

ANTONELLO MIRANDA*

**Immobilis in mobile: the Italian law of succession
in a changing family and society.**

“Of course, Esther, he said, you don’t understand this Chancery business? It’s about a Will, or it was, once. It’s about nothing but Costs, now. A certain Jarndyce, in an evil hour, made a great fortune, and made a great Will. In the question how the trusts under that Will are to be administered, the fortune left by the Will is squandered away; the legatees under the Will are reduced to such a miserable condition that they would be sufficiently punished, if they had committed an enormous crime in having money left them; and the Will itself is made a dead letter.

All through the cause, everybody must go down the middle and up again, through such an infernal country-dance of costs and fees and nonsense and corruption, as was never dreamed of in the wildest visions of a witch’s Sabbath. Equity sends questions to Law, Law sends questions back to Equity; Law finds it can’t do this, Equity finds it can’t do that. And thus, through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can’t get out of the suit on any terms, for we are made parties to it, and must be parties to it, whether we like it or not. When my great Uncle, poor Tom Jarndyce, began to think of it, it was the beginning of the end!”

Without any doubt “Bleak House” of Dickens is not only a masterpiece but also the first example of “law and literature” the most intriguing and modern “nouvelle vague” among jurists, coming out the States following the fortune of “law and economics”, “law and sociology”, “law and anthropology” and generally speaking of “law and ... something else”.

In my opinion the tale of the infamous “Jarndyce v. Jarndyce” is yet extremely actual, probably not more in England and most part of common law Countries (their systems are concretely elastic and adaptable to new needs and social changes) but surely in Italy and generally the “civil law systems” where

* Professor of Comparative and European Law, Dean of the Faculty of Political Sciences, University of Palermo, Italy

“statutory law” and “Civil Code” are the only sources of law and are very difficult to change, at least without a complex (parliamentary and therefore political more than juridical) reform. Furthermore in civil law countries the interpretation should be essentially literal or narrow so that the “supremacy” of statutory law cannot be discussed or diminished by judges or jurists. This means that, generally speaking, if a rule or right is not in a statute ... well in that case there is no rule nor right. From another side this means that statutory law (and I am afraid even the European’s one) is likely more precise and sometimes “pedantic” instead of general as we envisage.

Hence it is not unusual to find in a statute provision like this: “in the Nuts (unground) (other than ground-nuts) Order, the expression nuts shall have reference to such nuts, other than ground-nuts, as would but for this amending Order not qualify as nuts (unground) (other than ground-nuts) by reason of their being nuts (unground)”. Who is aware of European Directives ... can easily agree with me.

But even the jurist or the legal interpreter is “fascinated” if not “trapped” into a tangle of taxonomies and notions sometimes followed for path’s dependency or for avoiding complications. Therefore while the society is constantly developing, the law and its interpretation is apparently the same, increasing the separation and the distance between them.

My friend David Bradley asserted in a recent work that family law is so extremely dependant from the development of each different society, culture and habits that it is almost impossible to study it or to compare it without taking in consideration the socio-political analysis instead of a mere narrow juridical one and therefore it will be impossible to look for “general principles” of family law.

I agree: in fact while the development of family law means a more advanced commitment of legal system to family issues, the different legal answers have to settle with the ontological closeness of family law and its relational dynamic respect to the imposed external rules. In other words there is a resistance of the reality of the family to be regulated by law while there is a strong contiguity with social, moral and political rules, so that the problem of the existence, enforceability, efficiency and efficacy of those rules depends on the fact that people “feel” them as “social and moral fit and adequate”.

Without this every attempt to impose external rules will clash causing a high level of non compliance and litigation, with the risk of outmoded legal principles (with the effect of “legal irritants”).

This is particularly true for the Italian statutory law of wills and succession that is firmly based upon categories and rules more than 150 years old, notably related to the ancient Roman (Canon) Law model of monogamist and “indissoluble” family.

These rules seem to be now incoherent with the rising of new “families”, the fast evolution of social behaviour, the astonishing development of biomedical researches (i.e. not only artificial insemination but even the increasing of life expectation) and technologies.

Let me please give a little example: in Italy we have only 3 formal ways to make a will: a “holograph”, i.e. the will entirely written and undersigned “by the hand of testator”; the “public testament”, i.e. the last will written by and with the advice of a Notary; the “secret testament”, i.e. the will that may be written by a third party or by “mechanical tools” but nevertheless undersigned by testator at the end of each page and then closed in a sealed envelope to be delivered to a Notary with a formal declaration.

As you can understand this rule dating back up to 1942 refers as “mechanical tools” to “typewriters”. In my home I saved (as antique) my old and glorious “Olivetti” and probably some of you have a Remington but I think that today no one will use to “typewrite” anything but a computer and I wonder if a DVD or a pen drive or a CD may be considered as “page written by mechanical tools”. Of course this is matter of construction but it is interesting to note that while the Parliament passed a new statute on the validity of “electronic documents” nothing has been changed in the succession’s rules.

From a more relevant and general point of view it is difficult to conciliate the “immobility” of succession law with the “mobility” of family law.

In fact, in Italy, both the statutory framework of family law, and, to a greater extent, the traditional conception of mono-nuclear and legitimate family (based on indissoluble or stable and permanent marriage), have been put under pressure from:

- a. strong social forces which want to obtain major equality of roles and a real parity between the sexes;
- b. recognition of the paramount importance of children’s rights and interests;
- c. development of new technologies, particularly in the field of artificial fertilisation;
- d. the increasing number of de facto and same-sex relationships;
- e. the increasing number of divorces (reinforcing the need to protect the rights and interests of the weaker partner);
- f. the increasing number of births “outside marriage” and the growing number of families incorporating children with different blood parents and/or one-parent families.

Furthermore family law, in Italy, has an increasingly international dimension, largely because of greater worldwide mobility. The courts have to deal with matters (a novelty only recently recognised in a 1995 Statute) such as

marriages and divorces of mixed couples or of foreigners (with different religions, traditions and customs) living in Italy.

Until now these problems have been only partially confronted, with some piecemeal intervention, by means of specific statutes or through judicial interpretation and application of old law rules and the Civil Code.

For example we:

- g. have sought to simplify the procedures to grant divorce (in consequence of the changing demands to protect the legitimate family and its unity and indissolubility);
- h. have issued new rules to safeguard the rights of separated partners (use of the matrimonial home, right to alimony and maintenance) and the interests of children (right to education, care and maintenance);
- i. have simplified the rules on adoptions (including international ones) to try to favour adoption and simultaneously reduce resort to artificial fertilisation;
- j. have, furthermore, enacted rules which apply the European convention for protection of human rights and fundamental freedoms.

Since 1972 and 1974, thus, with the Reform of family Law **even the notion of “family” has been transformed**: first on the basis of a more effective parity among its members, secondly with the disruptive introduction of “no fault” divorce i.e. leaving the marriage *ad libitum* of one of the partners.

Probably the consequences had been underestimated but now **it is almost impossible to settle the rule on inheritance or legitimate portion with the provisions for a closed class of “legal beneficiaries”** (i.e.: spouse, children and parents) with the unforeseen possibility for divorcees who married again of forming new legitimate families or “step-families” with births and cohabitation of “legitimate” children from different parents, cohabitation and relations among children - all of them legitimate by definition – **from different biological parents**, or from the first, the second, the third, and so on, marriage.

Consequences are more dramatic for the divorced spouse in the **not uncommon case of a re-marriage** of the former partner. Indeed, according to inheritance law, only the surviving spouse has entitled of entire (or a greater part of it) partner’s assets.

Nothing will be “reserved” to the former spouse, even if the first marriage was years long and the new marriage just few months or days long. Pavarotti’s case is representative of a much-diffused situation.

From a different point of view the “persistence” of this old rule of inheritance and legitimate portion is at least “socio-political un-correct” for de-facto relationships particularly without a “dedicated” statutory provision. In Italy recently de

facto relationships over passed by number legal couples but the unchanged inheritance law continued to protect the blood ties instead of the affective and real ones. Frankly I don't understand why I should leave my assets to a brother I had not more seen or meet for many and many years, instead of to my long-life partner.

Analogous problems are produced by the **artificial and post-mortem insemination** and generally by medical developments like the increasing of life expectation and the improvement of "quality of life" and... sex. Just few days ago an Italian court nullified, on the ground of simulation, a marriage between an old Italian woman and a young Rumanian man who married her only for acquiring the Italian nationality. But there are so many recent cases of old men (and sometimes women) which marry their young foreign "nurse". There is nothing bad on this but the inheritance law is not set to face the phenomenon.

From another side there is the possibility to acquire accurate information telling us the maximum limit of our life: it is a sort of a knowledge that nobody has been used to cohabit with, and produce a very unpredictable range of reactions that inheritance law is not able to manage; as for the increasing cases of old persons living alone and which prefer to sell out their asset to bank or estate agents in consideration of a life long strong financial support.

This gap with social reality has been until now partially filled with "alternative" tools –some of them coming from different legal systems– of distribution of family assets: trusts, gifts, life insurances, (matrimonial and para-matrimonial) agreements, patrimonial conventions and so on.

Waiting for a new and complete reformation of succession law I suggest **"rethinking" and construing in a different way old statutes and legal categories, in particular the freedom of testation and the "privatisation" of family law.**

Until recently Italian Authors have suggested limiting the same State intervention to cases of necessity (e.g. where there is a need to safeguard children's interests or the economic and personal interests of separated partners, etc.); allowing individuals the freedom to self-regulate their own relationships (both economic and personal, familial and/or pertaining to couples by, for example, stipulating pre-matrimonial, post-matrimonial and para-matrimonial agreements). In this direction legal scholarship has also suggested the desirability of an increased sort to alternative dispute resolutions, such as Mediation and Conciliation.

It has to be taken into consideration that "family matters" are so complex and peculiar they cannot be subjected to a predetermined "standard" regulation and imposed by law, which is strict by nature. The peculiarity of family positions requires an extremely high degree of flexibility and adaptability, which statutory law does not seem to be able to guarantee: it is not possible to regulate in a general

and abstract way what is by nature far too peculiar and real. Moreover, it has to be taken into consideration that, as it has been said previously, modern social reality and technological innovations have caused a crisis within traditional family institutions, which today, in Italy, in real life are very far from the code's model. If we add that the extreme easiness of movement within and especially without the boundaries of the country often makes "national" law effectively inapplicable -as, for example, it was observed with artificial insemination⁽¹⁾-, or, anyhow, makes problems transnational (how was the case with trusts set up abroad and through which people tried to cheat on the limits imposed by the law regarding successions), it is easily understood that the solution cannot but be that of issuing a new reform act, which would globally reconsider the subject and which, while not limiting itself to a simple deregulation, would recognise the need to only establish basic rules, leaving, where possible, space to the privatisation of relationships rather than to their autonomous determination on behalf of single individuals.

The choice in favour of privatisation of family relationships, even if included within a wide "frame-legislation", appears preferable for at least three sets of reasons. In the first place, for the extreme difficulty which, as it has been said, is implied in the work of micro-juridification of family matters.

Strictly related to this first observation is the consideration that a family, as a juridical institution, is born and justifies itself according to the single participants' individual interests, and, more than that, that the law has the function of protecting the individual against the prejudice that family relationships or their coming to an end may cause him. Those interests would necessarily be sacrificed by a massive legislative intervention, which would inevitably place a specific conception of family relationships over specific realities⁽²⁾. But, if this position could perhaps have appeared justifiable until recently, today it becomes less and less acceptable, considering the absence, noted above, of a uniform social model of family. As Italian doctrine has observed⁽³⁾, it is

1. It is hardly the case to recall how in the Artificial Insemination Bill until recently debated in Parliament there was provision for a heavy criminal sanction (twelve years in prison, if I remember correctly) against doctors who operated outside the boundaries of that same law. And if the doctor is not an Italian citizen, it will certainly not be easy to sanction his behaviour. Also think of the simple need to adapt to the EU Blood sentence and the picture of the inapplicability of national laws concerning artificial insemination will be complete.

2. For example, see the problem of transmission of wealth within a family, on which the essay, in this congress by *M.D. Panforti*, A comparative study of the transmission of family health: from privilege to equality.

3. On the point, more in detail, see: *E. Quadri*, Rilevanza attuale della famiglia di fatto ed esigenze di regolamentazione in *Dir. fam.*, 1994, I, 288; and even more recently, *Quadri*, Problemi giuridici attuali della famiglia di fatto, in *Famiglia e diritto*, 1999, 502 ss.

totally contradictory, even if inspired by our best intentions, to want to extend marriage discipline and ties to someone who, by definition, has decided not to bind himself according to the rules established by marriage discipline, being it on the one hand inconvenient to wish for a minimum statute of living-in couples, which would end up institutionalising an inferior rank of families, and, on the other hand, totally useless, considering that, once we make *de facto* couples and legitimate ones equal, there would not be any reason not to resort to marriage. That obviously cannot mean giving up protecting the weaker parts in the relationship (think not only of a partner, but also of the children born from the *de facto* couple), as much as resorting to the development of autoregulation and the protection of positions specific to any individual relationship examined. Without, therefore, abandoning the weaker part to the will of the stronger one, but favouring each subject's responsibility in a circumstance which, by nature, is founded on a manifestation of unity and equality.

In conclusion, the creation of a "light" family law, ready to intervene only if necessary, otherwise leaving individuals free to decide, but always within a common agreement, in other terms on a "contractual" basis, how to manage their own affective relationships, would represent a healthy acknowledgement of legislation's limits to intervention in such a delicate field and, most of all, could limit the occurrence of controversies, also guaranteeing sufficient protection to who, for the most various reasons, cannot or will not resort to State regulation of the relationship (i.e. homosexual couples). According to this meaning, the "privatistic" choice seems to be preferable, thanks to its evident ability to support the real demands of individuals, without nevertheless compromising protection for situations that need to be safeguarded.

In my opinion, indeed, only giving to the family members an effective possibility of self-regulating their relationship – above all post-mortem – with the possible recourse to mediation and with the subsequent simplification of the until now formally stiff statutory provisions, should bring back in harmony the actual reality and complexity of modern family with the "machinery" of succession.

This is the only way to keep the law pacing with times and reduce legal actions. Otherwise we may discuss again, for years and years, like in "Jarndyce", the true case (of 1652) if a man who cut off a dead man's hand, put a pen in it and write and signed his will, has or not complied with the civil code rule requiring that a will should be written "by the hand of the testator".

