INNOVATION AND TRANSITION IN LAW

Experiences and Theoretical Settings

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Time of innovation and time of transition shaping the legal dimension: a methodological approach from legal history

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1. Innovation and transition in law: a tentative conceptual setting

Legal change constantly draws the attention of jurists. Its relevance lies in the fact that it offers the possibility of multiplying the levels of analysis of legal issues, by bringing its relationship with its social, political, economic and cultural dimensions to the forefront. For a jurist, however, this is always a challenge, since considering legal change - precisely because of its openness to the pre-legal basis of legal forms - requires a continuous updating of the instruments used to carry out an observation of law and its dynamics. The purpose of these pages is to consider, from a historical perspective, the possible heuristic advantage that two analytical categories such as innovation and transition can offer in this regard.

First of all, I would like to attempt some conceptual delimitations in order to grasp the *juxtaposition,* such as the *relationship* between "innovation" and "transition"; then I would like to reflect on their *situational value* with respect to the legal discourse; moreover, I would like to consider the *dynamics of the objectivation of law* which can be observed in this light (i.e. dynamics that help to identify law as a special form of normativity with its own "objective" value). This will also allow me to reflect, in conclusion, on the impact that this can have in relation to the wider problem of the interdisciplinary

challenge, that contemporary legal problems pose to legal science as well as to the humanities and social sciences.

1.1. Innovation and legal change

If "innovation" designates *a radical way* of transformations occurring in the social, political, economic, technological, cultural fields, is it possible to identify the dynamics of innovation in legal change? What makes a legal change "innovative"? Could we speak of a time of innovation in legal experience? We can assess these questions tentatively, but the exercise may serve to better define the contours of our theme. In this regard we can consider two different perspectives.

In a first perspective, *from the point of view of the object of the analysis*, legal innovation represents a change perceived (in the context in which it occurs) as progress. Thus understood, "innovation" indicates an explicitly stated (self-asserted) dynamic, which qualifies itself as oriented towards producing a novelty, an unprecedented configuration, in law.

Let us focus our attention on some examples that we can find in the history of legal thought: when the purpose of a theory is to promote a radical proposal, the contrast between new and old is a typical argument. An example is the well-known pamphlet by Cesare Beccaria, *Dei delitti e delle pene*.[1] Despite the descriptive character of the title, this essay aims to promote a radical change in the penal system in line with "a society organized in a different way, to be built on new political principles".[2] The book is related to a project for innovation; to this end the rhetorical constructions of its pages often insist on the contrast between new and old, where the new is just and correct and the old is unjust and wrong.[3]

Self-assertive innovation can also be found in works that are not characterized by an express purpose to mark a discontinuity, but which, at the same time, aim to explore new legal fields. Think of jurists like Hugo Grotius and his famous treatise *De iure belli ac pacis*. It is a work that intends to contribute to the establishment of a new legal framework for the new geopolitical dimension, that has emerged since the discovery of the Americas. The author

1 See Porret (ed.) (1997); Porret/Salvi (eds.) (2015); Chiodi/Garlati (eds.) (2014).

2 Sbriccoli (1997) 177.

3 Among the many examples see the opening page of the book "A chi legge", Beccaria (1764).

expressly underlines this aspect in the introductory pages (the *Prolegomena*), where he states that he intends to impart his discourse *sicut mathematici*...; it is a matter of considering a different interpretative paradigm of social facts, which relies on a logical-abstract rationality (introduced by the new methodological approach of Descartes)[4] rather than on a practical-evaluative one, as was common in the legal hermeneutics referable to the Aristotelian-scholastic tradition. A similar consideration can be made about many other authors that in this historic turn aim to develop this insight. Think for example, of works such as the *Nova methodus discendae docendaeque iurisprudentiae* by Gottfried W. Leibniz, which, highlighting this intent already in the title, aims to promote a radical change in legal hermeneutics.[5]

From a historiographical point of view, the fact that an "innovative" intention is explicitly expressed in the legal discourse, is a useful element of evaluation in the effort to historicize the experience. It may be relevant to consider, for example, that Leibniz and Grotius wanted to "label" their theory as innovative in order to understand the more general debate on legal change in early modern time. We know, in fact, that in this period there are other theoretical approaches, no less pertinent and effective in shaping a new legal landscape, which follow a different argumentative strategy, based on the demonstration of apparent continuity with tradition. I am thinking of figures such as Francisco de Vitoria, Domingo de Soto, Luis Molina[6] and, more in general, of the Iberian scholasticism of the early modern age.[7]

The fact of an explicitly innovative intent is significant; at the same time it is not self-sufficient with respect to the historical analysis to be carried out. As historians, in order to weigh a project of legal innovation *explicitly stated* in the sources, we question and verify the importance of this project, in terms of its impact (on scholarly debate or on regulatory regimes, etc.). A major aspect of the historical evaluation of ideas on legal innovation is, therefore, the examination of its links with (its effectiveness in relation to) the needs

4 Grotius (1625), Prolegomena, post medium, ante finem: "Primum mihi cura haec fuit, ut eorum quae ad ius naturae pertinen probationes referrem ad notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat [...] "Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in iure tractando ab omni singulari facto abduxisse animum".

5 Leibniz (1667); De Iuliis (2010); Hespanha (2012) 311-332.

6 Think of works such as those by Francisco De Vitoria (1538); Bartolomè de Las Casas (1997); Luis De Molina (1613); Domingo De Soto (1559).

7 Costa (2001); Costa (2014).

for change expressed by the social fabric or claimed by society. These brief considerations lead to the conclusion that the self-affirmation of the innovative intent of a theory, while it is a *determining* factor in understanding the occurrence of a legal change, is *not sufficient,* as such, to explain legal change in the historical experience.

This calls us to consider a second possible perspective on legal innovation: *recognised innovation*. Here we refer to phenomena of legal change that we – as observers, *from outside* – identify as innovative. Innovation we can consider from this point of view, as describing a certain way of being, a certain form, of change in law.

For this type of approach, the historical perspective is a privileged field. In fact, the historical point of view is always constituted as a sequence of experiences of change, that we qualify as such, based on evidence to which we attribute a certain degree of "*objectivity*". Law in history always appears to be in motion, but in a sequence of discontinuities like this some of them present themselves as "innovative", in the sense that they are outstanding for being bearers of a paradigm shift.

Francisco de Vitoria's theory on *ius peregrinandi* and *ius communicationis*[8] is innovative because it introduces a different way of conceiving legal protection and permits the employment of European law in a new context, like the possible space of the new world. In other words, the invention of individual rights in the case of Vitoria, seeks to derive a position for European legal tradition in the unprecedented scenario of the new world, where it would otherwise have had no chance of being implemented (since the new world lacks the cultural, historical and spiritual assumptions, which formed the pre-legal foundation of that tradition). This result, to our eyes, is not affected by the fact that this theory is conceived as part of a discursive strategy aimed at establishing continuity with tradition. In other words: there is no self-asserted innovation in the case of Vitoria, but, from the outside, we can easily recognise the innovative nature of his theory.

Now let us take a second and different example. The theory of the social contract in Thomas Hobbes is also innovative; as historians we can see that it provides an unprecedented solution to the problem of the foundation of political power and social cohesion; it also offers a different solution to the issue of legal protection through protection of rights, even compared with the innovative theories of Vitoria. It is different because it is founded on the unprece-

8 Costa (2014); Neuenschwander (2013); Meccarelli (2014).

dented juxtaposition between *ius* (whose meaning is reduced to that of "*right*") and *lex* (whose meaning is generalised in that of "*law*"), with the consequence that individual rights are the result of the will of the legislator, who, through its legal norm, provides rights; on the contrary, in the theoretical construction of Vitoria, individual rights are still the result of a legal dimensioning of justice.[9]

In the case of Hobbes, the recognized innovation also corresponds to a self-affirmed innovative intention: we are, in fact, dealing with a concept for modernization that is juxtaposed to tradition. Let us remember the well-known page in which Hobbes talks about "some foolish opinions of Lawyers concerning the making of Lawes" where he directly criticizes the attitude of "that juris prudentia" to the production of law; in fact, for him it is essential to dissociate the *ratio legis* from the *juris prudentia*, in order to place at the centre the will of the legislator.[10] The innovative nature that we recognize in Hobbes' theory, in addition to its outstanding position with respect to the context in which it is inserted, is also due to the fact that it is capable of explaining legal order without the need for tradition. Here innovation is undeniably associated with discontinuity.

Rousseau's theory of the social contract is also innovative and even though it fits into Hobbes's path, develops it in a novel perspective, which focuses on the citizen and the sovereign people, identifying new key problems, such as that of constituent power or of representation.[11] Rousseau is not the first to focus on the idea of the social contract in order to explain the genesis of a legal order, yet we agree in recognizing in his thinking a radical originality that introduces a discontinuity. His reflections, in fact, open up a novel scenario also from the point of view of the theories produced up to that moment, through the paradigm of the social contract; I am referring not only to the developments of thought that derive from Rousseau, but also to some institutional implementations inspired by it (think of the *Déclaration de droit de l'homme e du citoyen* of 1789).

I have mentioned three examples taken from different chronological phases; historiography often highlights their mutual relations as part of a unitary path of legal thought which, through the centuries of the modern age, produces the traits of legal modernity. However, the issue of recognizing the innovative nature of these developments of thought, allows us to identify

9 Please see Meccarelli (2014); Meccarelli (2017).

10 Hobbes (1651), part II, chapter 26, 189-193.

11 Costa (2001); Fioravanti (1998).

variations, in order to better articulate the way in which we can historicize this trajectory.

To come back to our main problem: with recognized innovation we intend to grasp an *intrinsic* character, an added value, which presents different features in each single original theory; at the same time this added value is always *relative*, since it depends, necessarily, on an *a priori* placed by us as the observer. Seen from this more "objective" side, innovation, even if it confirms its analytical value, reveals a limit.

Let us, therefore, reflect in synthesis on the two kinds of innovation we have considered, the "self-asserted" and the "recognized", in relation to legal change. In both cases, methodologically speaking, innovation in law does not offer itself as a category of *transcendental character*, in the sense that, it can never constitute a concept independent of the dimension of experience, it cannot represent an *a priori* with which to order or consider empirical data. On the contrary, its analytical value lies in its *situational attitude*, i.e. in the way it explains the link between the circumstantial framework and the phenomenon of legal change. "Innovation", in so far as it lets us grasp a *certain way of thinking about law* in the circumstantial framework, also allows us to understand levels of complexity and structures of that framework.

These were mainly methodological observations. And what can we say from a theoretical point of view? Can we speak of a time of legal innovation? If innovation in law, as we seem to have pointed out, does not have a transcendental nature but consists, above all, in *a way of considering the law in society*, which is necessarily affected by the relativity of the point of view, it can hardly be conceived as a *regime of law*. However, given its situational character, it seems plausible to speak of innovation as a time of law, if we understand it as an indicator of a perceived *regime of historicity*, in the sense specified by François Hartog: a certain "way of linking together past, present and future", an "experience of time" to which the "categories of past, present and future give order and meaning".[12] In this perspective we can consider the idea of a *time of innovation that gives shape to legal dimension*.

1.2. Ascriptive time and transition in law

Let us now consider the other pillar of our reflection: transition in law. Transition, like innovation, does not belong to the general categories of the

12 Hartog (2015) XV-XVII and 11-16; Paixão (2013); Ricouer (2000) 480-498; Benjamin (1940) 75-86; Scuccimarra (2016).

theory of law either; from a methodological point of view, it too presents itself as a category with different analytical values.

Usually we tend to consider "transition" in a *descriptive key*, that is, as a historical phase between a point of departure and a point of arrival. In this perspective transition seems to indicate a chronology of law rather than a legal regime. If one speaks either in specific terms of a transitional regime, or if one speaks in more abstract terms to refer to some kind of change in legislation, in case law and jurisprudence, in theoretical categories, the transition constitutes the *time frame* in which a phenomenon of change in law is observed. The importance of the transition thus understood, for the jurist and for the historian, lies in the fact that it represents a temporal segment in which a legal change occurs[13]; it is a historical time, qualified by the complex interweaving of old and new, which it is possible to observe in the interplay of forces between continuity, discontinuity, and also the emergence of the *innovation in the transition*. Nevertheless, thus understood, the transition does not describe a regime of law.

Besides acting as a descriptive category of historical phenomena, "transition" can also be considered in a different light as an *ascriptive time*, i.e. a time with its own attributive force. With this term, in fact, I would like to suggest the idea of a temporal condition capable of attributing to law specific regimes and contents. If descriptive time contains the occurrence of the law, ascriptive time, on the contrary, represents a *regime of the law*. There are many possible examples and they seem to be of two different types. We can, in fact, distinguish the attributive times that *rule the permanence* of the law[14] and those that bind it to a *condition of impermanence*.

If we think about customary law, repeal, constituent power, etc., they are all concepts that gain their own autonomy in legal terminology, making time an element of their content (in the sense that it is time that marks the production of legal effects). In the customary norm it is the recurrence in time that turns a social fact into a normative fact[15]. Repeal consists in a specific temporal turning point that defines the life of a norm from which precise effects derive; the constituent power is also a specific temporal turning point that takes on the founding value of a legal order.[16]

13 Costa (2019) 29-33.

14 See Bretone (2004) 33-58.

15 See Paolo Grossi's introduction to the re-edition of Bobbio (1942).

16 Ackerman (1991).

However, as we mentioned above, there are also examples of attributive time that affect the law in different ways, determining and justifying the law to the extent that it links it to a *condition of impermanence*. Transition is an example of this type of temporality. Transitional space, as such, is productive of circumstantial legal configurations, that act for the present; at the same time, with respect to the future, these legal configurations are reflected as constraints and preconditions[17]. In other words, the effects of the decisions, taken by political, social and also institutional actors during the transition processes, inevitably project themselves onto the post-transitional phase. This *ultra-activity* of transitional time results precisely from the special condition of impermanence that characterizes it; for this reason, we argue that transition, understood in the attributive sense, represents a regime of law.

1.3. An example in history: the transition to democracy and the aftermath of fascism in Italy

We can search for examples in history. For the contemporary age, I am thinking above all of the major theme of the transition to democracy. It is a time in which the project of the future applies to a reality in turmoil, "un monde perpétuellement glissant", as the historian Lucien Febvre observes in opening the first issue of the new series of the review *Annales* in 1946.[18] However, it is also a reality that is forced to deal with a dramatic demand for justice in order to build a new order.[19] This is the time in which the "angel of history", to recall the plastic image of Walter Benjamin, is pushed with open wings towards the future, while still looking at the past, contemplating the frightening scenario of the rubble, which can no longer be restored.[20]

We consider, in particular, the significant experience of the transition in Italy between 1943 and 1948, preparatory to the political and legal turning point for the Republic and democracy.[21] In this temporal frame (of transition understood in a descriptive sense) that goes approximately from the fall of Fascism to the enactment of the new Republican Constitution, we are im-

17 See also Costa (2019), in partic. 40-41, on the possibility of considering the transition as a "structuring totality" that gives shape to systems and structures.

18 Febvre (1946) 3.

19 Sands (2016); Stonebridge (2011); Sebald (2004).

20 Benjamin (1940) 80.

21 Pombeni (ed.) (2016); Bernardini et al. (eds.) (2017); Focardi/Nubola (eds.) (2015).

pressed by the richness of the questions that trigger the reflection of the jurists. A look at the indexes of the legal journals of those years already shows the variety of structural problems which are discussed to address the situation. They often concern problems of the moment, but they call into question the general principles, or rather, they impose a choice as to which are the general principles of reference for the solutions to be taken. In this impermanent space, in which the transition foregrounds its attributive nature, tentative assessments of new legal theories are experienced, and legal debates are held on relevant issues like, for example, the replacement of legal norms over time, such as those on *ius superveniens*, the retroactivity of the statutory law, the nature and limits of the normative power of the Executive, the relationship between law and constitution, the relationship between justice and law, etc.

Without making a list of the problems on the agenda, what is important to highlight here, is that the debate, on legal issues related to the circumstantiality, is immediately linked to that, *de jure condendo*, regarding the "regular" time that will follow the transitional time; this laboratory of transition offers itself as a place of identification and empowerment of new principles and fundamental categories, to be employed also for the new legal system.

Let us try to consider a more specific example, still with reference to this period of post-war and post-dictatorship which was a transition to democracy. Among the urgent issues to be addressed, that of the accountability of fascism and that of collaboration with German troops, during the last years of the war, assume a key importance. In this regard, between 1943 and 1946, we see a sudden change of approach.

The first is inspired by the aim to achieve *restorative justice*. The Minister of Justice Palmiro Togliatti, in submitting bills to the Parliament, explained that an act of clemency towards any criminal act should be granted for "any immediate and direct motive in the anti-fascist action". The amnesty would be "an act of restorative justice to which society is indebted" in favour of those who broke the law "to contrast the fascist tyranny".[22] Indeed, an amnesty of this kind was issued first with a Royal Decree no. 96 7th April 1944, and then with Decree no. 719, 17th November, 1945. At the same time, other measures enacted between 1944 and 1945 established severe sanctions and special courts against the fascist leaders for the acts committed during the dictatorship; also collaboration with the German enemy, as well as any support for the re-establishment of a Fascist regime, were considered criminal offences.

22 Togliatti (1945) 472-473.

This set of norms was implemented[23] in exemption of some fundamental principles of liberal criminal law (as was also happening at international level in order to make crimes perpetrated by the Nazi regime accountable), such as the prohibition of the retroactive effect of legal norms, the exhaustiveness and precision in the normative description of a criminal offence, and the principle that requires the courts to be pre-constituted to the facts they have to judge (the so-called principle of the *juge naturel*).

What is interesting is that, in a couple of years, the approach changed radically. Rather than "restoring justice" to the anti-fascists, the aim became to promote a broad pacification between winners and losers; as a consequence, the problem arose of mitigating the effects of the exceptional measures taken in order to make fascism and collaborationism accountable. In 1946, an amnesty was issued,[24] on the initiative of Minister Togliatti himself, the Minister that had supported and implemented the strategy of restorative justice. This time the amnesty was mainly for crimes perpetrated by fascists. Fascism would remain illegal with reference to future events[25], but for the past, with the new amnesty, the goal now became to promote a "new climate of unity and concord".[26]

It is the change in the political and institutional framework that inspires

23 This is a series of measures taken through different Acts. The most relevant is the Decree no. 159 27th July 1944, "Sanzioni contro il fascismo", that provided epuration from the administrative bodies of those who had held specific leading positions in the Fascist party; it established criminal sanctions for acts carried out by members of the Fascist party during the years of the regime; for the immediate future it provided for sanctions against those who collaborated with the German troops and supported the reconstitution of the Fascist regime; it created a special court, the High Court of Justice. For a more detailed analysis of this case, see most recently Caroli (2020); Franzinelli (2018).

24 Amnesty of 22th June 1946 no. 4. See Franzinelli (2006); Nubola (2016); Colao (2011); Caroli (2020).

25 See Act 3rd December 1947 no. 1546 "Norme per la repressione dell'attività fascista e dell'attività diretta alla restaurazione dell'istituto monarchico"; XII Transitional and final provision in the Italian Repubblican Constitution of 1948; Act 20th June 1952 no. 645 "Norme di attuazione della XII disposizione transitoria e finale (comma primo) della Costituzione".

26 Togliatti (1946) 711: "Tale è l'atto di clemenza che, approvato in un grave momento della nostra vita nazionale, certamente contribuirà a creare nel Paese quel nuovo clima di unità e di concordia che è il più favorevole alla ricostruzione politica ed economica, e nel quale dovrà continuare, entro i limiti stabiliti, la necessaria opera di giustizia per il definitivo nostro risanamento politico e morale".

this new approach. In fact with the Referendum of 2nd July 1946 the decision to proclaim the Republic was taken and a Constituent Assembly of clearly anti-fascist character was elected and called on to write the text of the new Constitution. Starting from the premise that "with the passage from the monarchy to the Republic a new period in the life of the unitary Italian State had opened up" Togliatti explained that, now, it was necessary to give a sign of "pacification and reconciliation of all good Italians", which was also meant to include former supporters of the dictatorship.[27]

1.4 Legal transition as a legal regime

Let us go back to our path for some evaluation. In the case I have just mentioned, the regimes that the law takes on are explained and justified in relation to the political situation. What is interesting for our analysis, however, is that this experience of transition is intended also to produce effects on the next scenario (thus highlighting, if you like, a double attributive effect: one on the present time, one on the future).

In fact, if we consider how the two approaches (reparation Vs pacification) were combined, or which prevailed, we can ponder to what extent the transitional time represented a constraint on future democratic life. Evidence of this can be seen in the activity of the institutions and in particular in the attitude of the judiciary in the first decades of democracy.[28] Then there is the other aspect I mentioned, that of the importance of the transition as a moment of emergence of issues and problems relevant to the legal debate. We must not forget, in fact, that the regulatory regimes that have been activated as a consequence of the problem of bringing the past to justice, have not been in line with the principle expressed by Italian liberal legal culture on criminal law. At the same time, it is precisely the legal culture of the liberal age that the project for democratization was looking at in order to identify the fundamental principles and to build the new constitutional order. That experience of transition was axiologically linked to the democratic project, but to close the accounts with the past it was employing instruments not completely in line with that project. This gap between the project and the instruments contrib-

27 Togliatti (1946) 708. See also Berlinguer (1946) 484; Pilotti (1947) 21; Funaro (1947) 62.

28 On this point see the chapter by Antonella Meniconi in this same volume, precisely in reference to the Italian case.

uted to a debate on the situation that, actually, was able to identify issues and problems, important for considering features of the new criminal system for democratic Italy. The issue of retroactivity, of the constitutionality (or constitutional basis) of criminal law, the issue of standards of precision in drafting norms concerning criminal offences, the issue of the presumption in criminal trial, the issue of causality in criminal law, the regimes of mitigating circumstances, and many other key issues of the criminal system in the democratic age, were identified and discussed, starting from the problems arising from the transitional criminal law we are talking about.[29]

Let us leave the examples aside and now return to our methodological itinerary. Transition, like innovation, comes to our attention as a category that helps us to understand the *situational nature* of the legal dimension. Both indicate a time of law (i.e. they refer to a certain regime of historicity that characterizes the phenomenon of legal change). However, the two concepts are significantly different.

We have, in fact, already considered that the category "innovation", applied to the legal dimension, does not have a transcendental character; on the contrary, it allows us, above all, to grasp a *certain way of thinking of* the law in the circumstantial framework. If, on the other hand, we consider the concept of "transition", understood as attributive time, it seems to reveal a *certain way of being* of the law; it is not only a time of the law, but also a *legal regime*.

2. Innovation and transition shaping legal dimension: the objectivation of law

2.1. The dyad "innovation-transition" and the objectivation of law

After the two concepts have been defined, we can now evaluate their possible relations. The aspects that distinguish them, as seen from our analysis, lead us to think of the two concepts as complementary. On a closer look, in fact, "innovation" and "transition" share a common element, that of *situating* our problem - i.e. understanding legal change and understanding the change of categories and concepts that describe it - *in a context*. They take this analytical value because, as we have just observed, they manage to take into

29 For more details on this point please see M. Meccarelli, Time and Legal Change. Some Methodological Remarks on Italy's Transition to Democracy; and A. Meniconi, The Failed Reconciliation: The role of the Judiciary in Post-Fascist Italy and the Togliatti Amnesty, both in Paixão/Meccarelli (eds.) (2021).

account respectively a way of seeing the law (innovation) and a way of being of the law (transition). Hence their complementarity. We might be able to go deeper into the analysis if we consider the horizon of possibility of *"innovation-transition" as a dyad*.

The last example I gave, which showed, in the attributive time of the transition, a moment of *mise en forme* and development of new legal configurations, suggests that the study of the transition allows us to acquire an analytical point of view on innovation processes. One could, in this respect, consider *transition as innovation*, and look at the time of transition as a preferential framework for studying the phenomenon of legal change.

It is "preferential" because it allows us to rediscover an aspect of this phenomenon that legal modernity has overshadowed. I refer to the dynamics of the *objectivation of law* (i.e. the dynamics of the transformation of social facts into normative facts, of the development of a jurisprudence capable of recognizing its legal importance,[30] of the construction of a legal knowledge based on a cognitive diagnosis of the social facts). Historiography[31] has identified "legal modernity" as the cultural and scientific turning point in the idea of law, which in Europe marks the detachment from forms and structures established during the medieval legal experience (based on the jurisprudential dynamics of production and construction of the legal order), to give space to a concept of law, based on the idea of the primacy of political power and, therefore, on the relevance of statute law as the main source of law. This transformation of the legal systems of continental Europe took shape, starting from the new approaches to natural law in the modern age and finding complete configuration in the Nineteenth century with the establishment of codified legal systems.

2.2. *The transition from the* ordo *to the* systema *and the disconnection of jurisprudence from the dynamics of objectivation of law*

It might be useful to dwell briefly on the paradigm shift from the *ordo* to the *systema*, which marks the entry into legal modernity between the 16th

30 In this same volume, Francesco Gambino also dwells on this problem, considered, however, from the point of view of the current legal system.

31 Grossi (2003); Grossi (2005); Hespanha (2012). For a philosophical perspective on the problem recently Cacciari/Irti (2019).

and 19th centuries.[32] With this I would like to draw more attention to the implications that this process had on legal hermeneutics, leading to its disconnection from the dynamics of the objectivation of law.

It is a process of re-signification of the concept of jurisprudence, which has been designed to relativize and with this to update the existing law, to an instrument conceived to promote the hypostatization (and then dogmatization) of legal concepts. As I have already had the opportunity to highlight in previous studies,[33] this change in the method of interpretation of law, contributes to redefining the nature of jurisprudence, and to reorienting the function of jurists; as a consequence, the process of production of law would cease to be a phenomenon to be made objective through a hermeneutic activity.

In fact, "jurisprudential law", developed according to the paradigm of the *ordo*, which for brevity we could also refer to the *ius commune* tradition, consisted precisely in a hermeneutical activity, based on an Aristotelian-tomist conception of *ratio* and, therefore, capable of shaping the legal dimension, by objectifying it. Following this approach, the order had to be recognized through an observation of social facts and, consequently, hermeneutic activity was that exercise that allowed jurists to produce a probable awareness of law; namely the jurists' interpretation represented a moment of approach to the truth, an *intelligere* that had to be verified and updated over time. The exercise of producing jurisprudence consisted, therefore, in an assessment of possible variations in the content of the law over time; it was a *nomo-poietic* process. Hence this understanding of legal hermeneutics served to ensure a permanent capacity to update the legal system, independently of the options of political power and its legislative activity.

The new paradigm of Cartesian rationality, which some orientations of legal thought have adopted,[34] was to change the method of interpretation; the jurists, proceeding from axiomatic assumptions, would carry out a hermeneutical activity which would no longer be practical-evaluative; on the contrary, it would be a logical-deductive activity, capable of producing firm results. Here lies the change: the legal hermeneutics of Modernity no longer look at the reality of social facts to reconstruct and justify the legal order; on the contrary, it is now based on an ahistorical and predefined *a priori* (for example, to stay with the doctrines of natural law: individuals as the main ob-

32 Cappellini (2010) 243-246.

33 Meccarelli (2016) 140-142.

34 See Hespanha (2012) 307-314; Tarello (1976) 133-190; Villey (2013) 493ff.

ject of the problem of the protection of rights, features of the state of nature, classification of natural rights, etc.).

As I have mentioned, this trend has taken on more and more prominence during the Modern Age. The real culmination was to be seen in the continental success of the jurisprudence of concepts in the 19th century. Here the activity of the jurist aimed definitively at "rationally" identifying the rules, institutions and ordering categories, so as to be able to describe the legal dimension as a legal system. This jurisprudence aspired to establishing and generalizing legal institutions by describing them as dogmas, so as to make them capable of subsuming social facts in themselves. As can be seen, with the jurisprudence of the *System*, an inversion with respect to the jurisprudence of the *ordo* was achieved, since only by starting from social facts could the jurisprudence of the *ordo* arrive at conceptualizations.

It should also be mentioned that this itinerary is also followed by the Judiciary. This is particularly evident in the invention of the procedural device of "*cassation*" in France, promoted as a model of judgement at the Supreme Courts, which has become widely established on the Continent.[35] Here too, the parable of the metamorphosis of jurisprudence closes, whose distinctive feature becomes that of its *nomo-phylactic* activity.

From the historical point of view, it is a process in which, while this jurisprudential law has been reduced to the format of the Cartesian *cogito*, the law imposed by the political power (statutory law) occupies the space left free, ruling the updateing of the law.

2.3. Innovation-transition as an analytical tool for understanding the constraints of theoretical sustainability of legal concept

I have lingered on this historical transition, because it highlights a change that directly affects our issue. The modern concept of law, in fact, has led to considering the emergence of legal normativity as a problem of identification of the sources of law and systematization of their mutual relationship.

That is, the categories that describe the emergence of legal normativity have been defined starting from the *result* in order to regulate an activity of *production* of law. Its value as a *process* and, therefore, the possibility of framing it as a phenomenon of *objectivation* of the law, have been left in the background.

35 Calamandrei (1921); Calogero (1937); Meccarelli (2011); Halpérin (1987).

Our hypothesis is that, through to the innovation-transition dyad (i.e. thanks to their situational value) we can recover this level of understanding of legal phenomenology. This possibility is evident from legal history; think of the example we have just given with regard to transitional criminal law and its ultra-activity.[36] A potential field of application for this kind of approach aimed at considering the innovation-transition as a dyad, is that of constitutional history. I am thinking in particular of the study of constitution-making processes which could benefit from an analysis that, in addition to the usual *constituent* factors, would also consider the *constitutive* ones, that emerge in ascriptive times (such as the transition, the exception, the crisis). In fact, through the first, the constituent factors, we focus on social, political and legal facts that aim to contribute to the production of a constitution (think of constituent conventions, or political rallies). These are bottom-up dynamics, bearers of a programmatic projection. With the second (the constitutive factors) we can include in the analysis of a constitution making process, also other dynamics that, as normative facts, have effectively contributed to producing the constitutional order, without being part of its design. These dynamics are both top-down or bottom-up, they can be multiple, simultaneous, asynchronous and competitive, and above all express circumstantial potential. Think, for example, of the granting of a Constitutional Charter, the enactment of a law of constitutional importance, a decision of a Constitutional Court that changes a constitutional rule, a transitional regulation, a revolutionary event or a coup d'état, that de facto establish a new constitutional order.[37] These are relevant factors that especially transitional time can contain, due to its special attributive force.

A possibility of re-gaining an understanding of the dynamics of objectivation of the law seems useful also in relation to the current time; the problems we are called to reflect on today, increasingly require us to consider a multi-normative space, which does not seem to be ascribable to the monistic format of state legal systems (set up from the Nineteenth to the Twentieth century) and the categories connected to it.

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36 Moreover,this would also help, perhaps, to provide new elements of understanding of some connected events such as the permanence in force, over the decades of the Republican experience, of the criminal code and criminal procedure code, issued during Fascism. See Sbriccoli (2009) 695-700.

37 For a more detailed reflection on the historiographical implications of the distinction between constituent and constituent dynamics see Paixão/Meccarelli (2020).

What we have observed above, concerning the opportunities that the situational value of innovation and transition opens up, urges us to consider one last issue. The use of these as analytical categories, in fact, in so far as it gives us a perspective on the processes of the objectivation of the law, allows us to gain a different point of view on legal concepts and their use. This is because it leads us to remove from the abstract (dogmatic) frame in which they are conventionally located.

The innovation-transition dyad - that serves as an analytical key for understanding the configurations of law in their situational value - allows us to observe legal categories and concepts in their original functions and therefore, to grasp the constraints of their theoretical sustainability,[38] that is, the assumptions that justify their original *raison d'être* and, consequently, the viability of legal concept. Highlighting the constitutive limits of the categories and legal configurations can help us to verify the adequacy of the use of our conventional conceptual tools in relation to current problems.

Innovation-transition helps us, in other words, to recover a perspective of meaning for those foundations of legal structures that their enhancement in the dogmatic field prevents us from considering.

3. Innovation and transition in law: rethinking borders of legal disciplines

The possible de-dogmatisation effect, of a study of legal change addressed through the dyad innovation-transition, allows us to conclude our itinerary with a reflection on the issue of the interdisciplinary dialogue and the opportunity to reconsider the boundaries between different legal disciplines.

Let us start from the observation that, if we look at the last two centuries, legal sciences have taken shape based on the *aggregative force of the dogmatic method*.[39] It was a matter of developing a knowledge composed of concepts and categories, hypostatizing the doctrinal configurations and thus the normative forms of legal problems. The axiological foundation, like the

38 See in this volume the chapter by Claudia Roesler which refers to this issue, considering the problem of repetitive structure in legal language. Roesler highlights how dogmatic thought, despite its operative and stabilizing function, necessarily interacts with zetetic thought, which due to its cognitive function, provides the premises that are dogmatizable. That confirms the attitude of legal hermeneutics to make legal concepts questionable, when considering the normative relevance of social facts.

39 Cappellini (2010) 155-162 and 239-248; Hespanha (2012) 410-451; Hespanha (2013); Haferkamp (2004).

assumed social model, inserted in this path, which referred to the liberal values of the monistic state and individual freedom, soon became an implicit one, which, from the perspective of legal hermeneutics, did not need to be questioned.

It is on the basis of this formalistic attitude, that a differentiation between the fields of law was produced; the premise for their study consisted in a *specialization of methods, categories and themes, marking boundaries and disciplinary partitions*. Achieving self-referentiality and thematic and methodological self-sufficiency, have also been ways of affirming the very essence and autonomy of each legal discipline. This means that the legal sciences have defined their specific identity by emancipating themselves from the problem of making a *cognitive diagnosis of social issues*. Over the last two centuries, making a diagnosis of the social has increasingly become a duty of other sciences, the social and human sciences and, above all, a duty of political actors.

All this has operated over the last two centuries, and in fact it is still operating, like a tacit pre-understanding horizon. This is an important problem today, when competence in grasping the social issues and an interdisciplinary openness is required in legal discourse. Considering this background, it seems to me that the study of innovation and transition, thanks to its situational implications, offers the opportunity to rethink disciplinary boundaries in the sense of breaking the self-referential closures. It is a question of starting a methodological practice that would encourage the experience of a dialogue between disciplines, by converging on three points:

– to include in the discourse on law the premises of a legal problem and, therefore, to *verify the tools and categories* with which we address it. In this, the opening to the social sciences and humanities, could be an added value; they can offer us inputs, suggest concepts and directions in order to carry out a cognitive diagnosis of the social issues from the legal point of view (think of the notions of otherness and of human and social interactions, the notions of social cohesion, or of normativity, just to mention a few examples that may concern our theme).

– to consider (also in the sense of questioning) the role that the single legal discipline can play in this context; which is a way to reconsider *what kind of pre-understanding* of the law in relation to society our disciplinary knowledge bears and what kind of pre-understanding could or should be bearer.

– to accept the challenge of a circulation of ideas, reflecting on the limits of the self-sufficiency of a specific disciplinary point of view and - in a sort of

reversed *actio finium regundorum*, made from (or according to) otherness - on the spaces of autonomy to be recognized by other legal disciplines.

Without seeking here to attempt a theoretical setting of such a challenging topic, we can, maybe, more simply observe that, today, while the need for an interdisciplinary dialogue seems to be accepted by most scholars, the question of its methodological implications remains to be investigated. An enhancement of the pragmatic attitude of legal hermeneutics, and a greater exploration of its dialogical potential, seem to represent grounds on which it could be possible to gain a margin of advancement. Furthermore dealing with time of innovation and time of transition could also represent an opportunity.

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