

**INNOVATION
AND TRANSITION
IN LAW** Experiences
and Theoretical
Settings

Edited by

MASSIMO MECCARELLI

CRISTIANO PAIXÃO

CLAUDIA ROESLER

Historia del derecho, 87
ISSN: 2255-5137

© 2020 Autores

Editorial Dykinson
c/ Meléndez Valdés, 61 – 28015 Madrid
Tlf. (+34) 91 544 28 46
E-mail: info@dykinson.com
<http://www.dykinson.com>

Preimpresión: TALLERONCE

ISBN: 978 84-1377-163-2
Depósito legal: M-29503-2020

Versión electrónica disponible en e-Archivo
<http://hdl.handle.net/10016/31394>



Licencia Creative Commons Atribución-NoComercial-SinDerivadas 3.0 España

New philosophical paradigms and demand for law: space for innovation.
Reflections on the time of transition as a practical structure

Flavia Stara

1. Innovation to accommodate social changes; 1.1. The epistemological nature of innovation; 1.2. Social innovation and social transformation; 2. Processes of transition; 2.1. Transition as a practical-conceptual space-time phase

1. Innovation to accommodate social changes

In order to accommodate social change, it is essential to innovate, introduce new conceptual systems, new regulations, new procedures for production and new spaces for action and interaction. This requires to develop new theories and translating them into practical structures, into adaptive strategies in the awareness of the challenges and performance that the environment-world requires. No innovation can have a lasting effect and impact in case it does not respond to needs already present within the context in which it occurs.

Creativity and innovation, as significant moments within the development process, belong to different logical levels. Creativity is an individual resource: it asks for flexibility, skills, talent, in many ways it is uncontrollable, it can be promoted but not planned. Innovation is a cultural and socio-economic phenomenon. It involves the community, presents a risk factor and is the result of strategic actions. It calls for investments, infrastructure, dedicated policies. To innovate means to modify the structures of meaning of a given community that are rooted in the biologically oriented ways of interaction, in the ways in which the community foresees a horizon of socio-cultural expectations.

The drive for creativity is dominant in our society as it underpins the desire for innovation. But the call to innovate, and the creative imperative in particular, has proliferated beyond significant shifts in the economic cycle to incorporate the comparatively unremarkable micro-level creative acts that may – ultimately – have very little effect on society. The meaning of creation is, on the one hand, loosely defined (almost anything can be described as creative) and on the other it is ever more tied to the paradigm of production. We measure the success of creativity and the imperative for innovation in capitalist terms: things and ideas are all units that can be sold or utilized to create economic

value. In short, there is nothing creative in the discourse of creativity. The ‘change-making’ in management discourse is what Gilles Deleuze describes as a product of a thought limited to what is its grounding (the economics) and which operates with perceived legitimacy: it is the established way of thinking. In contrast, to be truly creative and open to possibilities, we require an ‘untimely’ modality of thinking.¹ Deleuze terms it as ‘nomadic’ thought.

1.1. *The epistemological nature of innovation*

The issue opens up vast spaces for reflection that are linked to the epistemological nature of innovation which is generation of knowledge and, therefore, has an implicit or explicit epistemology. While investigating the concept of innovation cannot but refer to the philosopher of science Thomas Kuhn, whose conceptions surpass both any monistic model of scientific knowledge and the notion of progress as a simple incremental accumulation of experience. Kuhn addresses the issue of innovation of paradigms and theoretical models, trying to understand the relationships existing between normally evolutionary periods of science and the ones defined as revolutionary. In his work: *The Structure of Scientific Revolution*² he argues that for every science it is possible to speak of a “pre-paradigmatic” period in which random facts and ideas accumulate. According to Kuhn, in the pre-paradigmatic period, different schools of thought can arise and clash, at times they may be in competition with each other but not destined to take over one another. It may happen that a theoretical system begins to be accepted and shared by everyone, thus becoming a paradigm. Once the paradigm is fully established, then a period of “normal science” begins, in which research is conducted in accordance with the reference model provided by previous studies that have recorded favorable results. What in this period does not work or does not adapt to the paradigm is ignored or considered as anomalous. If, however, what is not working is recurrent then the paradigm goes into crisis: it reaches the stage defined as the revolution which leads to the emergence of a new paradigm and a subsequent period of “normal science”. Hence according to this theory we arrive at two conclusions, firstly that every cognitive discipline is punctuated and intercalated by important discontinuities. Secondly, one’s own *Weltanschauung* depends upon the commitment toward the paradigm one refers to. According

1 Deleuze (1997).

2 Kuhn (2012).

to Kuhn, innovation fully exists in a “revolutionary” context. There can be no grounding in innovation, since it exists in a purely binary logic or because knowledge has a break in its progress – and then everything changes or does not exist – nor can one talk about innovation by accumulation since the very concept of accumulation refers to a simply incremental phase, typical of a period of “normal science”. Innovation can therefore be generated by unexpected dialectical logics and can appear even if it is not intentionally produced. In short, innovation is not produced and is not rooted, is not imposed or matched, it originates and produces itself and can’t be systematized because it is already a system. The question is to understand if the new paradigms present appreciable advantages in facing problems – compared to the old ones – or are even less useful in solving those very problems. An assessment in this regard would be scientifically appreciable, and in any case would not justify renouncing to forge more adequate instruments than traditional ones. The history of science confirms the possibility of a long coexistence between old and new paradigms, which perform differently yet can continue to be usefully manipulated along with the usual tools (in the same way that the theory of Newtonian gravitation is still effective in calculating the orbits of celestial bodies, even though it has been superseded by the theory of relativity, which in turn waits to be absorbed into a more advanced Unified Theory).

The socio-cultural scope of paradigm shifts producing structural changes and transitions is vast and can’t be grasped in its complexity. Therefore, we are going to outline only some of the many possible related phenomena, presenting them as landmarks within a transdisciplinary reflection.

The paradigms introduced by postmodernity feature remarkable transitions transversal to all sectors of human thinking and acting. Every cultural action today moves within the space of a real antinomy between practical and theoretical reason, since it aggregates positions that are often ideologically distant from each other, within a globalized economy and a multi-ethnic society, which mirrors various experiences of public ethics and political participation. The space of subjectivity emphasizes the need for individual freedom along with new claims of rights, producing socio-political phases of legitimate redefinition of personal dignity.

The Twenty-first century is no longer the century of the Ego, but of the We – not of a symbiotic and totalizing We, of a We constituted by the I/You, by an alter-egoic reality. Evidence of this is the phenomenon of multiculturalism, which moves from being a static space of pure and simple coexistence of diver-

sity toward the process of inter-cultural reality which envisages a strong – albeit hard – interaction of identities. This osmosis among cultures and civilizations takes place through stages of transition by facing the syncretism or polytheism of values that cracks the canons of identity and the same personal ethical codes. We do experience the harsh reactions to this process of osmosis in the forms of fundamentalisms, nationalisms, sovereignties, populisms, localisms or glocalization which is undermining the still dominant globalization.

1.2. Social innovation and social transformation

Reflecting on innovative social dynamic we can comprehend how transition toward global integration is proceeding alongside sociocultural disintegration, the resurgence of various separatism and international terrorism. The construction of the identity as socio-cultural belonging and relational expression is significantly problematized for the defense and promotion of new freedoms, against the traditional political-regulatory stratifications. Most democratic theorists welcome and support struggles for recognition and identity movements to the degree to which they are movements for democratic inclusion, greater social and political justice, and cultural fluidity.³ Other theorists underline how democratic equality and deliberative practices are quite compatible with new legal and institutional designs that accommodate cultural pluralism. The philosopher Seyla Benhabib⁴ suggests a comparative perspective on multicultural justice to appreciate how demands of the same kind may bear different meanings and yield different results. She observes that vibrant deliberative democratic societies may succeed in realizing opportunities for maximum cultural self-ascription and collective intergroup justice. Other scholarly voices transversally recognize the phenomena of social innovation as cultural contestation within the public sphere. For Richard Sennett⁵ the profound awareness grounded in the notion of collaboration creating community and responsible views of the future is innovative. Martha Nussbaum and Amartya Sen⁶ indicate a possible action trajectory by introducing the concept of social generativity and capacity approach. The transformation of social relations can be qualified as “capacitive”, that is, able to empower, directly or indirectly, the most disadvantaged sections of the population through the capacity of action.

3 Taylor (1994); Fraser/Honneth (2003).

4 Benhabib (2002; 2004).

5 Sennett (2012).

6 Nussbaum/Sen (1993).

Since cultures are not homogeneous wholes, they are constituted through the narratives and symbolizations of their members, who articulate them as normative expectations expressed by particular social groups or by political or cultural minorities. Over the last few decades the claim for subjective and collective rights obtained, in different forms, public recognition in the context of Western political and juridical structures. (However, we acknowledge that some new rights are by now widely accepted as regulatory instruments even beyond the borders of the Western world). Some new rights – it is the case of gender rights or those aimed at protecting the new configurations of family institutions – are still in the process of full approval and adequate effectiveness. These innovative resolutions, which are still in the process of implementation, confirm how human rights cannot be traced back to a complete, static and universal regulatory complex. Sometimes, they tend to prevail over customary conventions and laws, as is the case of feminine claims from cultures where millennial patriarchal traditions are in force, or for the new instances relating to sexual, marital and reproductive relations that have dismantled structures deemed to be “sacred”. The basic pattern of the traditional family, the heterosexual couple, historically cocooned in a family network both broad and binding in its parental and patrimonial obligations, had already undergone a change, between 19th and twentieth centuries, as a mononuclear family. In the process it emancipated itself and eased from the traditional parental networks to become functional for labor mobility. The crisis of this mononuclear family during the post-industrial era has brought out its basic weaknesses and is progressively frayed by virtue of a theory of gender, that is most advanced “bio-political manifesto” of the re-engineering of “natural socio-genesis”, attested by the reproductive monogram of the heterosexual procreative couple. The demand for emancipation from traditional and natural constraints can be enacted and transcribed in social and juridical institutions. The natural bonds are no longer recognized as such because they can be manipulated by techniques, which are presumed to artificially redesign the socio-genetic relationship between sexuality and natural affiliation (see structural anthropology / Levi-Strauss).

Norberto Bobbio⁷ identifies the category of new rights by calling them rights of the third generation, thus distinguishing them from the rights of the first generation (political rights, freedom, private property) and the rights of the second generation, or social rights, including right to work, right to edu-

7 Bobbio (1990).

cation, right to health, as well as various public assistance and social security benefits, guaranteed in particular by the welfare state. According to Bobbio all human rights have historical and conflictual origins and are closely intertwined with the standards of rationality of Western culture. And yet, he observes that precisely because the doctrine of human rights presents antinomies within itself, it cannot have an absolute foundation: this foundation would entail the claim to make a right and its opposite both binding, irreversible and universal. The analysis conducted by Bobbio is perfectly in line with the reflections of contemporary anthropology (A. Gehlen) that underline how “productive” operational knowledge coincides with the confirmation of man’s capacity to transcend the given situation.

2. Processes of transition

This disposition to the manipulation of reality – that once was described as “ontologically founded” – reaches its highest expression within an epistemological scenario no more centered on totalizing notions of truth. The assertion that there is no absolute point of view to look at phenomena, is not an implicit admission of ethical relativism, but an admission of onto-ethic relativity, as well as of intellectual honesty, since knowledge always presupposes a somatic-chronologic-topologic situation. As H.G. Gadamer observes in “Truth and Method”, no one is without prejudice, since we all require some kind of prejudices to represent the horizon of our views.⁸ The recognition of the notion of truth as practicability of ideas (Pragmatism), generates a constant socio-political process of fluctuations, acceptability from levels of toleration toward actions and reciprocity. These processes are also challenged by the application of techno-sciences to the vital areas, that bring out the difficult transition of traditional ethical paradigms to the new processing of social justification: Bioethics, Biomedicine, Biolaw. The combination of computer science and genetics allowed technology to creep into the deepest folds of our lives, rewriting codes, superimposing biology and biography. Technology by transcending even the inconceivable, is becoming a human inner tool: high-performance computers that think on behalf of people, are the evidence.

In the face of the technique that seems to neutralize every sense of limit, or natural or moral boundary, there are hypotheses of revision or overco-

8 Gadamer (1975).

ming of traditional ethical paradigms.⁹ The foundation of a possible revision / ethical revolution lies in the need to bring the person back to the center of an otherwise dystopian and despotic technological development, to measure innovation according to critical parameters of social sustainability and ethical admissibility, as well as to legal and logical justifiability. In order to rebalance confidence in technology, it is necessary to think beyond technology itself and evaluate its historical impact through the experimentation of new grids of meaning that are intertwined with ethical threads, and also useful for the management of economic-productive cycles.

Internet which is the largest and most visited public space, is the new dimension in which the human dialectic of knowing and doing is articulated – or, to cite Article 2 of the Italian Constitution – is the reality in which rights are exercised or can be denied, and the freedoms can be deployed or violated. The digital transformation process invests huge value in the interactions that unfold and intertwine in social productions. The interconnection with objects, sensors, devices of daily use, feeds the treatment of large volumes of data and favors increasingly astonishing applications of artificial intelligence, destined to profoundly change economic processes and social structures. Data protection is, therefore, the necessary condition for freedom and democracy, because the data constitute the digital projection of our “persona” and manifest its vulnerability. The relationship between market and rights is also played on this terrain. The processes of work automation are almost determining a kind of dehumanization. The progressive replacement of workers – even those involved in more complex functions – with machines, is destined to have remarkable social consequences. New categories of technologies, which use natural language processing and self-learning, will escalate people and machines interactions, increasing the skills of artificial intelligences. The obscure side of digital innovation is cybercrime. Data protection is, therefore, the research target for regulations, as any private or public activity is mostly based on technologies powered by personal data. In the age of disintermediation and post-truth, new transitions often challenge the spaces of democracy. If the resolutions of justice are not available, or their application is not feasible, there emerges the extraordinary politics in which toleration plays a relevant role. Yet toleration presupposes and reserves not only the power of interference, but the discretion to define the threshold of interference.

We are entertaining a reflection on issues that, to a certain extent, pertain

9 Reichlin (2008).

to the “canon” of Philosophy of Law. The reflection on social change raises the central question of what American legal philosophers define as the “call to context”, or the need to bring law back to its historical context – also linguistic and symbolic context – from which derives the indication to observe the legal text as a cultural product involved in the construction of sense in a shared horizon. Martha Nussbaum points out that law when it is re-contextualized and desecralized – in relation to the human sciences – reveals its hidden, ambiguous, incoherent and paradoxical face, but at the same time it reveals its possibilities, its authentic function as a necessary tool to preserve human interactions. As Nussbaum points out, the greatest crisis that hit the globalized world in the last decade is not the one that occurred in 2008: the famous financial bubbles, but the progressive loss of the humanistic culture.¹⁰ It is ironic that we have also lost the sight of the reasons that hinted to its importance in public life. In her opinion law also is subject to the same process of distancing itself from the humanistic ethos and moral and ethical considerations. The social and moral concerns are the threads of the whole complex of social fabric to which law should remain destined: an area that claims conscious and critical actions.

2.1. *Transition as a practical-conceptual space-time phase*

Taking into account the relationship between conceptual transformations and their translations into social transformations, the central element is the time-space factor within transitions among juridical cultures, customs, perceptions and configurations of human dignity, amongst regulatory structures of freedom. The French thinker François Jullien refers to the concept of “*entre*”, “in-between” within human and social transitions, as the recognition of a specific time-space of dialogue in which awareness offers elements to formulate a solution which is a non-solution.¹¹ Paul Ricoeur, in his philosophical hermeneutics, had already referred to the ontological position of understanding as “the long way”, because only a long path allows to collect the analytical contributions necessary for understanding experience in its wholeness.¹² In other words, it implies to open up to a pluralism of views and partial solutions, or *ad hoc* solutions, by accepting how to manage the consequent, non-eliminable conflict of interpretations.¹³

10 Nussbaum (2012).

11 Jullien (2012).

12 Ricoeur (2010).

13 Ricoeur’s hermeneutics starts from the vision of the human condition presented

In the spirit of interpretation as a “long way”, it is necessary to recognize that we are always immersed in a phase of implementation, of transformation, and that meanings are constructed in perspective. It is precisely the possibility of genuinely different outcomes that allows us to recognize that transition is the practical-conceptual space-time phase to enact the potential of even inadequate solutions. As the historian Fernand Braudel pointed out, innovation is not the mere generation of novelties, but the creation of the conditions for a change destined to have long-lasting consequences that shift the limits of the possible.¹⁴

The “in-between” Jullien talks about, within transition, is the condition for promoting otherness: new criteria, categories and languages. Social practice is nourished by self-correction and free shared public debate and, therefore, it is able to develop an immune system against its own “deviations”. In view of an essential ethical-political, or more generally hermeneutical, component within the alleged scientific objectivity, Paolo Benanti, Italian political consultant on the ethics of technology, proposes to develop an ethics of algorithms to support the development of a national control strategy of artificial intelligences.¹⁵ By analyzing the debate that arose around the hypothesis raised by the European Parliament to attribute “electronic personality” to the robots, Benanti invites to distinguish three levels: technological, ethical and juridical. At present, the debate has been limited only to the last, that is how to regulate the use of these machines in society, but, according to Benanti, “traditional categories are no longer sufficient, new solutions must be found”. And he warns: “We cannot talk about ethics without knowing the technical

by Heidegger in *Being and Time*. For Heidegger the human condition is that of beings who try to understand the world in which they are thrown without wanting or choosing it. Every living, therefore, corresponds to an interpretation, and the resulting human condition is completely determined by the concrete possibilities available to each individual. Ricoeur accepts the Heideggerian approach and agrees with the principle that living is interpreting. However, he does not accept the conclusion that the human condition can be understood directly through the analysis of one’s own possibilities. Only in language can the human condition be discovered as a way of being. According to Ricoeur, therefore, the human condition discovers its meaning only with a long hermeneutical journey through the linguistic mediations of signs and symbols, of stories and ideologies, of metaphors and myths that determine it and in a certain sense constitute it, to end up enriched by deviations through the language of others.

¹⁴ Braudel (2009).

¹⁵ Benanti (2018).

aspects, we cannot give legal regulation without ethical principles and the competence of the technological substrate”. “These machines – he continues – work with algorithms” that today are “black boxes” protected by copyright. Hence the question: “Is it possible to maintain these black boxes or do we need to make them crystal boxes, that is transparent?”. To ensure that this innovation is truly at the service of mankind, it is necessary to “link progress to development through ethical values. A particularly demanding challenge in the case of artificial intelligence because the values on which the machine decides are numerical values and then it is necessary to create new paradigms to transform ethical values into something that the machine can decode”. For this reason, it is necessary to “formulate the new modality of the algorithm” which “must contain tables of values, principles and norms to be translated into machine language”. “A model – he explains – can be to” insinuate “a kind of uncertainty inside the machine”. Thus “in the face of a doubt the machine will call upon the person who is the bearer to validate his decisions. This leads us to create a “Human Centered Artificial Intelligence” “and to develop machines “that are integrated with human beings and together with them they seek the best solution”.

References

- Benanti, Paolo (2018), *Homo Faber: The Techno-Human condition*, Bologna, Edizioni Dehoniane
- Benhabib, Seyla (2004), *The rights of others*, Cambridge University Press
- Benhabib, Seyla (2002), *The claims of culture*, Princeton University Press
- Bobbio, Norberto (1990), *L'età dei diritti*, Torino, Einaudi Editori
- Braudel, Fernand (2009), *History and the Social Sciences: The Longue Durée*. Immanuel Wallerstein, trans. in: *Review*, vol. XXXII, n.2
- Deleuze, Gilles (1997), *Differenza e ripetizione*, Milano, Raffaello Cortina Editore
- Deleuze, Gilles, Félix Guattari (2002), *Che cos'è la filosofia?*, Torino, Einaudi
- Fraser, Nancy, Alex Honneth (2003), *Redistribution or recognition? A political-philosophical exchange*, London/New York, Verso
- Gadamer, Hans-George (1975), *Truth and Method*, London, Sheed & Ward
- Jullien, François (2012), *L'écart et l'entre: leçon inaugurale de la chaire sur l'altérité*, Paris, Galilée
- Kuhn, Thomas S. (2012), *The Structure of Scientific Revolution*, Chicago University Press, 50th Anniversary Edition
- Nussbaum, Martha (2012), *Not for Profit: Why Democracy Needs the Humanities*, Princeton University Press

- Nussbaum, Martha (2011), *Creating Capabilities: The Human Development Approach*, Belknap Press, Harvard U.P.
- Nussbaum, Martha, Amartya Sen (1993), Sen, A. *The Quality of Life*, Oxford, Clarendon Press
- Petersen, Hanne, Henrik Zahle (eds.) (1995), *Legal Policentricity: Consequences of Pluralism in Law*, Dartmouth, Adershot
- Reichlin, Massimo (2008), *Etica della vita: Nuovi paradigmi morali*, Milano, Mondadori
- Ricoeur, Paul (2010), *Écrits et conférences, Tome II: Herméneutique*, Le Seuil
- Sennett, Richard (2012), *Together: The Rituals, Pleasures and Politics of Cooperation*, Yale University Press
- Taylor, Charles (1994), *Multiculturalism: Examining The Politics of Recognition*, Princeton University Press

