The Axiology of Military Wills
A Comparative Analysis

Jan Rudnicki
Ph.D., Assistant professor, Department of European Legal Tradition,
Faculty of Law and Administration, University of Warsaw
j.rudnicki@wpia.uw.edu.pl

Abstract

The institution of military will, derived from Roman imperial law, developed into many various models. Despite crucial differences, all the models can be described as special forms of testaments restricted to soldiers and sailors, thus always having an element of personal privilege. The differences, on the other hand, prove that each model represents another ideas and principles concerning testamentary law. Every lawmaker has to decide how to balance two colliding principles: freedom of testation and security of legal circulation. The case of military will, via its uniqueness, gives an opportunity to look through fundamental models of solving of this collision.

Keywords
military will – forms of will – testament – succession law – military law – Roman law

1 Introduction

In 2004, as a result of the Austrian family and succession law reform, § 600 was eventually removed from the civil code (ABGB), thus ending the long history of the military wills in Austrian law. Two years later in France, by contrary art. 981–983 of the Napoleonic Code were revised, however the main structure and idea of the French military will has remained unchanged from the times of the First Empire. In 1992 a place for military will was found in the new civil code of the Netherlands, in 2002 in the new Brazilian code, and in 2009 in the new Romanian code. In Canadian provinces and Australian states the privileged military will of the common law has been removed from the legal systems or at
least thoroughly reformed during the last two decades. Meanwhile, in England and Wales the entirely informal privileged will resisted the intentions to abolish it. In New Zealand’s fresh 2007 Wills Act the military will is included in its very traditional form. All these facts prove that in recent times a lot of changes have occurred regards this specific, and in some sense negligible, institution of testamentary law in many corners of the world. The military will, a concept having its distant roots in ancient roman law, still remains vital today. That leads to the idea of reviewing a variety of military wills in both present and historical legal systems and comparing them. The method I wish to apply is accurately described by professor Dirk Heirbault who stated that “legal history and comparative law are two sides of one coin. Both expand beyond their own place and time, the difference only being one of orientation, the legal historian travels in time, whereas the comparative lawyer travels in space”.1 This journey both in space and in time shall prove that the institution, above described as negligible, has its own special importance as an accurate example of various problems of great concern for the whole succession law.

It should be stressed that this analysis focuses on axiology of military wills. I would like to prove that this special forms of testament constitutes a very clear example of the collision of principles. All matters concerning its social significance or actual practical use are therefore set aside as they constitute an entirely different subject of study. We can even assume that such institutions are of no greater importance to societies enjoying relatively peaceful times.2 My goal is to prepare an initial axiological and historical base for any further discussion, and emphasise the relevance of this issue for any study concerning principles of testamentary law.

2 A Collision of Principles

In 1914 German scholar, A. Schmidtborn, defined the military will as “a privileged disposition in the event of death, which a soldier can perform in certain conditions, with exclusion of certain limitations regarding form or content, required by the general provisions of testamentary law”.3 This definition should

---

2 E.g. in England and Wales the famous case of priv. Jones, fallen in Ulster during the Troubles, is the last major example of performing privileged will in practice (In Re Jones [1981] Fam 7).
3 A. Schmidtborn, Das Soldaten-Testament (Berlin 1914) 1.
be considered as accurate and precise. Its content places the military will among complex legal issues. First of all, military wills, as every form of will in general, address the issue of reconciliation between two ancient principles of law: the freedom of testation and the security of legal circulation. The form of will by itself constitutes an emanation of the freedom of testation in its formal aspect. The principle implies that the will of a deceased person is to be changeable until the last moment of their life.4 The more formal the requirements of making the last will, the smaller is the chance that a person would be able to meet them faced with death. However, testamentary formalities reduce the risk of misunderstanding, losing, or manipulating a content of a will. Thus the more formal will secures the principle of security of legal circulation at the price of reducing the principle of freedom of testation. That simply constitutes a typical Dworkin’s collision of principles and leads to the conclusion that it can be balanced by a lawmaker only by referring directly to these principles, in the field of axiology. However, what makes military wills somewhat more special is the issue of privilege which is indispensable to them.

The Roman military will was created solely as a personal privilege of imperial soldiers.5 Later on, Justinian reformed it by limiting its use only to the soldiers participating in military expeditions (in expeditionibus),6 establishing a pattern to follow in later centuries. Yet the element of personal privilege remains until today, since in every contemporary shape military wills are reserved to certain people only. It can be stated that the use of military wills from the times of Justinian is always limited by two sorts of conditions: first concerning the subject and second concerning the external situation. The English military will, for instance, is exclusive only for certain subjects (soldiers and sailors) and for certain situations in which they can find themselves (respectively: in actual military service; at sea). The condition of certain external situation is obvious for a special form of will in general, yet the condition concerning a subject is very rare and in most legal systems exclusive for the military wills. In contemporary legal systems, e.g. English, French, Spanish or Polish, sailors, soldiers and other persons related to the armed forces are the only social group privileged by the provisions of testamentary law. That should lead us to question whether such privilege can be justified on the ground of axiology.

4 D. 34.4.4 (Ulpian 33 Sab.). Ambulatoria est enim voluntas defuncti usque ad Vita supremum exitum.
6 C. 6.21.17 (Justin. 529).
The goal of this paper is therefore to place the existing military wills in the context of the abovementioned collision of principles and to answer the question regarding the justification of this privilege. In both common law and civil law systems a variety of military wills have existed, but in order not to blur the content I shall solely focus on the few most significant or representative examples of certain types. First, the Roman testamentum militis is to be described as the predecessor of all modern army-related testamentary institutions. The common law shall be represented by the English privileged will, since it laid the foundations for such forms of testament in many other Anglo-Saxon jurisdictions. The French military will is as significant as the whole Napoleonic Code. The Polish regulation will be the object of this paper not only because of my effort to disseminate the knowledge about my own country’s law, but also because it is the last remaining example of what should be called a “Austro-German model” of military will, since in both Austria and Germany these forms of testament practically ceased to exist immediately after World War II.7

3 Roman Roots

Modern scholars often tend to state that the military will is an institution derived from Roman law. Such a statement is as true as it is superficial, since it disregards the essential difference between the Roman military will and the modern ones. Since the medieval times, when testaments were reintroduced to the European legal tradition by the glossators, military wills are mostly a matter of external testamentary form. In Roman law, however, the question of form was a minor issue, since the testamentum militis was first and foremost a matter of testamentary content. Ancient Roman sources8 can be briefly summarise by stating that an imperial soldier was not obliged to obey most of rules and regulations of testamentary law, binding upon every other citizen of Rome. F. Longchamps emphasises that such scope of the imperial privilege “resulted in establishing a special legal regime for soldiers”.9 Needless to say, none of the contemporary legal systems follow that path. An Italian historian of Roman law, V. Arangio-Ruiz, revealed that such extraordinary solutions were the imperial response to

7 The removal of § 600 from abgb, mentioned in the very beginning of the article, was in fact a purely symbolic action, since these provision was only a provision referencing to “detailed military regulations”, which haven’t actually existed since 1946.
8 D. 29.1; C. 6.21; I 2.11; G. 2.109–111.
9 F. Longchamps de Bérier, Law of Succession (n 5) 173.
the problem of ‘provincionalisation’ of the legions,\textsuperscript{10} which means that by the end of the first century the provinces became a recruitment base for the army. Most soldiers were Roman citizens only formally, being brought up in different cultures. Thus they could not understand and apply the Roman law. The imperial privilege meant no more than granting them the possibility to ignore the Roman law and to perform their wills in accordance with their own customs. It can be stated anachronistically that the military will was a remedy for drawbacks of the multiculturalism in the Roman army and the whole empire. The problem of external form was mentioned by the Roman emperors and lawyers among other issues, yet it simply did not attract their attention as much as the issues concerning the content of will. From the perspective of the modern law, Roman reflections concerning the form of military wills are clearly much more important than they were for the Romans. Generally speaking, a Roman soldier was able to perform his will “in whatever way wanted and whatever way possible”\textsuperscript{11}.

The modern reinstatement of military will first in the Holy Roman Empire and later in other parts of Europe was effected in entirely different social circumstances. Since the exceptions from regulations concerning the content of will lost its cause and in consequence fell into oblivion, the issue of form became a key issue. The special form for soldiers acquired a new justification, which luckily could be derived from Roman law as well. Ulpian indicated the dangers of war as one of the substantiations of the privilege,\textsuperscript{12} while almost a century later Constantine the Great pointed out that soldiers are allowed to testate freely since they could lost their lives in battle.\textsuperscript{13} In modern times the dangers of soldierly life became the main justification of the military will. It was emphasised as early as the glossators\textsuperscript{14} and subsequently by Holy Roman


\textsuperscript{11} Quomodo velint et quomodo possint (C. 6.21.3.; D. 37.13.1.pr.). The probably most famous portion of Digest concerning the military will (D. 29.1.1.pr.) states furthermore that for performing such testament the nude will of testator is sufficient (nuda voluntas testatoris). Yet modern scholars proves that this fragment is not classical and could be interpolated by Justinian’s lawyers. See: G. Scherillo, ‘D. 1.4.3 (Giavoleno, L. 13 ‘Ep’) e il Testamento Militare’, in: Studi in onore di Eduardo Volterra III (Milano 1971) 618.

\textsuperscript{12} D. 37.13.1.

\textsuperscript{13} C. 6.21.15.1.

\textsuperscript{14} A. Schmidtborn, Das Soldaten-Testament (n 3) 101.
Emperor Maximilian I Habsburg in his legislation. Military wills are set on the same grounds until today.

4 The English Privileged Will

The renowned W. W. Buckland traced the origins of the English military will in the fact, that its maker, sir Leoline Jenkins was “an eminent civilian”. Regardless of this it is straightforward to observe that the soldiers’ and sailors’ will bears strong resemblance to the Roman military will in its Justinian version, limited to be performed only during a military expedition. The common law clearly sets aside all the Roman reflections about the content of a testament, yet concerning the external form and the conditions it can be considered a legal transplant. Thus the military will can be analysed as a rather rare example of a direct reception of an institution of the ancient Roman law into the English common law. Unfortunately, exploration of this thread goes far beyond the scope of this paper. Nevertheless, the Roman inspiration is fairly obvious. Nowadays the English privileged will, together with the remaining institutions that follow its example (like the New Zealand privileged will), are the only significant examples of entirely informal testaments in the whole western legal word. The English law defines the conditions of performing it in a way that highly resembles the Justinian version of the ancient Roman privilege. Both ‘Statute of Frauds’ of 1677 and the ‘Wills Act’ of 1837, effective until today, laconically formulate the conditions as “in actual military service” for soldiers and “at sea” for sailors. Since the early 19th century the judiciary had started to interpret and expand them. At first the Roman roots were even more visible as Judge Herbert Jenner-Fust in Drummond v. Parish established the so-called “Roman test” which affected later courts’ decisions for one hundred years. The test was finally abandoned by Judge Denning in a case concerning an airman who died during his training in Saskatchewan during World War II. In his own test Denning stated that a soldier can perform a privileged will “if he is actually serving with the Armed Forces in connection with military operations which are or have been taking place or are believed to be imminent”. The famous case of Private Jones, killed on duty in Northern Ireland during The Troubles followed the

---

15 J.H. Burchard, Ein Beitrag zur Lehre vom Soldatentestament (Hamburg 1875) 36.
17 Drummond v. Parish [1843], Jenner-Fust H.
18 In Re Wingham [1949] P 187, 196, CA.
same path.\textsuperscript{19} Relying on those cases we can conclude that in the contemporary English common law, a privileged will is accessible for every soldier performing actions during every sort of military or quasi-military operations. Regarding the sailors, the judicial interpretation went even further and according to the judiciary they can perform informal wills even when they ‘are on long-shore leave home’ or ‘are already under orders to join another ship in a fleet’,\textsuperscript{20} what is literally contradictory to the statute and rightly considered to be somewhat inconsistent.\textsuperscript{21}

However, what makes the privileged will of the common law a unique institution is the lack of any requirements regarding its external form. The Statute of Frauds provided that the subjects abovementioned ‘might have done before the makeing of this Act’ and it is clear that before this act came into force, English law knew almost no formal requirements regarding testaments. This absolute informality of the privileged will in England and Wales has not been limited until today. It should be taken into account that the general formal requirements of testation in English law are rather complex, especially when compared with the simplicity of the holographic and nuncupative wills of civil law. That leads to a conclusion that the English military will is a distinct privilege indeed, securing the soldiers’ and sailors’ freedom of testation in the broadest possible way. To the contrary, the total freedom of the external form poses a threat to the security of legal circulation. This problem was probably the main reason why the privileged will in that shape was severely criticised in England\textsuperscript{22} and has been a subject of reform or even abolition in many other common law jurisdictions.

\section*{5 The Military Will in the Tradition of Code Civile – The Romanesque Model}

Unlike the common law of England and Wales, the civil law developed many testamentary forms. A typical civil code recognises general forms of will, which can be used by every testator in every circumstances, and special forms, limited by special conditions. The French tradition of testamentary law focuses on public forms. Art. 969 of the Code Civile states that the general forms are a

\begin{itemize}
\item \textsuperscript{19} In Re Jones [1981] Fam 7.
\item \textsuperscript{20} Re Rapely’s Estate, [1983] 3 All ER 248.
\item \textsuperscript{21} M. Davey, The making and revocation of wills – I (1980) 71.
\item \textsuperscript{22} P. Critchley, ‘Privileged wills and testamentary formalities – a time to die?’, Cambridge Law Journal 58(1) 1999, 49–58.
\end{itemize}
holographic will, a will “by public act” and a mystique will. The last two forms require participation of a public notary, which means that the French law-maker emphasises the value of the security of legal circulation. That tendency is even more visible if the special wills are taken into consideration. All four of them require participation of a person who substitutes a public notary, therefore they are all public forms of testament. Contrary to German or Austrian civil codes, no nuncupative form is prescribed. The role of the special wills in the French system is thus not to provide a possibility to testate in an easier way in special circumstances, but to guarantee a possibly safe performance of a testament in situations, when a public notary is not accessible. The French military will is not an exception – the Code Civil provides only one public form of these special testament reserved for soldiers and mariners of the navy.

The special form is reserved by the art. 981 of the Code Civile for “soldiers, mariners of the State and persons employed by the armed forces”. Such subjects can perform the military will only in circumstances described originally in art. 983 and today in art. 93. Focusing on the contemporary regulation only it should be emphasised that art. 93 is a general provision of the Code Civil, concerning the records of the civil status of soldiers and mariners. Generally speaking, under this provision the military authorities are obliged to keep the records when due to the ongoing military operations abroad or even on the French territory the access to the regular records of civil status is impossible or seriously hampered. Under the same conditions a military will can be performed. In other words, the French military will can be performed in situations when soldiers, mariners or army employees have no access to a public notary and cannot therefore perform the public forms of will. A glance at the form of the military will confirms that the whole institution is intended as a surrogate of the general public forms of will. According to art. 981 and 982 the military will can be performed before certain military officials (higher officers, military doctors, commanders of the isolated outposts etc.) and in certain situations the presence of two witnesses is also required. These procedures are a direct copy of a notarial will, which means that the role of military officials in performing soldiers’ testaments is to substitute a public notary. As was mentioned above, all special forms of will in the French law are based on the same model – they are public wills, performed in front of a public official or other persons who substitute a notary. It should be said that the French special forms does not relax the general testamentary formalities at all.

The above described conditions and formal requirements of French military testament proves that these institution aims to provide soldiers with a relatively safe form of testation, yet not to simplify the performing of wills in extreme situations. The complete lack of the nuncupative will in the French
testamentary law even as a special form emphasises that the system is focused on providing the maximum security of legal circulation during the performance of action in the event of death. The freedom of testation is therefore formally limited. French military will fits perfectly into this model, being therefore a completely different institution than informal military wills. Many civil codes based on the French tradition faithfully follow these formula, e.g. the codes of the Netherlands, Belgium or Italy. The Spanish Código Civil of 1889, however, breaks out from these tradition, as it allows the nuncupative will in general and two forms of military will as well – one public and one oral, possible to perform only in direct combat. Notwithstanding these significant exception it can be stated that the testamentary tradition derived from Code Civile has several characteristics. Firstly, it places the provisions regarding the military will directly in the civil code. Secondly, it provides only one public and rather complex form of military will. This implies the third and general feature of the Romanesque model: the role of the whole institution, which provides a safe, but rather complex testamentary form for soldiers and mariners.

6 The “Austro-German” Model

The difference between military wills in the Romanesque tradition and in the Germanic tradition which is visible at the first glance is the absence of those wills in the civil code. The Austrian ABGB contained only the abovementioned § 600 – a provision referencing the matter of special form of testaments for soldiers to the military rules of procedure. The German BGBl never included even such a provision and thus the military wills were provided in the law of the army. The contemporary Polish civil code, which follows the German tradition in adopting the pandectistic system, makes no exception for the military wills. Art. 954 provides that the special forms of military wills are to be established by the regulation of the Minister of National Defence. These differences results in further distinctions between the two models. Placing the institution in the civil code compels the lawmaker to formulate its regulations in more general and universal way. On the other hand, inclusion of the military wills in the military law binds them to current military affairs, especially to the organisational model of the armed forces.

Another clearly noticeable distinction is the plurality of forms. When the French law and other systems that follow the Napoleonic Code includes only one form of a military will, the Austro-German tradition has always provided the soldier with a variety of special testamentary forms. This is simply due to the fact that both the Austrian and German civil codes have always provided
every testator with a broad spectrum of testamentary forms, including the nuncupative wills. The special forms of military wills were in fact equivalents of the general forms, yet less formal or adapted to military conditions. The judicial testament, once typical for Germany, is a good example. The BGB used to include a testament performed before the judge in the court. Consequently, German military law\textsuperscript{23} knew the special form of will before a military judge. The nuncupative military will was also present in all Austrian and German regulations I have analysed. The Austrian military regulation of 1873 provided a form accessible for soldiers only during military operations – the testament could be performed orally in presence of just two witnesses, and simultaneity of their presence was not required.\textsuperscript{24} The German military act of 1934, amended in 1943, went even further, providing a soldier whose life was threatened with a possibility of completely informal testation.\textsuperscript{25} This provision was only a short episode in the history of German law, yet it seems to be the only case of a entirely informal will in the history of codified civil law.

It should be emphasised that the forms of military wills in Austrian and German law generally didn't differ from non-military special or even general forms of will. In ABGB the nuncupative will used to be a general form. The military oral will was different only because of the smaller number of witnesses required. This leads to a conclusion that in the Germanic tradition the military wills didn't constitute major exceptions from general rules of testamentary law, as the privileged will of the English law does until today. From the axiological perspective it could be stated that military actions was for Austrian and German lawgivers just one of the special premises allowing an individual to perform a testament in special form and not a “very special” circumstance, constituting the one and only exception from the general forms.

In both Austria and Germany the military wills were effectively abolished after World War II, although § 600 remained in the ABGB until 2004 only as a basis for dealing with the wartime testament of soldiers. Setting the military wills aside was probably mostly due to the post-war German and Austrian pacifism. Poland did not undergo such a process and the abovementioned referencing provision of art. 954 has finally been included in the Polish Civil Code of 1964. Not only does the Polish law follow the Germanic model by regulating the military wills outside the code, but also by providing many forms of them.

\textsuperscript{23} Reichsmilitärgesetz of 1874; Wehrgestz of 1921; Gesetz über die freiwillige Gerichtsbarkeit und andere Rechtsangelegenheiten in der Wehrmacht of 1934.
These special forms can be performed only “in the time of war or mobilisation”. Such a condition, if read literally, limits them only to the situations when the war or mobilisation was formally declared by the authorities. That should be considered as the main drawback of the Polish military wills. In the Austro-German model of testamentary law the variety of special forms of wills is intended to enable the testator to perform an effective will in as many situations as possible. The freedom of testation definitely comes first place. The Germanic military wills are not excluded from this general idea. Contemporary Polish law provides many testamentary forms as well, yet in the case of military wills strictly formal conditions actually make them impossible to use by soldiers taking part and risking their lives in various operations that are not considered to be wars from the legal perspective.

As regards the forms of military wills, Polish regulation in general does not differ from its Austrian and German roots. The Polish Civil Code provides the testator with both holographic and public form of will as well as with special forms of will, including the nuncupative will. However, unlike the former Germanic regulations, some form of military wills provided by the regulation of the Minister of National Defence fail to correspond clearly with the testamentary forms known to the Code. Following the German law too strictly, the Polish lawgiver introduced a will in front of a military judge, while the Civil Code does not include any judicial form of testament at all. Only the less formal form of Polish military will follows the Code in a clear manner. When facing a danger of imminent death, a soldier can testate orally in front of two witnesses and simultaneity of their presence is not required. This form obviously alludes to the abovementioned liberal form of Austrian military will and, as for today, is the most liberal form of Polish private law at all. It is also evident that this form is just a simplified nuncupative will of the Civil Code. In this case Polish law provides a soldier with a testamentary form simpler than any of the forms available to everyone, establishing a very clear privilege.

7 The Axiology of the Privilege

As was mentioned at the beginning of this paper, Roman imperial soldiers were granted an extensive testamentary privilege due to specific cultural-based problems they had with understanding the Roman law, as well as thanks to their very special relations with the lawmaker – the emperor. Although from the times of Justinian the usage of military wills is limited not only to soldiers, yet also by another conditions, a strong element of personal privilege of military men remains in these testamentary institution. In every contemporary
model of military will described above these special form (or forms) of testament is restricted to soldiers and mariners only. In can be stated that in the countries where military wills are still in force, the military men are in some sort of way advantaged at least in the field of testamentary law. Consequently the presence of a military will in a certain jurisdiction means that a state to some extend grants soldier a special position. That observation leads us to the question the justification of the privilege in the modern legal systems and modern society.

For the western civilisation most of the 19th and 20th century were the times of conscript army. Unlike the mercenary forces of the centuries before, the conscript army is constituted by citizens, serving for a relatively short period of time. At least in its ideological sphere it is a form of realisation of the republican concept of participation of the citizens in the fulfilment of duties to their political community. For a long time conscription was considered as an important part of patriotic and civic formation. However, in the second half of the 20th century the attitude towards general military service changed, most likely as a part of deep social turbulences of the west at that time. On the other hand, the nature of armed conflicts changed as well. Generally speaking, military operations of our times do not require the usage of mass armies, which can be formed only by universal draft, but relatively small (especially comparing to the times of both World Wars), yet highly professional armed forces, performing so called expeditionary tasks. In vast majority of the western countries the army, despite still being officially bound with the duty to defend the homeland, has its strictly professional character and the service of soldiers is based rather on the private law contractual bases. The association with the once known mercenary armies seems to be quite clear.

With respect to the conscript army, consisting of “citizen soldiers”, the existence of the special military will could be seen as a way to recognize the special role of a drafted soldier in the defence of the common wealth. The question whether the privilege is justifiable today, when the face of the army has changed, is not easily answered. If we decide that it is only the importance of the armed service as the duty to the homeland that justifies advantaging the soldiers in any way, then we should consider to what extent the profession of a soldier today can be seen as a realisation of such duty. However, if we stress particularly that soldiers are especially exposed to the risk of sudden loss of life

---

26 In Poland for instance, such role of the armed forces is defined in the art. 26 sec. 1 of the Constitution of The Republic of Poland.

27 The association with the famous book by Stephen E. Ambrose, Citizen Soldiers: The US Army from the Normandy Beachs to the Bulge to the Surrender of Germany, is intentional.
and treat this as a justification for the military will, then we should consider extending the privilege to other professions, which are immanently bound with risking one’s life, e.g. policemen and fire-fighters. In these context it is worth mentioning that the Roman law extended the military wills to vigiles, who were performing the law enforcement and fire protection tasks in the city of Rome.28

8 The Collision of Principles and the Questions for the Future

Regardless of the answers we could give to the questions raised above, the problem of performing the last will in the situation which makes it impossible to execute any of the general testamentary forms or in the face of death on the battlefield is probably to the same extent actual today as it was in the times of Trajan or Justinian, the enacting of the “Statute of Frauds” or the Napoleonic Code. The fact that nowadays western countries do not deploy vast armies into great battles does not simply mean that such events could not occur in the future. And even if we were so fortunate that a major war would not shake the pillars of our world anymore, there are still many “minor” military engagements. Of course, this does not mean that performing of a last will in the military context is a major social issue. Private law and its changes of course has to focus on the matters of social and economic importance, yet it always should take into account many possible situations. This applies to a greater extent to the civil law systems, because the common law can always react swiftly owing to the judicial precedents. A. G. Lang already asked three decades ago if the privileged will is a dangerous anachronism.29 The answer to this question may be positive if we prove, especially by social research, that the institution does not fulfil its task any more. Yet if such question refers more to the whole axiological context of the military wills,30 the answer I shall give to it is definitely negative, since the axiological problem that a privileged will is answering is not

28 D. 37.13.1.1 Ulpianus libro 45 ad editum.
30 In my opinion the author mentioned in an note above does not refer to the axiological context of the privileged will too much. He states that “there is insufficient reason for soldiers and sailors not being expected to arrange their affairs before arriving at a combat zone, as the rest of the community is expected to do”. (A.G. Lang, ‘Privileged Will...’ (n 29) 178), which means that he does not take into consideration the principle that the will of a deceased person is to be changeable until the last moment of their life.
anachronistic at all. The point is whether a military will in any of its historical or present forms is still a good answer. Invariably it is the task of the lawgiver to decide on that matter. The answers given can vary, yet it is crucial that they do not disregard tradition, since tradition offers us a wide range of hints and solutions. Going back to the collision of principles described at the beginning of this paper we can state that its outcome determines the testamentary forms in general and the military wills in particular. The possibility of an individual to dispose one’s estate *mortis causa*, known as the freedom of testation, is definitely one of the basic principles of the western legal tradition. Legal systems may limit its formal aspects due to the security of legal circulation, yet even then they tend to equip the testator with various opportunities. The French tradition focuses on ensuring that everyone has access to relatively safe forms of the last will. The military will of the Napoleonic Code is based on such an assumption. The Austro-German tradition, trying to balance colliding principles, provides a wider scope of the special testamentary forms. The military wills of former Austrian and German or contemporary Polish law – both official and nuncupative – reflect the general idea of the testamentary law in these systems. The English privileged will is therefore probably the most original one. The basic testamentary form in the English common law is rather complex (but not official, like the complex forms in the civil law systems), thus the complete informality of the military will is a huge exception from the general requirements, emphasising the freedom of testation granted to soldiers and sailors. All these models differ significantly, each of them based on different axiological foundations. As such they highlight the diversity of the western legal tradition and, on the other hand, its common Roman roots, in this case surprisingly clearly visible in the common law as well. The contemporary lawmaker can obviously abandon the traditional way of dealing with the soldierly testation, as the Germans and the Austrians did seventy years ago and as many common law jurisdiction did recently, but the of course problems do not vanish automatically with the abolition of the solutions. We can answer them with the general forms of testament and consequently end the privileged position of a soldier in the field of testamentary law. We can also manage to resolve the problem with better legal education of soldiers and providing them with better conditions to perform the general forms of will. Nevertheless, we should always be aware of the principles we are dealing with when making such moves. The long history of the military wills gives strong basis for the future solutions not only for these particular problem, yet for the testamentary law as a whole, where the clash between many colliding principles is present in almost every institution.