

Fábio Portela Lopes de Almeida

Constitution

The Darwinian Evolution of a Societal Structure



Nomos

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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

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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 solved 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

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‘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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