INNOVATION AND TRANSITION IN LAW

Experiences and Theoretical Settings

Edited by
Massimo Meccarelli
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Innovation and Transition in Law:
Experiences and Theoretical Settings

The Figuerola Institute
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The Programme "Legal History" of the Figuerola Institute of Social Science History –a part of the Carlos III University of Madrid– is devoted to improve the overall knowledge on the history of law from different points of view –academically, culturally, socially, and institutionally– covering both ancient and modern eras. A number of experts from several countries have participated in the Programme, bringing in their specialized knowledge and dedication to the subject of their expertise.

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Innovation and transition in law: some introductory remarks on the heuristic value of a conceptual pair

Massimo Meccarelli, Cristiano Paixão, Claudia Roesler

1. Innovation-transition as a conceptual pair: correlation and juxtaposition; 2. The definition problem; 3. The issue of legal actors; 4. Areas of incidence of innovation-transition; 5. Conclusions

The contributions collected in this volume[1] are intended to offer a space for discussion on the major issues of the modernisation of law and legal change. Their object is principally represented by two key concepts – those of "innovation" and "transition" – which appear to be as relevant to these phenomena as they are little defined in the taxonomy of contemporary legal science.

Nevertheless, a critical reflection on the heuristic value of these categories in legal history seems to be useful[2]. The problem of the modernisation of law in recent times, especially under the pressure of technological development and globalization, is to be considered as increasingly addressed using the interpretative key of "innovation". Whereas it is rather in terms of "transition" that it seems possible to consider the effect of legal change.

The group of Italian and Brazilian scholars who participate in this volume, in continuing the common research itinerary undertaken in recent years,[3] aimed to investigate these problems using an interdisciplinary prism. It includes points of view from inside the legal sciences – such as legal history, philosophy of law, constitutional law, private and business law – and from outside them, such as philosophy and the history of political institutions.

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1 This book is the result of two workshops held respectively at the Department of Law of the University of Macerata on 17 and 18 June 2019 and at the Faculty of law at the University of Brasilia on 4 and 5 November 2019.

We would like to thank Prof. Manuel Martinez Neira for including this publication in the series Legal History of the Figuerola Institute - Universidad Carlos III de Madrid. Many thanks also to Gabriel Faustino Santos for the editing of the manuscript.

2 In this perspective see Costa (2019).

3 See the volumes: Meccarelli (ed.) (2016); Martins/Roesler/Paixão (eds.) (2020); Paixão/Meccarelli (eds.) (2021).

1. Innovation-transition as a conceptual pair: correlation and juxtaposition

Against this background, and in the light of the legal facts examined, the book investigates the theoretical possibility of conceiving innovation-transition as a conceptual pair and questions its possible applications. It seems that innovation, in fact, can occur precisely in processes of transition; while transition can be the consequence of innovation.

The framework of legal experience provides various confirmations in this respect. For example, to stay with the cases studied in the volume, let us look at the problem of the construction of a democracy in Italy or Brazil: here the projects, certainly oriented towards innovation, gained ground by crossing the space of a transition. This emerges from the analysis of the discursive strategies of the Judiciary in Italy after the collapse of Fascism (Meniconi), and from the study of the dynamics of constituent power in Brazil after the crisis of the Estado Novo in 1945 (Peixoto), as well as in the aftermath of the Dictatorship in 1988 (Paixão).

Other analyses clearly show how legal innovation finds its place in a transitional space. Alessio Bartolacelli reaches a similar conclusion by reconstructing the choices made by the Italian lawmakers in the last twenty years in private companies issues. It also emerges from the study of doctrinal and case law responses to unprecedented problems, such as the legal qualification of the body (Fusar Poli) and the legal regulation of the machines of the new technologies (Martello) in the early twentieth century, as well as regarding the new implications of the good faith clause in the current time (Gambino).

Moreover, philosophy indicates how transition is fully suited to act as a practical structure of innovation processes (Stara) and also from a strictly legal theoretical point of view, it can be seen that legal innovations are mainly expressed in new ways of using existing concepts (Gambino, Roesler). As pointed out by Massimo Meccarelli, innovation and transition share a common trait, as their performativity seems to consist in attributing a situational value to the law; moreover, they appear as complementary concepts that insist on different aspects of the phenomenology of legal change (respectively a *way of seeing* the law in the case of innovation and a *way of being* of the law in the case of transition).

The volume also takes into consideration a different value of the dyad innovation-transition: that in which the link between the two concepts is expressed as *juxtaposition*. In fact, if on the one hand, transition presupposes

the need for innovation, it also leads to opposing tensions. This is because by representing a place of time management (Paixão) and therefore by allowing different regimes of historicity[4] to coexist, the construction of the "space of loss" as a foundation generated by the past (Paixão, Pinheiro) depends on it. In contrast to innovation, then, transition is a process that does not always provide directions on "where we are going to" (Bartolacelli). It can trigger resistance to a project for innovation, as, for example, emerges from certain attitudes of the Judiciary and its case law, in different historical phases (Fusar Poli; Meniconi). Transition may also be the consequence of a crisis in an innovation programme. In this book, two experiences are analysed: Giovanni Di Cosimo evaluates the parable of parliamentarianism in Italy and Claudia Carvalho studies the crisis scenarios in which the presidential regime took place in the Brazilian Republic between 1945 and 1964.

These axes constitute the underlying plot of the volume while structurally it is organized in three parts. In the first part, the book faces both the theoretical and methodological challenges posed by the two key concepts. In the second part, the book focuses on the relationships between the language and content of law. In its concluding part, the volume concentrates on some meaningful experiences, with different results concerning research in cases of innovation and transition. This lay-out, developed through the interdisciplinary prism of the research group, has increased the possibilities of investigation of the theme. Of the multiple results that have emerged, we highlight below those on which the different analyses seem to converge.

2. The definition problem

The first area is related to the *definition problem*. In many ways it is insuperable. We are not reflecting, in fact, on a strictly formal concept that can therefore be captured within an exclusively legal dimension. On the contrary, innovation and transition, even when observed for their importance in legal matters, are concepts that necessarily refer to different contexts, at the same time social, political, economic, cultural and anthropological; the problem of their definition, therefore, implies a necessarily transdisciplinary approach.

A further aspect that makes the definition problem more complicated is the importance of the point of view (Meccarelli, Guerra, Roesler); the act of

4 Hartog (2012).

reflecting on them implies its own «referential dimension»,[5] since transition and innovation, seen from the legal point of view, do not have a *transcendental* character (Meccarelli). On the contrary, they are phenomenalistic and, if on the one hand, this explains the difficulty of defining them as legal categories, on the other, it highlights their value as a tool for uncovering the historicity of legal forms (which traces their correspondence to social facts).[6] This peculiarity, as will also be highlighted below, opens up an analytical perspective on levels of legal phenomenology, to which legal theory, inspired by a dogmatic understanding of law, has become insensitive.

The problem of innovation and transition, however, is not only the fact that it is irreducible to a purely legal format, but also offers a heuristic advantage for its impact. First of all, we should consider the problem of the function of the concepts that we use in order to talk about law. In the case of "transition" and "innovation" it is twofold: *theoretical* and *methodological*. Transition and innovation, in fact, are proposed as possible forms of legal change (identifying, therefore, a theoretical problem) and at the same time as analytical tools for studying legal change (identifying, therefore, a methodological problem). For example, it is possible, with transition and/or innovation, to perceive a way of being of legal phenomena such as democracy (Pinheiro), or constituent power (Peixoto), or even a temporal legal regime (Meccarelli, Paixão). At the same time transition and innovation serve as analytical tools when they allow us to differentiate between legal problems, to read them in their autonomy, with respect to social-political dynamics (Guerra, Paixão).

By emphasizing the functional dimensions of the concepts, the reader will find in the chapters of this volume an weighting of how their permanence and their replacement by other (new) concepts can be thought of. It is in conceptual innovation that, according to Roesler, the permanent and tense dialectics between the preservation of semantic meanings and innovation is harvested, which accompanies the also permanent process of interaction between the objectified law in different modes and the social reality that it seeks to regulate. Gambino makes us see, in turn, how conceptual innovations can be latent or explicit/radical and, according to this new conceptual pair, shows how they can bring about new and different hermeneutic demands. Martello's analysis illustrates these dynamics and their internal dialectics well, when she examines the path of telephone regulation in Italy and analyses

5 Ginzburg (2019) 256.

6 Grossi (2006) 97-124; Grossi (2020) 78-99.

the intersection between technological innovation and transition. Exploring several historical examples, Fusar Poli also links the terms innovation and transition in a particularly fruitful way - which is also full of potentialities for future studies - by conceiving innovation as a form of transition that contains its apparent contrary, persistence and tradition.

From these analytical dyads mobilized above, an important theme of juridical reflection still emerges: the limits and possibilities of legal dogmatics. Understood as a way of thinking about legal problems in their applicational dimension, dogmatics emerges in Roesler's reflection as a way of fixing some starting points for legal reasoning that must, however, be permanently questioned by an investigative or zetetic approach. Dogmatic is always dangerously close to succumbing to a demand for conservation and, consequently, the freezing of concepts, the dogmatic needs to be "oxygenated" and learn to look at other fields of knowledge so that its function can be fulfilled in an increasingly complex world, as Meccarelli makes us see. With Gambino, on the other hand, we grasp the hermeneutic challenges posed by a series of resources that enable an open and fluid interpretation and, with this, hinder or modify the ways in which the dogmatic construction of legal solutions is perceived, especially in the case of what the author qualifies as latent innovation.

In connection with the above observations on dogmatics, we can say that the defining challenge of transition and innovation opens a perspective of meaning on dynamics that, precisely the formal constructions of general theory, have 'hidden' or 'removed' from the field of possible objects of the exercise of legal science. This applies in particular to the possibility of rediscovering a dimension of legal change that the book identifies in the processes of *objectivation of law*.

The process of transformation of social facts into normative facts that involves the performative role of jurisprudence (Meccarelli); the exercise of rethinking of concepts in a zetetic sense (Roesler); the re-signification of the etymological value of concepts (Gambino); the transformative dimension of legal problems, as a constitutive moment of such problems (Fusar Poli, Martello): these are all dynamics, expression of the phenomenon of objectivation of the law, which the issue of innovation and transition bring to the foreground.

What we are observing refocuses attention on the question of the importance of the different theoretical dimensions relevant for understanding legal problems.

Several of the chapters, in order to gain a legal point of view on the problem of transition and innovation, discuss the possibility of importing conceptual categories developed outside the legal sciences, in the field of theoretical and political philosophy or in the field of social and political sciences. For example, in order to understand the problems of legal change, the practical structure of discursive plans (Stara), the performative effect of the politics of silence (Paixão) or of melancholy (Pinheiro), as well as fields of knowledge such as transitology (Guerra), lexicography (Fusar Poli) and rhetoric (Roesler, Reis) all assume importance.

One of the many modes of interdisciplinary relationship which are relevant to legal knowledge and which can be clearly perceived from the innovation-transition dyad is that of the relationship between law and language. It is in the perception of this intrinsic relationship and in its importance for the fulfilment of the functions performed by law that reflections on the functions of language appear. Following a clue from Koselleck,[7] Roesler stresses that expressing innovation always depends on the constitution of an acquired lexicon, that may not be completely new from the semantic point of view, but rather a gradual sliding of the meaning already present in the uses of language. Exploring the semantic dimensions that appear in the emergence of the word "innovation" itself and its uses, Fusar Poli contributes to a sharper and more subtle perception of the relationship between transition and innovation. The focus on the constitutive function of language and its many ways of shaping reality, its nuances and its interdictions also appear in the way Meniconi investigates judicial discourses, be they sentences or those aimed at a broader public, seeking to understand how the Italian judiciary expressed its values and attitudes in the Italian democratic transition. Another interesting aspect of these uses in judicial sentences is, finally, explored by Gambino when observing the hermeneutical nuances of the use of good faith as an interpretative clause capable of constituting a latent innovation.

It is worth pointing out an interesting aspect that emerges from the texts that make up this volume: one of the points of intersection between the categories of innovation and transition involves an important dimension in the history of law: space. As already stated in this introduction, it is evident that innovation and transition are placed as categories that allow for many temporal structures; this does not, however, rule out that space is an important component for some historical reconstructions proposed here, such as the

7 Koselleck (2010).

discussion of the Atlantic context at the time of the Haitian, American and French revolutions (Paixão) and the transformation that technological innovations promote in the relationship between society and space (Reis, Martello).

3. The issue of legal actors

A promising way to think about the innovation-transition pair that appears in the texts of this volume is from the perspective of the different players: jurists in general, magistrates, legislators, political actors in a strict sense such as political parties, collective social actors who mobilize around certain agendas and, last but not least, the historical contribution of certain individuals.

It is quite reasonable to suppose that certain players among those listed above can operate in such a way as to produce innovations or allow more or less clear and delimited transitions, especially since their mode of intervention in reality implies it. This is the case, for example, of the legislator and of political and social actors, as the texts of Paixão, Carvalho, Martello, Di Cosimo, Bartolacelli, and Gambino make us see. More subtle and latent, though no less efficient, is the way in which jurists and magistrates act in this scenario and the texts of Meniconi, Reis, Fusar Poli, Roesler and Gambino are excellent ways to approach the phenomenon.

Less easy to situate, perhaps because they require a specific look at the small details of a historical time, are the contributions made by individuals and their idiosyncrasies when we think of innovative dynamics and the construction of transitions. The reader will find stimulating clues in the texts of Meniconi, Reis and Peixoto.

In addition to these trajectories, one can also point out the actions of social movements that assume a prominent role in the dimension of constitutional history, as highlighted, for example, in the text of Paixão, which identifies a series of entities and groups that, in the struggle for democracy, constituted the unified black movement in Brazil.

4. Areas of incidence of innovation-transition

There is a third aspect which deserves highlighting in these introductory pages. It has already been noted that our volume aims to provide a contribu-

tion for a reflection on the significance of innovation and transition intended as analytical categories for understanding legal change.

This requires us to consider their impact on different areas of the legal dimension. Although it was not one of the goals of this project to carry out a comprehensive survey on this issue, the multidisciplinary approach of the book has opened up some perspectives on the subject. By referring back to each of the essays for further study, it may be useful, here, to consider some aspects. The first area of incidence of our analytical categories is undoubtedly represented by legal theory. Considering innovation and transition in order to reflect on legal change, leads, in fact, to a reflection on how legal thought proceeds, with which methods and with which instruments (Meccarelli, Roesler, Gambino, Fusar Poli). It also offers the opportunity to think of legal theory – rather than as the place of construction of a system – as the forum where various theoretical disciplines meet; as already mentioned above, in order to explain the legal importance of innovation and transition we must draw on keys of interpretation and categories elaborated by other knowledge (Pinheiro, Paixão, Reis, Stara) or even weave a dialogue with them in order to grasp the element of differentiation of the legal issue (Guerra).

Besides, legal history is another area to be considered. In this case it is a question of recovering, through the dimension of experience, indications for a phenomenology of the transition and innovation problem. This seems all the more relevant if we consider that, as observed above, only in their emergence in the real dynamics that trigger social aggregations, can innovation and transition express their relevance for the law. This volume, in particular, proposes itineraries on innovation and transition in modern and contemporary times in Italy and Brazil, with reference to legal thought (Meccarelli, Fusar Poli, Carvalho, Martello), case-law and the activities of judicial institutions (Fusar Poli, Meniconi), development of legislation (Martello, Bartolacelli) and the constitution making process (Paixão, Peixoto, Carvalho).

The latter, on the other hand, represents a thematic area that is also addressed with reference to the current phase. In fact, the dynamics of innovation and transition are considered not only in relation to the *constituent processes* (Paixão, Peixoto), but also with reference to the *constitutive processes*.[8] In this way, the institutional dynamics that, outside the constituent moment, take on importance in structuring the constitutional dimension are

8 On the distinction between constituent and constitutive dynamics in the constitutional dimension please see Paixão/Meccarelli (2020).

also considered. In particular, it is the de-constituent dynamics (Di Cosimo, Carvalho)[9] that become the object of analysis. More in general the problem of democracy, assumed as the terrain in which constitutional law, institutional and political dynamics intertwine, is the object of study in several chapters of the book (Pinheiro, Paixão, Guerra, Di Cosimo).

Another important point of the innovation-transition pair involves the relationship between law and emotions. Some texts discuss issues such as melancholy analysed as a power device, the identity between representatives and those represented, democracy and its relationship with memory policies and, finally, the role of silences in the construction of constitutional history (Pinheiro, Paixão). In fact, it may be interesting to question the role and function of emotions in historical processes related to law. New studies in this field are undoubtedly welcome.[10]

It is interesting to remark in this respect, how the space of relevance of the dynamics of innovation-transition is represented, not only by issues related to public law, but also to private law. The essays by Francesco Gambino and Alessio Bartolacelli effectively highlight the problematic nature of the phenomena of innovation-transition, when they occur in a normative space, which focuses on the values of stability and certainty in inter-individual relations. In addition to corporate law (Bartolacelli) and contract law (Gambino), the problem emerges in the investigations carried out on the early twentieth century by Elisabetta Fusar Poli and Francesca Martello with regard to the regulation of personality rights, copyright, patents and technological inventions.

5. Conclusions

The conceptual pair innovation-transition has multiple potentialities for further research, as we seek to highlight in these introductory lines. The range of research topics contained in the work, as well as the numerous other disciplines involved (beyond/outside legal history), suggest that discussions on innovation and transition are far from exhausted. New possibilities have actually been opened up by the contributions included in this volume.

Based on these perspectives, we should consider: what are the possible

9 For a reflection on the current Brazilian scenario, please see Paixão/Zaiden Benvindo (2020).

10 On the different configurations of emotions see Didi-Huberman (2013).

connections between innovation and transition? As shown in the texts of Meccarelli and Stara, it could be argued that innovation in law, in order to be autonomous, seems to presuppose the existence of a transition (or several of them). Transition, in turn, has greater autonomy as an explanatory key, as can be seen even by the existence of the fields of knowledge linked to it - "transitology" (dealt with in the Guerra paper), "transitional justice" (in the contributions of Meniconi and Paixão) and the extensive research, books and articles related to political transitions, especially in the second half of the twentieth century (a feature found in the articles by Peixoto, Carvalho and Di Cosimo).

Innovation and transition thus have a common aspect: both are actually temporal players, that is, they operate in the organization of the interaction between past, present and future. The studies performed based on this conceptual pair enable the articulation of the temporal dimensions in several ways, with emphasis on historical processes of continuity, rupture, transformation, restoration, permanence of past structures, invention of traditions and other attitudes focused on the tension between past, present and future.

Throughout the analyses proposed in this volume, we note the creative use of these concepts by actors, institutions, and organizations, emphasizing the aspects of quality, incisiveness, and distinctiveness of the conceptual pair innovation-transition.

All of the contributions in this volume are complex, rigorous, and open to various fields of knowledge. In the closing words of this introduction, we cannot fail to mention that we expect new research to be carried out - in legal history and in legal theory as in other fields of legal studies - relying on the conceptual pair innovation-transition, so that the capacity to think about the future may be renewed, like the character in the Divine Comedy who warns us that, despite all the obstacles, the stages of a life that "far longer will extend" must be completed.[11]

11 Alighieri (1921), Paradiso, XVII, 98 199.

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