(2) The search for a mechanism to relax the rigour of the wills formalities regulations

1. Departure from strict formalism

The concept of a will as a formal legal act has long been present in the law of succession, as indicated above, and covers virtually all legal systems. Originally, in the most exemplary succession laws that have influenced the shape of legislation in other countries in this area, this concept was found as a result of the perception of the wills formalities through the prism of a tool to ensure that a declaration of testator's intent is made effectively and without pressure.[177] However, as it has turned out over the years of application of the law in this area, strict compliance with the provisions on the form of wills - as was the case in most countries at the time - has often had unsatisfactory results.[178] A will as a tool to reflect the testator's real intention proved not to be foolproof, as it happened many times in practice that the testator was not able to effectively prepare a will according to the formal expectations of the legislator.[179] Such effects of applying the law in this area gave rise to a need to look at the formal requirements of wills from a slightly different perspective, i.e. from the standpoint of achieving the effects of a testation act while maintaining formalism. For a long time it has been recognised that strict observance of the formal requirements of wills may lead to the harm of testamentary heirs and challenge the testator's freedom to dispose of his estate upon death.[180] This became the basis for the theories that mitigated the formal rigor of dispositions made in the event of death. They then became the basis for legislative changes or changes in the practice of law in some countries. These concepts and the effects of their application gave rise to various comments, from deep acceptance to strong criticism. As some of them had an impact on the current

177 Hayton (n 12).

178 *Cf.*, e.g., Randall Friedman, 'Proof and Effect of Mistake as to the Provisions of Wills' (1973) 38 Missouri Law Review 48.

179 Langbein, 'Substantial Compliance with the Wills Act' (n 10) 489 ff.

180 *Cf.*, e.g.: Andrew G Lang, 'Formality v. Intention - Wills in an Australian Supermarket' (1985) 15 Melbourne University Law Review 82.

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legislation, it is worth looking at the stages of the search for the golden mean in this area.

2. *Ideas for the validation of wills executed against the regulations on the wills formalities*

Socially unacceptable statutory solutions in the area of succession law are not something new, coming up only recently. This is why these remarks can start with the observation that in the opinion of many, the unsatisfactory statutory solutions can be seen, for example, as early as the German law adopted in 1896 came into force. Among other things, the *Bürgerliches Gesetzbuch* introduced a rule according to which a will must be drawn up in the form of "a declaration, specifying the place where, and the day when, it had been made, and written and signed by the testator in his own hand" (§ 2231 subsection 2 of *Bürgerliches Gesetzbuch*). The failure of the declaration of last will to comply with the formal requirements outlined above meant that the entire disposition was invalid (§ 125 *Bürgerliches Gesetzbuch*). Despite the fact that the doctrine considered that the requirements laid down by it appeared to be "so straightforward and so easy to be complied with, that no testator has to worry about invalidity",[181] it soon became apparent that the application of this provision in practice raises important questions. As Reinhard Zimmermann have noticed recently, the generally accepted area of interpretation for the German courts was that the requirements laid down in § 2231 subsection 2 of *Bürgerliches Gesetzbuch* for holograph wills had to be taken seriously.

This has led to a situation where countless wills eventually failed, even though there could be no doubt that they reflected the real intention of the testator.[182] It was estimated that up to 25 % of the wills made in practice were invalid.[183] These solutions were therefore criticised, while pointing out the need for reform.[184] Such reform took place through the adop-

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181 Erler Busch and Michaelis Lobe, *Das Bürgerliche Gesetzbuch mit besonderer Berücksichtigung der Rechtsprechung des Reichsgerichts* (De Gruyter 1928) para 2231 n 3.

182 Reid, De Waal and Zimmermann (n 31) 188.

183 Weyer, 'Das eigenhändige Testament - Gedanken und Erfahrungen eines Nachlassrichters' (1935) 1935 Deutsche Notar-Zeitschfirt 348, 348.

184 Fritz von Hippel, *Formalismus und Rechtsdogmatik: dargestellt am beispiel der 'errichtung' des zeugenlosen schrifttestaments (eigenhändiges testament; testament olographe)* (Hanseatische Verlagsanstalt 1935) 121 ff.

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tion in 1938 of the *Testamentsgesetz*[185] amending the BGB, the provisions of which were finally incorporated into the *Bürgerliches Gesetzbuch* (in 1953).[186] The key provision of the *Testamentsgesetz* was § 21 dealing with holograph wills. It was now no longer necessary for a testator to indicate in his will the date when and the place where it had been made. According to the wording incorporated into *Bürgerliches Gesetzbuch* (§ 2247 subsection 5), where a will does not contain any information about the time when it was made and where this causes doubts about its validity, the will is to be deemed to be valid only if the necessary ascertainments about the time when it was made can be established in some other manner. The same applies with the necessary modifications to a will that does not contain any information about the place where it was made. These provisions are therefore an example of the admission in legal circulation of wills drawn up in a manner contrary to the formal requirements. They may serve as a basis for taking into account the testator's last will, even though it was expressed in a manner inconsistent with the law.

The practice in Germany has therefore changed the existing legal provisions, which in part have had the effect of increasing the number of valid wills in practice. However, before the statutory changes took place, the idea of keeping informal wills as valid wills came also from the German doctrine. These concepts are still valid today, also against the background of the current legal regime, although they are not very popular and are not applied in practice. There are at least three main trends in the viewpoint that aim to take into account the testator's last wishes at the expense of formal requirements for *mortis causa* dispositions.

Firstly, in this respect, it should be noted that as early as 1909 Erich Danz advocated the so-called theory of achieving a result.[187] According to this position, once the result of a form has been achieved, no importance should be attached to form and its observance. A judge should therefore ignore formal defects if the purpose of a formal requirement is achieved even without compliance with the form. According to this theory, a will drawn up informally could be regarded as valid, since the provision of § 125 of *Bürgerliches Gesetzbuch* does not apply to it (by achieving the result

185 Gesetz über die Errichtung von Testamenten und Erbverträgen, Reichsgesetzblatt 1938, No. 123.

186 Under the law: Gesetz zur Wiederherstellung der Gesetzeseinheit aufdem Gebiete des bürgerlichen Rechts, Bundesgesetzblatt 1953, No. 8.

187 Erich Danz, 'Können Testamente mit Formfehlern aufrecht erhalten werden?' (1909) 1909 Deutsche Juristen Zeitung 281.

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of the purpose of form).[188] However, this view was not very popular in the system there.[189] It was referred to many years later by Stefan Grundmann, an advocate of a liberal approach to the rules on the form of wills, who stressed that a will should not be considered invalid if the objectives of the formal requirements were achieved and if the denial of formal invalidity did not create a new form.[190] In his opinion, this may apply in cases where the application of a formal requirement is not met, but the testator's intention can be proven to be authentic and final. However, these views are also not widely accepted in Germany.

Secondly, in that legal system, for the purpose of keeping informal wills in force, the so-called theory of equity was also invoked. According to this position, the limitation of formal invalidity may be necessary in individual cases for reasons of equity. The formal invalidity of wills drawn up in contravention of the rules on the form of wills on the basis of § 125 of *Bürgerliches Gesetzbuch* is therefore subject to the stipulations set out in § 242 of *Bürgerliches Gesetzbuch*. According to the latter provision, good faith and customary practice must be taken into consideration when assessing the validity of a legal transaction. For example, in 1965, Helmut Coing considered this in the context of testamentary formalities.[191] According to this theory it is necessary to limit the effect of invalidity on the basis of good faith. The invalidity of a will should not take place if it leads, from the point of view of good faith, to results that are simply not acceptable to the general perception of the law. In balancing individual cases from the point of view of good faith, it is necessary to take into account the objectives of the form of wills.[192]

Although there appear to be important reasons for the supporters of this theory, this theory is not generally applied in practice, as the theory of achieving a result. In Germany, it is usually considered that for reasons of equity, there can be no justification for relaxing or not applying formal re-

188 Solzbach (n 60) 180.

189 Gert Reinhart, *Das Verhältnis von Formnichtigkeit und Heilung des Formmangels im bürgerlichen Recht* (Universität Heidelberg 1969) 154 ff.

190 Grundmann (n 61) 429 ff.

191 Helmut Coing, 'Form und Billigkeit im moderne Privatrecht' (1965) 1965 Deutsche Notar-Zeitschfirt1 29, 33 ff.

192 ibid 48.

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quirements.[193] Therefore this theory has been rejected by practice.[194] Against this background, it is generally stressed that there is a need for formal control over the testator's actions and that balancing the testator's interests individually could reduce legal certainty. Attempts to derogate from the formal requirements based on the equity principle are therefore rejected.[195]

Thirdly, there are also views in that doctrine that the well-known interpretative rule of *favor testamenti* should be applied not only to the interpretation of the testator's last will statements, but also towards a form of *mortis causa* dispositions. In this context, it is a question of examining the testator's actual intention and reflecting it without the need to take into account the form of the instrument reflecting that intention. Thus, it has sometimes been postulated, for example, that the will may be supplemented on the basis of evidence existing outside its content.[196] In this regard, it has also been suggested that, since such an approach seems to contradict the requirement as to the form of a will, only those results of interpretations that are somehow, although imperfectly, expressed or suggested in the will document should be taken into account.[197] The requirement of form should not be understood as an obstacle to making dispositions of property upon death, but as protecting the freedom to declare one's last will. In this regard, the need to protect the so-called negative freedom, i.e. the possibility for the testator to decide not to make a will, was also stressed. However, this theory has also not become widespread and has not become a common way to keep informal wills in force.

Regardless of the positions taken in the German legal sciences, the practice of applying the law in this country has not yet developed a clear mechanism to move away from strict compliance with the rules on the form of wills. However, some doctrine generally emphasises this desire and need, as can also be seen in the German case law. However, in practice, if there is no doubt as to the authenticity of the testator's last will, it is often difficult for the courts to disapply the rules on form and sometimes reluctant to declare them valid. Thus, a trend can be identified in the German jurispru-

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193 Ludwig Häsemeyer, *Die gesetzliche Form der Rechtsgeschäfte – objektive Ordnung und privatautonome Selbstbestimmung im formgebundenen Rechtsgeschäft* (Athenaeum 1971) 295.

194 Uwe Beinke, *Der Formzwang beim privatschriftlichen Testament* (Philipps Universität Marburg 1988) 37 ff.

195 Solzbach (n 60) 181.

196 Brox and Walker (n 26) 201.

197 Solzbach (n 60) 188.

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dence to take into account the *mortis causa* intention at the expense of formal requirements. The common feature of the views expressed in this regard is the view that the formal requirements for dispositions of property upon death constitute an irritating obstacle to reflect the testator's last will.[198] However, this is not a commonly accepted position.

When analysing the problem of testamentary formalities against the background of German law, it should also be mentioned that German law is one of the *ius civile* systems in which there is a general basis for a so-called conversion of invalid legal transactions.[199] According to § 140 of *Bürgerliches Gesetzbuch*, if an invalid legal act satisfies the requirements of another legal act, then the latter is valid if it can be assumed that the parties would have wanted the other legal act to be valid if they had known of the invalidity.[200] The position under German law is generally accepted that an “invalid legal act” can be maintained as another legal act if it meets the requirements of the validity of the other legal act. This also applies to succession law.[201] The purpose of the conversion in this regard is to make the testator's will come true. This statutory rule can therefore also be an instrument to keep an informal will in force as a valid will.

Measures aimed at keeping a flawed last will in force have also appeared in practice in other countries. A very interesting example of a system solution that allows to maintain an informal will is the instrument introduced into the Israeli law in 1965. As it is often indicated, it was the first statutory provision in the world to give courts a power to excuse flaws in wills formalities.[202] The provision was based on the Talmudic doctrine of *mitzvah* (to carry out the wishes of the deceased)[203] and was presented for public debate already in 1952 (*Israel Misrad ha-Mishpatim*).[204] The preparation of

198 ibid 193–194.

199 Helmut Heiss, *Formmängel und ihre Sanktionen. Eine privatrechtsvergleichende Untersuchung* (Mohr Siebeck 1999) 214 ff.

200 Thomas Zerres, *Bürgerliches Recht* (Springer 2019) 91 ff.

201 Röthel (n 113) 482.

202 As it can be judged today, it was the first *substantial compliance* approach to the wills formalities, since only minor defects could have been cured by the court.

203 However see: Samuel Flaks, ‘Excusing Harmless Error in Will Execution: The Israeli Experience’ (2010) 3 Estate Planning and Community Property Law Journal 27, 35 ff.

204 Israel Misrad ha-Mishpatim, A Succession Bill for Israel: Text and Explanatory Notes, translated in Harvard Law School-Israel Cooperative Research on Israel’s Legal Development (1952).

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the bill was influenced by American scholars.[205] The bill was passed in 1965 as the *Israeli Succession Law* (*חוק הירושה*)[206] and contained the Section 25 (prepared already in 1952) that allowed a court to probate a will that had a defect in the formalities required by law. According to its original wording, where the court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in Sections 20, 22, 23, or the capacity of the witnesses. The mentioned Sections 20, 22 and 23 of the *Succession Law* were related to other than holographic (Section 19) forms of will known in that system (attested wills, notarial wills and oral wills).

As it is noticed by the doctrine, the drafters of this law believed that wills formalities have no absolute value in themselves.[207] They argued that will formalities only exist to assure the authenticity of the decedent's will and of guarding against forgeries and fraudulent designs.[208] This was also emphasized in one of the first rulings of the Israeli Supreme Court based on this Section. The court deciding upon formal requirements of the will have described the doctrine of *mitzvah* as the major "guide-line" of the law of wills and have explained that where the intent of the testator is expressed in a will, and no doubt exists as to the genuineness of the will, then his intentions should be ascertained in order to uphold the wishes of the deceased and not to frustrate them merely for formal defect.[209] This provision therefore made it possible in practice to reflect the testator's last will at the expense of formal requirements.[210] However, against the background of this provision, there were some doubts about omissions in holographic wills,[211] which resulted in a legislative change in 1985. A new subpart was added to this Section that empowered courts to dispense with an omission of a signature or date in a holographic will. According to this subpart, if the court has no doubt as to the authenticity of a holographic will and as to the testamentary intent of the testator, it may, in special cir-

205 Amihai Radzyner, 'Inheritance from Uncle Sam: The American Influence on Israeli Succession Law' (2016) 4 Comparative Legal History 19, 19 ff.
206 Israeli Succession Law 5725-1965.
207 Israel Misrad ha-Mishpatim, A Succession Bill for Israel: Text and Explanatory Notes, translated in Harvard Law School-Israel Cooperative Research on Israel's Legal Development (1952) 67.
208 ibid 66.
209 Brill [1977] 31(1) Israeli Supreme Court 98.
210 Flaks (n 203) 40.
211 Koenig v. Cohen, [1982] 36(3) Israeli Supreme Court 701.

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cumstances, admit the will to probate even if the signature or date required by Section 19 is lacking.[212] The amendment made it possible for the courts, even in the absence of a signature and a date, to probate the will as written if the court has no doubt as to the authenticity of the document and as to the testamentary intent of the testator, and there are special circumstances justifying such action.[213]

These provisions lasted until 2004. They were modified then and in this modified version they are applicable until today.[214] According to the present wording of Section 25 of the *Israeli Succession Law* (*חוק הירושה*): if the fundamental parts of a will are present, and the court has no doubt that the will represents the true and free wishes of the testator, the court may, in a reasoned judgment, grant probate thereof, notwithstanding any defect with regard to an element or procedure detailed in Sections 19, 20, 22, 23, or with regard to the capacity of the witnesses, or due to the absence of one of these elements or procedures. "The fundamental parts of a will" are: (i.) in a handwritten will, as detailed in Section 19-the entire will is in the testator's handwriting; (ii.) in a witnessed will, as detailed in Section 20-the will is in writing and the testator brought it before two witnesses; (iii.) in a will made before the authority, as detailed in Section 22-the will was voiced before an authority, or presented to an authority, by the testator himself; (iv.) in an oral will, as detailed in Section 23-the will was voiced by the testator himself, before two comprehending witnesses, while he was on his deathbed or when he considered himself, justifiably considering the circumstances, to be facing death.[215]

The 2004 amendment of section 25 ended the era of a court's full dispensing power in Israel. On the background of this regulation the concepts of "*static formalities*" and "*dynamic formalities*" were born. The first ones are those who are indispensable and are called in the present law as the fundamental parts of a will. The second ones are those that could possibly be dispensed with, and therefore are not treated as the fundamental ones. This distinction may be understood as a path to rectify any flawed will that meets the fundamental parts criterium. The statute requires *strict compliance* with the listed fundamental parts of a will, but empowers courts to exercise a full dispensing power for less important formalities.[216]

212 Succession Law (Amendment No. 7) 1985, (1985) SH 1140.
213 Flaks (n 203) 42.
214 Succession Law (Amendment No. 11) 2004, 5764-2004.
215 Menashe (n 54) 125.
216 Flaks (n 203) 44.

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The fundamental parts of a will serve as safeguards necessary to establish true testamentary intent. If a *static formality* is executed in a faulty manner or is completely lacking, then it cannot be corrected. However, if a *dynamic formality* is faulty or lacking, then it can be dispensed, in order to fulfil the goal of executing the will of the deceased.[217]

The Israeli legal system thereby provides for a mechanism that allows for a departure from the formal requirements for *mortis causa* dispositions, the aim of which is to seek to reflect the real intention of a testator. A bequeather who draws up a will contrary to formal requirements can nevertheless achieve the desired result. The invalidity of the will is limited by the regulation of the aforementioned provision. However, it has to be mentioned that the prevailing view in the Israeli case law interprets this section literally. Therefore, a beneficiary wishing to probate the will must prove his case "beyond any doubt".[218] The recent Israeli cases indicate that courts applying the rules of Section 25 of the *Israeli Succession Law* usually arrive at results that reasonably protect the authentic testamentary intent of the testator.[219]

One of the most frequently cited solutions in the doctrine of succession law for the validation of informal wills is the solution that was developed in South Australia, enacted in 1975. The roots of this solution go back to the Report of the Law Reform Committee of South Australia on intestacy and wills,[220] prepared in 1974, where it was noticed that there are a number of situations in which legislation should be enacted to cure deficiencies in the binding law. One of such situations (as mentioned in this Report) was the requirement of the South Australian *Wills Act* (1936) that the signature of the testator must be placed at the foot or end of the will (Section 8 of *Wills Act*) what caused a number of cases in which a testator did not do it so, and because of this mistake died intestate.[221] The Committee has observed that in all cases where there is a technical failure to comply with the *Wills Act*, there should be a power given to the court to declare that the will in question is a good and valid testamentary document if the court is satisfied that the document does in fact represent the last will and testament of the testator and that he then had the requisite testamentary capaci-

217 ibid 45.
218 Menashe (n 54) 127.
219 See a survey of case law presented by Samuel Flaks: Flaks (n 203) 47 ff.
220 Law Reform Committee of South Australia, *Twenty-Eight Report of the Law Reform Committee of South Australia to the Attorney-General Relating to the Reform of the Law on Intestacy and Wills* (1974).
221 ibid 10.

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ty.[222] Similar solution, according to this Report, should also be enacted in order to maintain a will made without the requirement of two witnesses being present at the testation act. "There should be a general provision that of the document produced without doubt represents the last will of the deceased and the court is satisfied that for some good sufficient reason it was impossible or impracticable to obtain witnesses to that will then the court should have power to declare that the will is valid in those circumstances".[223]

In 1975 this recommendation was enacted as Section 12(2) of the South Australia *Wills Act*. According to its wording, a document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this act, be deemed to be a will of the deceased person if the court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.[224] However, as noticed it the doctrine, this Section was rather accidental and surprising also for its creators.[225] One of the authors of the 1974 Report, Howard Zelling (an active judge), deciding one of the cases based on the enacted provisions has written that he had "no idea that section 12(2), which came from one of the ideas incorporated in the Report, would produce the amount of case law that it has".[226] Regardless of that kind of assessment, it has to be recalled that under Section 12(2) of the *Wills Act* the court could validate a defectively executed will only if persuaded that there was "no reasonable doubt" that the decedent intended it to be his will. As noticed by the doctrine, this "beyond-reasonable-doubt standard" originated in the criminal law, where it served the special purpose of tilting the scales in favour of liberty for an accused who is threatened with penal sanctions.[227] Usually it is said that this is the highest standard of proof known to the law.[228] For this reason, its application in private law is interesting.

222 ibid 11.
223 ibid.
224 Wills Act Amendment Act (No. 2) of 1975, 8 South Australia Statutes 665.
225 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 10.
226 Kelly, [1983] 34 S.A. State Reports 370, 380.
227 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 34.
228 Kelly, [1983] 34 S.A. State Reports 370, 384

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The first case decided upon Section 12(2) of the South Australia *Wills Act* was the so-called case of *Graham*. In the proceedings, it was found that the will was signed by the testatrix and by two witnesses. However, the testatrix did not sign or acknowledge the will in the presence of the witnesses. Instead, having signed the will, the testatrix handed it to a relative and asked him to “get it witnessed”. The relative took the will to two neighbours who knew the testatrix, and they both signed as witnesses. In these circumstances the court held on the evidence that there was “not the slightest doubt that the deceased intended the document to constitute her will” and accordingly ordered that the will be admitted to probate.[229] The statutory change has therefore achieved the goal of maintaining a flawed will.[230]

During a similar period as in South Australia, preparations for reforming the succession law of another Australian state, Queensland, began. The Queensland legislation resulted from a large-scale review of Queensland succession law that the Queensland Law Reform Commission commenced in 1973 and published its results in 1978.[231] As indicated there, the Commission have given careful consideration to attractive arguments which have been raised with the object of reducing the formalities. The two cases decided in 1972[232] and in 1974,[233] where the wills were refused admission to probate have raised the Commission doubts about the utility of the formal requirements.[234] The Commission highlighted that some formal requirements are necessary, however there is a need for uniformity of practice throughout Australia, especially that this is an area of law where unqualified persons sometimes feel competent to exercise themselves.[235] In the opinion of the Commission, there was more a need for uniformity, than for a law reform. However, the Commission has noticed “different

229 In the Estate of Graham, [1978] 20 S.A. State Reports 198.

230 Stephanie Lester, ‘Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule’ (2007) 42 Real Property, Probate and Trust Journal 577.

231 Queensland Law Reform Commission, *The Law Relating to Succession. Report No. 22* (1978).

232 In re Colling, [1972] 1 WLR 1440, where a will was refused admission to probate because one of the attesting witnesses left the presence of the testator when he was half way through writing his signature.

233 Re Beadle, [1974] 1 ALL ER 493, where a will was refused to admission to probate on the grounds that it has not been signed at the foot or end thereof.

234 Queenstead Law Reform Commission, *The Law Relating to Succession. Report No. 22* (n 231) 7.

235 ibid.

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criticism of the working rules relating to the formalities prescribed for the execution of wills, and that is the criticism not of the formalities themselves, but of the rigid attitude of the courts respecting compliance with them".[236] Understanding the criticism, the Commission has decided to recommend "that some relaxation in the court's standard should be permitted", especially when "the instrument presented for probate represents the testamentary intention of the maker of it".[237] This gave grounds for the adoption of § 9(a) of the Queensland Succession Act (1981). The provision of this article was formulated as follows: the court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed (by law) if the court is satisfied that the instrument expresses the testamentary intention of the testator.[238] As it is believed, this wording was drafted by W.A. Lee, who was influenced by the article prepared in 1975 by John H. Langbein[239].

This provision was slightly different than the South Australian one. As it was estimated in the first comments on this provision made in the literature, in practice it may occur that despite the differences of wording, the sorts of defects of execution which have been overlooked under the South Australian jurisdiction would be seen as coming within the scope of the Queensland jurisdiction.[240] However, as the case law shows, it was not going to happen. The three cased decided in 1985, as already noticed in the literature, have buried the reform.[241] Those cases include: *Grosert*,[242] *Johnston*,[243] and *Henderson*.[244] In all of the cases there was a presence defect; the wills were not signed or attested by a proper amount of witnesses. It seemed that according to the position represented there, *substantial compliance* wasn't a mean of discerning testamentary intent. It was rather a new formal requirement that must be established independently of testamentary intent.[245] It was observed that the standard for this formality was es-

236 ibid.
237 ibid.
238 Queensland Succession Act (1981), § 9(a).
239 Langbein, 'Substantial Compliance with the Wills Act' (n 10).
240 WA Lee, 'Queensland Succession Act 1981' (1983) 3 Oxford Journal of Legal Studies 442, 442.
241 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 42.
242 Grosert, [1985] 1 QR 513.
243 Johnston, [1985] 1 QR 516.
244 Henderson, [1985] QSC 611.
245 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 44.

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sentially quantitative, and the compliance cannot be discussed as substantial unless the defect was minimal. This can be read in the final judgement decided in the *Henderson* case by the High Court of Australia made after the appeal: there was no reason to doubt that the attestation by two witnesses is a substantial requirement, and that if the will is attested by one witness only there has been a failure of substantial compliance.[246] The same thought can be read in another case decided in Queensland in 1990, where a will was witnessed by two witnesses, but there was evidence that they were not present at the same time.[247] Such rulings have laid the foundations for another reform. It was signalized in the Queensland Law Reform Commission Report on wills prepared in 1997.[248] It can be read there that the former recommendation of Commission that there must be "*substantial compliance*" has proven to be such a great stumbling block, that the provision has had poor success, and that the cases that would almost certainly have been found to come within the dispensing power in other jurisdictions have failed in Queensland. To address the difficulties and uncertainties with respect to the concept of "*substantial compliance*" it was recommended to replace this with a testamentary intention test whereby the court would be able to admit a document to probate if it is satisfied the document incorporates the testamentary intentions of the deceased person, even though it does not comply with the formal requirements for executing a will. This was adopted only in 2005, when the new provision of the Queensland *Succession Act* (1981) has been enacted.[249] The new variation of the "*substantial compliance*" provision was placed in the § 18 of the Act. According to § 18 Subsection 2 of the Act, the document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will. In making a decision under this provision, the court may, in addition to the document or part, have regard to (a) any evidence relating to the way in which the document or part was executed; and (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person (§ 18 Subsection 3 Queensland *Succession Act*).[250]

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246 White v. Public Trustee & Blundell, [1986] Qld FC 28.
247 Will of Eagles, [1990] 2 QR 501.
248 Queensland Law Reform Commission, *The Law Of Wills. Report No. 52* (1997).
249 The Queensland Succession Amendment Bill 2005.
250 Purser and Cockburn (n 55) 47.

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With these Australian examples in mind (both laws are still in force today), two different approaches to minimising formal requirements can be distinguished: *substantial compliance* and *dispensing power*. The first one is based on the assumption that the court may omit only minor defects, while the second one is based on the analysis of the existence in a given case of a prerequisite of the testator's intentions. The *dispensing power* idea does not refer to "*substantial compliance*" with the wills execution requirements, it rather gives a general power to the court to dispense with the formal requirements for execution of a will if the court is satisfied that the deceased person intended the instrument to constitute his will. The latter approach has gained more recognition in the doctrine. It has become the basis for the adoption of similar solutions in other Australian states[251] as well as in other countries. This was noted, among others, by John H. Langbein, who in his other article, published in 1987,[252] stressed the predominance of the *dispensing power* doctrine over its prototype - the doctrine of *substantial compliance*. Since then, one can basically speak of the *substantial compliance* doctrine and its variations. These variations have at least one more variety (or at least a one more name) - the doctrine of *harmless error* - which is basically a copy of the doctrine of the *dispensing power*. However typically this is also called the "*dispensing power*" because it allows the courts to dispense with the strict wills act formalities.[253]

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251 For example, the Northern Territory has adopted this rule in the *Wills Act* (1990): "A document purporting to embody the testamentary intentions of a deceased person, notwithstanding that it has not been executed with the formalities required by this Act, is deemed to be a will of the deceased person where the Supreme Court, upon application for admission of the document to probate as the last will of the deceased person, is satisfied that there can be no reasonable doubt that the deceased person intended the document to constitute his will" (§ 12 Subsection 2 of the Northern Territory *Wills Act* (1990)); the State of Victoria has adopted similar provision in the Wills Act (1997): "The Supreme Court may admit to probate as the will of a deceased person a document which has not been executed in the manner in which a will is required to be executed by this Act; or a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act if the Court is satisfied that that person intended the document to be his or her will" (§ 9 Subsection 1 of the Victorian *Wills Act* (1997)).

252 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42).

253 Generally, the term "*dispensing power*" is mainly used in Canada and Australia, and the term "*harmless error*" is usually used in the United States of America. These terms are interchangeable. Both terminologies, as can be assumed, are useful and satisfactory. The "*harmless error*" terminology brings the scope and

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When writing about the *substantial compliance* doctrine and its variations the already mentioned person of John H. Langbein should be brought up. As already explained, it was him that has extensively present in the doctrine of succession law the idea of *substantial compliance* with wills formalities and has started a broad discussion on this subject. In his well known article published in 1975 he argued that the law of wills is notorious for its harsh and relentless formalism and the most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.[254] He advocated that the insistent formalism of the law of wills is mistaken and needles, the finding of a formal defect should not lead to automatic invalidity of a will, but to a further inquiry: "does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate formality to enable the court to conclude that it serves the purposes of the law".[255] At that time he was convinced that the courts should have developed a *substantial compliance* doctrine as a matter of judicial interpretation of the wills formalities law. Therefore no statutory changes were proposed. However, after twelve years, in 1987, he has published his another well known article, in which he evaluated the statutes of South Australia and Queensland that abrogated the traditional rule of *strict compliance* with the requirements of wills formalities and have noticed that the idea of *substantial compliance* already was a failure.[256] Observations of the two Australian examples led him to the recommendation that the *dispensing power* doctrine should be incorporated into the wills law because, among other things, the intent-serving goal of the wills act is achieved better without than with the rule of *strict compliance*.[257] He concluded that "the abiding lesson that emerges from the decade's experience with the *harmless error* rule in South Australia is that the rule works".[258] However, he has also noticed that "the *substantial compliance* doctrine will, however, remain available to do the work for which it was devised; it is the one means by which a court may

reason for the rule to mind every time it is used. The "*dispensing power*" terminology brings to mind the effect of the power. *Cf.* Alberta Law Reform Institute, 'Wills: Non-Compliance with Formalities' (2001) 20 Estates, Trusts & Pensions Journal 155.

254 Langbein, 'Substantial Compliance with the Wills Act' (n 10) 489.

255 ibid.

256 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 41–45.

257 ibid 53.

258 ibid 51.

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relieve an execution error when legislation has not yet intervened to supply a statutory *harmless error* rule”.[259]

This John H. Langbein's deliberations have had an impact on subsequent legislation. The following years have been a period of increased interest by legislators in some countries in legislative changes to reflect the testator's last will. His comments were often analysed and referred to.[260] The same has happened with the first legislative experiences. They have also led to the increased interest in the doctrine.[261] Individual works considered the legitimacy of changes in the law on succession,[262] the desired scope of the changes[263] or the optimal shape of the testamentary formalism.[264] This discussion has basically continued until today. John H. Langbein was also continuing it.[265]

The greatest legislative changes, following the pattern of *substantial compliance*, took place in Australia, New Zealand, Canada, the United States of America and South Africa. Basically, all these countries, to a greater or lesser extent, have adopted solutions based on the idea of reflecting the testamentary intent at the expense of formal requirements.

The first non-Australian solution based on Australian patterns appeared in the Canadian province of Manitoba. In 1980 a Report on the wills act and the doctrine of *substantial compliance* has appeared.[266] As it was described there, the testamentary formalities of Manitoba as for that time were similar to those in force in most *common law* jurisdictions, and since that a literal compliance with the formalities was mandatory. This formal-

259 ibid 53.

260 *Cf.*, e.g.: Miller, ‘Reforming the Formal Requirements for the Execution of a Will’ (n 90); Institute (n 253) 154; Lloyd Bonfield, ‘Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past’ (1996) 70 Tulane Law Review 1893; Dorman (n 134); Gray (n 130).

261 *Cf.*, e.g.: du Toit (n 99) 160; George Holmes, ‘Testamentary Formalism in Louisiana: Curing Notarial Will Defects Through a Likelihood-of-Fraud Analysis’ (2014) 75 Louisiana Law Review 511; David Horton, ‘Tomorrow’s Inheritance: The Frontiers of Estate Planning Formalism’ (2017) 58 Boston College Law Review 540; Brook (n 50).

262 *Cf.*, e.g.: J Rodney Johnson, ‘Dispensing with Wills’ Act Formalities for Substantively Valid Wills’ (1992) 18 Virginia Bar Association Journal 10.

263 *Cf.*, e.g.: Lindgren (n 80).

264 *Cf.*, e.g.: John M Greabe, ‘The Riddle of Harmless Error Revisited’ (2016) 54 Houston Law Review 59.

265 Langbein, ‘Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion’ (n 94).

266 Manitoba Law Reform Commission, *Report on ‘the Wills Act’ and the Doctrine of Substantial Compliance* (1980).

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istic approach has created a body of harsh and often inconsistent case law. This is why the results of law enforcement were called as unfortunate.[267] It was noticed however, that it is not the formalities which create the difficulties but rather the approach taken to them.[268] This is why, according to the Report, the need for remedial provisions was necessary.[269] The South Australian provision of Section 12(2) of the South Australia *Wills Act* was named as the "optimal approach for such a section",[270] however the standard of proof applied in the South Australian law was questioned. As it was stated, "the Manitoba provision should employ the normal civil standard of proof on the balance of probabilities".[271] As the result, the Report's recommendations were to introduce into the Manitoba's law a provision allowing the court to admit a document to probate despite a defect in form, if it is proved on the balance of probabilities, that the document embodies the testamentary intent of the deceased person (in 1983).[272] This gave grounds for the adoption of the Section 23 of Manitoba *Wills Act*: "Where, upon application, if the court is satisfied that a document or any writing on a document embodies (a) the testamentary intentions of a deceased; or (b) the intention of a deceased to revoke, alter or revise a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will; the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be".[273] The provision was changed in 1995 and the wording "was not executed in compliance with all of the formal requirements" was substituted for "was not executed in compliance with any or all of the formal requirements" and since then it sounds as follows: "where, upon application, if the court is satisfied that a document or any writing on a document embodies (a) the testamentary intentions of a deceased; or (b) the intention of a deceased to revoke, alter or revive a will of the deceased

267 ibid 7.
268 ibid 17.
269 ibid.
270 ibid 27.
271 ibid.
272 ibid 30.
273 Manitoba Wills Act SM 1982-83-84, C. 31, Section 23.

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or the testamentary intentions of the deceased embodied in a document other than a will; the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be" (Section 23 of Manitoba *Wills Act*).[274] Hence this meant that the courts could order that a testamentary document was effective "notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements…" so that, apart from the requirement of a document, proof of testamentary intention become the only prerequisite for the document to be regarded as the final will of the testator.[275]

As can be seen, there were two main changes in comparison to the South Australian statute. The Manitoba standard of proof is not the "beyond-reasonable-doubt" standard and refers to the balance of probabilities. The Manitoba version of the *substantial compliance* variation clearly relates not only to the preparation of a will, but also to the revocation and alteration of it, as in the new Queensland version. The only threshold requirement under this provision was testamentary intention in a documentary form and that neither substantial nor any compliance with other formalities was required. This proposal has also been and still is often analysed, both in the doctrine and during the legislative process considering the possibility of adapting a similar solution to one' own legal system.[276] Therefore, despite relying mainly on the South Australian model, Manitoba's proposal also played an important role in the development of law in this area.

Likewise, a proposal from another Canadian province, British Columbia, can be assessed since its adoption was a very interesting process. This proposal was widely consulted by the British Columbia Law Reform Commission with a number of correspondents in the early 1980s. After the

274 Manitoba Law Reform Commission, *Section 23 of the Wills Act Revisited*, Informal Report 22B (1992).

275 Tafadzwa Jairos Alfred Banda, *The Court's Power to Condone a Document in Terms of Section 2(3) and Section 2A of the Wills Act 7 of 1953: A Comparative Analysis and Recommendations* (University of Pretoria 2012) 64 ff.

276 JG Miller, 'Substantial Compliance and the Execution of Wills' (1987) 9 International and Comparative Law Quarterly 343, 574.

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consultations, the Commission was convinced that a court should be given the power to admit a will to probate notwithstanding that no attempt has been made by the testator to comply with the wills act, as long as the court is satisfied that the deceased intended the document to constitute his will.[277] However, the Commission pointed out that no embodiment of testamentary intent should be admissible to probate unless it satisfies threshold requirements: the will is in writing, it is signed by the testator and there is a civil litigation standard of proof satisfied by the balance of probabilities that a document is a last will of a testator. What is also interesting is that the Commission has noticed that in then-recent years (1980s) modern technology has brought methods of storing data, undreamt of by the draftsman of the wills act and this is why, in the opinion of the Commission, the law should be open to the possibility that a will may be probated even though the "writing" consists of images mechanically or electronically reproduced.[278] In the light of the above, according to the Commission, the British Columbia *Wills Act* should have been amended by adding a section comparable to the following: "a document is valid as a will if (a) it is in writing, (b) it is signed by the testator, (c) the testator dies after this section comes into force, and the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect".[279] However, the amendments were not adopted then. Only after consultation on the new law proposal and observation of practice, about 25 years later, the changes were recommended again. In the 2006 Succession Law Report, the British Columbia Law Institute recommended that a *dispensing power* to relieve against formal invalidity of a will in proper cases shall be included in British Columbia's wills legislation.[280] This recommendation was enacted in 2009, and can be found now in the section 58 subsection 3 of the *Wills, Estates and Succession Act* (which came into force in 2014): even though the making, revocation, alteration or revival of a will does not comply with this act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made (a) as the will or part of the will of the deceased person, (b) as a revocation, alteration or revival of a will of the deceased person, or (c) as the testamentary intention

277 Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills (LRC 52)* (1981).
278 ibid 54 ff.
279 ibid.
280 British Columbia Law Institute (n 15).

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of the deceased person. The court may make an order under this subsection if the court determines that a record, document or writing or marking on a will or document represents (a) the testamentary intentions of a deceased person, (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will (section 58 subsection 2 of the *Wills, Estates and Succession Act*. This variety of the "*dispensing power*" doctrine is usually called the "curative" *dispensing power*.[281] It allows the court the discretion to admit a document to probate despite formal defects if the court is satisfied the document embodies the deceased's final testamentary wishes. As can be judged, it's a very interesting formula, mainly restricted to the examination of testamentary intent. As it was explained in the first reported decision based on the new law, two principal issues for consideration emerge: is the document authentic, and if so, whether the non-compliant document represents the deceased's testamentary intentions.[282]

When analysing Canadian law, another aspect of it should be mentioned: the solution known from the legislation of the province of Quebec. It may be interesting for civil law states since this is one of the few Anglo-American examples where civil law is based on a civil code.[283] As early as 1982, a bill proposed a new provision, which was to become Article 714 of the *Civil Code of Québec*.[284] According to its content, a will that would be invalid due to failure to observe mandatory formalities may be valid as a will if the court makes sure, after hearing the parties concerned, that the document contains, in an unquestionable and unequivocal manner, the last wishes of the deceased. In a subsequent version of the 1994 draft,[285]

281 du Toit, 'Remedying Formal Irregularities in Wills: A Comparative Analysis of Testamentary Rescue in Canada and South Africa' (n 7).

282 Estate of Young, [2015] BCSC 182.

283 Didier Frechette, Frank Zylberberg and Martin Raymond, 'Canada - Quebec' in Louis Garb and John Wood (eds), *International Succession* (Oxford University Press 2010).

284 Loi portant réforme au Code civil du Québec du droit des successions, Projet de loi 107, art. 759.

285 Loi portant réforme au Code civil du Québec du droit des personnes, des successions et des biens, Projet de loi 20, art. 765.

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this provision was almost literally repeated, while the 1995 draft[286] made it clear that a will that would be invalid because of a failure to observe the formalities may be valid as a will before the witnesses or as a holograph will, if it essentially meets the required conditions, and the court, after hearing the persons concerned, will make sure that the document contains, unquestionably and unequivocally, the last wishes of the deceased. This new version therefore laid down the formal requirements for the validity of a will and required that a written document should fulfil the essential conditions required for its validity in its original form or another form. Subsequently, in 1990 draft,[287] in accordance with the first version of the act, this section was substantially amended by deleting the expression "after hearing the persons concerned". The last version of the act was adopted in 1991,[288] and was to create the *Civil Code of Québec*, that came into force in 1994. The final draft did not change the provision created in 1990, and gave Article 714 of this Code. According to its wording: a holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.[289] Justifying the introduction of this provision, the Minister of Justice therein indicated that the court may thus recognise the validity of a will on the grounds of failure to comply with compulsory formalities if it is satisfied, after hearing the parties concerned, that the document contains, in an unquestionable and unequivocal manner, the last wishes of the deceased. In his view, this provision is intended to respect the freedom and intent of citizens and to give them priority over formal requirements where there is no doubt as to the scope of the document prepared.[290] However, the act does not apply to all defects in the drafting of wills, but only to those which are not essential to the formal validity of the will.[291] The legislator does not specify which elements are to

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286 Étude détaillée du Projet de loi 20 – Loi portant réforme au Code civil du Québec du droit des personnes, des successions et des biens, Journal des débats de la Sous-commission des institutions,5e session, 32e législature, 26 juin 1985, S-CI-619.

287 Code civil du Québec, Projet de loi 125, art. 713.

288 Projet de loi 125, art. 714.

289 *Civil Code of Québec*, art. 714.

290 Ministre de la Justice du Québec, *Commentaires du ministre de la Justice* (Les Publications du Québec 1993) 426.

291 Lefebvre (n 80) 424 ff.

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be regarded as essential and which may be regarded as non-essential.[292] It also has to be noticed that the Quebec provision does not apply to notarial wills, and is somewhat different than other Canadian variations of the *substantial compliance* doctrine: it applies to a "will" rather than to a "document".[293]

The concept of *substantial compliance* has found supporters also in South Africa. In 1991, the South African Law Commission after observing the practice of the courts recommended that the court should be vested in the power to accept a document notwithstanding non-compliance with wills formalities as a person's last will.[294] In 1992 the South African legislature enacted its version of the *substantial compliance* variation by importing section 2(3) – the so-called "condonation" provision – into the South African *Wills Act* (1953). According to the Section 2(3) of the *Wills Act*, if a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master[295] to accept that document, or that document as amended, for the purposes of the *Administration of Estates Act* (1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills.[296] According to this provision, there must be a document, it has to be drafted or executed by a person who has died and it has to be done with the intention that the document was this person's will.[297] A court is empowered to issue the condonation order only if the require-

292 Martin (n 55) 437.

293 Jacques Beaulne, *La liquidation des successions* (Wilson & Lafleur 2002) 41 ff.

294 South African Law Commission, *Review of the Law of Succession* (1991).

295 To fully comprehend this provision it is necessary to understand the significance of the Master of the High Court in South Africa. As explained in the doctrine, the Master is a functionary charged with the administration of deceased estates. The *Administration of Estates Act* assigns various functions to the Master regarding testators' wills, including the inspection of wills to ascertain whether these comply with the formalities prescribed by the law. If the Master is satisfied that a particular will is formally compliant, the Master will accept such a will for the purposes of winding-up the testator's estate in terms of the *Administration of Estates Act*. If, however, the Master is of the opinion that the will does not comply with one or more formalities, the Master will reject the will. If someone wishes to contest the Master's decision to reject the will, that person must do so before the High Court. *Cf.* du Toit (n 99) 165.

296 Wills Act (1953), section 2(3).

297 Banda (n 275) 2 ff.

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ments stipulated in section 2(3) of the *Wills Act* have been met *prima facie*.[298]

In the light of the above, the process of adopting amendments to the succession law on the basis of recommendations of various committees responsible for the shape of legal regulations in a given jurisdiction can be observed. This is why an interesting way for the adoption of new law seems to be the one chosen by the USA, where – as it is known – the succession law is a domain of state law. Meanwhile, changes in the local state law resulted from the work of two national-level institutions, the Uniform Law Commission and the American Law Institute. In the late 1980s the Uniform Law Commission was engaged in preparing a comprehensive revision of the *Uniform Probate Code*, which is a model act that governs, in the states that have decided to enact it, both probate procedure and the substantive succession law. The drafters of the revised Code, officially promulgated in 1990, determined to add into the Code a version of the *dispensing power*, which became new provision of the Code - § 2-503.[299] According to this provision, although a document or writing added upon a document was not executed in compliance with the formalities, the document or writing is treated as if it had been executed in compliance with the formalities if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.[300] Also, the American Law Institute in 1995 when revising its *Restatement of Property: Wills and Other Donative Transfers*, a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law, took the occasion to approve as a principle of American law[301] that "a *harmless error* in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will".[302]

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298 du Toit (n 99) 166.

299 Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94) 5.

300 Uniform Probate Code (1969), § 2-503.

301 Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94) 6.

302 American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (1999) vol 1, § 3.3, 217.

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It can be seen that this provision, so-called the *harmless error* rule,[303] was drafted on the basis of the South Australian statute, however the American drafters made two significant changes.[304] They have extended the *dispensing power* to defects in compliance with revocation formalities as well as execution formalities, and also, they have decided that the standard of proof should be “a clear and convincing evidence” instead of a “beyond-reasonable-doubt” standard. This provision was adopted, not without a resistance, only in some US states,[305] sometimes with modifications.[306] The latest adoption of this provision was enacted by the state of Minnesota in 2020. Under the new rule, Minnesota courts are empowered to recognize a will or will modification as valid as long as there is “clear and convincing” evidence that the testator intended the document to be controlling, even if it fails to meet one of the traditional requirements (§ 524.2.503 of the *Minnesota Statutes*). What is interesting about this solution, however, is that it was introduced as a temporary solution in response to the COVID-19 pandemic, and it applies only to documents and writings executed on or after March 13, 2020, but before February 15, 2021 (§ 524.2.503(b) of the *Minnesota Statutes*).[307] However, the sunset for a harmless error provision was removed by a bill enacted in February 2021 (S.F. No. 258).

As can be seen, the *harmless error* rule in its American variation is a mechanism that reworks the conclusive presumption of invalidity for an imperfect execution into a rebuttable presumption that can be overcome

303 This is the name of this section in the Uniform Probate Code. As it can be noticed, the terminology comes from the criminal law, and is connected with the obligation imposed on appellate courts to vacate or reverse criminal judgements marred by constitutional error unless the government demonstrates that the *error* was *harmless* beyond a reasonable doubt. *Cf.* Roger J Traynor, *The Riddle of Harmless Error* (Ohio University Press 1970) 16 ff.

304 Crawford (n 36) 269 ff.

305 As for 2020 only twelve states have codified some form of the *harmless error* rule. See: California Probate Code § 6110(c)(2); Colorado Revised Statutes § 15-11-503; Hawaii Revised Statutes Annotated § 560:2-503; Michigan Compiled Laws § 700.2503; Minnesota Statutes § 524.2.503; Montana Code Annotated § 72-2-523; New Jersey Statutes Annotated § 3B:3-3; Ohio Revised Code Annotated § 2107.24; Oregon Revised Statutes § 112.238; South Dakota Codified Laws § 29A-2-503; Utah Code Annotated § 75-2-503; Virginia Code Annotated § 64.2-404.

306 Langbein, ‘Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion’ (n 94) 6.

307 Matthew J Frerichs and Ena Kovacevic, ‘What Could Be the Harm? Minnesota’s Harmless Error Statute’ (*Lexology*, 2020) 2020/06/23 <https://www.lexology.com/library/detail.aspx?g=74e38c22-0717-4e2d-bc0f-3412e1ecd60f>.

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with clear and convincing evidence that the decedent intended the instrument to be his or her will.[308] Although sometimes it is indicated that "the larger the departure from the formalities, the harder it will be to satisfy the court that the instrument reflects the testator's intent",[309] the practice shows a broad spectrum of flawed wills that were admitted to probate.[310] American solutions are often the subject of foreign doctrine research and constitute a model that is indicated as a one that could serve as a basis for introducing its own version of *substantial compliance* provision into a particular legal system.

In order to complement the world's picture of searches for models that allow to reflect the last intent of the testator at the cost of formal requirements, it is still necessary to mention at least the solution functioning in New Zealand. It is a system with a *strict compliance* background,[311] where a provision based on the Australian pattern was adopted in 2007.[312] As indicated in the doctrine,[313] the Australian experience and the benefits of saving wills from invalidity on purely technical grounds persuaded the New Zealand Law Commission to recommend the adoption of a similar power in its Report from 1997.[314] That recommendation was implemented with the adoption of the new New Zealand's *Wills Act* enacted in 2007. The so-called "validation power" is implemented in the section 14 of the *Wills Act* (2007). According to the subsection 2 of this section, the High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.[315] This subsection applies to a document that: (a) appears to be a will; and (b) does not comply with the formalities and (c) came into existence in or out of New Zealand (section 14(1) of the *Wills Act*).[316] This provision enables the power to be used in respect of all non-compliant wills, when the four

308 Robert H Sitkoff, 'Freedom of Disposition in American Succession Law' in Antoni Vaquer Aloy, María Paz Sánchez González, Esteve Bosch Capdevila (eds), *La libertad de testar y sus límites* (Marcial Pons 2018) 501 ff.

309 Crawford (n 36) 283.

310 ibid 284 ff.

311 *Cf.* Joseph Dainow, 'Restricted Testation in New Zealand, Australia and Canada' (1938) 36 Michigan Law Review 1107, 1107 ff.

312 Peart (n 98) 27 ff.

313 Peart and Kelly (n 98) 74.

314 New Zealand Law Commission, *Succession Law. A Succession (Wills) Act* (1997) 19.

315 Nicola Robbins, *New Zealand and the Holographic Will* (Victoria University of Wellington 2016) 25 ff.

316 Wills Act (2007), section 14.

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abovementioned requirements are met (1. there must be a document; 2. it must appear to be a will; 3. it must not comply with the formalities; 4. it must have been made in or outside New Zealand).[317] Its literal wording suggest that there is a potential to give good effect to the testamentary intentions. As in many other countries, this potential depend upon the courts and their willingness to use the power provided by the law.

Certainly it is not possible to mention all the regulations that are made to validate flawed wills, but it is necessary to highlight at least two more examples met in the world's legislations. The first one is the already mentioned Dutch *Burgerlijk Wetboek*, a regulation that is often pointed out in the literature as very strict, due to the construction providing only for the notarial form of wills (Article 4:94 of the *Burgerlijk Wetboek*). The second one, is the Polish *Kodeks cywilny*, with the regulation validating certain defect of informal holographic wills (Article 949 § 2 of the *Kodeks cywilny*). In the context of the transformation of the law of succession in the world, the Dutch proposal, in force since 1 January 2003, may come as a bit of a surprise, although it is precisely here that the rigour of the form is strongly mitigated. A manifestation of such mitigation is a rule provides for the nullity of wills created in breach of statutory requirements, but this applies only to certain requirements (lack of the testator's or notary's signature), and in the case of other requirements, failure to comply with the rules on the form of the will does not automatically result in the nullity of the will, it is only voidable (Article 4:109(4) of the *Burgerlijk Wetboek*) – "the non-observance of other formal requirements set by law for the validity of a last will makes the last will voidable").[318] On the other hand, the Polish provision of the *Kodeks cywilny* says that "a lack of a date shall not result in the invalidity of a hand-written testament if it does not raise doubts as to the testator's capacity to draw up a testament, contents of the testament and the mutual relationships among several testaments".[319] These are also examples of the recognition by legislators of the need to protect the testator's last intentions and to reflect it, the sources of which lie in the same ideals as the doctrine of *substantial compliance* and its variations. These are certainly also another examples that show that the law in this area can be further developed.

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317 Peart and Kelly (n 98) 81 ff.

318 Du Mongh (n 170).

319 Michał Krawczyk, 'Testament własnoręczny w świetle regulacji kodeksowej , poglądów doktryny i orzecznictwa Sądu Najwyższego' (2009) 7 Zeszyty Naukowe 123, 123 ff.

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The practice of succession law also knows a number of attempts to keep the testator's last will in force despite the lack of an explicit statutory instrument for such action by the court. This kind of action is based on the well-known and commonly accepted in the succession law principle of *favor testamenti*, which begins to gain meaning not only in terms of interpretation of the testator's last will expressed in the will, but also in terms of interpretation of the applicable law in a manner favourable to the testator.[320] This practice can be found especially in continental European countries, including the mentioned Germany, and also some other countries, e.g. Spain or Poland.[321] Traditionally, the principle of *favor testamenti* is considered as an interpretative rule, according to which the will must be translated in such a way as to preserve the testator's will as much as possible. For some time now, however, the application of this rule has become more widespread, and social, economic and legal practice indicates situations in which the *favor testamenti* principle allows the legally invalid form of will to be considered valid.[322] As a consequence, the *favor testamenti* principle, which applies to the interpretation of civil law, also applies to the very form of testamentary acts which, despite its *ius cogens* nature, may be relaxed in specific cases.

In this light, at least the following types of mechanisms to reflect the testator's last will at the expense of formal requirements can be distinguished: genuine *substantial compliance* (possibility to cure defects if the will substantially complies with the formalities, e.g.: Israel, Queensland until 2005, South Africa [at least to some extent], Germany or Poland with the provisions on the holographic will), *dispensing power* (possibility to cure defects if testamentary intent is present, e.g.: South Australia, other Australian states, New Zealand, Canadian provinces), *harmless error* (a variety of the *dispensing power* specific for the US legislation), *favor testamenti* (possibility to cure defects by generous interpretation, e.g.: Germany, Poland, Spain). It seems that the requirements of modern societies are precisely such that they seek to reflect the bequeather's last will, rather than strictly adhering to the formal requirements that destroy that will. The flawed wills might not be as flawed as it sometimes seems.

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320 Aloy (n 17) 10 ff.

321 This is analogous to the proposal to apply the doctrine of substantial compliance mentioned by John H. Langbein in 1987. *Cf.* Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 53.

322 Milena Perka, 'Zasada favor testamenti w prawie spadkowym' [2017] Palestra 57.

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It is also necessary to mention the period of development of regulations on the form of wills related to the COVID-19 pandemic, because this is also a period during which some legislators have decided to introduce mechanisms to mitigate formal requirements or to simplify the use of dispositions of property upon death. The reason for this type of change was the increased interest in drawing up wills in society and the barriers which existed for this purpose in the traditional methods of drawing up wills, which were related, among other things, to the participation of other people, which, during a period of social isolation, often proved difficult or even impossible. [323] The statutory changes to this area of law was an option chosen, for example, by New Zealand. The government there has made a law change to modify the requirements for signing and witnessing wills under the New Zealand's *Wills Act* of 2007. *Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020* introduced the principle that during the pandemic wills could have been signed and witnessed using audiovisual links (modification of Section 11(3)-11(6) of *Wills Act* of 2007). The change allowed wills to be done by Zoom, Skype, Facetime, Google Meet etc. The same has happened, for instance, in Australia.[324] For example in Queensland, as of 15 May 2020, according to *COVID-19 Emergency Response – Wills and Enduring Documents Regulation 2020*, video conferencing technology was admitted to be used for having important end of life legal documents witnessed (Section 7 of the Regulation). Also, some Canadian provinces have taken some steps to allow individuals to witness a will through videoconferencing technology. The changes have also affected notarial wills. According, for example, to the new Quebec's pandemic regulation (*Order 2020-010 of the Minister of Health and Social Services*), as of 1 April 2020, notarial wills were admitted to be signed remotely. Similar solutions have also been introduced in other legal systems. The pandemic has therefore caused amendments of formal requirements for wills, and to some extent, these solutions complemented regulations based on the doctrine of *substantial compliance* and its variations. However, many legislators have only adopted the new regula-

323 Jemma Slingo, 'Coronavirus: Demand for Wills Jumps by 76%' *The Law Society Gazette* (31 March 2020).

324 Julia Newbould, 'Demand for Wills on the Rise as Coronavirus Fears Set in for Australians' *Money Magazine* (8 April 2020).

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tions temporarily - until the end of the COVID-19 pandemic. After this period, everything is to return to the state it was before the pandemic.[325]

When exploring the instruments used for the validation of flawed wills and thinking about the further development of this area it has to be stated that there are also jurisdictions where the idea of introduction into the law of one of the variations of the *substantial compliance* doctrine was rejected. An English law can serve as an example. In a consultative document released in 1977 the English Law Reform Committee solicited a comment on the possibility of introducing a "general *dispensing power*" into the *Wills Act* (1837). However, in their Report on making and revocation of wills, issued in 1980,[326] that option was rejected: "While the idea of a dispensing power has attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to probate, it could lead to litigation, expense and day, often in cases where it could least be afforded, for it is the homemade wills which most often go wrong".[327] Another attempt has been made in 2017.[328] The Law Commission in its 2017 consultation on reform of the law on wills recommended that a *dispensing power* should be introduced in English law.[329] The recommendation was supported by the doctrine.[330] So far as the statutory amendment has not yet been passed,[331] it should be noted that while there is no *dispensing power* in the law of England and Wales, there is a statutory power to rectify wills, which in some cases may produce results similar to those of the *dispensing power* doctrine.[332] According to the Section 20(1) of the *Administration of Justice Act* (1982), if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence - (a)of a clerical error; or (b)of a failure to understand his instructions, it may order that the

325 *Cf.* Załucki, 'Preparation of Wills in Times of COVID-19 Pandemic - Selected Observations' (n 52).

326 Law Reform Committee, *Making and Revocation of Wills* (1980).

327 ibid 4.

328 Law Commission, *'Making a Will' Consultation Paper 231* (2017).

329 ibid 97–98.

330 Hedlund (n 46).

331 In July 2020, as a response to the COVID-19 pandemic, the British Government has proposed to relax the formalities of witnessing the wills, allowing for the remote witnessing of wills. *Cf.* https://www.gov.uk/government/news/video-witnessed-wills-to-be-made-legal-during-coronavirus-pandemic

332 Lately it was used with the problem of "switched" wills, where two testators making mirror wills has signed in each other's will in error. See: Marley v. Rawlings, [2014] UKSC 2.

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will shall be rectified so as to carry out his intentions. Hence, there is a degree of overlap between *dispensing powers* and a power to rectify wills, but certainly this overlap is not complete. In addition, it should be pointed out that some changes to the law there have recently taken place in this area, which was linked to the COVID-19 pandemic. Section 9 of the *Wills Act* (1837) was amended on 4 September 2020 by *The Wills Act 1837 (Electronic Communications)(Amendment) (Coronavirus) Order* and the remote witnessing of wills via the use of video-conferencing technology was introduced, with retrospective effect, applying to wills made on or after 31 January 2020, when the first confirmed case of COVID-19 was recorded in the UK, and unless extended, it has a sunset clause providing for it cease to apply after 31 January 2022.

Certainly, English law is not the only example of rejection of the doctrine of s*ubstantial compliance* and its variations, therefore before analysing the functionality of solutions that reflect the testator's last will at the expense of formal requirements, it is necessary to look at the opinions evaluating these solutions in a negative way. Despite a certain area of potential changes in legislation that have been noticed, it is not at all clear whether the possible arguments of opponents of such changes should not be relevant to the assessment of the issues identified at the beginning of this book. This is why, at this point, it is worthwhile to look at the views proclaimed against the doctrine of *substantial compliance* and its variations, which emphasize the legitimacy of continuing the rules of *strict compliance* with the wills formalities.

3. *The views against the ideas for the validation of flawed wills*

Solutions based on the primacy of the testator's last will at the expense of the formal requirements of *mortis causa* dispositions are relatively often criticised. It is stressed, *inter alia*, that succession law is an area of law where there is no room for much freedom and discretion, especially since a will, if made, has an *erga omnes* formative effect, and what is fair and just should be assessed only in relation to the parties concerned and not to society as a whole.[333] There are also voices that any relaxation of formal requirements is contrary to the law and its purpose, as formal requirements

333 Beinke (n 194) 39.

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are not used to subsequently introduce mechanisms to relax them.[334] The formal requirements in the case of wills are intended to achieve a certain effect in the future, where the main focus is on the reliable recreation of the testator's last will (intent). The purpose of their presence in the law is to control the subsequent fact of acting with the intention and awareness of testation, which is difficult, if not impossible, when withdraw from formalism.[335] It is, after all, the characteristic of succession law that the testator, when his will is subject to examination, is no longer able to explain it and determine his real last will. While the freedom of testation is common, it is stressed that it must be linked to formal requirements. It cannot be arbitrary.

In this light, a broad and liberal interpretation of the formal rules in force (to which come down some mentioned concepts of reflecting the testator's last will), applying the principles of equity or fairness cannot be, according to some, an acceptable solution. While in some cases such a solution might prove to be justified, it is noted that in the long run this limits legal certainty and uniformity of application of the law. This is particularly mentioned in *civil law* systems,[336] where a judicial precedent is known not to be a source of law. It is claimed that too much discretionary power of the court may give rise to legal uncertainty in this respect, and it is the formal rigour rather than the assessment of the court that is supposed to give the highest probability that the will contains the real intention of the testator.[337]

In the opinion of some, the strict formal requirements must be extensive and detailed, as it serves, among other things, to persuade the testator to maturely consider the legal significance of the act being performed and its content. It also ensures consistency between the content that was determined by the testator at the time of drafting the will and the content that will be reproduced and have legal effects. Therefore, it’s been said that the formal requirements must be strictly applied and should be subject to strict grammatical interpretation. According to this opinion, this is necessary in the light of the objectives to be achieved through their application and any attempt to liberalise formal requirements should be considered inadvisable. If an attempt is already made to liberalise formal requirements,

334 Joachim Gernhuber, ‘Formnichtigkeit und Treu und Glauben’, *Festschrift zum 70. Geburtstag von Walter Schmidt-Rimpler* (C F Müller 1956) 158 ff.
335 Häsemeyer (n 193) 203 ff.
336 Solzbach (n 60) 192 ff.
337 Elżbieta Skowrońska-Bocian, *Testament w prawie polskim* (Lexis Nexis 2004) 18.

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it is observed that this should be done with extreme caution. According to the views sometimes expressed, the mere fact that the application of the provisions on the form of wills may lead to the invalidity of the dispositions made, is not a sufficient argument against a strict interpretation of those provisions.[338]

Criticism of judicial discretion, even in systems where appropriate solutions to liberalise the law of succession have been in place for some time, is widespread. It is noted, among other things, that solutions based on the doctrine of *substantial compliance* actually introduce another form of a will[339] - a judicial will.[340] In this respect, it is argued that the requirement to meet formal requirements was in fact introduced in order to limit the discretion of the court.[341] The authors criticise the uncertainty and ambiguity of the criteria for the exercise of a judge's powers, or the lack of guidelines that could shape discretionary judicial powers.[342] It is raised that allowing the courts to assess whether the formality imposed by the legislator is necessary, on the basis of a specific case, contradicts the need to approach the formal requirements *in abstracto*, and leads to "throwing testamentary formalism into the trash".[343] As it is believed, this should not be the aim of the mechanisms mitigating formalities, if at all.

Some other voices argue that it is not the role of the courts to create new forms of dispositions of property upon death (as sometimes the rules based on the doctrine of *substantial compliance* are evaluated), as the judge should not look for an act of testation in any action taken by the testator, but only in that which results from the applicable law. If similar mechanisms are already in place, which many people find doubtful anyway, they should encourage the overly severe consequences of sanctions against wills to be mitigated with a minor defect rather than practising, as is sometimes called, the art of divination.[344]

338 ibid 62.

339 Nicholas Kasirer, 'The "Judicial Will" Architecturally Considered' (1996) 99 Revue du notariat 3.

340 Lefebvre (n 80) 420.

341 *Cf.* Germain Brière, *Traité de droit civil - Les successions* (Éditions Yvon Blais 1994) 551.

342 Lefebvre (n 80) 422.

343 Pierre Ciotola, 'La vérification d'un testament sur disquette ou l'art de vers le formalisme testamentaire à la corbeille informatique' (1997) 4 Entracte 10.

344 Jacques Beaulne, 'Bilan d'une première décennie en droit des successions' (2003) 105 Revue du notariat 271, 271 ff.

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Sometimes when criticizing the liberal approach to the problems of testamentary formalities, it is assumed that to use the form of a will actually means to use the freedom of testation. Formalism is not seen as its limitation, that is why the formal rules do not need any relaxation.[345] The purpose of the strict form of a will is to ensure the free expression of a declaration of last will and its future preservation, including the possibility of later restoration.[346]

According to this group of views, the formal regime is intended to be a natural complement to the effectiveness of the freedom to dispose of property upon death, and is intended to protect or guarantee that the disposer's declaration of last will is consistent with the disposer's real will.[347] According to some other views expressed on many occasions, the need for *strict compliance* with formal requirements is also related, among other things, to the protection of the testator, who, often in his old age, no longer understands the importance of his dispositions, and therefore the relaxation of formalism could result in taking into account a will that has not in fact been freely and consciously expressed.[348] Therefore, a lenient approach to formal matters may in fact distort the will of the testator, even though it may seem different. For this reason, the importance of formalism is stressed,[349] which is at the same time supposed to be a counterbalance to the views pointing to the need to move away from it.

The doctrine considering the legitimacy of the concept of *strict compliance* also emphasises that it does not have to be harsh and relentless, as it is sometimes indicated. It also argues that judicial decisions applying the doctrine of *substantial compliance* are often inconsistent.[350] It is emphasised that the formalities may provide sufficient protection against witnesses who would misrepresent the wishes of those who are dead and unable to give direct evidence of their testamentary wishes and acts.[351] For this rea-

345 *Cf.* Alfonso Cossío, 'Dolo y captación en las disposiciones testamentarias' (1962) 1962 Anuario de Derecho Civil 277.

346 *Cf.* Aloy (n 17) 10.

347 ibid.

348 Olga de Lamo Merlini, 'Los vicios de la voluntad testamentaria: Apuntes para una interpretación del articulo 673 del Código Civil' (2007) 2007 Revista General de Legislación y Jurisprudencia 50, 50 ff.

349 Aloy (n 85).

350 Wendel, 'Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?' (n 122) 361.

351 William F Ormiston, 'Formalities and Wills: A Plea for Caution' (1980) 54 Australian Law Journal 451.

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son, in those forms of will where witnesses are required to attend the testation act, the doctrine recommends that courts should be hesitant to admit testimony concerning the testator's direct expressions of intent because the testator, who is no longer alive to testify at probate, may not have made such expressions sincerely.[352] Therefore, while there is public dissatisfaction with the rigor of formal *mortis causa* dispositions, the doctrine also suggests that the legislatures should not give courts discretion to excuse all formal defects in wills but the legislatures should instead reconsider which required formalities are truly necessary and reform their statutes.[353]

Opponents of the doctrine of *substantial compliance* also raise that courts applying *dispensing power* statute must examine intent of the testator and state that determining intent after the testator has died is difficult and leads to unclear results.[354] It is argued that this theory therefore does not serve the purpose of the will form at all,[355] and the results achieved by the *dispensing power* are unpredictable.[356] The testator's interests would be better served if the law from the beginning only laid down formal requirements and if these requirements were strictly observed.[357] In the application of this doctrine, it is difficult, according to some, to assess whether the functions of the will form regulations are fully preserved.[358]

It is criticised that a system of succession law based on equitable justice may be fraudulently used by persons who belong to the circle of heirs interested in a specific court decision favourable to them.[359] It is pointed out that the court's powers in such cases are too far-reaching,[360] as successions should not be assessed from an individual perspective, but only from an objective perspective.[361] It is also stressed that society can only be motivat-

352 ibid 455.
353 ibid 457.
354 Lydia Clougherty, ‘An Analysis of the National Advisory Committee on Uniform State Laws’ Recommendation to Modify the Wills Act Formalities’ (1991) 10 Probate Law Journal 283.
355 Gail B Bird, ‘Sleight of Handwriting: The Holographic Will in California’ (1981) 32 Hastings Law Journal 605, 630 ff.
356 Charles Nelson and Jeanne Stark, ‘Formalities and Formalism: A Critical Look at the Execution of Wills’ (1978) 6 Pepperdine Law Review 331, 356.
357 ibid.
358 C Douglas Miller, ‘Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism’ (1991) 43 Florida Law Review 167.
359 Clougherty (n 354) 283.
360 Bonfield (n 163).
361 Orth (n 163) 81.

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ed to comply with formal requirements with leniency[362] and that the principle of *harmless error* consequently leads to an increase in the number of court disputes, their duration and costs.[363] In practice, the collection of evidence confirming the intention to draw up a will may turn out to be a lengthy process, which will have a negative impact on the speed with which succession cases are dealt with.[364]

Another trend that calls into question solutions based on the doctrine of *substantial compliance* emphasises that as a result of compliance with formalism, the negative freedom of testation is also protected. The fact whether the testator intended to draw up a will or only, for example, a draft, can be assessed best when formal requirements are observed. In other words, according to this opinion, a deviation from the strict formal requirements is constantly leading to the neglect of the function of the law on testamentary inheritance.[365] This leads to an uncertainty in legal transactions, since, according to the critics, it is not possible to fully reconstruct the testator's real last will after his death. It has been highlighted that the criticised doctrine belief that the healing of formal defects may occur after the testator's death, without his participation, meanwhile, the testator's participation in such an action, done to reconstruct his last will, seems important and desirable, but is impossible. This is why only strict formal requirements can work properly, rather than a lenient *ex post* evaluation of clear and convincing evidence.[366]

It is also raised that while for the *dispensing power* or the *harmless error* rule there are normative grounds in the law, for the application of the doctrine of *substantial compliance* it is not sufficient merely to provide a generous orientation of the interpreter, since he should also have a legal basis for such orientation, however the assumptions of the doctrine of *substantial compliance* do not provide for this. This is why it cannot be argued that a will does not have the effect of invalidity if there is no effective legal basis for such a claim. In other words, the principles of generous interpretation cannot be applied to formal rigours if the law provides that a failure to comply with the form leads to invalidity of a given legal act. A legal mech-

362 Adam J Hirsch, 'Inheritance and Inconsistency' (1996) 57 Ohio State Law Journal1 1057, 1067.

363 Miller, 'Substantial Compliance and the Execution of Wills' (n 276) 581.

364 Emily Sherwin, 'Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice' (2002) 34 Connecticut Law Review 453, 471.

365 Solzbach (n 60) 170.

366 ibid 171.

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anism should have a legal basis, and due to this view, the *substantial compliance* idea understood as an interpretation tool does not have it.[367]

All such arguments discrediting the application of the doctrine of *substantial compliance* and its variations seem to be important in assessing whether and how to modify the rules of testamentary succession in a given legal system. Undoubtedly, the certainty of succession law and its predictability are extremely important features. Reflecting the testator's will as the most important value of succession law has in fact proved impossible more than once. This was and still is the case, after all, the testator is already dead when the carrier of his alleged declaration of last will is assessed. He cannot therefore explain his last will clearly, even though he may have tried to do so before his death. In this light, it is necessary to look at the practice of applying these solutions before making any assessment of the legitimacy of the individual solutions aimed at reflecting the testator's last will at the expense of formal requirements. Only the analysis of the issues that have actually happened will allow for proper observations as to the legitimacy of applying specific solutions, as well as possibly for distinguishing a proper theoretical model of a tool allowing for reflecting the testator's last will in the maze of surrounding formalism. This will be the subject of further consideration.

367 ibid 182.

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