Audiovisual Wills: A Contemporary Approach to Testamentary Formalities

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Abstract

Despite several differences between civil law and common law jurisdictions, today's modern succession law is based on Roman law, which requires strict formal rules for will-making. However, a historical perspective demonstrates that there is a slow but continuous shift away from strict formalism. In fact, form's superiority over substance is diminishing, and testamentary formalities are mellowing. Yet legislative intervention is compulsory to ensure that succession law is in harmony with the latest technological developments of the era. We argue that *de lege ferenda*, legal order should allow testators to execute audiovisual wills through electronic means of communication. Within this stance, the option of audiovisual wills should not be restricted to cases of emergency. Everyone should be allowed to make an audiovisual will at any time, and such wills should not be automatically terminated if the testator is still alive after a specific time following the execution of the will. However, one needs a feasible and secure system that will ensure that audiovisual wills bestow the functions of testamentary formalities. Accordingly, we propose that each state create a digital registry. Testators could upload their audiovisual wills to such a registry, and these wills could be shared directly with competent public authorities.

Keywords: testamentary formalities, intestacy, nuncupative will, oral will, audiovisual will.

1 Introduction

In today's liberal world, which cherishes the human being as well as his will, freedom of contract is a well-expected principle to be respected. One can create legal results and bind himself just by declaring his intent. This leads to the freedom of form, which states that the declaration of intent could be made in any form of communication, including oral. However, sometimes the law regards the form of declaration as equally important to the will itself, perhaps even more important than the will.

In many legal systems, testaments need to be handwritten or notarised. Sometimes the law requires that one or more witnesses join the ceremony of execution of the testament. Otherwise, the testament would be invalid. Only in some very exceptional cases, might a testament be nuncupative (oral). However, even in legal systems that accept oral testaments, there are strict conditions for validity: an emergency must prevent the testator from executing a will in other ordinary forms. This is then followed by the automatic termination of the will if the testator is still alive after a specific time following the case of emergency and execution of the oral will.

Although the figures vary from one country to another, we know that many people die intestate. Dying intestate is problematic for several reasons, and we think that the legal system should incentivise and lead more people to make a will. We argue that this could be possible by prioritising substance over form and allowing audiovisual wills to a great extent. With a comparative and historical perspective, this article will elaborate on testamentary formalities and the possibility of granting validity to wills made by audiovisual recording devices (audiovisual wills) *de lege ferenda*.

In the first part, we will refer to the principles of law and economics to discuss why people die intestate and why this is problematic. In the second part, we will elaborate on the evolution of testamentary formalities, retrospectively. Starting with contemporary law, we will provide an overview of testamentary formalities in Roman law and early modern Europe to demonstrate the slow but progressive change through the centuries. In the third part, the functions of formal requirements will be examined with a special emphasis on testamentary formalities. In the fourth and final part of the article, based on the succession law reform draft of Switzerland and its provisions concerning audiovisual wills, we will discuss the suitability of granting validity to audiovisual wills. We will propose a tech-savvy, feasible and secure method that grants audiovisual form the functions of testamentary formalities and persuades more people to make wills.

2 Dying Intestate: Why and Why Not?

Studies show that many people die intestate. Although it is not possible to find out the exact numbers, in civil law countries, testacy rates are 30% or lower. For instance, in France and Belgium the rate is calculated to be around 15%, whereas in Brazil it is six to eight per-

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cent.[1] Testacy rates are relatively higher in common law countries. For instance, according to 2009 figures, the testacy rate in the US was found to be 35%.[2]

2.1 Why Do People Die Intestate?

In the literature, there are several arguments that try to explain why people die intestate. Some scholars argue that the 'fear of mortality is an obvious cause of reluctance to make a will'.[3] Furthermore, the size of the estate is accepted as a decisive factor as poor people have little incentive for making a will. Satisfaction with the default rules of succession is regarded as another reason why people die intestate.[4] It is also argued that many people do not make a will because it is an 'unfamiliar, highly technical, burdensome, and expensive' process.[5]

Most likely there is no single reason why people die intestate. As a matter of fact, all the preceding reasons might be true. However, we think that the most important reason why people die intestate is that they are not acting rationally. Studies show that dying intestate is not generally an active choice. For instance, in a study conducted in the UK, the most common cause of intestacy (42%) was found to be that people simply 'hadn't got around to it'. The second most common reason (30%) was that people had never thought about making a will.[6]

When people die intestate, default rules of the succession law shall apply to the distribution of their assets. It could be argued that this is a deliberate choice. However, making a rational choice assumes that decision makers have complete and perfect information about the alternatives prior to making a decision.[7] Considering the technical features of succession law, it would be naïve to argue that laymen are well informed about the default rules that shall apply when they die intestate. Therefore, not making a testament can hardly be a rational decision based on intentional reliance on the default rules of intestacy.[8]

It is even debatable whether people could make rational choices when they are perfectly informed about the alternatives to their actions. For a long time, economists assumed that humans are rational beings and that they can make rational decisions. According to the neoclassical theory, when faced with alternative courses of action, the rational and self-interested *homo oeconomicus* would choose the option that would maximise his individual utility.[9] However, the behavioural approach to law and economics has shown that this is not true because people display 'bounded rationality'.

Bounded rationality refers to the fact that human cognitive ability is not infinite. Therefore, when making a judgment, people very often resort to heuristics. In other words, they make decisions by mental shortcuts that allow them to deal with their limited brain power and time.[10] These heuristics simplify the complex task of decision-making. Therefore, resorting to such mental shortcuts may be useful in this regard. However, these can also cause predictable mistakes.[11] In fact, heuristics lead to cognitive biases and prevent people from making rational decisions.[12]

Among heuristics and their related biases, some are particularly important for this study as they may be preventing people from making their testaments in their better days. The first of these is egocentric bias. Inferences about what will happen in the future play a critical role in decision-making.[13] However, people tend to think they are invulnerable.[14] They underestimate the risk of the occurrence of a negative event or a bad outcome, while overestimating the prospect of positive or desirable things.[15] Younger people, especially, may refrain from making their wills because they do not expect to die anytime soon.

Another bias that might prevent people from will-making is the status quo bias. Other things being equal, people tend to stick to the state of affairs that they perceive as the status quo rather than choosing an alternative option.[16] Since they associate change with uncertainty or risk, people have a tendency to privilege the status quo over change.[17] This might help to explain why people choose to stick with the rules of succession law even if they do not have accurate knowledge on the default rules of the law.

Finally, procrastination and myopia may also be influential in not making a will. In the first case, because of their tendency to procrastinate, people may voluntarily

1 K.G.C. Reid, M.J. Dewall & R. Zimmermann, 'Testamentary Formalities in Historical Comparative Perspective', in K.G.C. Reid, M.J. Dewall & R. Zimmermann (eds.), *Comparative Succession Law – Volume I – Testamentary Formalities* (2011) 432, at 435.

2 W.S. Goffe and R.L. Haller, 'From Zoom to Doom? Risks of Do-it-Yourself Estate Planning', 38 *Estate Planning* 27, at 27 (2011).

3 Reid, Dewall & Zimmermann, above n. 1, at 435-6; A.J. Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills', 61 *Boston College Law Review* 827, at 874 (2020).

4 Reid, Dewall & Zimmermann, above n. 1, at 435-6.

5 R.K. Weisbord, 'Wills for Everyone: Helping Individuals Opt Out of Intestacy', 53 *Boston College Law Review* 877, at 899 (2012).

6 National Consumer Council, above n. 2, at 5.

7 L. Kørnøv and W.A.H. Thissen, 'Rationality in Decision- and Policy-making: Implications for Strategic Environmental Assessment', 18 *Impact Assessment and Project Appraisal* 191, at 192 (2000); M. Zey, *Rational Choice Theory and Organizational Theory: A Critique* (1998), at 3.

8 P. Pleasence, N.J. Balmer & C. Denvir, 'Why do I Need a Will Anyway? Assessing the Impact of a Public Legal Education Intervention Embedded in a Longitudinal Survey', 18 *Social Policy and Society* 187, at 189 (2019); Weisbord, above n. 6, at 886.

9 K. Mathis and A.D. Steffen, 'From Rational Choice to Behavioral Economics', in K. Mathis (ed.), *European Perspectives on Behavioural Law and Economics* (2015) 31, at 31.

10 C. Jolls, C.R. Sunstein & R. Thaler, 'A Behavioral Approach to Law and Economics', 50 *Stanford Law Review* 1471, at 1477 (1998).

11 *Ibid.*, at 1477; A. Tversky and D. Kahneman, 'Judgment under Uncertainty: Heuristics and Biases', 185 *Science* 1124, at 1124 (1974).

12 Mathis and Steffen, above n. 10, at 31; R.B. Korobkin and T.S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', 88 *California Law Review* 1051, at 1085 (2000).

13 T. Sharot, 'The Optimism Bias', 21 *Current Biology* R941, at R941 (2011).

14 N.D. Weinstein, 'Unrealistic Optimism About Future Life Events', 39 *Journal of Personality and Social Psychology* 806, at 806 (1980).

15 Mathis and Steffen, above n. 10, at 40; C. Jolls, 'Behavioral Law and Economics', in P. Diamond and H. Vartiainen (eds.), *Behavioral Economics and Its Applications* (2007) 115, at 123; E. Zamir and D. Teichman, *Behavioral Law and Economics* (2018), at 61; Sharot, above n. 14, at R941.

16 Zamir and Teichman, above n. 16, at 48.

17 Mathis and Steffen, above n. 10, at 41.

delay making their wills despite being aware of the adverse effects.[18] Myopia, on the other hand, refers to the tendency to discount future costs and benefits in comparison with immediate ones.[19] Accordingly, people may refrain from consulting a lawyer or applying to a notary to make their wills because of the expense.

In my opinion, cost in itself can hardly explain why people die intestate. However, several solutions could be considered if one claims that cost is the discouraging factor. For instance, national laws could fix the prices of making a notarial will. It could also be an option to provide such services free of charge to those people who cannot afford this. Most probably, this would still not create the required incentive as these people would have few assets that would lead them to make a will.

When one considers these weaknesses of human beings, it becomes easier to understand why many people die intestate. It may also be difficult to blame them for not making a will in their better days. However, dying intestate has several disadvantages, and we strongly believe that the legal system must designate a secure and feasible system to persuade people to make wills.

2.2 What Are the Disadvantages of Dying Intestate?

When people die intestate, their assets are distributed to their heirs in accordance with the default rules of the applicable intestacy law. There are two main theories that underlie intestacy law: 'presumed will theory' and 'duty theory'.

The presumed will theory tries to imitate the estate plan that the deceased person would have chosen if he had made the effort.[20] This is important to prevent a trap for the ignorant and misinformed.[21] Moreover, by setting default rules that match the preferences of the majority, the law attempts to reduce transaction costs and maximise social welfare.[22] The duty theory, on the other hand, focuses on the deceased person's responsibilities to his/her dependents, such as children, spouse and parents.[23]

Empirical research shows that both theories have their flaws. In fact, it might not be possible to find a consensus or even a simple majority opinion as to how property should be distributed. Furthermore, even when there is such a majority or consensus, the law might fail to reflect it.[24] More specifically, most modern intestacy statutes reflect the preference of only 31.9% of individuals endorsed.[25]

The default rules of inheritance law have other flaws. First, they are unsuitable for non-traditional families.[26] When distribution under default rules is determined by the degree of affinity between the heir and the deceased, the nature and quality of the relationship between these people are not taken into consideration by the law.[27] For instance, if an unmarried person dies without a will, his/her closest friends will not inherit anything.[28] Likewise, in many legal systems, unmarried cohabitees or same-sex couples would not be entitled to anything if one of the partners dies intestate.[29]

Second, when a person dies intestate, society cannot benefit from his/her input on the best use of his/her property.[30] However, the deceased person is in the best position to know the specific circumstances and personal circumstances of his/her friends and family.[31] For instance, intestacy law is unable to know that a daughter would value her mother's engagement ring or that a charity was at the centre of someone's life.[32] Similarly, in some legal systems, a limited number of heirs have reserved portions (forced shares) that the will-maker cannot interfere with. For instance, in Turkish law, one's wife/husband, parents, children and grandchildren cannot be completely deprived of the estate that they are entitled to under the law. However, the testator may decrease their otherwise applicable portion up to the reserved portion. In some other systems, there is no forced heirship, and the testator has full control over his assets. For instance, under Texas law, the testator has complete freedom to distribute his assets to the heirs – with no restriction of reserved portion. In such legal systems, making a will is especially important if the deceased person wishes to leave everything to his/her spouse rather than his/her children from another marriage.[33]

Third, default rules fail to prevent disputes between heirs. As a matter of fact, the sole function of wills is not to distribute the testator's assets; they play a role in minimising disputes between the survivors, ensure that the testator's children are cared for and minimise legal disputes.[34] Especially when an estate cannot be settled amicably, dying intestate may tie up assets for an undetermined period of time. This would not only cause delays in the distribution of the assets but would also be costly.[35]

Fourth, dying intestate may even result in impairment of economic development. When someone dies intestate, wealth is disbursed among multiple heirs rather than concentrated. Some scholars argue that in small estates, such fractionation results in underuse of the as-

18 Zamir and Teichman, above n. 16, at 87.
19 *Ibid*., at 88.
20 A.A. DiRusso, 'Testacy and Intestacy: The Dynamics of Wills and Demographic Status', 23 *Quinnipiac Probate Law Journal* 36, at 56 (2009).
21 M.L. Fellows, R.J. Simon & W. Rau, 'Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States', 3 *American Bar Foundation Research Journal* 319, at 324 (1978).
22 M. Glover, 'A Social Welfare Theory of Inheritance Regulation', 2018 *Utah Law Review* 411, at 421 (2018).
23 DiRusso, above n. 21, at 56.
24 *Ibid*., at 57.
25 *Ibid*.
26 Weisbord, above n. 6, at 892.
27 Texas Young Lawyers Association, 'To Will or Not to Will' (2014), at 7, http://archive.tyla.org/tyla/assets/File/ToWillOrNoToWill2014.pdf (last visited 19 October 2022).
28 *Ibid*., at 8.
29 DiRusso, above n. 21, at 57; Weisbord, above n. 6, at 893-4.
30 DiRusso, above n. 21, at 59.
31 Glover, above n. 23, at 416.
32 DiRusso, above n. 21, at 59.
33 Texas Young Lawyers Association, above n. 28, at 8.
34 Pleasence, Balmer & Denvir, above n. 9, at 188.
35 Texas Young Lawyers Association, above n. 28, at 9.

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set (anti-commons problem), and such dead capital assets impair economic development.[36] In the end, economic intergenerational continuity is destroyed.[37]
Finally, dying intestate does not have financial disadvantages alone. In many legal systems, one could name in his will a preferred guardian for his minor children. This prevents the costly and burdensome guardianship proceedings[38] as well as the risk that the court appoints a guardian that the deceased person would not have desired. Furthermore, if the intended beneficiaries are living in the deceased person's primary residence, intestacy may result in rendering the deceased person's wife homeless.[39]
Considering the low testacy rates and the associated disadvantages, we think that the legal system must benefit from technology to find a tech-savvy, feasible and secure method that would encourage more people to make wills. This would not only support people's freedom of choice about property succession but also make the legal system more accessible to vulnerable populations, the elderly, and ill people. Finally, such a system would result in fewer legal disputes, saving time and taxpayers' resources.[40] In fact, the evolution of testamentary formalities reflects a slow but continuous shift from strict formalism.

3 Evolution of Testamentary Formalities

3.1 Testamentary Formalities in Contemporary Law

Despite the principle that no form needs to be observed in legal dealings in private law, many legal systems have – exceptionally – established form requirements regarding testaments. In fact, testaments take effect when the testator dies and he can no longer be reached and questioned about his real intentions. Therefore, modern legal systems resort to three different types of testamentary form as evidence of content and authenticity of a will: writing, reliance on witnesses or involvement of an officer such as a notary or judge.[41] Hence, in western systems, we see four main types of testaments: holograph will, witnessed will, public will, and special/emergency wills. There are some attempts to keep up with technological advances; however, these fail to provide a common and problem-free method for making a feasible and secure will.

36 B.J. Deaton, 'Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia', 41 *Journal of Economic Issues* 927, at 928 (2007).
37 Weisbord, above n. 6, at 897.
38 DiRusso, above n. 21, at 58; Weisbord, above n. 6, at 895.
39 Weisbord, above n. 6, at 898.
40 Willing.com Legal Advisory Board, 'Modernizing the Law to Enable Electronic Wills', https://willing.com/learn/modernizing-the-law-to-enable-electronic-wills.html (last visited 18 October 2022).
41 Reid, Dewall & Zimmermann, above n. 1, at 433.

In what follows we will first explain testamentary formalities and their evolution over time so that the functions of such formal requirements can be clearly elaborated in the following section.

3.1.1 Main Types of Wills in Contemporary Law

Holograph will refers to a written document in which the testator explains his last wishes in writing. Originating in Roman law, *holograph will* spread to several countries within and outside Europe in the sixteenth century. Today, with the exception of some states in the US, holograph will is reserved for civil law countries.[42]
Witnessed will, on the other hand, is reserved for common law and mixed jurisdiction countries. Even in such countries, oral will has largely disappeared, and it is accepted that the witnessed will must be made in writing and signed by the testator and witnesses. The number of required witnesses, originally seven in Roman law, has decreased to two in many modern legal systems.[43] This may be regarded as an indicator of the shift away from strict formalism, which makes will-making easier.
Public will – unlike private will – is made before an authorised public official. Public will is principally reserved for civil law countries, and the authorised official is generally the notary. Notarial will – which is not the only type of public will – can be handed to the notary for authentication and safe-keeping.[44] However, there is no uniformity in different countries regarding the role of witnesses in public wills. In some civil law countries, including Germany, Spain and the Netherlands, the witnessing of the public will is no longer required, or only required in special cases. In fact, the idea is that the notaries do not need monitoring by any person. Therefore, in such countries, as a principle, the witness requirement is confined to the witnessed will.[45] Common law jurisdictions have not developed a distinctive notarial profession. Perhaps this is the reason why public will is not recognised in common law or mixed jurisdiction countries.[46]
In almost all (civil law as well as common law) countries, there are one or more types of special or emergency wills. This may be regarded as mellowing formalities to prevent people dying intestate. In fact, in some cases, it may be difficult or even impossible for the testator to comply with the testamentary formalities. For instance, in some civil law countries, wills made on board a ship or aircraft are deemed valid. On the other hand, in common law countries such as England and New Zealand, the only type of emergency will is a military will, which allows oral wills by those on active service. However, emergency wills are not completely form free. In some countries, emergency will can be made before a specific public figure instead of the notary, whereas some other legal systems allow the last will to be orally declared before any person available as a witness. Some countries

42 *Ibid.*, at 438 *et seq.*
43 *Ibid.*, at 446-7.
44 *Ibid.*, at 449.
45 *Ibid.*, at 458.
46 *Ibid.*, at 471, 448.

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(such as France, Spain, Italy, Portugal, Germany and the Netherlands) aim at specifying the emergency situations (such as epidemics, contagious diseases or disasters). Some others (such as Austria, Hungary, Switzerland, Poland and Brazil) contrarily refer, in general, to exceptional circumstances or situations of imminent danger. However, where it is allowed, emergency wills are deemed to be valid for a limited time following the cessation of the special circumstances.[47]

In modern law, many countries are reluctant to grant validity to oral wills. Such reluctance is even reflected in international legal instruments aiming to harmonise succession law. For instance, according to Article 1/f of the European Succession Regulation,[48] 'the formal validity of dispositions of property upon death made orally' is excluded from the scope of the Regulation. A similar attitude can also be observed in The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions dated 1961. Accordingly, Article 10 of the said Convention sets forth that contracting states *'may reserve the right not to recognise testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other nationality'*.

3.1.2 Will-making by Technological Means

It can be argued that in modern law, form's superiority over substance is diminishing, and testamentary formalities are mellowing. For instance, in countries such as Italy, and Hungary, non-compliance with formal requirements results in the voidability of the transaction rather than voidness. In some legal systems, non-compliance with testamentary formalities may result in voidness or voidability depending on the relevant formal requirement. For instance, Dutch Civil Code lists the cases that cause voidness of a will and states that the non-observance of other formal requirements set by the law for the validity of a will makes the will voidable.[49] In Austria and Germany, an invalid will can be 'converted' into another type of will provided that the invalid instrument meets the validity requirements of the latter. The Federal Constitutional Court of Germany also ruled that wills can be made by non-verbal declarations, such as sounds and gestures. Such an approach, which allows people unable to write and speak to make wills, favours the freedom to make a will and non-discrimination. In common law countries, witnessed wills can be made by anyone who is capable of communicating his intentions by any means. If the testator is unable to write his name, he may sign by a mark or ask a third person to sign on his behalf.[50]

There are some attempts to modernise succession law and keep up with technological advances. In comparison with civil law courts, which show great adherence to testamentary formalities, common law courts are more inclined to grant validity to audiovisual wills. As an exceptional example, in Chinese law, a will made in the form of an audio or video recording is valid if attested by two or more witnesses. According to the law, both the testator and the witnesses must record their names and specify the date.[51]

3.1.2.1 Harmless Error Doctrine and Dispensing Power

In the US, courts have developed the doctrine of substantial compliance. This doctrine upholds wills that are substantially, but not strictly, in compliance with the formal requirements if the document clearly and convincingly reflects the decedent's will.[52] By mellowing the requirements for executing a valid will, the harmless error doctrine offers relief for testators who fail to meet the requirements for making a valid will.[53]

In several decisions, common law courts have resorted to the harmless error doctrine (or its equivalent in the concerning jurisdiction) to grant validity to electronic wills. In the seminal case of *In re: Estate of Javier Castro* dated 2013, Ohio probate court probated an electronic will that was created on the tablet of the testator and signed by the testator and witnesses using the tablet's stylus.[54] In this decision, the court accepted that under the law, writing did not have to be on any particular medium. In another decision (*Taylor* v. *Holt*), the court interpreted the signature requirement broadly and ruled that by typing his name in a cursive font and distinguishing his signature from the rest of the document, the testator validly signed his will written on his computer.[55] Similarly, in the *In re Estate of Horton* case, the Michigan Court of Appeals probated an electronic and entirely typed document stored on the Evernote App. In this case, the testator had left an undated handwritten note stating that his final note and farewell was on his phone's Evernote App under the name 'Last Note'.[56]

Electronic wills have been found to be valid in several other jurisdictions as well. For instance, in 1993 a Canadian court used its dispending power and ruled that the unsigned document in a floppy disk clearly reflected the last wishes of the testator.[57] In South Africa, the court upheld a draft will that the testator stored electronically on a hard drive. In this case, the testator had left a handwritten note stating the location of his electronic 'last will and testament' in his computer.[58] In New Zealand, a

47 *Ibid*., at 451-3.
48 EU Regulation 650/2012 (Brussels IV), Official Journal of the European Union, L. 201, 27.7.2012, at 107-34.
49 See Art. 4:94 and Art. 4: 109.
50 Reid, Dewall & Zimmermann, above n. 1, at 462 *et seq*.
51 Civil Code of the People's Republic of China, Art. 1137.
52 Uniform Probate Code § 2-503, www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c9e55522-8363-74ba-e087-175af9e4c93e&forceDialog=0 (last visited 19 October 2022). Six states have accepted this provision verbatim, and five other states have adopted the provision with modifications. For detailed information on the doctrine of substantial compliance, see, R.J. Scalise Jr, 'Testamentary Formalities in the United States of America', in K.G.C. Reid, M.J. Dewall & R. Zimmermann (eds.), *Comparative Succession Law – Volume I – Testamentary Formalities* (2011) 357, at 375.
53 Hirsch, above n. 4, at 840.
54 *In Re: Estate of Javier Castro*, *Deceased*, No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013).
55 *Taylor* v.*Holt*, 134 S.W.3d at 830 (Tenn. Ct. App. 2003).
56 *In re Estate of Horton*, 925 N.W.2d 207 (Mich. Ct. App. 2018).
57 *Rioux* v.*Coulombe* (1996), 19 E.T.R. 2d 201 (Can. Que. Sup. Ct.).
58 *Macdonald and Others* v.*The Master*, 2002 (5) SA 64 (N) (South Africa).

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court ruled that an email sent by the decedent to her attorney (together with handwritten notes of the said attorney) could be deemed as a 'document', and hence valid via dispending power.[59] In 2018, another New Zealand court granted validity to an audio-will accepting that the transcript of such a recording following the death of the deceased qualified as writing.[60] In Australia, a series of documents created on the testator's iPhone[61] and even a draft text message (SMS) that had not been sent[62] were regarded as valid wills. Australian courts have even used their dispensing power to validate audio and visual wills. For instance, in different decisions, the court decided that the testator validly amended/supplemented his/her written will with an audio recording.[63] In other cases, an audiowill[64] and a DVD containing the video recording of the deceased were regarded as 'documents'.[65] The court also granted validity to a video that was made four years previously and kept on the iPhone of the deceased.[66]

3.1.2.2 Uniform Electronic Wills Act

In 2019, the Uniform Law Commission in the US adopted the Uniform Electronic Wills Act (UEWA). According to UEWA, a document that was 'readable' at the time of signing by the testator is deemed as a valid will. It is important to underline that UEWA grants validity to documents and audiovisual recordings that are not covered by the Act. In the Discussion Draft, the drafters of UEWA justified such a choice by a fallacy that 'writing emphasizes the seriousness of intent', as if writing is the only instrument that emphasises seriousness of intent.[67]

According to UEWA, electronic wills must be signed by two witnesses in the physical or electronic presence of the testator. In other words, the testator and the witnesses can be in different locations, and the ceremony conducted through online mediums such as Skype, Zoom or Teams. In this regard, UEWA preserves the real-time component while changing the platform and how it is satisfied.[68] In fact, it was one of the main goals of the UEWA 'to create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will'.[69]

In the US, Nevada was the first state to give validity to electronic wills – even before the enactment of UEWA. However, Nevada's electronic will statute – dated 2001 – was not used in practice. It required an authentication characteristic that included biometric data such as fingerprint, retinal scan, face or voice recognition. Such restrictive requirements prevented testators from executing a compliant electronic will.[70] In 2017 Nevada revised the statute and brought alternatives of notarial certification and dual witnesses to the existing authentication characteristics.[71]

Currently, Nevada, Arizona, Florida and Indiana have enacted electronic will statutes and granted explicit validity to electronic wills. Still, there are some important differences in each state's law. For instance, in Florida and Indiana the same formalities apply to paper wills and electronic wills. However, in Arizona law electronic wills have to be dated. Similarly, Nevada law requires not only that electronic wills are dated but also that the wills should be executed before witnesses, a notary or with 'an authentication characteristic of the testator'. The laws also differ about requiring the physical presence of witnesses at the will execution ceremony.[72]

Especially in the US, some scholars argue that the Uniform Probate Code's harmless error doctrine is flexible enough to allow courts to effectuate clear testamentary intents. According to them, it is not necessary to enact electronic wills legislation.[73] We think that the argument that courts may answer the need by harmless error doctrine is not acceptable. Reliance on harmless error doctrine requires a case-by-case analysis and imposes a high burden of proof on the parties and workload on the courts.[74] Moreover, it pressures courts to bend the law and fails to provide legal certainty about the validity of electronic wills.[75] Additionally, the American harmless error doctrine applies only when there is a written document and oral will is not a document.[76] For instance, in Estate of Reed, the Wyoming Supreme Court refused to probate an audiotape recording of the deceased's last wishes because the writing requirement in the law did not cover any tape recording or other type of voice print.[77] Therefore, in US law, such a doctrine is not applicable to audiovisual files where the testator does not leave a written document behind. Finally, the harmless error doctrine and dispensing power are instruments available only in common law countries. Therefore, one needs to find a legal instrument that may be used to grant validity to electronic wills in other legal systems as well.

59 *In re Estate of Feron* [2012] NZHC 44 (New Zealand).
60 *Pfaender* v.*Gregory* [2018] NZHC 161 (New Zealand).
61 *Re: Yu* [2013] QSC 322 (Australia).
62 *In Re Nichol; Nichol* v.*Nichol & Anor* [2017] QSC 220 (Australia).
63 *Wai Fun Chan* [2015] NSWSC 1107 (Australia); *Re: Estate of Carrigan* (deceased) [2018] QSC 206 (Australia).
64 *Treacey* v.*Edwards* [2000] NSWSC 846 (Australia).
65 *In Re Wilden* [2015] SASC 9 (Australia) and *Mellino* v.*Wnuk & Ors* [2013] QSC 336 (Australia); *Radford* v.*White* [2018] QSC 306 (Australia).
66 *In Re Quinn* [2019] QSC 99 (Australia).
67 Electronic Wills Act, 1-2 February 2019 Drafting Committee Meeting, at 7, www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=506a61da-e7cc-9b69-0fe1-8df8df6bf431 (last visited 17 October 2022).
68 J.C. Wilson, 'Electronic Wills: Why Would Georgia Choose to Delay the Inevitable?', 73 *Mercer Law Review* 337, at 348 (2021).
69 Prefatory Note, at 2, www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c57bbb6c-8460-e697-93a6-a1652e5d310a&forceDialog=1 (last visited 17 October 2022).
70 P. Hall, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentay Intent', 20 *Nevada Law Journal* 339, at 353 (2019).
71 See, Nevada Revised Statutes (NRS) § 133.085 (2013), www.leg.state.nv.us/nrs/nrs-133.html (last visited 17 October 2022).
72 For details, see Hirsch, above n. 4, at 847 *et seq*.
73 S.S. Boddery, 'Electronic Wills: Drawing a Line in the Sand against Their Validity', 47 *Real Property, Trust and Estate Law Journal* 197, at 211 (2012).
74 Hall, above n. 71, at 349.
75 *Ibid*., at 353.
76 Hirsch, above n. 4, at 840.
77 *Estate of Reed* 672 P.2d 829 (Wyo. 1983).

3.1.2.3 Civil Law Approach

Unlike common law courts, courts in civil law countries have shown a stricter commitment to formalities. For instance, when assessing the validity of sent text messages as a written will, Swedish and French courts have followed a conservative interpretation of the law. For instance, the Swedish court decided that even if a text is written by the deceased it is not possible to sign a text message; therefore, a text message cannot be deemed as holographic will.[78] Similarly, a French court ruled that holographic will formalities serve to protect testators from the risk of falsification and writing errors, and a text message fails to meet such formalities.[79]

3.2 Tracing Back Testamentary Formalities

Although traces of wills can be found in earlier civilisations, scholars accept that the will is a Roman institution and that the true power of testation was first known to the Romans.[80] Therefore, the reflections of the rules and doctrines of Roman law of succession can be found in modern succession laws. Moreover, understanding the evolution of formalities and their functions in Roman law might demonstrate the slow but continuous shift from strict formalism and help us decide whether audiovisual wills pose any threat to the legitimate interests protected by formalities.

3.2.1 Roman Law

In the Roman Empire, will was regarded as a means to appoint a worthy heir who would continue the family and also as an opportunity to repay debts of gratitude.[81] In his celebrated work, Maine expresses that the Romans had a 'horror of intestacy'. According to the author, such testamentary power was valued owing to its assistance in making provision for family and dividing the estate more fairly than the law applicable otherwise.[82] Although such an opinion is disputed by some other scholars,[83] it is generally accepted that making testamentary depositions was a common practice among the proprietor and educated echelons of Roman society.[84]

In Roman law, private wills were the regular form of will-making.[85] In the archaic period, there were three forms of wills: *testamentum calatis comitiis*, *testamentum in procinctu* and *testamentum per aes et libram*.[86] However, alongside these wills, in different eras there were special privileges and special rules for soldiers, blind persons and persons incapable of writing, the rural population unable to sign documents, times of contagious diseases, and parents distributing their estate among their children.[87] Moreover, testators could insert a clause into their wills and accept that written documents called *codicils*, which were not actually a part of the will, would be valid as if they were part of the will.[88] These reflect the aim to make will-making accessible for everyone despite adherence to strict testamentary formalities.

In Roman law, *mancipatio* originally had the function of ensuring transparency of the act performed. Should there be a dispute, it also eliminated any doubts with regard to what had happened. However, with time, its role gradually started to be fulfilled by documentation and registration. This, in the end, resulted in the disappearance of *mancipatio* in legal practice.[89] Considering the material importance of the written document and the decreasing function of the *mancipatio* ritual, praetors decided to accept a written document sealed by seven witnesses even when there was no proof that the *mancipatio* act had been performed.[90]

In the classical period, it became customary to record testamentary dispositions in writing.[91] Therefore, around 160 A.D., *mancipatio* became merely a formality, and validity was given to the written declaration.[92] The tablets aimed to preserve and protect the dispositions of the testator. Similarly, the function of the witnesses was simply to confirm the authenticity of the written document.[93] The witnesses did not know about the content of the will, but they only testified that the sealed document was the one that the testator had presented at the *mancipatio* and referred to in his *nuncupatio*.[94]

In the fifth century, it became customary to deposit wills in the archives of the provincial governor, a municipality or the emperor. In Justinian's code this was accepted as an alternative to seven witnesses. Hence, such deposited wills were valid without the participation of any witnesses in the will-making process. The authenticity of such wills (*testamentum apud acta conditum* or *testamentum principi oblatum*) was guaranteed by the involvement of public authorities, who preserved the will until the testator's death.[95]

78 *Hovrätt* [Court of Appeals] 2013-06-13 T11306-12 (Sweden).
79 *TGI Metz*, 17 août 2018, n° 17/01794 (France).
80 G.A. Pelletier Jr. and M.R. Sonnenreich, 'A Comparative Analysis of Civil Law Succession', 11 *Villanova Law Review* 323, at 323 (1966).
81 T. Rüfner, 'Testamentary Formalities in Roman Law', in K.G. Creid, M.J. Dewall & R. Zimmermann (eds.), *Comparative Succession Law – Volume I – Testamentary Formalities* (2011) 1, at 2.
82 S.H. Maine, *Ancient Law* (1908), at 193.
83 Especially, see Daube, who argues that even in the classical period, nine out of ten people had nothing to make a will about. D. Daube, 'The Preponderance of Intestacy at Rome', 39 *Tulane Law Review* 253, at 253 (1965). Also see Watson, who argues that even wealthy Roman citizens died without leaving a will. A. Watson, *The Law of Succession in the Later Roman Republic* (1971), at 175.
84 E. Champlin, 'Creditur Vulgo Testamenta Hominum Speculum Esse Morum: Why the Romans Made Wills', 84 *Classical Philology* 198, at 199 (1989); Rüfner, above n. 82, at 2.
85 N. Jansen, 'Testamentary Formalities in Early Modern Europe', in K.G. Creid, M.J. Dewall & R. Zimmermann (eds.), *Comparative Succession Law – Volume I – Testamentary Formalities* (2011) 27, at 37.
86 Watson, above n. 84, at 8; Rüfner, above n. 82, at 3.
87 Jansen, above n. 86, at 28.
88 *Ibid*., at 44.
89 M. Novak, *Wills in the Roman Empire: A Documentary Approach* (2015), at 33. Another factor that facilitated the disappearance of *mancipatio* from wills was the praetorian will (*testamentum iure praetorio*). Novak, at 34.
90 Rüfner, above n. 82, at 7. The co-existence of two wills that require different numbers of witnesses was later abolished by Justinian. Rüfner, above n. 82, at 20.
91 Rüfner, above n. 82, at 5.
92 Pelletier Jr. and Sonnenreich, above n. 81, at 341.
93 Novak, above n. 90, at 36-7.
94 Jansen, above n. 86, at 5; Rüfner, above n. 82, at 5.
95 Rüfner, above n. 82, at 23.

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In the post-classical era, the holographic will was introduced to Roman law through an imperial constitution dating from the fifth century A.D. Accordingly, a will could be made without the presence of witnesses if it was entirely handwritten by the testator himself.[96]
An overview of the development of testamentary formalities in Roman law shows that the strict adherence to formalities mainly aimed to preserve and protect the authentic dispositions of the testator. Within centuries, as written wills became common not only did the *mancipatio* ritual lose its importance but also the need for (the number of) witnesses decreased. However, this does not mean that Roman testamentary law was not strictly formalistic. It was merely not insensitive to the contemporary developments.

3.2.2 Early Modern Europe

A slow but continuous shift from strict formalism continued over the centuries that follow the Roman law era. This perspective is reflected in the will-making rituals, the number and role of witnesses, and the presumption that those involved had complied with the necessary formalities.
Unlike Roman law, Canon law was designed to provide ease in will-making even in the last minutes of a sinner's life. Therefore, in Canon law, the only testamentary formality was the presence of a priest and two or three witnesses.[97] Moreover, prioritisation of form over substance was incompatible with the general conception of private law, which gives effect to the intentions of the parties rather than the formalities. Therefore, under Canon law, witnesses were no longer a validity requirement of a will but were regarded as a means of evidence that could be replaced, in principle, by other means.[98]
Despite several divergences in the succession laws of European towns, Roman law had a constitutive character on the consequences of violation of formal requirements. More specifically, in Roman law, the legal effect of a will was bound to the performance of the formal ritual, and violation of formal requirements caused voidness of the will in the time of *usus modernus* as well. However, the lawyers of *usus modernus* remedied the harshness of Roman law by accepting the presumption that those involved had complied with the necessary formalities (*in dubio pro testamento*). Such a presumption gave effect to a will in the case of doubt and also helped one deal flexibly with the complex and ambiguous formal requirements.[99]
Under the later *ius commune*, formalities were regarded as tools aimed at understanding the testator's last will upon his death. They aimed to make certain that the testament was based on the testator's free will and that he was protected against undue influence and fraudulent behaviour.[100]
From early Roman law's strict adherence to the *mancipatio* ritual to the idea that witnesses are simply a means of evidence that could be replaced by other means, the meaning of testamentary formalities has been subject to a significant evolution through the centuries. To explain whether we are ready to grant validity to audiovisual wills, it is necessary to understand the functions of formalities in testamentary law.

4 Functions of Formalities

Although modern private law has acknowledged the freedom of form, there are some exceptional cases where the law requires that a transaction is made in a specific form. The reason for this is that formalities have several functions that justify deeming a transaction invalid if the will is not expressed in a specific way. In what follows, functions of formalities will be explained with a special emphasis on the functions of testamentary formalities.

4.1 In General

Form requirements in law are mandatory in nature. Therefore, parties to a transaction are not entitled to remove or change such rules by mutual agreement. As a result, by imposing mandatory rules, the law regulates the transaction between the parties.[101]
Based on Fuller's well-known distinction, the functions of formalities may be divided into three: evidentiary function, cautionary function and channelling function.[102] These functions have been widely elaborated on in the literature with their legal and economic aspects. Scholars also apply such distinction and functions to statutes of wills.[103]

4.1.1 Evidentiary Function

Form requirement provides legal clarity and certainty. When the parties follow the required form, the transaction itself as well as its content can easily be proven. In other words, the parties create evidence of the transac-

96 Although this was a significant novelty in testamentary formalities, holographic will failed to make it into Justinian's *Corpus Juris Civilis*. Rüfner, above n. 82, at 19.
97 Jansen, above n. 86, at 31-2.
98 *Ibid*., at 36-7.
99 *Ibid*., at 36-7.
100 *Ibid*., at 47.
101 R. Cooter and T. Ulen, *Law & Economics* (2012), at 294. Also see G. Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights', 3 *Erasmus Law Review* 47, at 53 *et seq*.(2010); F. Chirico, 'The Function of European Contract Law: An Economic Analysis', in P. Larouche and F. Chirico (eds.), *Economic Analysis of the DCFR* (2010), at 24 *et seq*.
102 L.L. Fuller, 'Consideration and Form', 41 *Columbia Law Review* 799, at 800-1 (1941). According to Posner, functions argued by Fuller fail to explain why formalities cannot be bargained around as these functions could be maintained even if formalities were regulated as default rules rather than mandatory rules. Posner argues that the purpose of formalities is to prevent people from defrauding victims with whom they do not have a contractual relationship. This is the only reason that explains why parties are not allowed to bargain around formalities. E.A. Posner, 'Norms, Formalities and the Statute of Frauds: A Comment', 144 *University of Pennsylvania Law Review* 1971, at 1986 (1996).
103 See, A.G. Gulliver and C.J. Tilson, 'Classification of Gratuitous Transfers', 51 *Yale Law Journal* 1, at 5 *et seq* (1941).

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tion.[104] This reduces the ex post costs of enforcement.[105] In fact, the requirement to present evidence in a standard form reduces costs within the court system.[106]

The evidentiary function of formalities also aims to prevent fraud.[107] For instance, formalities required for unilateral obligations – such as donations – aim to prevent exploitation of one party by the other. In such cases, the private and social risks of opportunism and fraud are quite high. However, the social costs of discouraging people from making donations are considered low. Therefore, the lawmakers make such transactions more difficult to conclude.[108]

Form requirements also protect third parties by maintaining legal security and publicity. They reduce the information costs of third parties who have an interest in knowing the status of the assets in which they may have a claim.[109] For instance, ownership of immovables is recorded to the land registry so that interested third parties may access such records.

4.1.2 Cautionary Function

Cautionary function of form requirements is concerned with ensuring people appreciate the transactions they make.[110] As a matter of fact, form requirements draw the parties' attention to the importance and the consequences of the transaction they are about to make. Since they have to follow a specific procedure, it prevents inconsiderate action.[111]

This function ensures that the consent given truly reflects the informed and well-considered will of the parties.[112] As a result, this prevents inefficient exchanges and undesired distributional transfers from the uninformed to the informed.[113] In fact, individual decisions lead to efficient outcomes only if they are made by rational agents.[114]

Transactions with large impacts are also subject to strict form requirements. For instance, marriage, surrogate motherhood and various transactions concerning inheritance are subject to form requirements. This reflects the importance attached to autonomy and deliberateness of choice.[115] In such cases, the additional transaction costs of the formalities are justifiable when one considers their function to deter impulsive behaviour.[116]

4.1.3 Channelling Function

Form requirements also mark and signalise to courts that the parties regard their promises as enforceable.[117] The channelling function provides a public mark of legal rights and duties as well as evidence for the courts, the parties to the transaction and third parties.[118] In other words, once the parties have followed the standardised formality for a transaction, it shows the court that it is a particular type of transaction that the parties are willing to enter into.

4.2 In Testamentary Law

Testamentary form is a tool that aims to ascertain that the testator's last desires are made publicly known and fulfilled. As a matter of fact, the form helps one understand the testator's desires correctly and genuinely. This is crucial to correctly enforce the will. However, it should not turn into an obstacle that prevents the testator from validly declaring his wishes to the next generation.[119]

In succession law, the cautionary function of form is that it protects the testators against themselves by alerting them to the significance of will-making. However, formalities also protect the testators against coercion and undue influence by others at the phase of will-making, as well as against fraudulent behaviour by guaranteeing authenticity. Therefore, testamentary formalities also have an important evidentiary function. Finally, the channelling function of the form shows the courts that the testators are willing to make a will and be bound by it. However, there are some other virtues that are attributed to testamentary formalities. Accordingly, they must be clear and straightforward; they must be financially affordable even for the less well-off; they must provide the testator with the potential of secrecy; and they must be discoverable following the testator's death.[120]

Public wills, including the notarial will, have cautionary, evidentiary and channelling functions. A notary not only verifies the identity of the testator but also makes sure that one complies with all the formalities.[121] Although the involvement of the notary means expenses for the parties, it is argued that this decreases transaction costs in general. When a public authority makes sure that the formal requirements of the transaction are met it eliminates the need to find a reliable consultant that the parties would otherwise need. Such participation also minimises the information gap that occurs owing to the regulatory framework, which is increasingly complex.[122] The public authority conducts all the verifications concerning the titles of the parties and explains the obligations that each party is undertaking.[123] This

104 E. Mackaay, *Law and Economics for Civil Law Systems* (2013), at 452.
105 B. Hermalin, A.W. Katz & R. Craswell, 'Contract Law', in A.M. Polinsky and S. Shavell (eds.), *Handbook of Law and Economics* (2008) 3, at 48.
106 P. Cserne, *Freedom of Contract and Paternalism* (2012), at 110.
107 C. Bridgeman, 'Default Rules, Penalty Default Rules, and New Formalism', 33 *Florida State University Law Review* 683, at 690 (2006).
108 Cserne, above n. 107, at 107-8.
109 *Ibid*., at 110; Hermalin, Katz & Craswell, above n. 106, at 51.
110 Bridgeman, above n. 108, at 690.
111 Fuller, above n. 103, at 800-1.
112 Mackaay, above n. 105, at 452.
113 Hermalin, Katz & Craswell, above n. 106, at 49.
114 Wagner, above n. 102, at 53.
115 Cserne, above n. 107, at 108.
116 Hermalin, Katz & Craswell, above n. 106, at 51.
117 Fuller, above n. 103, at 800-1.
118 Bridgeman, above n. 108, at 690.
119 P. Breitschmid, 'Standort und Zukunft des Erbrechts', 3 *Successio* 276, at 307 (2009).
120 Reid, Dewall & Zimmermann, above n. 1, at 468-9.
121 *Ibid*., at 449.
122 E. Morandi, 'The Role of the Notary in Real Estate Conveyancing', 4 *Digital Evidence and Electronic Signature Law Review* 28, at 31 (2007).
123 Morandi, above n. 123, at 33; R. Zeng, 'Real Estate Operations and Notary System at Civil Law Legal System', 9 *US-China Law Review* 547, at 553

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also reduces potential legal disputes that could arise in the future in regard to the legal aspects of the transaction.[124] In fact, functions of ex post law enforcement mechanisms and courts are fulfilled by these public authorities.[125] Once the legality of the document is verified by the public official, potential errors and the risk of invalidation by the court decrease.[126] As a result, litigiousness and production costs of judicial services also decrease.[127] Finally, in cases where registration to a public registry takes place, this protects legal security. Since these registries are public, even third parties can easily be informed about the transaction and rely on it for legal purposes.[128] This is particularly important in succession law as the notary is generally responsible for the safe-keeping of the will. However, notarial will lacks the simplicity and affordability – at least ex ante at the will-making stage. In its open form, it also lacks the secrecy that the testator may need.[129] The ceremony and cost of making a will before a notary may discourage people from resorting to this method.

In holograph will, a signature and the handwritten requirements provide the evidentiary and channelling functions. In fact, at the stage of signing, a signature warns the testator about the seriousness of the act he is about to commit; following the testator's death, the handwriting functions as proof of authenticity. Such a document also shows the finality of the testator's intention and his willingness to be bound.[130] These documents are easy to make, and they provide the testators with the secrecy that they may seek. However, holograph wills fall behind notarial wills with regard to the protective and cautionary virtues as they are easily obtainable by compulsion. Moreover, like all types of private wills, there might be a problem of discoverability following the testator's death.[131]

With regard to formality, a witnessed will stands between a holograph will and notarial will. As is generally the case in common law jurisdictions, if it is prepared by a lawyer, it displays cautionary function. When it is lodged with a professional, it can easily be discovered following the testator's death. However, witnessed will fails in terms of its evidentiary function. As a matter of fact, the reliability of witnesses as evidence is highly questionable.[132] Witnesses can easily make mistakes; they can forget or even lie. These risks also apply to emergency wills, which are made before witnesses.

Apparently, all main types of wills that modern legal systems accept to be valid have their strong and weak points when it comes to their functions. If audiovisual wills do not fall behind these types of wills in terms of fulfilling the testamentary functions, it might be possible to grant them legal validity.

5 Testamentary Formalities in Technological Era: Audiovisual Wills

Testamentary formalities are an area of law where lawmakers in all jurisdictions have always been quite conservative. This is likely because divergence from the existing formalities would mean sacrificing the evidentiary function of testamentary formalities. In fact, it is argued that in testamentary law, the most important function of formalities is the evidentiary function.[133]

Unlike contract law, at the time of its enforcement, the testator will not be alive to contest the will.[134] This increases the significance attributed to the evidentiary function of testamentary formalities. For instance, it has been defended that oral wills are especially deficient in fulfilling evidentiary function as they lack both the permanence of writing and the probative value of the signature.[135] Similarly, some scholars argue that the convenience of electronic wills is not worth sacrificing the functions of formalities.[136] Accordingly, electronic wills involve unknown possibilities of security and fraud risks.[137]

Today, we think that technology has advanced and the writing requirement is no longer indispensable as evidence.[138] Instead, current technological advances make it easier to make an unwritten will without sacrificing the authenticity of a testament. In what follows, we will first present the Swiss reform draft, which proposes granting validity to wills made by audiovisual means. After discussing whether audiovisual wills bestow the functions of testamentary formalities, we will discuss whether granting validity to audiovisual wills may increase testacy rates without sacrificing the functions expected from testamentary formalities.

5.1 Audiovisual Wills in the Swiss Inheritance Law Reform Project

Like many other legal systems, Swiss law recognises an emergency will (Art. 506-508 of the Swiss Civil Law). Accordingly, if the testator is prevented from making any other type of will owing to extraordinary circumstances such as risk of imminent death, traffic blockage, epidemic or war, he can declare his will orally to two witnesses who shall later have it drawn up as required in

(2012).

124 Morandi, above n. 123, at 31.

125 B. Arruñada, 'The Economics of Notaries', 3 *European Journal of Law and Economics* 5, at 5 (1996).

126 Morandi, above n. 123, at 31.

127 Arruñada, above n. 126, at 8.

128 Morandi, above n. 123, at 31; Zeng, above n. 124, at 549.

129 Reid, Dewall & Zimmermann, above n. 1, at 469.

130 *Ibid*., at 455.

131 *Ibid*., at 469.

132 *Ibid*., at 470.

133 J.H. Langbein, 'Substantial Compliance with the Wills Act', 88 *Harvard Law Review* 489, at 501 (1975); Developments in the Law, 'What Is an 'Electronic Will'?', 131 *Harvard Law Review* 1790, at 1793 (2018).

134 Langbein, above n. 134, at 501.

135 *Ibid*., at 493.

136 Boddery, above n. 74, at 208.

137 *Ibid*., at 209.

138 Hall, above n. 71, at 359.

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the form of a deed for submission to the judicial authority. If the testator survives such circumstances, the will automatically becomes invalid 14 days after the opportunity arises to make a will in another (ordinary) form.

As part of the Law of Inheritance Reform project, in 2016 Swiss authorities published a preliminary draft (Vorentwurf) for amending Articles 506-508 of the Code of Obligations. The draft was unexpectedly innovative as it allowed testators to make audiovisual wills in cases of emergency. According to the preliminary draft, the testator himself must appear on the recording, state his or her name, explain the extraordinary circumstance, and, if possible, state the date and his last wishes. According to the provision, two witnesses would not be necessary to make an audiovisual will, but such a will would lose validity 14 days after the opportunity arises to make a will in another form.

The provisions concerning audiovisual wills did not find their way to the first statement (Botschaft) of the Federal Council (BBl 2018 5905) because the issue was found to be a non-political and merely technical matter.[139] However, prior to such a decision, the preliminary draft was sent to Swiss cantons as well as to political parties and several related organisations with a request for feedback. Although the vast majority of those taking part in the consultation supported the amendments to the said provisions, there were also some concerns and criticisms.[140]

The feedback from the stakeholders showed that the major concern was about the risk of coercion and abuse. Within this stance, it was argued that the lack of two witnesses could make it easier for third parties to coerce or abuse the testator while he gave his last will. Therefore, it was recommended that witnesses should also be present when making an audiovisual will. It was further argued that people should learn to make their wills in a timely manner and in a quiet moment; therefore, the emergency will could be abandoned entirely.

The authenticity of the audiovisual will was also a matter of concern. It was argued that the recording device, which contains the original version of the emergency will, would have to be officially secured to be able to prove any forgeries. Moreover, it was discussed whether the timecode in the recording would be enough or whether it would be necessary for the testator to state the date in the recording.

Finally, it was argued that with the availability of making audiovisual wills, the number of emergency wills and court cases would increase. The obligation to take these audiovisual emergency wills under record would also increase the workload of the courts.

The concerns about granting validity to audiovisual wills may be further extended. For instance, it might be rightfully argued that audiovisual wills lack the channelling function expected from testamentary formalities. In fact, it might be difficult to differentiate someone's uncontemplated thoughts or even jokes from their serious intention to make a testament. Suppose that following his death, one finds a video recording on the deceased person's cell phone. Could such a recording be deemed as the final and true wishes of the deceased? Such a risk does not arise in holographic wills and public wills, which are bound to strict formal requirements and ceremonies. Even if emergency wills are not as strong in this regard, the presence of witnesses makes it easier to assess the seriousness of the deceased person's intentions.

Another important question is with regard to the registration and deposition of audiovisual wills. If audiovisual wills are not registered or deposited but simply sent to third parties by email, or if they are posted on the social media accounts of the deceased, it could be difficult to differentiate a will from an ordinary thought or wish concerning the future. Moreover, if these wills are not sent to anyone but simply kept in the testator's phone or computer, this would possess discoverability risk. There is also the risk that one could have more than one – and conflicting – audiovisual will in different devices. On the other hand, if one was required to go to the court or notary to deposit their audiovisual wills, this could undermine the ease and affordability expected from audiovisual wills. In fact, making an audiovisual will would not be easier or cheaper than making other types of wills. Finally, there is a higher risk of authenticity, considering the deep-fake technology that is now accessible to almost everyone.

5.2 Could Audiovisual Wills Bestow the Functions of Testamentary Formalities?

Nowadays, almost everyone carries a device with them that can be used to record videos, while in many cases they do not have access to anything to write by hand. Moreover, in today's world, a recording device is easier to find than one or two witnesses in an extraordinary case. As a result, some scholars argue that it is difficult to understand why an oral testament on a dictation machine, smartphone or a similar device (that has a recording and identification function) cannot be used to make a will.[141]

We think that will-making must be made as easy as possible so that everyone can always decide on the future of his estate. However, as mentioned previously, there are valid concerns about the risks of an audiovisual will. Considering the criticisms made to the Swiss draft law, we will first propose a method for audiovisual will-making and then demonstrate how such a method would eliminate or at least minimise the risks associated with the audiovisual form.

139 P. Breitschmid, 'Art. 506-508', in H. Honsell, N.P. Vogt & T. Geiser (eds.), *Basler Kommentar Zivilgesetzbuch II, Art. 457-977 ZGB Art. 1-61 SchlT ZGB* (2019), at N. 3.

140 See, Änderung des Zivilgesetzbuches (Erbrecht) – Bericht über das Ergebnis des Vernehmlassungsverfahrens, at 63-5, www.admin.ch/ch/d/gg/pc/documents/2500/ZGB-Erbrecht_Ergebnisbericht_de.pdf (last visited 18 October 2022).

141 Breitschmid (2019), above n. 140, at N. 3; P. Koller, 'Studer Anwälte und Notare AG – Modernisierung des Erbrechts', 2 *Mögazette*, at 15 (2016).

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5.2.1 *Establishment of an Electronic Gateway Registry System*

In the literature, electronic wills are generally divided into three categories: offline, online and qualified custodian.[142] Offline electronic wills are quite similar to holographic wills because they are typed or handwritten with a stylus onto an electronic device by the testator. They are signed by the testator (by typing his/her name or putting another signatory mark to the electronic document) and stored on the local hard drive of an electronic device.[143] These are highly susceptible to tampering and fraud.[144] Moreover, such devices may get lost or damaged with time.[145]

Online electronic wills are created and stored using an unsuspected third-party service such as Dropbox or Facebook. As they are stored on a neutral platform, such wills are easier to authenticate; however, third-party platforms could object to the production of the electronic will owing to the decedent's right to privacy.[146]

Qualified custodian electronic wills are created, executed and stored by companies that are subject to the rules and regulations put forth by a state. These companies charge a fee to provide their service, and this makes such wills superior to offline and online electronic wills. In fact, the custodians store the wills permanently and share them at probate proceedings upon the testator's death.[147] It is argued that qualified custodian wills fulfil the evidentiary, channelling and cautionary functions of will formalities.[148]

We agree with the aforementioned concerns about offline and online electronic wills. If validity will be granted to electronic wills, the legal system must be able to identify the authenticity of the electronic record. In this effort, technology can be used in two ways: for creating and storing electronic wills by a reliable custodian or for using security technology to track access and any modifications to electronic wills.[149] In the first case, the courts would rely on the credibility of the custodian, who stores the will in a secure and tamper-proof way. This would provide a presumption of authenticity and validity.[150] In the second case, authenticity of the electronic will would be maintained through existing technologies such as metadata. In fact, metadata can provide information about the creation, storage, access and alteration of electronic records.[151] Accordingly, the legal system may benefit from continuously developing metadata technologies such as hashing to protect and authenticate files.[152] It is rightfully argued that metadata cannot reveal whether the testator was coerced while drafting the will.[153] However, such risk applies to holograph wills as well, and they are still permitted. In fact, the authenticity of a handwritten will may also be challenged in court. Although it is argued that in comparison with paper records electronic copies are more susceptible to getting destroyed,[154] we disagree with this idea because electronic files may easily be backed up and kept at one or more secure servers, making them more durable.

In favour of the second option, we think that it is possible to design a form of audiovisual will that would be easy, secure and economical without involving any custodians because it would not only require special regulation and permit but also create problems and disputes of its own. Moreover, it would be costly for the testators. We think that creating a secure, state-owned web database where citizens could upload their electronic wills could be the solution to many concerns concerning audiovisual wills.[155]

Today, many countries have electronic gateways where they run public services. They provide their citizens with passwords; by using these secure passwords, citizens receive several public services online. It would not be difficult to create a digital registry and integrate a module into these systems where citizens could upload their audiovisual wills. These wills could be transferred directly to public authorities who could process them after the death of the testator. If the testator changes his mind, he could later erase these recordings.

When the drafters of the UEWA decided that the act should not cover video recordings, one of their arguments was that 'an individual might leave a series of videotapes, with changes in bequests and unclear directions' and 'court might be faced with overlapping and uncertain bequests and directions'.[156] We do not think that this concern would be valid for audiovisual wills that are uploaded to gateways. If a testator uploads more than one will, each will would have its upload date, and the latest will would totally or partially override the former one if they contradict each other. Otherwise, one could argue that these wills supplement each other. This would be a basic interpretation activity to be made by the court in case of a legal dispute – similar to a dispute on two holographic wills with different dates.

Unlike the Swiss draft, we think that the option of audiovisual wills should not be restricted to cases of emergency. Everyone should be allowed to make an audiovisual will at any time, and such wills *should not* be auto-

142 Developments in the Law, above n. 134, at 1791.
143 *Ibid*., at 1792.
144 *Ibid*., at 1797; J.L. Fox, 'Twenty-First Century Wills', www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2019/november-december/twentyfirst-century-wills/ (last visited 18 October 2022).
145 Developments in the Law, above n. 134, at 1798.
146 *Ibid*., at 1797, 1802; Fox, above n. 145.
147 *Ibid*., at 1807; Fox, above n. 145.
148 Developments in the Law, above n. 134, at 1807.
149 Willing.com Legal Advisory Board, above n. 41.
150 *Ibid*.
151 Wilson, above n. 69, at 361; Willing.com Legal Advisory Board, above n. 41.
152 Willing.com Legal Advisory Board, above n. 41.
153 Developments in the Law, above n. 134, at 1797.
154 Wilson, above n. 69, at 362; Hirsch, above n. 4, at 862.
155 Proposing a secure web database to upload electronic wills, see K. DuComb, 'The Promise of Electronic Wills', *Michigan Telecommunications and Technology Law Review*, http://blog.mttlr.org/2007/11/promise-of-electronic-wills.html (last visited 18 October 2022).
156 Uniform Electronic Wills Act, Memorandum, 21 January 2019, at 2, www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7b8ec0ed-1b92-2abc-2b16-145661-a09142&forceDialog=0 (last visited 19 October 2022).

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matically terminated if the testator is still alive after a specific time following the execution of the will. However, we also think that audiovisual wills would mostly be used in cases of emergency. In fact, someone who would be willing to make a will in his better days would not need to resort to an audiovisual will. He would most probably consult with a legal expert and go to the notary to decrease the risk of invalidity claims when he dies. However, many people refrain from making their will until the very last moment, and audiovisual wills would enable such people to declare their last wishes. If they have a phone and internet connection in their last minutes, they may make an audiovisual will.

While making an audiovisual will, electronic signatures can fulfil the cautionary function just like ink signatures. Electronic signatures also show the testator's intent to make a binding transaction.[157] Considering that electronic signatures may be used in several transactions (including transactions worth billions of dollars, tax payments and even organ donations in some countries), one could hardly explain the reason why they should not be used in will-making.[158]

5.2.2 Risk Assessment of Audiovisual Wills Concluded Through the Proposed Electronic Gateway Registry System

Our proposal to create digital registries over electronic gateways either eliminates or minimises the foregoing risks that have been pointed out. We argue that such a method would not only make it easier and economical to make a will but that it would also allow audiovisual wills to bestow the functions of testamentary formalities.

5.2.2.1 No need for Participation of an Official

Will-making through audiovisual means does not require the participation of an official, such as the notary. One could simply use his electronic devices to make one's will in a valid way.

It is rightfully argued that a notary makes sure that one complies with all the formalities and that this decreases transaction costs in general. We also agree that notaries' participation in the process also eliminates the need to find a reliable consultant that the parties would otherwise need. One could also argue that consulting an expert, such as a notary would protect the testators who lack legal knowledge. If one does not know about his options and the legal consequences of his choices, could his will reflect his last wishes?

We think that these advantages of a notarial will should not deprive people of the option to make other types of will that are simpler and relatively cheaper. This should not be surprising as many legal systems grant validity to holographic wills in addition to notarial wills.

People must have the freedom to – or not – consult a legal expert as long as they face the legal consequences. In fact, granting validity to audiovisual wills does not deprive people of the freedom of consulting a legal expert. The same applies to many legal transactions from conclusion of lease agreements to purchase of immovable property. If someone with no legal knowledge chooses to make a will by himself, the content of the will must be deemed his last wishes.

One could also argue that an official, such as notary, checks the mental health of the person making a last will. We can hardly agree with this argument. First, notary is not a doctor who has the required knowledge and skills to assess someone's mental health. Second, holographic wills are regarded as valid in many legal systems, and no one assesses the testator's mental health ex ante. Finally, this issue can be dealt with by the courts when a person dies.

5.2.2.2 No Need for Witness Participation

With regard to audiovisual wills, one of the most important questions is whether or not they can provide convincing evidence from a technical point of view. In fact, one of the primary criticisms against the Swiss draft provision was that, similarly to public wills or extraordinary wills, witnesses must also be present for audiovisual wills. It is argued that witness participation would prevent coercion and abuse of the testator. In fact, without the presence and the statement of a witness, one could never know who is behind the camera. Moreover, witnesses would have the function of submitting the audiovisual wills to the authorities.

Although this is a valid concern, we do not think that the presence of witnesses is necessary when making audiovisual wills. In fact, it is rightfully argued that it must be possible to make wills by using today's technological means without lowering the qualitative requirements for the authenticity of testamentary dispositions.[159]

Many legal systems allow testators to make oral wills before witnesses in cases of emergency. In such cases, witnesses have two functions: they listen to the last wishes of the testator, and they transmit such wishes to the competent authorities. However, an audiovisual will may carry both functions of a witness. Moreover, witnesses are hardly reliable as evidence. They can forget and can make mistakes or even lie.[160] Therefore, the presence of witnesses could only be a partly effective tool in the prevention of coercion and influence. However, in return, this would make it more difficult for a testator to make an audiovisual will for two reasons: the testator may wish to keep his last wishes a secret until he dies, and in cases of emergency, it might be difficult to find a witness at all.

We think that technological advances and means of communication reflect the entire and true intentions of the testator. One could record his last wishes, upload it to the registry and share it with the authorities through the electronic gateway registry system. As a result, the video recording would reflect the true intention of the testator much more effectively than a witnessed will,

157 Willing.com Legal Advisory Board, above n. 41.

158 DuComb, above n. 156; Wilson, above n. 69, at 362; Willing.com Legal Advisory Board, above n. 41.

159 Breitschmid (2019), above n. 140, at N. 3.

160 Reid, Dewall & Zimmermann, above n. 1, at 469.

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which is based on the questionable memories of the witnesses.[161]

5.2.2.3 No Higher Risk Regarding Coercion or Authenticity

One could argue that the electronic gateway registry system does not fully eliminate the risk of coercion or fraud, and this criticism would be true. Theoretically, it is possible to coerce someone to make a recording and upload it to an electronic gateway registry system. However, undue influence, duress or fraud risk in holographic wills are not lower than the risk in electronic wills.[162] The same argument applies to nuncupative wills as well.[163]

To be more specific, one could force another to write and sign a holograph will. It is never possible to be absolutely sure that any testament is not made under coercion or undue influence. On the other hand, because a video recording shows the testator's appearance, actions and the surrounding environment, it may be used to determine the absence of undue influence and fraud.[164] Moreover, such a video recording may also be an important tool for an accurate determination of the testator's mental capacity.[165]

With regard to authenticity, the proposed registry system would be as safe as it can be. The audiovisual recording of the testator would be uploaded using the password, which is at the disposal of the testator. As long as the security of the electronic gateway is provided by the state, the risk of authenticity would be very low – even lower than holograph will. In fact, the risk that audiovisual wills may be tampered with is present in all kinds of evidence: witnesses perjure, documents may be falsified and exhibits can be crafted to prejudice interpretations.[166] The legal barriers applicable to prevention of fraud in traditional wills would also be available for audiovisual wills.[167] If the legal system accepts that will-fraud is a criminal offence, this would be a strong deterrent. Moreover, such fraud is highly susceptible to detection because beneficiaries under the default rule would have a strong incentive to contest the will at court.[168]

In their article dated 1989, Beyer and Buckley argued that in comparison with a written will that can be altered by anyone that has a 'correction tape or fluid, scissors, a photocopier and a bit of evil ingenuity', a videotaped will is harder to alter, requiring more sophisticated skills and equipment.[169] Although such an argument was valid at the end of the twentieth century, today technology has advanced so much that an average computer user may purchase the necessary software and alter a video recording. Moreover, artificial intelligence makes it possible to create so-called 'deepfakes', and someone's face and voice can be changed in a video to make them appear to be someone else. Therefore, a video cannot be regarded as mere evidence of someone's last wishes. However, its authenticity can be tested by using additional security tools, and, as a result, validity may be granted to audiovisual wills. We are not strangers to such security tools. When using online banking or even accessing our emails, we are required to pass through two-factor authentication. For instance, we enter our username and password and later enter a code that is sent to our cell phones or registered email addresses.

5.2.2.4 Channelling Function of Audiovisual Form

An electronic gateway registry system would eliminate the difficulty of differentiating uncontemplated thoughts or even jokes from the serious intention of making a testament. In fact, the conclusion of such registration by the testator would also provide the audiovisual wills with a channelling function. Through the registration system, one can easily differentiate a draft found in the deceased person's computer, phone or flash drive.[170] More specifically, if someone uses his password to upload a video to the said platform, this reflects his seriousness and intention to be bound by such a declaration.

5.2.2.5 Cautionary Function of Audiovisual Form

It might be argued that regarding their cautionary function, holograph wills and public wills are superior to oral wills, especially those made in emergency cases. It might also be questioned whether someone can make healthy decisions about his property at the very last moments of his life and whether such decisions would reflect his real intentions.[171] However, this is not a valid reason to deprive someone of making a will, even if he was not prudent enough to make his will in a timely manner and in a quiet moment. Besides, human beings are open to making emotional decisions or mistakes even in their better days. It is never possible to know for certain that any testament reflects the testator's real intentions in entirety.

None of the well-established forms of testaments meet all of the virtues expected from a testamentary disposition. For instance, notarial wills are complex and expensive. Moreover, in its open form, notarial will infringes the secrecy of the testator. Holograph wills, on the other hand, lack protective and cautionary functions as they can be easily obtained by compulsion. Besides, they are not easily discoverable following the testator's death. Witnessed wills are not unproblematic either. Witnesses are not reliable as evidence as they can forget, make mistakes or even lie.[172]

161 G.W. Beyer and W.R. Buckley, 'Videotape and the Probate Process: The Nexus Grows', 42 *Oklahama Law Review* 43, at 53 (1989).
162 G.W. Beyer, 'Technology's Impact on the Changing Future of the Trusts and Estate Practice', at 20, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3528403 (last visited 18 Ocotober 2022).
163 Hirsch, above n. 4, at 878.
164 Beyer and Buckley, above n. 162, at 49.
165 *Ibid.*, at 49.
166 *Ibid.*, at 57.
167 DuComb, above n. 156.
168 Weisbord, above n. 6, at 938.
169 Beyer and Buckley, above n. 162, at 49.
170 DuComb, above n. 156.
171 Reid, Dewall & Zimmermann, above n. 1, at 452.
172 *Ibid.*, at 469.

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Audiovisual wills, on the other hand, are advantageous in this regard. Since the testator will first record his video or voice, then login the gateway using his password, and finally upload the testament, we think that registration of audiovisual wills through the electronic gateway registry system would fulfil the cautionary function more than holograph wills – even if arguably less than public wills.

5.2.2.6 Discoverability Risk of Audiovisual Wills

The discoverability risk regarding holograph wills does not exist for registered audiovisual wills. In fact, once audiovisual wills are uploaded to the registry, they may easily be shared by the relevant authorities. Therefore, there will be no need to follow bureaucratic procedures to deposit them with the competent authorities (such as courts). Moreover, after recording the disposition with his own device, the testator may even forward it to third parties concerned – such as beneficiaries – by email or other means (if there is sufficient network coverage).[173] Otherwise, it would be more appropriate to keep the testament and its contents confidential until the death of the testator. The electronic gateway registry system provides such secrecy as well.

5.2.3 Is Registration Really Necessary?

What if the testator only records his last wishes on his cell phone but fails to upload it to the electronic gateway registry system? Common law courts have regarded even unsent text messages or video recordings on cell phones as valid wills. Perhaps one could send such a recording by email to third parties or post it on one's social media profile. Could such dispositions be deemed valid testaments unless they are registered and deposited on a platform such as electronic gateway registry system? We find this question hard to answer affirmatively. Although will-making must be easy and affordable, functions of testamentary formalities cannot be sacrificed to make it even easier. Otherwise, the institution could lose its function completely. It is critical to find a balance between making a will easily and ascertaining that the testator's last desires are made publicly known and fulfilled.

We think that a video found on the phone or computer of a person cannot be regarded as a valid will. The same applies to emails and social media posts. One must be certain that the audiovisual will reflects the serious intentions of the testator. However, without any formality such as the registry system, it could be difficult to differentiate a will from an ordinary thought or wish concerning the future.

If registration is not required at all, it is possible that different recordings may be found in different devices of the testator. Similarly, suppose that one of the videos is sent to the beneficiary of the said testator but that a different and contradictory video is found in the deceased person's computer. Although it is generally possible to technically figure out the recording dates of the different videos, they might still be falsified. What if one of the videos is recorded on a later date but the latest of the two emails contains the video that was recorded on an earlier date? Which of these contradicting videos and statements would be regarded as the last and final will? All these cases carry the risk that the last wishes of the testator cannot be understood or fulfilled. This is a risk that one cannot take for making will-making even easier.

6 Conclusion

Many people die intestate. This is problematic for several reasons, and we think that the legal system should incentivise and lead more people to make a will. We argue that this could be possible by prioritising substance over form and allowing audiovisual wills to a great extent.

Within an historical approach, one can see that through the centuries there has been a slow but continuous shift away from strict formalism in testamentary law. However, legal developments in the field of succession law have usually amounted to a liberalisation of existing rules rather than an open-minded revolution.[174]

Although judicial interpretation is an important technique that allows overcoming the unwanted results of strict formalism, it has very limited scope.[175] Therefore, legislative intervention is compulsory to make sure that the testator's intention is superior to the formalities and that the succession law is in harmony with the latest technical and technological developments of the era. We think that, *de lege ferenda*, legal order should allow testators to execute audiovisual wills. The option of making audiovisual wills should not be restricted to cases of emergency. Everyone should be allowed to make an audiovisual will at any time, and such wills should not be automatically terminated if the testator is still alive after a specific time following the execution of the will.

Testamentary formalities have important functions, and we think that audiovisual wills would also bestow such functions under some circumstances. Accordingly, we propose that each state creates a digital registry to be integrated into their electronic gateways ('electronic gateway registry system'), where they run public services. Testators could easily upload their audiovisual wills to such a registry, and these wills, deposited in the system, could directly be shared with competent public authorities. This would not only be a tech-savvy, feasible and secure method of will-making that bestows the functions expected from testamentary formalities but would also encourage people to make a will.

173 U. Fasel, *Erbrecht-Entwicklungen 2016* (2017), at 23.

174 Reid, Dewall & Zimmermann, above n. 1, at 471.

175 *Ibid.*, at 463.

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