* 1940, I, 9, case note R. Savatier, *JCP éd. G* 1943, II, 2254 and more recently Supreme Court (F), *Bull. Civ.* 1994, I, nr. 354.

handed over to one custodian heir under the obligation to make them available to the other heirs whenever needed (see in general Puelinckx-Coene 2011). More recently, other authors argue that family heirlooms follow the general regime of movables belonging to an estate, and are thus subject to division (Verwilghen 1990, Pintens *et al.* 2010). Even if a specific legal regime would apply, case law ensures the protection of the reserved portion of certain heirs (see below on the reserved portion)⁸. The application of forced heirship rules therefore can never be avoided by the testator by qualifying an object as an heirloom.

2.4. *Post-mortem personality rights*

All legal systems contain rules on the disposal of human corpses and of bodily parts in accordance with human dignity. A corpse is considered the ultimate symbolisation of mankind in general; how we treat the dead represents to some extent our treatment of the living. In Continental legal systems, the de-symbolisation of the corpse has led to the legal recognition of private autonomy in burial and funeral planning (Van Beers 2009). Thus most legal systems allow the living some choices vis-à-vis the disposal of their body (or parts thereof) and of the funeral service. As mentioned before, the Belgian Supreme Court has already recognised a subjective right to this end in 1899. The Belgian federated entities and the French legislator explicitly warrant the right to choose *the (non-)denominational ritual* of one's funeral (e.g. Wuyts 2013).⁹ Such warranty is implicitly present in the other systems' legislation.¹⁰ The same applies to the respect for one's ethical opinions in regard to *post-mortem* organ transplants, *post-mortem* use of bodily tissues and *post-mortem* artificial procreation. Legal systems also provide for the exercise of moral rights *post mortem auctoris*.¹¹

2.5. *Influencing behaviour*

More importantly, a deceased may try to influence the behaviour of his heirs with a view to transferring his values. Thereto, the allocation of money, property or other advantages may be used as a carrot or a stick, that is: to encourage (positive incentive through a suspensive condition) or discourage (negative incentive through a resolutive condition) certain behaviour (see below and Whiting 2001). Some specific statutory provisions explicitly allow a deceased to influence the behaviour of certain heirs. In the absence of specific provisions, a behavioural charge or condition may be imposed on an heir by application of the general rules of inheritance law.

2.5.1. Legal framework

The legal framework, against which such charges and conditions must be assessed, is as follows in Continental legal systems.

On the one hand, all Continental law systems honour the principle of freedom of testation¹², as the expression within inheritance law of the principle of private autonomy and the freedom of contract (Gerhardt *et al.* 2009). As mentioned above, testamentary provisions regarding personal interest gain legal protection. Beside, testamentary freedom regarding tangibles – particularly as carrot or stick – is also protected under article 1 of Protocol 1 to the ECHR, according to which

"[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions".

⁸ District Court Dendermonde (B), *Pas.* 1931, III, 60.

⁹ E.g. Article 15 Flemish Decree of 16 January 2004; article 3 French Act of 15 November 1887.

¹⁰ Article 18 Dutch Act of 7 March 1991. For Germany, e.g. § 3 *Hamburg* Act of 14 September 1988.

¹¹ Article 7 Belgian Act of 30 June 1994; article 25(2) Dutch Act of 23 September 1912; article L 121-1 French *Code de la propriété intellectuelle*; § 28 German Act of 9 September 1965.

¹² § 2303 German Civil Code.

According to the two dissenting opinions in the *Pla and Puncernau* judgment of the ECtHR, the freedom to dispose of one's property in private instruments must be given effect "save in exceptional circumstances where [it] may be said to be repugnant to the fundamental ideas of the Convention or to aim at the destruction of the rights and freedoms set forth therein".¹³ The majority in the ECtHR opted for a somewhat higher level of protection of the applicants against the private action of the testatrix (horizontal effect) than the dissenting judges did.

On the other hand indeed, testamentary freedom is restricted on two grounds. First, all Civil Codes explicitly prohibit (testamentary) dispositions or clauses and (testamentary) charges or conditions that are *de iure* or *de facto* impossible to fulfil, or are contrary to the law or to good morals or public order.¹⁴ Both the *content* and the *causa* of the disposition are assessed under that rule. Illegality of only the *purpose* cannot lead to nullity (Maasland 2012). Much will therefore depend on the explanation of the *causa* in the preamble (Whiting 2001, Horsch 2010). Rutten (2007) gives the example of the *Shari'ah*-wills, in which parents bequeath a double portion to the sons vis-à-vis the daughters. Such bequest does not seem contrary to the public order as to its content (Maasland 2012). In Dutch law, the clause will stand in the absence of an explanatory preamble on the *causa* (Maasland 2012)¹⁵, which would be contrary to the public policy ("*ordre public*") had it been expressed (see however Rutten 2007). Second, even if the ECtHR

*"is not in principle required to settle disputes of a purely private nature [...], in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, [...] appears unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention"*¹⁶.

One might object that there is no absolute right to inherit, so that beneficiaries always have the option either to freely make their life choices – albeit with a financial sanction – or to abide to a testamentary restraint or constraint and then receive or retain a financial reward (Grattan and Conway 2005). The German Constitutional Court¹⁷ has addressed this issue in a case where a provision in a testamentary contract excluded as (subsequent) beneficiary, any descendant who would enter into a morganatic marriage (a marriage with a woman of uneven social rank). Whether such interference with the right to marry should be assessed as *serious* ("*einem schweren Eingriff*") – and thus unconstitutional with regard to article 6 German Basic Law – a.o. depends on the existence of *unreasonable pressure* ("*unzumutbaren Druck*") to exercise an option. The Courts must assess whether the value of the estate, in light of the current living standard of the beneficiary, would persistently influence his life choices. Moreover, attention should be had to the grounds for the restriction and for the recontracting argument (see Chalmers 2007).¹⁸

Restrictions can be based either on the doctrine of public policy ("*ordre public*") or on the horizontal application of human rights, particularly the ECHR. Horizontal application means that human rights obligations that are mainly meant to apply in

¹³ ECtHR (Fourth Section), *Pla & Puncernau v Andorra*, 2004, Partly Dissenting Opinion of Judge Bratza, § 4 and Dissenting Opinion of Judge Garlicki, p. 2, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61900>.

¹⁴ Article 900 Belgian Civil Code; article 4:44 and 45 Dutch Civil Code; article 900 French Civil Code; § 138 German Civil Code.

¹⁵ Article 4:44(2) Dutch Civil Code

¹⁶ ECtHR (Grand Chamber), *Fabris v France*, 2013, § 60, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116716>; ECtHR (Fourth Section), *Pla & Puncernau v Andorra*, 2004, § 59, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61900>.

¹⁷ BVerfG (D), 1 BvR 224801 of 22 March 2004, § 41, http://www.bverfg.de/entscheidungen/rk20040322_1bvr224801.html.

¹⁸ Application in BVerfG (D), 1 BvR 1937/97 of 21 February 2000, http://www.bverfg.de/entscheidungen/rk20000221_1bvr193797.html.

the ('vertical') relation between a State and citizens, are also given effect in the ('horizontal') legal relations between citizens. Which basis applies seems an academic question in Continental legal systems. Primacy of international rules indeed seems equally achieved by the interpretation of the doctrine of public policy ("*ordre public*") in light of international rules and by the direct, horizontal, application thereof (Van Gerven and Lierman 2010).

In either case is it advisable anyhow to add an alternative disposition to the ethical will, in case the main clause would be assessed contrary to public policy ("*ordre public*") (Whiting 2001).

2.5.2. Provisions concerning the deceased

A deceased may impose a charge to 'maintain' his personality to his heirs, i.e. impose an obligation to give, to do or to abstain from something (see below). Such charges can oblige heirs to promote initiatives the testator would have promoted if still alive. A former Private Foundation of the Belgian Queen Fabiola – dissolved upon public outcry – provided for initiatives that answer to the "religious, philosophical and moral convictions of the Founder and her late husband [King Baudouin]".¹⁹ Another testator suffered from phantasms with regard to the State of Israel and imposed on the beneficiary

*"to inform his Holiness Pope John Paul II or his successor to crown a future legitimate candidate King of Israel for the sake of world peace"*²⁰. The Court refused to invalidate the will on the basis of insanity.

Another example, which was very popular in older times but is probably more or less extinct these days, is the reading of Masses for the dead.²¹

Much more common are charges or conditions constraining or restraining beneficiaries' behaviour with regard to "life choices" (Whiting 2001, Paal 2005):

2.5.3. (Non-)denominational choices

Ethical wills may address (non-)denominational life choices by beneficiaries. The case law assesses such conditions by considering its *causa*. As noted above in one case a woman tried to make her daughters' inheritance dependant on her abandoning her membership of and faith in the Church of Scientology. The Court considered that the foremost *ratio* of the woman was to avoid the family company being divided, which would be the result, as the daughter would sell her part to donate it to the Church. That (reconstructed) *causa* was considered valid for it did not *aim* at influencing the daughter's religious choices.²² That reasoning is of course subject to criticism, for it does as a *consequence*. In another case, a bequest was made under the suspensive alternative condition of marrying or entering religious life²³. The latter condition was not considered invalid for the testatrix had no intention of using pressure on the beneficiary's conscience and the beneficiary retained his civil and religious freedom.

Religious norms on marriage may furthermore come in conflict with State norms. We found one case in which the testamentary prohibition to marry a Jew was invalidated. The Court first referred to the freedom to marry a person of one's own choice. The obligation to marry (or to abstain from marriage) is contrary to the right (not) to marry and thus invalid. Also, such provision was considered contrary to the prohibition of discrimination on the grounds of race, religion or belief, as

¹⁹ By-laws of former Private Foundation *Fonds Pereos*, <http://www.just.fgov.be> [in French].

²⁰ District Court Liège (B), 5 December 1986, RG 80.267/85.

²¹ By-laws of former Private Foundation "*Virginia's Lodge*" [renamed to "Theo's Refuge"], <http://www.just.fgov.be> [in Dutch].

²² OLG Düsseldorf (D), *NJW* 1988, 2615.

²³ District Court Oudenaarde (B), *RPN* 1903, 222.

enacted after WW II²⁴. We have found no published case law on the encouragement of religious in-group marriage (comp. First Testament, book Tobit, ch. 4, 12).

Of particular importance in (non-)denominational matters are the guarantees with regard to the education of children.

A series of statutory provisions first concerns guardianship upon death of both parents. Article 405 Belgian Code civil imposes an obligation on the guardian to respect the educational principles the parents may have expressed, particularly in regard of housing, health, education, recreation and *religious or philosophical choices* (emphasis added). The German Act on the Religious Education of Children contains a comparable rule.²⁵ Article 401 of the French Civil Code more generally refers to "*the will the father and mother may have expressed*". For example, a Court ordered a guardian to accept a State scholarship for the pupil to attend a lyceum, instead of being allowed to pay the fee for a Catholic college. The mother herself had applied for the State scholarship.²⁶ Another Court validated the guardian's decision to respect the parents' choice to raise their child in the Catholic religion²⁷.

Second, a group of judgments concern the attempted interference with religious education by parents. The *Dutch Supreme Court* had to judge the following case. A woman belonging to the Dutch Reformed Church had instituted her Catholic foster-daughter as a beneficiary. The bequest would however be reduced to mere usufruct in case she would not have her children baptised in the Dutch Reformed Church before their reaching the age of two. This left the foster-daughter with the choices of remaining unmarried, having no children, or having her children baptised in a religion that was not hers. The testatrix wanted to avoid her property definitively falling in Roman Catholic hands. The Dutch Supreme Court considered the clause contrary to the *bona mores*, for no pecuniary pressure may be used to influence religious educational choices by parents.²⁸ More generally, after World War II, many problems have arisen in Belgium, France and The Netherlands in regard of Jewish orphans who had been raised in Catholic families or institutions during the war and whose families, with or without success, tried to impose a Jewish education after the war (hereto Petit 1951, Rimanque 1980, Casman 2013).

2.5.4. Marital and other relational choices

Some ethical wills *prohibit* the heir to marry, in general or a member of a group or a specific person. Such clauses not only infringe on one's liberty, they would also

*"divert him from the fulfilment of his destiny"*²⁹, particularly in case such condition is imposed upon "a still-young man"³⁰ or "still-young woman"³¹, "who had no children from the first marriage" and thus would infringe upon the "*natural liberty for a woman to support herself in life and to seek the duties and pleasures of motherhood by lawful means*"³².

Some authors therefore defend the *in abstracto* nullity of these prohibitions (Bénabent 1973, Huet 1967, Asser, Perrick 2009). The case law, and other authors (e.g. Maasland 2012), however propose an *in concreto* assessment of the *causa*.

²⁴ TGI Seine (F), *D.* 1947, Jur., 126.

²⁵ Act of 15 July 1921. Also see §§ 1779(2) and 1801(2) German Civil Code and BGH (D), *NJW* 1952, 703.

²⁶ TGI Lille (F), *DP* 1904, II, 240.

²⁷ TGI Paris (F), *Defrénois* 1969, Art. 29209, case note R. Savatier.

²⁸ Supreme Court (NL) *NJ* 1929, 1325.

²⁹ CA Caen (F), *DP* 1876, II, 237.

³⁰ CA Liège (B), *Pas.* 1890, II, 383.

³¹ CA Brussels (B), *RPN* 1950, 185.

³² District Court Liège (B), *Pas.* 1883, II, 129.

In case the *causa* is malicious *in abstracto* (e.g. prohibition to marry a Jew³³) or *in concreto*, the condition will then be declared null and void. The German Constitutional Court has followed this reasoning in the abovementioned *Hohenzollern* case, in which a provision in a testamentary contract restricted the male descendants' selection of a bride to women of equal social rank. This was considered an unconstitutional serious interference with the right to marry with a partner of one's own choice, for unreasonable pressure existed *in concreto*³⁴. The descendant would effectively be discriminated against on the basis of descent and origin of the bride and provided with no possibilities for negotiation.

Marriage prohibitions are also sometimes considered invalid in the *absence of an explicit benevolent* condition, which renders impossible the necessary *in concreto* assessment.³⁵

By contrast, an expressed *benevolent* condition can be declared valid. Some older case law, even of the French Supreme Court,³⁶ thus unjustly considers valid conditions that are inspired by benevolent yet paternalistic intentions. One example concerns a man who had bequeathed property in usufruct to his servant on the condition of her not marrying. The condition was considered valid, as the court of appeal agreed with the testator that the woman's misconduct – being an unmarried mother – was such that no man would marry her for any other reason than her fortune. The court set as a general rule that:

*“the age of the beneficiary, his physical or mental disability, his misshapeness, his notorious disgrace, the future of his children, can justify in his only interest that a bequest is made to him under the condition not to marry, because that is a way to avoid shameful speculation or greed of which he could be the unfortunate victim and that is morally repulsive”.*³⁷

It seems to us that such paternalistic intentions are not worthy of legal protection nowadays. Resolutive conditions of remarriage seem to be more generally admitted.³⁸ This is the case if the bequest is intended as a temporary maintenance until the surviving spouse finds a new partner who will provide for his needs (Paal 2005, Chalmers 2007, Waaijer 2011)³⁹. Such conditions may also be acceptable in cases of an unmarried sibling⁴⁰ or niece⁴¹ who is favoured in the will. We think however these intentions can and should not be formulated in terms of marriage restrictions.

A variant to marriage prohibitions is the addition of substantive or procedural conditions to a marriage, e.g. the prohibition to marry before reaching an age higher than the legal marriageable age, or the condition that the grandparents consent. The French Supreme Court has considered such conditions valid upon assessment *in concreto* (see below). The German Constitutional Court has accepted a provision of a testamentary contract under which a descendant was excluded as remainderman where the chieftain would not consent to his marriage. The refusal of his consent could only be based on family traditions and could be assessed by an arbitration board. It was therefore not considered *contra bona mores*.⁴²

³³ TGI Seine (F), *D* 1947, Jur, 126.

³⁴ BVerfG (D), 1 BvR 224801 of 22 March 2004, § 41, http://www.bverfg.de/entscheidungen/rk20040322_1bvr224801.html

³⁵ District Court Liège (B), *Pas.* 1883, II, 129; CA Liège (B), *Pas.* 1890, II, 383; CA Brussels (B), *RPN* 1950, 185.

³⁶ Supreme Court (F), *DP* 1913,1, 105.

³⁷ CA Caen (F), *DP* 1876, II, 237.

³⁸ See for a disposition in a marital contract: Supreme Court (B), *Pas.* 1977, I, 878.

³⁹ District Court Ghent (B), *Rec.gen.enr.not.* 1951, n° 18983 ; District Court Alkmaar (NL), *NJ* 1995, n° 281.

⁴⁰ CA Liège (B), *Pas.* 1910, 2, 222.

⁴¹ CA Liège (B), *Pas.* 1873, II, 174.

⁴² BVerfG (D), 1 BvR 1937/97, www.bverfg.de.

The other way round, *suspensive* conditions – sometimes with a deadline – to marry a certain person, a member of a certain group or any person (“*si nuptiae sequantur*”; on the difference between these conditions: Bénabent 1973), have also been under review. The Romans in the *Lex Julia & Papia Poppaea* already knew the promotion of marriage in general.

Benevolent conditions to marry have been validated by courts, for also the legislators promote marriage as a matter of policy (Huet 1967, Bénabent 1973, Paal 2005).⁴³ The latter consideration however seems out-dated, since marriage has lost its status as the only exclusive socially accepted family form. Why then should only marriage be promoted or dissuaded? However, it seems that legislators still may prefer marriage to other family forms to some extent.⁴⁴

Malicious conditions to marry a certain person are null and void anyhow. A renowned example is of course that of Portia in Shakespeare’s *Merchant of Venice* (Sherman 1999).

The suspensive condition of a *divorce* is considered inconsistent with the right to the protection of family life (Paal 2005). However, the German Supreme Court has found valid such condition to the heirship of a farm, where the wife had been unfaithful during WW II, and the testator wanted to restore the family’s honour.⁴⁵ It is doubtful however whether the Courts would so decide nowadays.

Some authors defend the application of the aforementioned principles to other family forms than marriage as well (Asser, Perrick 2009). There is some case law to that effect.⁴⁶

2.5.5. Parents and children

Discrimination on the basis of descent or origin was considered contrary to the beneficiaries’ human rights protection on several occasions. In the abovementioned *Pla & Puncernau* case, an Andorran Court had interpreted a *fideicommiss* in favour of “*a son or grandson of a lawful and canonical marriage*” as excluding adoptive children. The ECtHR reminded that “very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention”; the exclusion of adoptive children was found blatantly inconsistent with the ECHR.⁴⁷ The same way of reasoning might have applied to the former private foundation set up by the Belgian Queen Fabiola. The Foundation only provides for her and her late husband’s grand-nieces and -nephews that are “biological descendants from a first Catholic religious marriage”.⁴⁸ The German BVerfG applied a comparable analysis with regard to the prohibition of a morganatic marriage.⁴⁹

All researched legal systems allow the parents, or the last of them who was instituted with the parental authority, to appoint a *guardian* for their children if necessary.⁵⁰ The *ratio legis* is to offer the parents the possibility to have appointed⁵¹ as a guardian a person they trust will continue their values in the

⁴³ District Court Oudenaarde (B), *RPN* 1903, 222 (suspensive alternative condition of marrying or entering in religious life).

⁴⁴ ECtHR, *Schalk and Kopf v Austria* (2010) Application no. 30141/04).

⁴⁵ BGH (D), *FamRZ* 1956, 130.

⁴⁶ Constitutional Court (B), nr. 54/2004, www.const-court.be.

⁴⁷ ECtHR (Fourth Section), *Pla & Puncernau v Andorra*, 2004, § 59 and 61, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61900> and also see more recently ECtHR (Grand Chamber), *Fabris v France*, 2013, § 60, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116716>.

⁴⁸ By-laws of former Private Foundation *Fonds Péroos*, <http://www.just.fgov.be> [in French].

⁴⁹ BVerfG (D), 1 BvR 224801 of 22 March 2004, § 41, http://www.bverfg.de/entscheidungen/rk20040322_1bvr224801.html. Comp. with BVerfG (D), 1 BvR 1937/97 of 21 February 2000, http://www.bverfg.de/entscheidungen/rk20000221_1bvr193797.html.

⁵⁰ Article 392 Belgian Civil Code; article 1:292 Dutch Civil Code; article 397 French Civil Code; § 1776 German Civil Code.

⁵¹ There is no absolute duty for the appointed guardian or for the Court to accept the appointment.

education of the child. Fewer possibilities exist in regard of the appointment of and recommendations to the guardian of an incapacitated adult⁵².

Parental authority concerns public policy ("*ordre public*") – for it is fundamental to the organisation of the family in civil law. Therefore, testamentary provisions by grandparents imposing on a parent to cede the education of the grandchild to a more trusted third person were declared null and void⁵³. Also null and void are conditions under which the surviving parent, after her second marriage, would have to abide to the family council's educational choices⁵⁴ (hereto Rimanque 1980; Grattan and Conway 2005). The *French Supreme Court* however has validated the condition to a bequest that it would be inalienable until the beneficiary has reached the age of 30 years or had married before with the consent of her grandparents. The Civil Code however only imposed parental consent. The Supreme Court accepted the condition nonetheless, for the testator's objective was to protect the beneficiary from her father's greed, in which light he would too easily consent to her marriage. It considered that the freedom to marry was not restricted thereby. Moreover, the bequest was not annulled, but just inalienable for some more years.⁵⁵

Incentives that do not impose an unreasonable burden on a parent or guardian may be considered valid (Whiting 2001).

2.5.6. Other life choices

A condition in regard of one's *residence* is not necessarily contrary to the public policy ("*ordre public*") as to its content. Beside the assessment of the *causa* it depends to what extent the freedom of choice of the person is limited.⁵⁶ Considered valid by the French Supreme Court, was the condition that an heir would live on the bequeathed estate, for the testator had cultivated the estate for many years and wanted a family member to keep on doing so – at least for 20 years⁵⁷. But considered invalid by a Belgian court, was the exile imposed on a prodigious son by his shamed father. The son would receive a monthly allowance as long as he would live abroad⁵⁸. Such condition contravened the personal freedom and the principle *nulla poena sine lege*, as guaranteed by the Constitution, and several political rights of the son as a Belgian citizen.

Many life choices furthermore do not directly concern fundamental rights or freedoms and may be encouraged or discouraged by the testator. Whiting (2001) offers an overview of the different mechanisms to support education and professional career or homemaker choices, and to discourage harmful behaviour (to others), such as smoking, or drinking.

2.6. Analysis

Testamentary freedom sometimes collides with the general interest or with interests of others, particularly beneficiaries whose behaviour is under restraint or constraint. Such collision gives rise to an *in concreto* balancing of interests (Chalmers 2007). Testamentary freedom is the rule, and restriction of that freedom the exception (see a.o. Grattan and Conway 2005).

Testamentary freedom is *mostly* restricted with an appeal to the human rights protection of beneficiaries, and particularly their right to respect for private and family life and their freedom of thought, conscience and religion.

⁵² See however article 496 Belgian Civil Code *as per 1 June 2014*.

⁵³ CA Orléans (F), *DP* 1870, 2, 49.

⁵⁴ Supreme Court (F), *DP* 1855, 1, 341.

⁵⁵ Supreme Court (F), *DP* 1923, I, 177.

⁵⁶ Comp. ECtHR (Plenary), *Guzzardi v Italy*, 1980.

⁵⁷ Supreme Court (F), *DP* 1928, I, 176.

⁵⁸ District Court Brussels (B), *Pas.* 1887, III, 107.

We do not agree with those scholars who contend that *every* interference with a human right invalidates a testamentary charge or condition (Huet 1967, Bénabent 1973, Rimanque 1980, Dirix 1982, Asser, Perrick 2009). Such contention indeed would grant *a priori* and absolute priority to the interests of the beneficiaries, whereas a balancing of interests must be possible since also the testator's interests are protected under article 1 of Protocol 1 to the ECHR.

The relevant case law, also of the ECtHR, indeed calls for restraint over the invalidation of private law dispositions, leaving the Courts a broad margin of appreciation. An analogy could be drawn with the right to marry of article 12 ECHR, of which violation is only accepted in case a national provision *in concreto* restricts or reduces "the right in such a way or to such an extent that the *very essence* of the right is impaired" (our emphasis)⁵⁹.

We consequently only see three justifications for a restriction of testamentary freedom in light of the beneficiaries' human rights protection (comp. Swennen 2011):

1. A '*Notstandsfest*' (non-derogable) human right is violated by the testator.⁶⁰ *Volenti non fit iniuria* is no defence in this regard.⁶¹
2. The application or interpretation of the condition would be *blatantly inconsistent* with a (derogable) human right, such as the prohibition of discrimination, or would create circumstances that provide the State a *particularly serious reason* to intervene. Discrimination on the basis of descent or origin was considered blatantly inconsistent with the prohibition of discrimination both by the ECtHR and the BVerfG, in the abovementioned *Pla & Puncernau* and *Hohenzollern* cases.⁶²

It is however not clear what makes an inconsistency 'blatant' or which reasons might be 'weighty' enough to justify a difference in treatment. Some authors refer to unreasonable or unnecessary burdens on the beneficiary in regard of significant life choices (Whiting 2001, Paal 2005, Maasland 2012); such benchmark is comparable to the BVerfG's prerequisite of "*unreasonable pressure*".⁶³

3. The bequest enters the public sphere, in which case the same human rights obligations should apply as to public governance systems (Dirix 1982; Grattan and Conway 2005; Van Leuven 2009). One may think of a Private Foundation *publicly* offering support to traditional families only. Much will depend on the answer to the question whether the offer is 'public', e.g. when the statutes of a foundation state that the board may, at its discretion, decide to award benefits in kind to family members as further defined.

One might *subsequently* discern a tendency in the reviewed case law to protect the formation and preservation of stable partner relations and parent-child relations, e.g. by restricting interference in educational choices. In our opinion, such protection is rather institutional than factual, for reference is usually made to rights and freedoms in this regard and not to *de facto* private or family life (compare with Grattan and Conway 2005, Chalmers 2007). It proves the interest courts attach to family institutions as "natural and fundamental group units of society" (in

⁵⁹ ECtHR, *Schalk & Kopf v Austria*, 2010, § 49.

⁶⁰ Comp. ECtHR, *A v United Kingdom*, 1998, § 22 [corporal punishment].

⁶¹ UN Human Rights Committee, *Wackenheim* Communication No. 854/1999 of 26 July 2002 [dwarf tossing].

⁶² ECtHR (Fourth Section), *Pla & Puncernau v Andorra*, 2004, § 59 and 61, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61900>; BVerfG (D), 1 BvR 224801 of 22 March 2004, § 41, http://www.bverfg.de/entscheidungen/rk20040322_1bvr224801.html. Comp. with BVerfG (D), 1 BvR 1937/97 of 21 February 2000, http://www.bverfg.de/entscheidungen/rk20000221_1bvr193797.html

⁶³ BVerfG (D), 1 BvR 224801 of 22 March 2004, § 41, http://www.bverfg.de/entscheidungen/rk20040322_1bvr224801.html.

accordance with article 23.1 of the International Covenant on Civil and Political Rights).

3. Instrumentum: the document

3.1. General estate planning instruments

In general, the classic estate planning instruments apply to ethical wills. In case the allocation of assets is meant to encourage or discourage behaviour, the use of those classic instruments is even necessary.

Ethical provisions can be included in testaments, and the general testamentary forms apply. In some Continental law systems, the statutory provisions on testaments only concern testaments on property⁶⁴. It is however generally accepted that wills may *also* or even *only* contain ethical provisions (e.g. Malaurie 2006; Pintens *et al.* 2010).

Because of its closed system of *uiterste wilsbeschikkingen*, it is disputed amongst legal scholars to what extent, if any, a testament may be used for ethical matters such as burial and funeral dispositions (Nuytinck 2006, Asser, Perrick 2009). However, Dutch law explicitly provides for a less formalistic testamentary form, the *codicil*, for some ethical matters.

In legal systems that recognize the validity of testamentary contracts, ethical provisions may also be included therein; the usual forms apply.

In all researched legal systems researched for this article, testaments and contracts of succession are on principle formalistic. Generally, testaments must at least be written documents (Bael 2005; Pintens *et al.* 2010). They even often require a notarial deed⁶⁵. As recently confirmed by the French Supreme Court, oral testaments are generally void⁶⁶.

These formalistic requirements do not only apply to the patrimonial dispositions, but also to the ethical provisions. The deceased cannot refer to oral ethical instructions or provisions, linked to the attribution of assets. These oral instructions are void, although some legal systems recognize that the beneficiary can feel morally obliged to execute them (*natural obligation*).

In Belgian and French law, the nullity of the oral instructions can even lead to the nullity of the whole bequest, in case the oral instruction was the principal *causa* of the patrimonial dispositions (Dillemans 1973; Bael 2005).

Ethical wills can also be included in the by-laws or charters of legal structures that are set up in the framework of the estate planning, such as civil limited partnerships or private foundations – comparable to trusts (Whiting 2001; Swennen 2011).

The settlor can thus organise and control the timing of the transfer of property, which appears to be critical to meeting his ethical objectives. Economic research has pointed out that, once wealth has been given, there remains only a limited incentive to meet the ethical will. A major problem in the use of classic estate planning tools thus appears to be their weak enforceability (also see below):

"I have the funds already, so why should I exert myself?" (Whiting 2001).

As the foundation or trust assets will only be transferred to the beneficiaries, once (and every time) the ethical objective is met, those structures appear to be a better incentive and thus allow a better control of the expected behaviour (Whiting 2001).

⁶⁴ E.g. art. 895 Belgian Civil Code and article 895 French Civil Code.

⁶⁵ See for Germany: § 2276 (I) German Civil Code.

⁶⁶ Supreme Court (F), *RNB* 2005, 317. Nonetheless: see e.g. Sections 2250-2251 German Civil Code, that allow oral wills in exceptional circumstances.

3.2. Specific ethical wills

In light of the abovementioned protection of private autonomy regarding one's person, the legislators in all researched systems also allow ethical wills to be drawn in less formalistic forms.

Such is particularly the case when the expected behaviour concerns the person of the deceased, e.g. the execution burial and funeral choices,⁶⁷ *post-mortem* organ donation,⁶⁸ *post-mortem* use of bodily tissues or gametes and embryos⁶⁹.

As mentioned above, Dutch law explicitly provides for a less formalistic testamentary form, then called a *codicil*, for some ethical matters. Other ethical provisions only require a contract⁷⁰, a written statement⁷¹ or an explicit declaration/wish⁷². Sometimes, the authorities even provide for standard documents for ethical provisions, such as organ donation⁷³.

These specific instruments generally not only require less formalistic forms. In several researched legal systems, ethical wills also require less severe conditions of validity. In Dutch law, for example, burial and funeral choices⁷⁴ or organ donation⁷⁵, can be made by a minor, under the condition that the minor is capable of reasonably assessing his interests, even if he is not legally capable of making a testament.

Moreover, some statutory provisions and case law impose the next-of-kin to even respect informally expressed ethical views, e.g. with regard to burial or funeral choices⁷⁶ or educational options for children.⁷⁷ This is an exception to the general nullity of oral testaments.⁷⁸

4. Enforcement

4.1. By whom?

Particularly with regard to burial and funeral choices, and of the use of organs, bodily tissues, parts, gametes or embryos do statutory provisions organise the registration and consultation of the expressed will.⁷⁹ Unfortunately, a general legal framework on such choices is still lacking in all researched legal systems (Swennen 2011).

The best way for a testator to warrant his ethical legacy is to entrust a person with the execution of his will. Some statutory provisions explicitly provide in the appointment of persons thereto.⁸⁰ In the absence of such provisions, the general techniques apply. The testator can grant powers of attorney, but the risk of revocation thereof by the heirs cannot always be excluded (Pintens *et al.* 2010). The better option therefore is the appointment of executors of a will (comparative overview in Dillemans *et al.* 2012). In Continental law systems, the powers of the executor are however far more limited than in common law systems. It is wise to provide for a margin of appreciation for the person so appointed (Whiting 2001).

⁶⁷ E.g. for Belgium: article 15 Flemish Decree of 16 January 2004; for the Netherlands: article 19 Burial and cremation Act of 7 March 1991.

⁶⁸ E.g. article 1232-1 French Code santé publ.

⁶⁹ E.g. article 7 Dutch Act of 20 June 2002.

⁷⁰ E.g. for Belgium: articles 15, 20 and 44 Medically assisted procreation Act of 6 July 2007.

⁷¹ E.g. article 9 Dutch Organ donation Act of 24 May 1996.

⁷² E.g. article 18 Dutch Act of 7 March 1991

⁷³ E.g. article 9 Dutch Organ donation Act of 24 May 1996.

⁷⁴ E.g. article 19 Dutch Act of 7 March 1991

⁷⁵ E.g. article 9 Dutch Organ donation Act of 24 May 1996.

⁷⁶ E.g. article 18 Dutch Act of 7 March 1991.

⁷⁷ TGI Seine (F), *DP* 1904, II, 240; TGI Paris (F), *Defrénois* 1969, n° 29209. BGH (D) *NJW* 1952, 703; OLG Düsseldorf (D) *FamRZ* 2013, 140.

⁷⁸ Exception: §§ 2250-2251 German Civil Code.

⁷⁹ E.g. article 15 Flemish Decree of 16 January 2004.

⁸⁰ E.g. article 3 (2) French Act of 15 November 1887.

Many statutory provisions moreover provide a default system of protection. Next-of-kin may refer to the presumed will of the deceased with a view of executing his will in case the appointed person would not do the necessary (hereto Baillon-Wirtz 2006).

4.2. Techniques

4.2.1. Passkey-solution

Only the Belgian and French Civil Codes encompass one *passkey*-solution in case an heir does not respect the testator's ethical will. Article 1047 of both Civil Codes provides in the revocation of a bequest in case of a *grave insult to the memory of the testator*. No such provision exists under Dutch and German law. However, in Dutch law the general rule of reasonableness and fairness may lead to the exclusion of a *legal* heir in case of *post-mortem* grave misconduct.⁸¹

4.2.2. General techniques: charges and conditions

In absence of cut-and-dried solutions, a common technique to encourage or discourage behaviour of the heirs is the allocation of assets as a carrot (to encourage) or a stick (to discourage), through the insertion of charges and/or conditions in the testament (Whiting 2001). The general rules of charges and conditions apply to ethical wills.

As demonstrated by Whiting (2001), these charges or conditions can take many forms and e.g. encourage education, entrepreneurship, social stewardship, altruism or volunteerism or discourage/prevent individualism or unhealthy habits (smoking, drugs....).

A *condition* is a stipulation in a legal act, in this case often in the testament, whereby the exigibility (suspensive condition) or the extinction (resolutive condition) of the obligation depends on a future and uncertain event (the "condition-event"). This condition-event can be purely fortuitous, but can also be an event on which the heir has an influence. The heir has no obligation to fulfil the event, but the fulfilment will influence his bequest.

Charges, on the contrary, are obligations of the heir to give, to do or to abstain from doing something (Barbaix 2008). As a result, once the heir accepts the legacy, he is obliged to fulfil the charges. In case of non-(appropriate) performance, the testator's legal successors can claim the resolution of the bequest⁸².

Even if all legal systems provide for a termination ("resolution") of the bequest in case the beneficiary does not meet its conditions or charges, the testator often also provides for a so-called "punitive clause", "forfeiture clause" or "alternative clause". He thereby usually also appoints a subsidiary beneficiary in order to assure that someone will watch over (and thus guarantee) the implementation of the gift (and its charges or conditions).

Such clause puts the beneficiary before the "choice" to accept the gift *with* the charges or conditions or to retain complete freedom by renouncing the gift. In all researched legal systems, such forfeiture clause is valid. However, in Continental law systems with forced heirship claims, the clause cannot prevent the forced heirs from claiming their forced heirship share (without charges and conditions).

In all researched systems, charges and conditions that are contrary to the law or to good morals or public policy ("*ordre public*") (see section 2.5) are null and void⁸³. The same applies for charges and conditions that are impossible to fulfil.

⁸¹ WPNR 5395 (1977) and WPNR 5400 (1977).

⁸² Article 954 *jo.* 1046 Belgian Civil Code ; article 4-131 Dutch Civil Code ; article 954 *jo.* 1046 French Civil Code ; § 2196 German Civil Code.

⁸³ Article 900 Belgian Civil Code; article 4-44-45 Dutch Civil Code; article 900 French Civil Code; § 138 German Civil Code.

As a general rule, in case a charge or condition is contrary to the law or to good morals or public policy ("*ordre public*"), only the charge or condition will be void (comp. Chalmers 2007). The testamentary disposition, on the contrary, will stand. Dutch law provides explicitly that this will only be different in case the charge or condition was the determinant motive of the disposition⁸⁴. In Belgian and French law, case law of both Supreme courts provide for a similar solution⁸⁵.

4.3. Boundaries and impediments to enforcement

In case the enforcement of ethical dispositions would be encouraged by the acquisition or discouraged by the loss of (a share of) the estate, forced heirship rules must be taken into account. Whereas testamentary freedom is called one of the corner stones of the common law (Grattan and Conway 2005) with only very restricted forced heirship or provision claims, this testamentary freedom is indeed much more restricted in most Continental law systems through the traditional mechanism of the forced heirship (*reserve, réserve, legitieme portie, Pflichtteil*). Our aim is not to question the forced heirship rules in this article.

Forced heirship implies that certain protected heirs are entitled to claim a certain reserved portion of the estate (or: the fictitious mass) of the deceased and cannot be deprived from it. In most legal systems, the reserved portion is a fraction of the estate (mostly from 1/2nd to even 3/4th). Forced heirship does not imply that the deceased cannot dispose of his whole estate. The forced heirship "merely" allows the protected heirs to oppose testamentary dispositions that would jeopardize their reserved portion. This means that, whenever a deceased aims at imposing and enforcing ethical wills via the acquisition of a part of the estate, the heirs can oppose this enforceability via their protected inheritance rights.

Forced heirship rules do not only provide a quantitative protection, but also a qualitative protection of the heirs: a protected heir cannot only claim his reserved fraction of the estate, in kind or in value, but he can also claim to obtain this protected share 'free and unburdened'. Thus, a protected heir can oppose terms or conditions or ethical dispositions with regard to his reserved portion (Waaier 2011, Barbaix and Verbeke 2013). In case the deceased has nonetheless burdened that protected share, the protected heir can ask for the (partial) nullity of the – *in se* valid – charge or condition.

5. Conclusions

Our main research question was how, and to what extent, the planning of one's ethical heritage can be legally binding upon heirs. The foremost way of transferring values is by influencing the behaviour of the successors, particularly through the allocation of valuables.

Our research pointed out that all researched Continental law systems accommodate ethical provisions regarding the deceased's own personality, particularly his corpse. He may usually freely allocate family souvenirs, and may provide for his funeral and burial, and for accessory decisions.

The transfer of values upon one's (legal, natural, social or spiritual) heirs is less obvious, for solutions may only be found in the creative application of general rules. As a general rule, testamentary freedom prevails in case the testator aims at restraining or constraining behaviour through the allocation of assets. Ethical dispositions are however void in case they are contrary to the law or to good morals or public policy ("*ordre public*") and may be attacked through forced heirship claims. Alternative clauses may serve as a palliative in that regard.

⁸⁴ Article 4-45 Dutch Civil Code.

⁸⁵ Supreme Court (B), *RCJB* 1953, 5, case note J. Dabin; Supreme Court (F), *D.* 1863, I, 429 and *S.* 1864, I, 269.

Even if testamentary freedom has traditionally been restricted in Continental law systems, in light of rules on forced heirship and maintenance claims against the estate (Grattan and Conway 2005), restrictions to the remaining freedom are apparently applied with restraint. Notwithstanding the larger testamentary freedom in common law systems, common law courts recognise the increasing importance of human rights instruments and their applicability in private law relationships (Chalmers 2007), even if much reticence remains (Grattan and Conway 2005). In *re Blathwayt* it was indeed argued

“that a testator should be free, subject to the rights of his surviving spouse and children, to dispose of his property as he pleases”⁸⁶.

The evolution in the case law of the ECtHR may however make Continental and common law systems meet midway.

In sum, testators in Continental law systems dispose of a quite large freedom to try influencing their heirs' behaviour. The reviewed case law reveals that this freedom is mostly used through negative incentives, so as to restrain or constrain behaviour. Testators – and their legal counsels – should consider whether reigning from the grave through negative incentives really is the value they want to pass to the next generation(s). We advise that positive incentives be used when and where possible, and that the balance of the estate, in case of non-compliance by the heirs, would be bequeathed to charitable organisations. That is however yet another interpretation of the term “ethical will”.

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⁸⁶ *Re Blathwayt v. Baron Cawley* (1975), (1976) AC 397.

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