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Proactive and reactive innovations in Food Law

Abstract

Innovation and *Food law* share a peculiar relation, characterized by reciprocal strong influence and interference.

Technological innovation, mainly from XIX century, starting with the revolutionary ideas of the famous French chef Appert, has radically changed the techniques applied to food, in all phases from production, to processing, to distribution.

The same reference to "*tradition"* cannot be properly appreciated in the field of food production if not connected to *innovation*.

If, in general terms, we can speak of "*The invention of tradition*" (as remarked by Eric Hobsbawm), or we must admit that "*tradition is a well sorted innovation*" (as noticed by Corrado Barberis), these considerations assume peculiar meaning when referred to the agri-food sector.

Quality wines and extra-virgin olive oils – to mention only two renowned flags of "*traditional*" Italian food products – have to-day a quality much higher than only a few decades ago, as a result of radical technological innovations, both in the primary phase and in the transformation process.

Food products (even those named as "*traditional*") cannot renounce to *innovation*. But technological innovations - due to their nature of something *new*, whose effects are far from being fully known and appreciated – offer at the same time benefits and costs (not only in the economic field), advantages and risks (potentially affecting human health or natural environment).

In other words, *technological innovation* affects in a radical way products and processes in the agri-food sector, modifying almost every day what Tullio Ascarelli described as "*la natura delle cose*" .

As a consequence, Food Law is under strong pressure to find adequate regulatory answers to the challenges of technological innovations, in a sort of permanent confrontation between *technical innovation* exploring new territories, and *legal innovation*, forced to deal with new issues, new problems, new regulatory areas.

In this perspective Food Law is called to *react* to technological innovation in food.

In Europe, the *Novel Foods* legislation, the introduction of rules on the *traceability* of beef after the explosion of the "mad cow" crisis, and the general adoption of the *precautionary principle*, may be cited among the many significant examples of an approach of the food legislator, aimed to *answer* to needs and demands coming from innovation and not finding sufficient regulatory tools in the already existing legislation.

The impact of *technological innovation* on the legal framework is not limited to the substantive aspects of food, as it deals largely – in an always more pervasive way – to immaterial aspects, first of all those related to the communication on the market, thus forcing the food legislator to deal both with substantive and immaterial issues in regulating food production and marketing.

But *juridical innovation* is not only an *answer* to technique, it is not only *reaction*.

Juridical innovation - with great evidence in the specific area of food law - is also *action*, *proactive innovation*. It is by itself an expression of the elaboration of new and original models and institutions, through an experimental approach, which develops in what some German scholars effectively defined as *Rechtsreform in Permanenz*.

As a U.S. scholar observed: «*The most important principles of United States constitutional law have been developed in the context of food legislation in general*» (P.B.Hurt).

We can therefore conclude that *juridical innovation* in food law, sharing roots and elements with *technological innovation*, includes both:

- *juridical innovation* as *reaction*, and
- *juridical innovation* as *action*,

Such a conclusion appears to be true even for European law. To appreciate the role played by food law in developing basic principles of general Community law, it is sufficient to remind the judicial doctrine of *mutual recognition*, and the large number of decisions of the Court of Justice in the field of food production and food market, defining content and scope of principles of *proportionality of administrative action* and of *protection of European citizen's rights*.

Regulation (CE) No. 178/2002 not only reaffirmed and enlarged rules already introduced with more limited scope (as *traceability* or *precautionary principle*), but moved in the direction of a comprehensive legal system, in which even traditional European rules (such as those referred to labelling marketing, or producers' liability) should be applied in a new integrated context.

In this perspective, interpretation and application of regulation No. 178/2002 and of the large number of European food rules introduced before and after year 2002, require to scholars, legal practitioners, public administrators and business

operators, to appreciate the framework within which regulations and directives operate.

It is no longer sufficient – as it was until recently – to merely follow individual rules each by each.

European Food law is expressly moving toward an integrated and systematic approach, which contemplates goals, objectives, competences, responsibilities and procedures, emphasizing the role of administrative and judicial experience, and introducing a net structure, within which local, national and European regulators and administrators are called to a strict cooperation.

It is therefore possible to assume that, as a result of such process, it is emerging a new legal model, in which rules coming from a Community level and rules coming from national and local level are strictly linked in an unitary model of *European law.*

In this complex and articulated process, which enriches the armoury of legal tools with new additions, and in the same time enhances consolidation and simplification of existing rules, the traditional borders between public and private law are assuming new contents.

Protected interests typically classified as "*public goods*" – like consumer's protection and fair competition – increasingly rely on new tools which utilize private models, like contracts, voluntary acceptance of rules and standards, and civil compensation as enforcement tool instead of criminal or administrative sanctions. In the field of control and surveillance, certification bodies of private nature are chosen to perform duties which are traditionally considered "*public*".

The report will try to highlight the mechanisms through which new models and institutions are emerging, in a *proactive* and *reactive* permanent dialogue between *Innovation* and *European Food Law*.