Cognitive techniques of legal innovation

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1. Introduction

This chapter starts from a few theoretical premises, which can be summarised as follows.

a. Law (in the West) is a human invention.

It is a historical phenomenon. As such, it has an origin: May be 'invented'.

b. Law (in the West) is in a constant state of change.

As a historical phenomenon, law changes over time because it is both the product and the engine of cultural, economic, social, political, or other types of transformations. Law changes when changes the way of 'thinking the law' and when changes the way of looking at law. Legal change is also due to transformations in rule-making methods, in the content of rules, as well as to the rise of new institutions, new concepts, and new responses to the needs of a society.

According to Harold J. Berman, author of the famous *Law and Revolution*, one of the main features of the Western Legal Tradition is the existence of an intrinsic process of organic change. In particular, Berman writes:

"The concept of a body or a system of law depended for its vitality on the belief in the ongoing character of law, its capacity for growth over generations and centuries – a belief which is uniquely Western. The body of law only survives because it contains a built-in mechanism for organic change".[1]

Harvard Emeritus Professor explains that in the Western Legal Tradition change does not happen by chance but stems from the reinterpretation of the past in order to meet present and future needs. Legal change is also fostered by another feature of the Western Legal Tradition: Pluralism. The latter is the consequence and at the same time the engine of pluralism in political and economic life. As such, it became a source of legal and political development

[1] H. J. Berman, Law and Revolution. The Formation of the Western Legal Tradition, vol. I, Harvard University Press, 1983, p. 9.

and of economic growth. Internal pluralism periodically led to the violent overthrow of legal systems by revolutions. However, the Western Legal Tradition, which is wider than each of the legal systems it is made of, survived to and was renewed by these revolutions.[2]

By definition, the history of law unfolds through changes, evolutions, transformations, innovations, revolutions and inventions.

c. We can look at legal innovation in many different ways.

For instance, sociology explores the relationship between legal change and social change. Lawrence M. Friedman's illuminating pages are devoted to identifying 4 types of change: 1) change which originates outside the legal system, i.e. in society, but that only affects the legal system and is confined to it; 2) change which originates outside the legal system but that passes through it (with or without some manipulation) and has an impact outside the law, that is in society; 3) change that begins inside the legal system and produces its full impact within it; 4) change which originates within the legal system and, progressing through it, goes out and produces its impact in society.[3] Ehrlich, too, has described legal innovations not produced by any statute.[4]

Historians, in turn, investigate the pathways of law in the making. Those pathways witness evolutions and changes, even of a radical type. Specific branches of historical studies deal with the general characteristics of legal phenomena at different times (antiquity, the Middle Ages and the modern age) and in different geographic areas. And there are in-depth studies on the origins and development of specific legal institutions, branches of law, legal families, as well as legal principles and ideas.

Legal change may also be observed from the political and institutional point of view, given the close link between the development of law and the evolution of political institutions.

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[2] H. J. Berman, Law and Revolution, p. 10. On the concept of change in different legal traditions see H. P. Glenn, Legal Traditions of the World. Sustainable Diversity in Law, 5th ed., Oxford University Press, 2014, passim.

[3] L. M. Friedman, The Legal System: A Social Science Perspective, Russell Sage Foundation, 1975, p. 269 ff..

[4] In 1913 E. Ehrlich, Grundlegung der Soziologie des Rechts, Duncker and Humblot (English translation Fundamental Principles of the Sociology of Law, Transaction Publishers, 2002, 391f.) wrote: "A glance at legal history will show that even at a time when the state had already gained control over legislation, great changes were always taking place in the law that were not brought about by legislation. Slavery disappeared from Europe during the course of the Middle Ages; from the beginning of the sixteenth century the peasant in England was gradually acquiring an ever increasing measure of liberty, while in Germany his freedom was being progressively curtailed; and wherever modern large-scale industry has been introduced, it has given rise to countless new kinds of contracts, real rights, rights of neighbors, forms of succession, and has influenced even the family law. In the beautifully developing cities of detached houses of our time a servitude requiring the building of detached houses has arisen. Electrical works have given rise to new kinds of real rights, among others the rights of transmitting currents, and new kinds of obligatory contracts, among others the contract to supply electrical current".

When it was created in 1951, the European Coal and Steel Community was a new type of international political institution aimed at organizing and maintaining a common and competitive market for coal and steel.

Another driver of change is the link between law and the economy. Karl Marx's writings are an easy example of the approaches that connect great transformations of law with a revolutionary nature to great transformations of economic structures. At the same time, every small legal change reflects a partial modification of society's economic structure. More generally, it should be noted that key events (e.g. the Industrial Revolution) were possible not only because of technological progress, but also because the institutional system and property rights led to a more effective exploitation of individual motivations, thus channeling human and financial resources towards more socially useful activities and making it possible modern development. Many economic changes are obtained through the creation of legal instruments for the organisation and coordination of human activities. It should not be forgotten that we could not fully understand contract law without considering that it is only the legal scaffolding of an economic transaction. The output of lawyers' rational reflection may be real social engineering projects, or real inventions. For all these reasons, it has now become common to look at legal innovation as a tool that can be deployed to pursue economic objectives. Every economic crisis prompts a legal reaction (e.g. Roosvelt's New Deal).

In comparative legal studies, legal change is one of the main fields of investigation. Techniques supporting the diffusion of legal models have been identified. Imitation of foreign models is one of the most important techniques. There are legislative imitations (e.g. the Napoleonic Code), doctrinal imitations (e.g. the influence of German doctrine in nineteenth century) and judicial imitations. The latter may be: a) direct imitations of judges by other judges; b) imitation through intermediaries (like in the case of transnational judicial imitation which takes place through supra-national courts); or c) judicial imitation through the narrative of the case law made by legal scholars of another country. Alan Watson has devoted much attention to the theme of legal imitation. According to him, in most times and places, borrowing from a different system has been the main driver of development of the law.[5] It can be added that today this form of legal "creativity" is fostered by increasing recourse to comparison and by the availability of a wider range of information sources.

Legal change plays a crucial role in Law and Technology studies.[6] There is a close relationship between law and technology. More specifically, there is a symbiotic relationship

[5] A. Watson, Comparative Law and Legal Change, Cambridge Law Journal, 1978, 313.

[6] http://www.lawtech.jus.unitn.it/

between law and human activities that, by exploiting scientific progress, create new tools, appliances, devices aimed at improving living conditions. Law is called upon to regulate technologies, but at the same time it uses technologies to pursue its own goals. Today attention is focused on digital technologies, but it must be underlined that hardware, software and electronic networks are no more “technology” than paper, pen or language (they are technology for thinking). Legal rules pursue their objectives through the technologies available when they are enacted. Therefore, legal rules are tightly linked to the technologies that made it possible and prompted their enactment. As soon as new technologies become available, it is likely that law will use them to pursue its own objectives (old and new). Hence, the advent of new technologies may lead to the creation of new rules. Looking at the evolution of law in a diachronic perspective it is easy to see that the most important turning points occurred whenever mankind had access to new technologies. The evolution of law also coincides with the evolution of means of communication and of technologies related to them.[7] Legal innovation may also be explored from another point of view: the cognitive maneuvers employed to imagine new solutions for old and new problems. These pages adopt exactly this point of view.

d. Legal innovation may mean many things.

Legal innovation may include different phenomena with different origins. They can be:

1. A new approach to legal reasoning. Innovation may consist of new legal concepts and new legal theories. To pick up a small set of legal theories that were developed in the last centuries: natural law, legal positivism, legal realism (with its different versions of realism *stricto sensu*, sociological jurisprudence, institutional approaches). Each theory has proposed different methodologies for the study of law. To mention just a few examples in the last centuries: the school of exegesis, that described the lawyer as the ‘mouth of the law’; the historical school (usually identified with Savigny) that looked at law as a system to be built, studied and implemented; the German pandectist school, striving to develop a conceptual pyramid through logical syllogistic methods which should leave no space for creativity; the jurisprudence of interests, that drew on pragmatism and sociology of law and held that rules were the product of various interests; the new German topical reasoning and its way to organize thinking around problems; Kelsenian neopositivism. There also are the most recent developments: the analysis of language, deontic logic, Perelman’s new rhetoric, the economic

[7] For a more detailed analysis see G. Pascuzzi, Il diritto dell’era digitale, 3rd ed., Bologna, Il Mulino, 2010, passim.

analysis of law, critical legal studies and so on. We have legal innovation when there is a new approach to legal reasoning.

2. Evolution of concepts and institutions. Legal change may manifest itself in the evolution of traditional institutions. A paradigmatic example is the right to property[8].

3. Emergence of a new area of law. We also have legal innovation when areas/branches of law are created. This happens because of the evolution/separation/extension of existing branches (e.g. civil liability distinguishing its contents and functions from criminal law) or because new rules are needed to cope with new societal challenges. In the last fifty years the most significant example of legal innovation is represented by European law. The globalisation of trade has led to the regulation of cross-border economic activities. The law of international trade was thus created. It is made by States, inter-governmental organisations (specifically the World Trade Organisation), non-governmental organisations (and in particular the International Chamber of Commerce), as well as transnational corporations (a form of "soft law"). It is a law based on contract (from the individual export transaction to foreign direct investments) and on arbitration as the most important means to solve disputes. Additional examples can be mentioned: environmental law, energy law, social security law, tax law, food law, etc.

4. Emergence of new institutions and concepts. Another type of legal innovation is the emergence, within new and old branches, of new institutions and new concepts. The establishment of the European Communities (now European Union) is in itself one of the most significant innovations of the last century. European law changed almost all fields of law. A familiar example is VAT (value added tax) that did not exist before its introduction by European law in 1967. To European law we owe many other new institutions and concepts. Among them the concept of 'universal service', which was used for the first time in Directive 97/33/EC of 30 June 1997 on interconnection in telecommunications. Other examples of European institutions include the EEIG (European Economic Interest Grouping) and the European Company.

It is not uncommon for lawyers to be explicitly recognised as inventors of specific institutions or concepts. Hans Kelsen, for instance, is considered the 'inventor' of constitutional courts.[9] He argued that rigid constitutions are not truly guaranteed without special courts charged with

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[8] F. H. Lawson, *The law of property,* Oxford, Clarendon press, 2002.

[9] H. Kelsen, La garantie juridictionnelle de la Constitution (La justice constitutionnelle), Revue du droit public, 1928, 197-257.

the task of monitoring their application. Similarly, Rudolf von Jhering is credited with the invention of ‘negative (contractual) interest” (negatives Vertragsinteresse).[10]

e. Techniques of legal innovation

Law changes through the techniques that, in different jurisdictions, are made available by the sources of law. They could be:

1. Legislative reform: e.g. the introduction of new laws that attempt to provide different answers to a given problem.
2. Evolution of the case law: e.g. judicial *revirements*.
3. Innovation in legal practice: e.g. new contracts arising from business practice.

In this chapter we do not deal with technical legal innovation, but with cognitive techniques of legal innovation. The latter help figure out new legal solutions for new and old problems. Any new solution resulting from the application of cognitive techniques must then be introduced into the legal system through the techniques of innovation.

2. Law as technology

The lawyer is by definition required to solve problems. This is because society looks at law as a tool to be deployed to address its own needs. The legislator is asked to lay down rules aimed at solving a wide range of problems. The judge is asked to solve the problem underlying the dispute between the plaintiff and the defendant. The lawyer is asked to find the most useful answer to the problem her customers face (e.g.: finding means, different from the will, of transferring wealth to the heirs). More specifically:

- Legislation as a solution to all kinds of problems. We are used to thinking that any problem of daily life, from the smallest to the biggest, can be solved by the intervention of the legislator.
- Issues and problems in judicial proceedings. Legal actions are the tool normally supplied by legal systems to apply abstract rules to a specific case. In the perspective adopted in this chapter, legal actions may be regarded as a mechanism to solve problems.
- Private autonomy of the contracting parties in response to problems. Using their private autonomy the contracting parties try to design a legal framework which satisfies their interests and sets up the resulting rights and obligations. The parties enter into contracts to solve

[10] R. Jhering, Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jherings Jahrbücher, IV, 1860, p. 1-112.

problems. The legal system will offer several enforcement mechanisms should one of the parties breach the agreement that the parties themselves considered the more appropriate answer to the problem they were dealing with.

The lawyer can be considered a problem solver. If every technology is defined as an instrument that can improve the conditions of human life (i.e.: means to an end), the emphasis placed on the law as a tool to satisfy human needs and to solve problems lends credit to the idea that law itself may be regarded as a technology.

3. Cognitive maneuvers for legal innovation

Law changes constantly in response to newly emerging problems in society. Lawyers make such a change possible by 'inventing' new tools, concepts, institutions.

Tullio Ascarelli wrote: "In the current crisis of values, the world asks lawyers rather new ideas than subtle interpretations".[11] Lawyers are increasingly called upon to provide innovative responses to old and new challenges. When lawyer advises the legislator/regulator about the drafting of new rules; when a judge decides on new demands for legal protection arising from society; when a lawyer suggests new solutions to the judiciary called upon to decide on those new demands; when lawyer develops new contractual tools that satisfy the needs of commercial practice; when lawyer proposes new theories, interpretations, or doctrinal opinions, the lawyer is bound to use the skills of legal innovation. Those skills can be defined: skills of creativity.

Solving problems requires a strategy. Within this strategy we can find those maneuvers that are more useful to promote innovative solutions.

An overall strategy for solving problems can be divided in specific steps.

First of all, the problem should be identified, defined and represented. Mistakes in identifying the contours and constituent elements of the problem lead to solutions that are likely to fail. In this perspective, it is useful to know whether the problem belongs to types already well-known and dealt with in the past (in order to apply the same strategies) or it is a completely new issue that requires further reflection and the design of new solutions. It may be necessary to acquire further knowledge than that already held. It goes without saying that some problems can be easily defined. Conversely, others are difficult to define.

[11] Ascarelli, T., Studi di diritto comparato e in tema di interpretazione, Giuffrè, Milan, 1952, 344.

In the light of the foregoing, it is possible to draw up a first inventory of questions which should be asked when called upon to solve a problem. This first group of questions addresses the problem itself. In particular, it might be asked:

1) What exactly is the problem to be solved ?

2) Are there different ways to frame the same problem ?

3) What are the interests involved ?

4) How can the problem be formulated from the point of view of every stakeholder involved ?

5) What is the objective sought for ?

6) What is the objective that each stakeholder would like to achieve ?

The second step is to formulate a strategy to solve the problem. It is useful not to stop at the first strategy that comes to mind, but to consider the pros and cons of each strategy and choose the best. Sometimes avoiding what cognitive psychologists call the "focusing illusion" [12] helps see the problem from different points of view, and thus give rise to innovative and creative solutions. In order to tackle new problems it is possible to try cognitive techniques which help envisage original solutions. Needless to say, 'real' innovation will only be possible if the legal innovation techniques are deployed.

A second group of questions concerns the solutions which are identified through the cognitive techniques. In particular, it might be asked:

1) Is it possible to extend the forms of protection already provided for by the legal system ?

> 1a) Is it possible to expand those forms of protection by generalising solutions already introduced in specific contexts?
>
> 1b) Is it possible to expand the forms of protection by extending solutions already adopted?
>
> 1c) Is there room for differentiating solutions already adopted ?

2) Is it possible to combine different instruments to achieve a specific goal?

> 2a) Is it possible to unify different instruments, institutions, or concepts ?
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> 2b) Is it possible to link different instruments, institutions, or concepts ?
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> 2c) Is the hybridization of different instruments, institutions, or concepts possible ?
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> 2d) Can available elements be arranged in new ways ?

3) Is it possible to transform available tools ?

> 3a) Can an instrument be used in a way other than the one for which it was conceived?

[12] A. Tversky e D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in *Science,* 1974, 185**.**

3b) Is it possible to imagine that existing instruments, institutions and concepts can perform functions different from the ones traditionally accepted ?

3c) Is it possible even to 'distort' the function of instruments, institutions, concepts ?

3d) Is it possible to change the strategy adopted to pursue an objective ?

Further steps of the general strategy to solve problems are: the implementation of the strategy, the monitoring of the chosen strategy and the evaluation of the achievement of the objectives. On this last point it should be borne in mind that the evaluation may not be immediate but require time to be completed. However, it is not uncommon that at this stage new problems arise which require new solutions and new approaches.

The steps briefly described above are but a small example of how to use the skills of creativity or, to put it in different terms, how to select the cognitive maneuvers that are more helpful in finding effective responses to old and new problems.

4. Conclusions

Change is one of the features of law in the Western legal experience. The lawyer is a major innovator. History is replete with examples of innovations resulting from the work of the legislator, the judges, the practitioners and the legal scholars. Behind these innovations is the know-how of the lawyer that uses a number of techniques to provide new responses to old and new challenges.

It would be important to start interdisciplinary research on the skills of creativity in the legal field, i.e. strategies aimed at encouraging the emergence of new ideas. And it would also be important to include teaching of these skills as a permanent feature of legal education: it would be a good opportunity to remind would-be lawyers to never forget considering the consequences of the proposed legal solutions.[13]

[13] For further information see: G. Pascuzzi, La creatività del giurista. Tecniche e strategie dell'innovazione giuridica, Bologna, 2013.