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Constitution

The Darwinian Evolution of a Societal Structure

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For Eduardo.

Foreword

Hauke Brunkhorst

In an essay that appeared 2014 in *Cardozo Public Law, Policy & Ethics Journal* a young Brazilian scholar, Fabio Almeida, reconstructed modern constitutionalism as a legal order based in the mediation of our universal moral grammar with modern society and the revolutionary dynamic of cultural evolution. The essay was already 100 pages long, and we exchanged some e-mails about it. A little later I read Fabio's pathbreaking book manuscript that explained his theory of social evolution in extenso.

To a certain extend Fabio follows the path of Niklas Luhmann's system theory. However, in two crucial respects, he changes the theory. First he drops the thesis that mind and society, social and psychic systems are both closed systems, which are environment for each other, and can observe each only from the outside. Consciousness and agency matter in evolutionary terms. In particular, our moral consciousness functions as a kind of internal constraint of the possible paths the social evolution can take. Second, Fabio overcomes Luhmann's reduction of culture to the semantic reflection of social structures (systems). Only an autonomous cultural evolution that is due to cognitive and normative learning processes of social groups can explain how our moral consciousness can fulfill its directional function within the social evolution through agency.

In his pathbreaking study Fabio Almeida shows that the culturally mediated development of moral consciousness within social agencies is a driving force of collective learning processes, and that only culturally mediated moral consciousness can explain the solution of the adaptive problems that emerge during the transformation from segmentary (egalitarian) to stratified (hierarchical), and from stratified to functionally differentiated societies. Modern constitutionalism is due to this complex developmental process of cultural knowledge, societal class- and systems-formation, and individual and collective agency.

To this explanatory purpose, Fabio develops two special hypotheses. Due to the long lasting period (between hundred and two hundred thousand years) of egalitarian hunter-gatherer societies with an anti-hierarchical and anti-authoritarian system of norms, human beings developed an *innate universal moral grammar* centered at a core of *moral principles* such as egalitarian freedom, that is to a certain extend universalizable and based on a

kind of individual independence. As in Chomsky's universal or deep grammar theory, these principles are contextualized by specific parameters, which adjust them to local social and cultural conditions.

Moral learning through social interaction can occur on the level of principles. However, most of it occurs on the level of parameters. The parameters allow learning to assume an endless variety of different languages of morality in the course of one or two generations, whereas hundreds of generations and more are needed to change the grammar of our innate moral principles. If we take the epigenetic turn of the last two decades in account, this idea becomes even more plausible than on the basis of the 'modern synthesis' of evolutionary genetics.

Having said this, there are recalcitrant problems of adapting the moral deep grammar of human beings to the emerging imperial class societies of unprecedented injustice since about 3000 BC. As Fabio Almeida shows, these problems cannot be solved by functional mechanisms such as the replication of relatively egalitarian structures within the different social strata (classes, estates). This, it needs at least some *structural* changes of the moral parameters to affect the scope and deepness of the universalizability and individualization of the moral grammar of egalitarian freedom. The invention of an unconditioned morality (deontological ethics) within the frame of comprehensive philosophical and religious world-views (exemplary in the story of Job) finally led to a *double* – and therefore ideological – solution of two independent problems at the same time. First, of the systemic problem of adaptation of a class-society to the egalitarian expectations of its environment of human agencies. Second, of the cognitive and normative problem of injustice, which tears asunder the individual consciousness and the cultural knowledge of society as a social group of humans. This problem cannot be solves from the point of view of adaptation as the old saying 'Fiat Justitia et pereat mundus' nicely demonstrates. Therefore, it needed an ideology that enabled a fierce criticism of injustice, and a kind reconciliation of the demand for justice with structurally unjust domination, or as Fabio expresses it, inequalities had to be justified as fair and deserved. Religious and metaphysical world views satisfied both demands for the time being but not for ever, and never completely, and this became a driving force of further search for solutions (learning-processes) which due to changing circumstances could become a weapon of critic that could destabilize and destroy unjust societal structures. This way religion in the service of class domination can strike back, and it did so in Europe in the time of great legal revolutions first of the so-called Papal Revo-

lution and the Protestant Revolution and later in the post-Christian world revolutions of the 18s and 20s centuries.

In the course of the Protestant Revolution and the religious civil wars of the sixteenth and seventeenth centuries another recalcitrant problems emerged that was due to progressing functional differentiation and religious fragmentation. Due to Fabio, this problem was solved in a learning process over two generations. First (Peace of Augsburg 1555), a *modus-vivendi* was legally enforced but remained social-psychologically unstable. However, the second generation started to internalize the law psychologically, and transformed it finally into a morally convincing religion of tolerance, and the external threat of legal sanctions became rationally motivated *moral habit*.

The point of Fabio Almeida's ingenious synthesis of Rawls and Luhmann again seems to prove that psychologically based moral constraints of evolutionary adaptation of functional systems are due to independent cultural learning processes, as Rainer Forst's (Toleranz und Konflikt 2003) reconstruction of the religious and philosophical discourse on tolerance during the seventeenth and eighteenth centuries nicely shows.

Today, the egalitarian, normatively and cognitively inclusive tendency of constitutionalism (rule of law, subjective rights, democratic principles: civic self-determination, 'quod omnes tangit' etc.) enables the fight for rights within the right, that is, the fight within the law against the existing interpretation of law. This fight is essential for gradual and continuous cognitive and moral learning (and unlearning) in modern societies. The function of constitutional law in this learning process is met by Almeida's reconstructive interpretation. The combination of subjective rights with the organizational principles and legal norms of democratic check and balances (*demokratisches Staatsorganisationsrecht*) functions as a 'built-in rightswidener' (Steven Pinker). Therefore, constitutions can bridge the modern chasm between a high-speed cultural evolution and a much slower evolution of our moral psychology. Backed by *built-in rightswideners*, constitutions can stabilize the precarious emancipation of the universalistic *principles* of the individual mind from the reactionary censorship of parochial and egocentric *parameters*. Already in his essay from 2014 in the Cardozo Law Review Fabio Almeida rightly emphasizes that the 'built-in rightswidener (…) could be invoked to end slavery four score and seven years' after the *Declaration of Independence*, 'and other forms of racial coercion a century after that'. This was not despite, but 'because' 'the *abstractness* of the declaration of rights' and the constitutional priority of the right over the good. Even if they ever again were (ab)used 'hypocritically', they

'allowed' 'for the discussion about *who* are their legitimate bearers and opened the door for a new possibility: that every human being might be considered a bearer of constitutional rights' (Almeida).

January 2020

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Acknowledgments

The academic odyssey that led to this book, a result from my doctoral dissertation, would not have been possible without the support of the dearest people in my life. Over the last ten years, I have accumulated an enormous debt to the many people who gave me the support I needed to develop this research. First and foremost, I must mention my beloved son, Eduardo, whose bright and curious eyes were a light in the long road of reviewing and editing the PhD's dissertation. Without him, I would have never had the strength and courage to publish this book.

I will be always grateful for the dedication and support from my family, whose support both during the research period and the publication process was essential. In this regard, I would like to thank Aline Regina, my sister Erika, and my mother, Rosamelia. I am also grateful for my father, Nancides (*in memoriam*), whose memory has always been a candle during the darkest moments of my life.

The support of Justice Maria Cristina Irigoyen Peduzzi was also of major importance. Her understanding of the demands related to a PhD while working in a full-time job was essential for the accomplishment of this endeavor. In addition, I will never be able to express my deepest gratitude for the whole year I spent at Harvard, licensed from my job at the Court.

I also had the luck of finding so deeply committed supervisors, Marcelo Neves and Paulo Abrantes, who took my project really seriously. The sociological motivation provided by my supervisor, Marcelo Neves, was decisive. In the beginning of the research project, I was inclined to agree with sociobiologists and evolutionary psychologists, who sustain an under-determination of sociological processes by our psychology. Marcelo "saved me" from this bias and inspired me in taking sociology seriously, without abandoning my idea of taking psychological and biological aspects of the human nature into account. His presentation of the sociologist Niklas Luhmann, as well as of the works of Talcott Parsons, became a fundamental part of the thesis. Without his academic support – even though we have not always agreed! –, I would have never been able to bring the sociological and biological traditions into the conversation.

The supervision by Paulo Abrantes also had an ultimate impact. This academic endeavor began almost ten years ago, during discussions in a class taught by Paulo Abrantes on the Philosophy of Biology. From that

time onwards, we have developed a productive partnership and friendship, including his supervision on my Masters in Philosophy, which, in many ways, anticipated several of the questions discussed herein. Abrantes' influence is pervasive throughout this trajectory, since he was the one who introduced me to authors such as Peter Richerson, Robert Boyd and Peter Godfrey-Smith – among so many others! –, who are important references. His disciplined and analytic mind was, for sure, a powerful guiding light. Also, I am indebted to the research group led by him on the Philosophy of Biology subject, since many themes explored in the book were subject of discussion the meetings inspired.

Jon Hanson, my supervisor during the period at Harvard, was also a major source of encouragement. Our discussions in his office, his invitation for me to present the findings of my research in an open debate at Harvard Law School and his classes on torts law proved that taking psychology into account is indispensable if we want to fully understand the role of law in regulating social life.

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Introduction

Nothing about law makes sense except in the light of evolution.

The emergence of modern societies, structured around the rule of law, is an evolutionary puzzle in need of explanation. Although traditionally seen as the result of historical, philosophical and sociological contingencies, these societies are also an unexpected and improbable institutional construction when observed through the lenses of modern biological theories of cooperation. *Homo sapiens* is the only animal species capable of cooperating in large-scale societies where individuals are not genetically related.

Although it is possible to find natural examples of animal species whose members live in societies consisting of millions of genetically related individuals or in small societies in which genetically unrelated members cooperate, we are the only known species capable of cooperating under both of these conditions: we cooperate in large-scale societies composed of unrelated individuals. More than that, we cooperate in a culturally and institutionally complex environment. Our interactions are not only based on our biological nature, but also on shared beliefs transmitted through various methods of cultural transmission, embedded in an institutional background and – especially after modernity – in functionally differentiated social systems. We collaborate not only to fulfill our biological needs, but also to fulfill sociological expectations, performing economic, religious, educational, legal and political operations.

From an evolutionary perspective, this is an intriguing question that must be addressed. Social scientists usually assume that life in large-scale societies is the result of cultural, social and institutional history. In this perspective, social institutions such as law, economy and religion facilitate cooperation at higher levels. However, the answer to this puzzle just calls for the following question: Why do these institutions exist and how do they regulate human social cooperation in a way that allows for the growth of large-scale cooperation in our species? Gene-culture coevolutionary theories have been studying this issue from an integrated framework that ac-

counts for social and biological theories of cooperation.[1] These theoretical approaches have provided a successful account of the emergence of human institutions with reference to a coevolutionary background in which specific innate psychological features of the human mind enabled the evolution of social institutions that impose social pressures, requiring the evolution of a complex moral psychology to enable life in a social environment with institutions.

However, whereas gene-culture coevolution theories can explain cooperation in pre-modern societies,[2] they still cannot explain cooperation in functionally differentiated societies as complex as contemporary societies. The primary mechanism that allows for cooperation in large-scale societies, as we will see, is symbolic marking: the psychological ability to identify cultural signs – religion, language, dressing style, tattoos and ritual practices, among others. These markers inform how people belong to particular groups, and they enforce cooperation with a greater number of people because they allow the easy identification of those who are from the same group, allowing the targeting of altruistic acts to benefit group members. However, symbolic marking is not enough to explain by itself the evolution of complex societies that are strongly divided by different symbolic markers. In contemporary democratic societies, cooperation is possible even in a context in which individuals do not agree about the comprehensive doctrines that embody the main values of their society.[3] In other words, individuals in democratic societies are able to cooperate with other individuals who do not share their symbolic markers.

Acknowledging this fact brings into question the discussion concerning how it has been possible, from a biological perspective, that individuals cooperate in large-scale societies with people with whom they are not genetically related and with whom they also do not share emotionally strong symbolic markers. Following the ambition of Edward O. Wilson[4] to achieve consilience between natural sciences and humanities, I will argue that the cooperation level needed to drive the evolution of complex soci-

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1 See Gintis, H. (2011). Gene-culture Coevolution and the Nature of Human Sociality. *Philosophical Transactions of the Royal Society B-Biological Sciences*, 366(1566), 878-888.

2 See Richerson, P. J. and Boyd, R. (2008). *Not by Genes Alone: how Culture Transformed Human Evolution*. Chicago: University of Chicago Press. pp. 235-236.

3 See Rawls, J. (2005). *Political Liberalism* (Kindle ed.). New York: Columbia University Press. pp. 532-702.

4 See Wilson, E. O. (1998). Consilience among the Great Branches of Learning. *Daedalus*, 127(1), 131-149.

eties is possible as a result of the emergence of one particular institutional sociocultural framework: constitutionalism. In this sense, this is an attempt to integrate sociology, biology and legal theory to understand constitutionalism as an evolutionary adaptation to specific historical and sociological circumstances that demanded the emergence of institutions that could accommodate diversity, pluralism and complexity.

I argue that nothing in law makes sense except in the light of evolution. This strong statement, an explicit appropriation of the title of a lecture delivered by the biologist Theodosius Dobzhansky in 1973[5], implies some epistemological commitments, particularly the supposition that evolutionary theory can help us understand how human societies came to be what they are nowadays and the role that law – and more specifically constitutional law – played in this process. However, stating that nothing in law makes sense except in the light of evolution is bolder than that, and this claim needs to be justified. This is the task I hope to accomplish in the first chapter: as I see it, only an evolutionary approach can allow us to understand legal history as part of a much wider process that encompasses not only written history, but also our very history as an evolved biological species. As a result, legal history will be observed as part of the evolutionary history of how we, humans, came to cooperate in such a distinct way.

I discuss the evolutionary foundations of human pro-social behavior in the second chapter. How do we cooperate? In which ways does human cooperation resemble how other individuals in other species interact and collaborate? And, more important, how is human behavior distinct? In this chapter, the human pro-social behavior will be examined as part of natural history. In order to do so, I begin by examining the evolutionary mechanisms that predispose altruistic behavior, such as kin selection and direct reciprocity, in order to explain how human behavior is unique. An important point highlighted here is the role of our psychological dispositions to act in accordance with social rules and to engage in egalitarian and reciprocal interactions – what I call a 'normative mind'. In this chapter, it will become clear how our evolved social psychology paved the way to the emergence of tribal societies such as egalitarian bands of hunter-gatherers.

The third chapter is dedicated to another issue. I will discuss how human societies are to be understood as evolutionary units. Based on Peter Godfrey-Smith's *Darwinian Populations and Natural Selection*, the sociological micro-macro link debate will be addressed. Issues such as the emer-

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5 See Dobzhansky, T. (1973). Nothing in Biology Makes Sense except in the Light of Evolution. *The American Biology Teacher*, 35.

gence of society as an autonomous entity, as described in social theory from Durkheim onwards, and how the social order emerges from individual interactions and plays a causal role on social behavior will be taken into account. I will also assess Luhmann's systems theory, reconstructing it in order to devise a theoretical approach capable of describing the interaction between sociological and psychological processes, by taking as a premise that biology imposes some constraints on sociocultural evolution.

In the fourth chapter, I discuss the role law played in the development of stratified societies. As already mentioned, the prehistoric bands of hunter-gatherers were egalitarians. In the last 5,000-10,000 years, however, things changed and many stratified societies marked by a deep and structural inegalitarianism emerged. How did this happen? In order to discuss the issue, I present the function of law as an adaptive feature of society that promotes cooperation and maintains the social structure. The concept of function is also an important theme in this chapter, insofar as I attempt to demonstrate that it is an abstract concept, applicable not only to biology, but also to sociological entities. The role of psychological predispositions in the evolution of law will be also evaluated in this chapter, where I claim that the normative assumptions nested within our innate social psychology shape a universal structure of law. These normative predispositions can be understood as the natural law root of all legal systems, in the sense that law must adjust itself to the normative assumptions nested within our minds. Law is also presented as a necessary feature in the development of stratification in pre-modern societies, which, as I will argue, became widespread as a result of evolution. Stratified societies prevailed because they were more efficient vis-à-vis other societal forms, at least until modernity.

Constitutionalism is the theme of the fifth – and last – chapter. The question to be answered is: how did modern constitutional democracies reverse the pervasive stratification of pre-modern societies? My hypothesis is that constitutionalism played a fundamental role in this process, by structuring egalitarianism not only in the micro-dynamic level of individual interactions – as in prehistoric hunter-gatherer bands –, but also as a functional imperative regulating the very relationship between social systems. The emergence of such possibility will be explained in strictly Darwinian terms, as a result of the natural selection acting upon the societal structure and sorting out less fit social structures in comparison to others. As I will argue, constitutional societies were selected because constitutions are an adaptive feature in the context of modernity, when functional systems became increasingly differentiated, thus reducing the fitness of pre-modern societies, which were unable to cope with such a complex environment.

Another debated issue relates to the connection between constitutionalism and moral psychology. In order to structure a stable social order, constitutions must be compatible with our innate psychological normative predispositions – or, otherwise, social unrest would lead to rebellions and revolutions, probably undermining the endurance of constitutional societies. As I will sustain, there are strong reasons to believe that constitutionalism, as a matter of fact, fits with many features of our own psychology.

The book is indebted to many theoretical traditions. First of all, evolutionary theory is the most obvious influence. From Darwin to many recent developments within the evolutionary framework, such as gene-culture coevolution theory, allusions to theories of biological, social and cultural evolution will be constant. The reference to evolution is not to be understood as a strictly biological approach, considering the fact that the sociological reality must be understood in its own terms. As a result, this is an attempt to understand social evolution considering an interdisciplinary framework which respects and takes seriously the contributions made by sociologists, economists and other social scientists. In this sense, I am indebted to the research developed by Peter Richerson, Robert Boyd, Peter Godfrey-Smith, Samuel Bowles, Herbert Gintis, E. O. Wilson, Marc Hauser, Paulo Abrantes, among many others.

A major sociological reference here is Niklas Luhmann's systems theory. Luhmann's complex work opens many theoretical possibilities that can be used to structure a theory of how biological and sociological entities relate to each other. The approach to Luhmann's theory will be dialogic, meaning that I will not take his theory as a departure point, but as an important interlocutor whose insights will be debated on, accepted as part of the proposed project or, sometimes, rejected. However, the reader will notice the prominent influence of Luhmann's work, especially concerning, but not restricted to, the description of the modern world society and the transition from pre-modern times. Other social theorists also had a major influence, such as Talcott Parsons, Jonathan Turner, Marcelo Neves, Kent Flannery and Joyce Marcus and David Sciulli, whose theories influenced me in one way or another. Hauke Brunkhorst's Critical Theory of Legal Revolutions was also an important influence, as will be clear in chapter 5.

Another pervasive influence in this text is John Rawls' philosophy. However, his famous two principles of justice will be barely mentioned here. I am more concerned with some secondary insights in his thought, such as the use of Chomsky's explanation of how individuals grasp a language to understand how we reason about normative issues. Another major influence of Rawls relates to his late perception that the stability of constitu-

tional democracies relies on an overlapping consensus. I will refer to these (and other) Rawlsian insights and attempt to provide an evolutionary explanation for them, while simultaneously taking into account sociological and biological considerations.

As I see it, the relevance of this proposal relates to the interdisciplinary approach taken. The complexity of human societies urges us to explain how the social order emerged by making reference to all the theoretical tools available in the pursuit of a balanced and consilient perspective that understands the various scientific fields as complementary, and not opposite attempts to understand social reality. This is an inherently difficult task, although – I believe – a valuable one.

1. Constitutionalism, Evolution and Social Theory: the Need of an Integrated Approach

The market of ideas has already provided a lot of theoretical approaches to constitutionalism. Legal Historians such as Jack Rakove, Gordon Wood, Lynn Hunt, Jonathan Israel, Maurizio Fioravanti, Arthur Jacobson, Bernard Schlink — among so many others! — have carefully analyzed, scrutinized and explained almost every possible historical aspect on constitutional origins' revolutions.[6] Despite their disagreements over substantial issues, legal and moral philosophers from widely different traditions, such as John Rawls, Ronald Dworkin, Jeremy Waldron, F. A. Hayek, Robert Alexy, Hans Kelsen, Carl Schmitt, Jacques Derrida, Bruce Ackerman, Sanford Levinson, among many others who could also be on this list, have also clarified many issues about the meaning of constitutionalism, its premises, strengths and contradictions.[7] The contributions from legal soci-

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6 See, e.g., Rakove, J. (2010). *Revolutionaries*. New York: Houghton Mifflin Harcourt; Wood, G. S. (2002). *The American Revolution - A History*. New York: The Modern Library; Hunt, L. (2008). *Inventing Human Rights: A History* (Kindle ed.). New York: W. W. Norton & Company; Israel, J. (2014). *Revolutionary Ideas*. Princeton: Princeton University Press; Jacobson, A. J., Schlink, B. and Cooper, B. (2000). *Weimar* (Cooper, Caldwell, Cloyd, Hemetsberger, Jacobson and Schlink, Trans.). Berkeley: Univ of California Press; Fioravanti, M. (2001). *Constitución: de la Antigüedad a Nuestros Días* (Neira, Trans.). Madrid: Editorial Trotta.

7 See Rawls, J. (1999). *A Theory of Justice* (Revised ed.). Cambridge (MA): Belknap Press; Rawls, J. (2005). Political Liberalism; Dworkin, R. (1986). *Law's Empire*. Cambridge (MA): Belknap Press; Dworkin, R. (1965). Does Law Have a Function? A Comment on the Two-Level Theory of Decision. *The Yale Law Journal*, 74(4), 640-651; Waldron, J. (2006). Are Constitutional Norms Legal Norms? *Fordham Law Review*, 75, 1697-1713; Waldron, J. (2009). Can There Be a Democratic Jurisprudence? *Emory Law Journal*, 58, 675-712; Waldron, J. (2013). Separation of Powers in Thought and Practice. *Boston College Law Review*, 54(2), 433-468; Alexy, R. and Rivers, J. (2010). *A Theory of Constitutional Rights*. New York: Oxford University Press; Kelsen, H. (2013a). *The Essence and Value of Democracy* (Graf, Trans.). Lanham: Rowman & Littlefield; Kelsen, H. (2009). *General Theory of Law and State* (Wedberg, Trans.). Clark: The Lawbook Exchange, Ltd; Schmitt, C. (1985). *Political Theology* (Schwab, Trans.). Cambridge (MA): The MIT Press; Hayek, F. A. (1998). *Law, Legislation and Liberty*. London: Routledge; Derrida, J. (1990). Force of Law. *Cardozo Law Review*, 11(5-6), 920-1045; Derrida, J. (2012). *Negotiations* (Rottenberg, Trans.). Stanford (CA): Stanford University Press; Ackerman, B. (1993).

ology to understanding the meaning of constitutionalism in modern societies cannot be overrated, and so we must also invoke the research advanced by Jürgen Habermas, Niklas Luhmann, Marcelo Neves and Günther Teubner.[8] More recently, economic and institutional theory has provided lots of insights on the role that law — and constitutions — play in providing a structural framework of costs and incentives to individuals and businesses, and so one cannot forget to mention at least Elinor Ostrom, Douglass North, Adam Przeworski, Eric Posner, Robert Cooter, Jon Elster and, more recently, Daron Acemoglu and James Robinson.[9]

Of course, I could not do justice in this already huge list of names to all those many theorists who have made strong contributions to our knowl-

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We the People: Foundations. Cambridge: Harvard University Press; Ackerman, B. (1997). Temporal Horizons of Justice. *The Journal of Philosophy*, 94(6), 299-317; Ackerman, B. (1999). Revolution on a Human Scale. *The Yale Law Journal*, 108(8), 2279; Ackerman, B. (2000). *We the People: Transformations*. Cambridge: Harvard University Press; Ackerman, B. (2014). *We the People: The Civil Rights Revolution*. Cambridge: Harvard University Press; Levinson, S. (1995). *Responding to Imperfection*. Princeton: Princeton University Press; Levinson, S. (2011). *Constitutional Faith*. Princeton: Princeton University Press.

8 See Habermas, J. (1996). *Between Facts and Norms*. Cambridge: MIT Press; Habermas, J. (2001). Constitutional Democracy: A Paradoxical Union of Contradictory Principles? *Political Theory*, 29(6), 766-781; Luhmann, N. (2004). *Law as a Social System* (Ziegert, Trans.). Oxford: Oxford University Press; Luhmann, N. (2010). *Los Derechos Fundamentales como Institución*: Universidad Iberoamericana; Luhmann, N. (2014). *A Sociological Theory of Law*. New York: Routledge; Neves, M. (2011). *A Constitucionalização Simbólica*. São Paulo: Martins Fontes; Neves, M. (2013). *Transconstitutionalism*. Portland: Hart Publishing; Teubner, G. (1993). *Law as an Autopoietic System*. Oxford: Blackwell; Teubner, G. (2012). *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford: Oxford University Press.

9 See Ostrom, E. (1990). *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press; Ostrom, E. (2009). *Understanding Institutional Diversity*. Princeton: Princeton University Press; Przeworski, A. (2010). *Democracy and the Limits of Self-Government*. Cambridge: Cambridge University Press; Posner, R. A. (2000). Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers. *The Journal of Legal Studies*, 29(S2), 1153-1177; Cooter, R. (2002). *The Strategic Constitution*. Princeton: Princeton University Press; Elster, J. (1988). Economic Order and Social Norms. *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, 144(2), 357-366; Elster, J. (2000). *Ulysses Unbound*. Cambridge: Cambridge University Press; Acemoglu, D. (2005). Constitutions, Politics, and Economics: A Review Essay on Persson and Tabellini's *the Economic Effects of Constitutions*. *Journal of Economic Literature*, 43(4), 1025-1048; Acemoglu, D. and Robinson, J. (2012). *Why Nations Fail: the Origins of Power, Prosperity and Poverty* (Kindle ed.). New York: Crown Publishers.

edge of constitutions in the last few decades and who were not listed. My point here is not to appraise their contributions, but to justify the claim advanced here. And, in order to do so, I must differentiate the proposal hereinafter developed from the theoretical body of other disciplines, highlighting the specific contributions of an evolutionary approach to legal theory. In this sense, the first question I want to address is quite straightforward: are we really in need of an evolutionary perspective to understand constitutionalism? After all, what should we gain from studying constitutionalism from *another* approach, considering the fruitful insights the already existing perspectives have already provided? Do we gain anything at all that we did not have within the theoretical body of the already existing set of disciplines?

In this chapter, I argue that an evolutionary perspective offers new insights concerning the understanding not only of legal dynamics, but specifically of the emergence of constitutional law, its mode of change and its specific function in societal[10] organization. In this sense, the quick and dirty answer to the proposed question would be that the adoption of an evolutionary perspective allows us to see theoretical problems and solutions in legal theory that we could not see through the lenses of alternative theories.

In order to understand this point, it is important to clarify what I mean by adopting an evolutionary approach. Scholars and legal practitioners are used to talk about legal evolution in a usual, but wrong, sense. They assume that law evolves when it develops from a primitive legal system to a more complex one, usually the kind of legal order where they carry their lives. In this sense, they say that Western law, based on respect for human rights, separation between church and state and on democratic participation, is a more developed system than the alternatives, both from the past and from the present. Legal history is seen as the history of how the normative institutions of the present became what they are today, and legal evolution is conceived of as the unfolding of law to its full potential, changing to "better" forms of law.

Alan Watson's *The Evolution of Western Private Law* is a major example of this way of thinking. The intent of the book is clear from the beginning:

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10 As will clarify in the text, I outline a difference between the concepts of "social" and "societal." The domain of the *social* is related to social relations and social roles, as understood traditionally in sociology. The domain of the *societal* relates to society and its overall structure, as will become clearer in the subsequent chapters.

Watson aims to "show the evolution of Western law as a process,"[11] and in every use of the expression 'legal evolution' in the tome, the term could be replaced by 'development of law'. In the beginning of the first chapter, this is stated more clearly, as he argues that a true concept of legal evolution must be built on history - not abstract theorizing! -, grounded on "individual sources of law, their availability in a given society, and their interaction."[12] The same trend could be observed in other excerpts, where Watson focuses his attention on the unfolding of newer legal institutions from ancient traditions, often stating the direct influence of remote causes such as Justinian's *Corpus Juris Civilis* on the French Code Civil as if the latter were a natural unfolding of the former.[13]

Watson is not alone in this reading of legal evolution. Many authors also refer to the *evolution* of specific legal institutions when they are in fact alluding to their *historical development* or about how that particular branch of law became as sophisticated as it is contemporaneously. There are many academic papers and books about the evolution of democracy, human rights, contracts, property rights and of as many legal institutions as one could possibly devise, and most of them are referring to the history of such appraised institutions.[14]

From the standpoint of evolutionary theory, however, this is a misuse of the expression 'evolution'. First, evolution is not simply history. Evolution, as understood in evolutionary theory — Charles Darwin's theory, in its current formulation —, is change mainly through processes of selection in populations that display variation and inheritance.[15] It is clear that Darwin

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11 In Watson, A. (2001). *The Evolution of Western Private Law*. Baltimore: The Johns Hopkins University Press. p. xi.

12 In Watson, A. (2001). The Evolution of Western Private Law. p. 1.

13 Watson, A. (2001). The Evolution of Western Private Law. p. 135.

14 See, e.g., Picado, S. (2004). The Evolution of Democracy and Human Rights in Latin America: A Ten Year Perspective. *Human Rights Brief*, 11(3), 1-4; Buergenthal, T. (1997). The Normative and Institutional Evolution of International Human Rights. *Human Rights Quarterly*, 19(4), 703-723; Owen, D. G. (2007). The Evolution of Products Liability Law. *The Review of Litigation*, 26, 955-989; Anderson, T. and Hill, P. J. (1975). The Evolution of Property Rights: a Study of The American West. *Journal of Law and Economics*, 18, 163-179; Parker, G. (2015). The Evolution of Criminal Responsibility. *Alberta Law Review*, 9, 47-88; Tabusca, S. (2013). Evolution of Human Rights Protection Within the EU Legal System. *Law of Ukraine Legal Journal*, 256-264. These are only some casual examples of my claim.

15 See Godfrey-Smith, P. R. (2009). *Darwinian Populations and Natural Selection*. Oxford: Oxford University Press. p. vii; Hodgson, G. M. and Knudsen, T. (2010). *Darwin's Conjecture*. Chicago: University of Chicago Press. p. vii.

himself did little to link his theory to an evolutionist approach. The first edition of *The Origin of Species* did not even use the word 'evolution', and Darwin wrote 'evolved' only once, usually referring to his theory with phrases like 'descent with modification'.[16] However, it is undeniable that his theory has been explicitly related to evolution, which happened mostly as the result of Herbert Spencer's efforts to popularize his theory.[17]

Taking the evolutionary road in order to explain the processes of emergence and change of legal and political institutions means that we cannot credit them to be simply the result of history. Of course, history matters, and evolutionary explanation is a kind of historical explanation in its own right.[18] As a result, it also takes history seriously, albeit in a very different sense from legal scholars' usual historical approach. When explaining the evolution of a particular institution, legal scholars are usually satisfied if they can elucidate the sociopolitical circumstances and the sequence of statutes and judicial decisions that have led to a specific state of affairs. However, this is not enough if the task is to adopt an evolutionary stance; although all these historical and social elements have to be weighed in, it is also needed to clarify if any evolutionary processes acted in order to select the institution subjected to examination.

Second, there is another sense in which the common usage of the term 'evolution' by legal scholars is mistaken from the perspective of Darwinian theory. Although not always explicitly recognized, it is not unusual, when describing the evolution of a legal institution, to assume a *biased normative presumption* in favor of the institutions of the present when comparing them with those of the past. As a result, evolution is understood as a ladder that leads to better institutions. History is an arrow of progress that always leads to the best possible world – not surprisingly, and, ethnocentrically biased, *our own contemporary world.*[19]

The political scientist Adam Przeworski calls this the *retrospective criterion*, which is epistemologically unjustified (and unfair?) not only to the past, but also to the present times.[20] As ourselves, the citizens of the 18th century had no idea of the future results of their actions, and surely their

16 On this point, see Hodgson, G. M. and Knudsen, T. (2010). Darwin's Conjecture. p. 30.
17 See Bowler, P. J. (1989). *Evolution*. Berkeley: University of California Press. p. 251.
18 See Beatty, J. and Desjardins, E. C. (2009). Natural Selection and History. *Biology & Philosophy*, 24(2), 231-246.
19 See Przeworski, A. (2010). Democracy and the Limits of Self-Government. p. 3.
20 See Przeworski, A. (2010). Democracy and the Limits of Self-Government. p. 8.

political ideals were far from being the same as ours. We simply are not justified in reading their actions as if they were trying to build the kinds of institutions that we came to have *nowadays*. No matter what their conscious objectives were, the plurality of historical, political, economic and sociological circumstances brings contingency into play and the certainty that the resulting *status quo* will be far from the intended purposes. Reading our present state of affairs as the necessary result of direct will is a mistake.[21] Nevertheless, it would be also a mistake to conceive of them as a product of pure randomness, a simple succession of chaotic events.

These are good reasons for rejecting this traditional approach to legal evolution, but it does not mean that the insight that law is a product of evolution should be abandoned. On the contrary, we should take this idea seriously from the very beginning and understand evolution as proposed by Darwinian evolutionary theory. This assertive raises an immediate question: how can evolutionary theory be applied to law, if it has been elaborated in order to explain biological phenomena? This is a legitimate question that deserves to be answered, and will be addressed in this and in the following chapters.

Nonetheless, Darwinian processes are not limited to the biological world and, given some conditions, we might expect evolutionary processes to arise in other contexts as well.[22] Acknowledging this point brings us to the main question of this chapter: *to what extent can evolutionary theory contribute to the understanding of how constitutionalism have emerged and evolved?*

After all, constitutional law has been studied and explained through many theoretical lenses. Legal and moral philosophers, sociologists, historians, economists and many more scholars have discussed and unveiled most of constitutionalism tenets and how its institutions innovated not only in the legal field but also in the sociocultural framework of modern civi-

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21 My claim is not that all historians adopt such a naïve point of view about the evolution of society, but that this is a common-sense understanding among many legal scholars. Historiography has progressively abandoned this approach at least since the late 1920s, when the *Annales d'Historie Economique et Sociale* developed an interdisciplinary paradigm through the adoption of models from fields other than the social sciences. See Hobsbawm, E. (2011). *On History* (Kindle ed.). London: Weidenfeld & Nicolson. p. 1206. On a late history of the Annales School, see Hunt, L. (1986). French History in the Last Twenty Years: The Rise and Fall of the Annales Paradigm. *Journal of Contemporary History*, 21(2), 209-224.

22 See Mesoudi, A. (2011). *Cultural Evolution: How Darwinian Theory can Explain Human Culture and Synthetize the Social Sciences*. Chicago: University of Chicago Press; Godfrey-Smith, P. R. (2009). Darwinian Populations and Natural Selection.