Preface

Freedom of testation is one of the fundamental principles in the succession regimes of all legal systems in Europe as well as of those legal systems outside of Europe influenced by European law. It is often intellectually related to two other key features of a civil society built upon private autonomy: freedom of contract and the protection of property. But freedom of testation is never acknowledged without limitation. In particular, it is widely accepted that this principle must be balanced against the moral precept of family solidarity. In many legal systems, therefore, the deceased's closest relatives as well as his or her spouse are given either a compulsory share in the estate itself, or a claim for the monetary value of such share against the heirs, if they have been passed over, or even specifically disinherited, in the deceased's disposition *mortis causa*. In other legal systems certain dependent individuals are at least given the right to apply to the competent court for an award of financial support from the deceased's estate. Sometimes, also, the surviving spouse is given an "elective share"; or the spouse and children are given special "statutory entitlements" against the heir. Such entitlements, in the Netherlands, can consist of a usufruct for the provision of support, or of lump sums.

The rules relating to the compulsory share, or their equivalents, no doubt constitute the most significant curtailment of a person's freedom of testation. But there are other such curtailments. Some of them follow from the fact that a disposition *mortis causa* has to comply with certain minimum standards which a self-respecting legal system has to establish for judicial acts in general. Thus, for instance, a will that has been made in order to incite the beneficiary to commit, or to remunerate him for, a crime, cannot be valid: it would be *contra bonos mores*, or against public policy. The law will also sometimes frown upon attempts on the part of the testator to interfere with the intended beneficiary's freedom to determine the parameters of his own life, for example by making the disposition dependent upon the intended beneficiary's conversion to another faith, his remaining unmarried, or his marrying a partner of equal rank. Testators can also be tempted to control the disposition of property beyond the first generation of heirs, or even indefinitely. The rules relating to subsequent

succession, or against perpetuities, constitute attempts by the law to curb the rule of the cold hand.

This brings us to rules specifically relating to the law of succession and pursuing entirely legitimate aims whilst also, indirectly, affecting freedom of testation. Thus, for example, all modern legal systems recognize that a will has to comply with certain form requirements. On the most elementary level this reflects the fact that the testator is no longer with us at the very moment when his will becomes effective. It is obvious, however, that legal systems such as the Dutch and the Portuguese ones which recognize the notarial will as the only regular type of will, effectively impose a limitation on freedom of testation: the testator must bear the inconvenience of having to go to a notary's office and to pay him for his services. But even the holograph will, ie the most convenient type of will, still restricts the testator in the way in which he can make his intentions known. Contracts, on the other hand, are normally valid even if they have not been reduced to writing. Testamentary freedom can also be restricted by rules *not allowing* the testator to make specific dispositions (thus, French law traditionally does not allow the testator to appoint an heir: "institution d'hérétier n'a lieu"), or *requiring* the testator to make a certain disposition (thus, according to Catalan law, a will is valid only if it contains the institution of an heir: "institutio heredis caput et fundamentum est totius testamenti"). Many legal systems do not allow the testator to delegate the right to appoint an heir, ie to confer a "power of appointment", on another person. Freedom of testation is also affected by the rules relating to testamentary capacity and to interpretation, as long as such interpretation is guided by a literalist approach. The same is true of legal rules diminishing the estate that is passed to the testator's intended beneficiaries, whether as a result of the imposition of inheritance tax or of rights of reversion (the latter exist in Spanish law).

Contracts of inheritance and mutual wills can be considered to constitute limitations on freedom of testation in view of the fact that the testator is no longer free unilaterally to revoke the contract, or his will, and to dispose of his property in another way by means of a subsequent will. A number of legal systems, therefore, do not recognize the validity of contracts of inheritance and/or mutual wills. On the other hand, however, the availability of these institutions can also be conceptualized as an extension of the testator's freedom to determine how he wishes to dispose of the property. Even if a legal system is happy, therefore, to recognize contracts of inheritance or mutual wills, it may not be happy to allow a testator to conclude a contract by means of which he binds himself to make, or not to make, a will. German law provides an example of such a system. English law, on the other hand, does recognize contracts of the latter type.

There is also another dimension to freedom of testation. The law does not only have to enable the testator to dispose of his property as he wishes; it also has to make sure that his will is an expression of the testator's right of self-determination. That is why testamentary dispositions are void, or can be avoided, insofar as they have been made under the influence of duress. Some legal systems also have specific provisions according to which managers or employees of old-age and nursing homes are not allowed to receive anything under a will made by the residents of these homes. Other legal systems have more general undue influence doctrines, or presumptions concerning wills made by vulnerable testators under suspicious circumstances. Yet, at the same time, such doctrines also limit the testator's freedom, particularly if they are as broadly conceived as in the United States. The same applies to the provisions aiming to protect the residents of old-age and nursing homes. Legal systems also often allow the avoidance of a will as a result of mistake in order to give effect to the testator's real intention as opposed to his normative intention resulting from the process of interpretation. "Pretermitted" spouses and heir statutes are also based on the idea that the testator may not in fact have made the will that he intended to make. It is obvious, however, that their operation may have the opposite effect and thwart the testator's real intention.

The contours of the notion of testamentary freedom are very largely, therefore, constituted by its limitations. The meeting of the Private Law Division of the *Gesellschaft für Rechtsvergleichung* on 16 September 2011 in Trier was devoted to gaining a comparative overview in that respect: What does testamentary freedom mean in different legal systems and how far does it extend? Of particular interest was the question whether there are recognizable shifts or trends of development that may have found expression, for example, in the more recent recodifications of the law of succession. Apart from Germany, Switzerland and Austria, Italy and France, the Netherlands, Catalonia and the remainder of Spain, as well as Great Britain and the United States, Islamic legal systems were looked at in order to assess the extent to which the problems discussed reflect specifically European legal experiences.

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The conference of the *Gesellschaft für Rechtsvergleichung* in September 2011 had the general theme, "Rechtliche Grenzen der Freiheit und Rechtsschutz". Two other volumes emanating from this conference have already appeared: Uwe Kischel/Christian Kirchner (eds.), Ideologie und Weltan-

schauung im Recht (2012), and Jürgen Schwarze (ed.), Der Rechtsschutz vor dem Gerichtshof der EU nach dem Vertrag von Lissabon (*Beiheft* of the Journal *Europarecht*, 2012).

Hamburg, July 2012 *Reinhard Zimmermann*