A method issue: from “definitions” to “rules”. An application for answering a family law question: are prenuptial agreement effective or void?[*]

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1. Governing the chaos

Modern society is so complex that the work of the jurists seems like governing the chaos.
The civil law judge has been depicted as the faithful servant of the law, the “mouth of the law”, according to the influential definition by Montesquieu. Nevertheless, we know that rules are nowadays so complex that the jurist seems like Theseus moving within the labyrinth created by Daedalus: the chaos of modern rules is the Minotaur. Maybe the jurist is lost within the mouth of the Minotaur! Can we help Theseus to kill the Minotaur and to find a way out from the labyrinth? Do we have an Ariadne’s red cord? A grounded method for interpreting and applying the law is our Ariadne’s red cord.

2. Old and new techniques

We have several methods for interpreting and applying the law, finding out rules to be applied dealing with problems arising from interactions between people, that is the task of a civil law jurist.
The classical itemization of these methods is the following:

- grammatical interpretation: we use the literal meaning of the text;
- historical interpretation: we use the legislative history, to reveal the intent of the ruler;
- systematic interpretation: we consider the context of provisions;
- teleological interpretation: we consider the purpose of the text, as it appears from legislative history, or other observations.

Of course, the interpreter uses and combines all the above-mentioned methods. Sometimes they converge towards the same solution. Sometimes they do not, and the interpreter is forced to

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choose a method prevailing over the others. His work is discretionary for a relevant range. This is the reason why the jurists will never be replaced by machines and calculator.
Contemporary jurists have also a number of new techniques. I can mention here only the luckiest examples.
First, the so-called "law and economic approach" also known as "economic analysis of law". After the founding works by Ronald Coase[1] and Guido Calabresi[2], economic concepts are used to explain the effects of laws and the effects of different interpretations, in order to assess which legal rules are more economically efficient.
Secondly, I can mention the "Means to an end" approach, known as the "jurisprudence of interest", suggested by Rudolf von Jhering[3]: rules are created for the protection of individual and societal interests.

3. The classical legal syllogism

I think that the modern jurist runs the risks to be overwhelmed by chaotic rules and by new methods for governing the chaos. Sometimes we run the risk to forget the classical legal syllogism as the red cord to analyze a civil law problem.
The scheme of the legal syllogism is the following:

- If A, then B, where:
    - A is the definition of a fact;
    - B is the rule supposed to be applied to A.

Emilio Betti, a well-known Italian jurist of the first half of the XX century, described the legal syllogism first using in Italy the catchword *fattispecie*[4], from the Latin words *facti* and *species*, meaning a fact (a concept, a *Begriff* in German) that we imagine for building up a standard. The ruler defines a "fattispecie" and states which rule (in Italian *disciplina*) applies to the "fattispecie".
I think that the relation between *fattispecie* and *disciplina* is the standard brick for building up a legal system "*ordine geometrico demonstrato*" (using Spinoza's wording).
In order to better show the importance of what I am saying, let me tell you a story coming from a colleague of mine, a criminal law professor. He is an aged professor teaching from nearly forty years. At the beginning of his course, each academic year, in order to explain the method of criminal law, he questions his class asking to his young students what a willful murder is. Years

[1] R. COASE, *The problem of social cost*, *Journal of Law and Economics*, 1960, 3, 1.
[2] G. CALABRESI, *Some thoughts on risk distribution and the law of torts*, in *The Yale Law Journal*, 1961, 499, where the Author applies the law and economic approach to the law of torts.
[3] R. VON JHERING, *Der Zweck im Recht*, Breitkopf & Härtel, 1877.
[4] E. BETTI, *Le categorie civilistiche dell'interpretazione*, Prolusione al corso di diritto civile pronunciata il 15 maggio 1948, (the written text can be read now in Rivista italiana per le scienze giuridiche 5/2014, Prolusioni, 11).

ago, the answer of his class was unanimously: a willful murder is the fact committed by a person who kills another person and he or she has the aim to kill him or her.
During the last years he often receives a quite different answer: a willful murder is a crime punished with lifetime jail. My aged colleague says that nowadays our students are overwhelmed by rules and forget the classical legal syllogism: first of all, the jurist is supposed to provide a definition (a *fattispecie*); than he has to identify the rule be applied to the facts corresponding to a definition. Blending definitions and rules brings to the chaos.
Maybe I am giving you the impression that I am an old-fashioned law professor, unfit to discuss a method issue at a doctoral conference in 2020. Using the names of two great Maestros of the past for describing different methods, maybe I am giving you the impression that that in the fight between Jhering (the above-mentioned father of the "Jurisprudence of interest") and Windscheid (the king of pandectists), I choose Windscheid.
This would be a wrong impression, of course. Keeping on using the names of those Maestros to represents different approaches, I think that Jhering and Calabresi stand on the shoulders of Windscheid, meaning that we can look at the individual and societal interests, or we can move toward an economic analysis of law, only once we have a conceptual order built up through the classical jurist syllogism.

4. Definition problems under the question "Are prenuptial agreements effective or void?"

I want to tell you another story. Several years ago, I was attending a meeting of the International Academy of Family Lawyers: family law lawyers coming from all over the world. The Academy submitted a multiple-choice question to the participants: are prenuptial agreement effective or void in your own jurisdiction?
Trying to outline the answers:

- lawyers coming from the USA, the UK as well as from other common law States answered that prenuptial agreements are effective under certain conditions;
- lawyers from a number of European States answered that the effectiveness of prenuptial agreements is increasing and their relevance in family law is getting higher;
- Italian lawyers (and lawyers coming from other States where catholic culture is relevant) answered that prenuptial agreement are definitively void.

A few weeks after the IAFL meeting, I was requested to advice an Italian man who was going to get married with a USA woman living in California. He have relevant assets both in Italy and in the USA. The spouses were going to get married in Italy, but they planned to live in Los Angeles. He told me that "of course" the spouses chose the separation of assets regime: this is the most common choice in Italy and separation of assets regime may be chosen by a simple declaration made at the time of the celebration of the marriage. Basically, it is a simple cross on a form. I

was asked by this person to make what is necessary to reach the aim that the separation of assets regime is effective also in the USA. I contacted a lawyer in Los Angel for obtaining his help, thinking that this should be an easy task. Being the USA the birthplace of prenuptial agreement, it should be quite easy signing before the marriage a separation of assets agreement between the spouses. Nevertheless, my dialog with the USA lawyer was less easy than I thought. First, I was asked by the USA lawyer to provide a definition of "separation of assets regime". My answer is based on Art. 213 of the Italian civil code: a marriage ruled by the separation of assets regime is a marriage where each spouse remains the sole owner of the assets purchased by him or her before and after the marriage. The USA lawyer was quite surprised: does this regime means that in the event of a divorce the judge will not carry out any equitable distribution?
This question should entail a new definition issue: what is "equitable distribution"? Moreover, a civil law European lawyer should question to the USA lawyer why he introduces a connection between the matrimonial property regime and the consequences of the eventual divorce: from our perspective these issues are (and should remain) separate issues.
In any case, the answer to the question ("Does the separation of assets regime means that, in the event of a divorce, the judge will not carry out any equitable distribution") is negative. As a matter of facts, the Italian judge, during divorce proceedings, never carries on an "equitable distribution" of the assets owned by the spouses (regardless they live under community of assets regime or separation of assets regime). If the spouses live in community of assets regime, all assets purchased during the marriage are common assets and are supposed to be equally shared after the regime ends (but the judge who decides the divorce doesn't handle the division of the assets between the ex-spouses). On the other hand, if the spouses chose the separation of assets regime, the sharing of their assets is definitively excluded.
This answer surprises the USA lawyer because, from his point of view, a marriage where no equitable distribution is made after divorce is quite unusual. He is not at all sure that, in the event of divorce, the judge will consider fair an agreement in which the spouses give up any rebalancing of their assets.
In any case, the USA lawyer says that such an agreement (the separation of assets agreement) is considered in the USA under the *fattispecie* (using Emilio Betti's wording) "prenuptial agreement", meaning that it is ruled as all prenuptial agreements are. This agreement is effective only if:

- it is fair; and
- both spouses obtain independent legal advice; and
- the agreement is signed on the basis of a full disclosure from both spouses of all their incomes and assets.

This is something very far from the Italian experience: making a cross on a form.
If we read the answer to the IAFL questionnaire, we learn that in the USA the prenuptial agreements are effective (under certain circumstances), while in Italy they are void.

Nevertheless, a separation of assets agreement can be signed in Italy with a simple cross on a form, while in the USA the same agreement is considered as a prenuptial agreement and it has very pregnant validity requirements, while as a matter of facts we are not at all sure that it is considered as effective in court.
What are we doing wrong? The mistake is in the way we use the legal syllogism.

5. Comparing Italian and common law approach

First, let's try to better understand why Italian lawyers say that prenuptial agreements are void in Italy and what do they mean.
From an Italian perspective a prenuptial agreement is an agreement signed before the marriage where the spouses regulate the effects of their possible future divorce.
We easily follow a legal syllogism in reaching this conclusion:

- the effects of the divorce are, even though indirectly, effects of the marriage; and
- the effects of the marriage are regulated in Italy by Art. 160 of the Italian Civil Code, which prevents spouses from entering into agreements that have the effect of giving up or modifying the rights and duties deriving from the marriage; therefore
- the spouses cannot validly enter into an agreement with respect to the maintenance rights after the divorce.

On this basis, the Italian Corte di Cassazione consistently states that the agreements by which the spouses rule the economic effects of their future divorce are not binding[5]. This case law was very recently confirmed[6].
We have now to understand why that syllogism doesn't apply to separation of asset agreement. The answer is easy.
Artt. 159 and 162 of the Italian Civil Code expressly state that art. 160 doesn't apply to conventions about matrimonial property regime. On the other hand, the definition of "prenuptial agreement" in Italy is "an agreement signed before the marriage where the spouses regulate the effects of their possible future divorce". The separation of assets agreement doesn't regulate the effects of the spouses' possible future divorce. It only regulates the allocation of the spouses' assets during the marriage.
From a common law perspective, the Italian approach is a nonsense because during the marriage the spouses live happily together, and they do not care and do not deal with what's mine and what's yours. The separation of assets regime becomes effective and relevant only in the event of divorce. This a practical approach that makes sense: there are no reasons to treat an agreement between the spouses differently if it is a matrimonial property regime agreement or an agreement about the effects of a future divorce.

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[5] Cass. 30 January 2017, n. 2224; Cass. 28 January 2008, No. 1758; Cass. 5 March 2006, No. 5302; Cass. 12 February 2003, No. 2076; Cass. 18 February 2000, No. 1810; Cass. 20 March 1998, No. 2955
[6] Cass. 26 April 2021, n. 11012.

On the contrary, in Italy it appears ethically intolerable that the spouses, before or during the marriage, want to regulate their potential divorce and its consequences, because the divorce is the extreme solution that, until the very last moment, must be avoided. I observe that there is another issue where the Italian law states that the agreements regulating the consequences of a future unfortunate event are null and void: succession agreements that are banned by art. 458 cod. civ..

6. Balancing dogma, evolution of society and efficiency

A remote decision from the Italian Corte di Cassazione[7] states that art. 160 Italian civil code must not be regarded as an absolute dogma, in the light of the "values of self-determination and negotiability that even in the family law are emerging".

This statement, constantly repeated in different contexts, never led to claim the validity of prenuptial agreement.

Nevertheless, some movements in that direction can be reported, within two decisions issued by the Corte di Cassazione in 2012 and 2014[8].

In the case of 2012, the Italian Corte di Cassazione deals with an agreement signed the day before the wedding where the wife undertook, in the event of a future marriage failure, to transfer to her husband a property of her own as compensation for the expenses incurred by him for the renovation of another property to be used as family home during the marriage.

The judgment is relevant for the problem we are dealing with for two reasons:

- firstly, a commitment made in the prospect of a divorce is considered binding and the dogma according to which the divorce cannot be the subject of any agreement is overcame.
- Secondly, the Court, incidentally but expressly, notes that the assertion of nullity of the prenups has been criticized by Italian jurists for failing to adapt to the "evolution of the regulatory system, which is now geared towards recognizing greater autonomy to the spouses in determining their economic relations, even after the marital crisis".

In the case of 2014, the issue was not about the validity of a prenuptial agreement.

Nevertheless, incidentally the Court deals about our problem, recalling the restrictive approach but also the openings made in the 2012 decision, to conclude that:

"*Such agreements [prenups] are very frequent in other States, in particular those of Anglo-Saxon culture, where they carry out an efficient function of deflation of family and divorce disputes*"

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[7] Cass. 24 February 1993, No. 2270.

[8] Cass. 21 December 2012, No. 23713; Cass. 20 August 2014, No.18066.

and recalling

“The criticisms of some authors towards the traditional orientation, which seems to neglect not only the principles of family law but also the evolution of the regulatory system, now oriented towards recognizing more and more autonomous spaces for spouses in determining their economic relationships, even after the marital crisis, obviously protecting the interests of the minors involved”.

Trying to summarize the keynotes we have reached, we start from:

- the definition of prenuptial agreements;
- a rule supposed to be applied to that definition (art. 160, Italian civil code);
- a syllogism leading to the conclusion that prenuptial agreements are void.

Nevertheless, we also know that:

- the above-mentioned rule is not a dogma since it indicates a principle, that needs to be interpreted in the light of new values that are emerging;
- the Italian Corte di Cassazione remembers us that we need to consider efficiency needs.

7. A proposal for modifying Italian approach

I think that now we are ready to outline a proposal for modifying Italian approach insofar as prenuptial agreements, in order to fulfil the requirements of modern families in the contemporary society.
Any solution in Italy cannot disregard art. 160 Italian civil code and the general rule that duties and rights arising from the marriage cannot be the subject of agreements between the spouses. However, this rule is no longer an absolute dogma, since even in the Italy it is subject to very important exceptions. On the contrary, it is a flexible principle that is based on the nature of the rights arising from the marriage. The mentioned rule fellows the circumstance that one of the spouses is often in a state of weakness that prevents her or him from evaluating his/her interests. The aim of the rule is to protect the weaker spouse. However, it is a principle that must be reconciled with the growing importance of private autonomy in family relations.
Consequently, any prenuptial agreement which deals with patrimonial rights post-divorce, and in particular maintenance obligations, has the same effects that a court order in that matter has: it is subject to the clause *rebus sic stantibus*.
Moreover, the judge has the power to appreciate the fairness of the agreement reached by the spouses, so that the agreement can be considered as not binding if it is evaluated as unfair.
Following the international standard, we could also assume that a full disclosure by the spouses about their assets and incomes needs to forerun the prenuptial agreements and each of the spouses should have an independent legal advice so that the agreement is the output of an “assisted negotiation”.

This solution starts from the legal syllogism mentioned above. Nevertheless, the conclusion is made flexible reading the rule mentioned in Art. 160 of the Italian civil code in the light of its aim and considering efficiency needs.

Keywords: Law interpretation; method; prenuptial agreements; divorce
Prole chiave: Interpretazione della legge; metodo; accordi prematrimoniali; divorzio

Source of law: Art. 160 of Italian civil code
Fonti normative: art. 160 del codice civile italiano

Abstract: Modern society is so complex that the work of the jurists is often quite difficult. Therefore, we need a grounded method for interpreting the law, balancing old and new techniques. We try to apply this method for answering a modern family law question: are prenuptial agreements effective or void? We compare the answer in different States and for different agreements, finding out some surprises. Then we analyze the Italian approach proposing a new solution for the problem.

Riassunto: La società contemporanea è a tal punto complessa che il lavoro del giurista è spesso assai difficile. Per questa ragione, abbiamo bisogno di un metodo solido per interpretare la legge, combinando vecchie e nuove tecniche. Cerchiamo di applicare questo metodo per rispondere ad una domanda che si pone nel diritto di famiglia contemporaneo: sono validi i patti prematrimoniali? Vengono comparate le risposte a questa domanda in Stati differenti e in relazione ad accordi differenti, scoprendo alcuni aspetti sorprendenti. Analizziamo poi la soluzione italiana e proponiamo una nuova soluzione al problema.

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