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Law and Human Evolution

Ricardo Rivero Ortega

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Ricardo Rivero Ortega

Translated from the Spanish

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Law and Human Evolution

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Introduction. Law Makes Us Human

1. Does Law Humanize Us?

The hypothesis I put forward in this book is the following: law changes people's minds, producing a cognitive and epigenetic impact on individuals in regulated societies. Our laws and systems of justice would thus contribute to the course of evolution.

What would become of us without laws? Could we live by following our natural tendencies, guided only by instinct in each of our actions? Would we behave as human beings in the absence of frameworks that limit our conduct? Do we truly need to follow rules?

Legal theory takes the answers to all these questions for granted. It always begins from the desirability of order, without probing the psychological repercussions of submitting to guidelines set by others. It scarcely turns its attention to those who will have to obey the rules, honoring the social contract.

Inertia is probably the main explanation for compliance with rules. Most people simply do what others do, what has always been done, or what is expected of them. It is clearly a comfortable, safe, and guaranteed position for avoiding reproach. "Normal" people do not want trouble.

Each individual who conforms to the rules contributes to social coexistence, benefiting themselves by making possible both the planned pursuit of their ends and predictability—a considerable advantage for our species and for each of its members, especially the best adapted.

Morality—understood as a cultural mechanism for tuning multiple interests to one another—and law, guaranteeing that morality is effectively enforced, would simultaneously produce profound consequences for individ-

uals' personality profiles. They would foster more considerate orientations toward others.

It is clear that law and morality offer default tools for the dynamic coordination of conduct. We human beings accept acceptable parameters of behavior in exchange for the advantage of being able to predict how others will act. Without a doubt, the capacity to anticipate reactions is one of the great achievements of the species.

We have paid little attention to the transcendent effect of a potentially collaborative environment. Thanks to the possibility of anticipating, in many cases, the consequences of acting or not acting, each of us can act while remaining aware of the foreseeable results, condemning those that are wholly aberrant.

Through rules we are free, we relate to one another, we can decide better and think more slowly. Our understanding of ourselves, of our relationships with others, and of our surroundings can be refined, moving beyond the mere recognition of crude instincts and coarse, self-interested appraisals.

It is not easy to explain this to children, to adolescents, or even to so many immature adults. Anyone who, in defending their own interest, is unable to internalize another's point of view is at a disadvantage for coexistence, exposed to an endless string of conflicts and disputes of uncertain outcome.

Rules correct the limits of self-restraint, contributing an element of external restraint that is not exclusive to law but is predominant within it. Other techniques of social construction perform similar functions—above all others, instruction and education.

Of course, we must in no way think that the transformation of the human being is owed to rules alone. It is culture as a whole that fosters the virtuous circle of external restraint that may have brought us to our present self, more considerate and more sociable.

In this book, I am going to focus on four basic aspects of law that reveal its contribution to the development of advanced personality profiles—advanced in the sense of capable and collaborative. Grounded in our anthropological premises, they would orient us in a positive direction.

The acceptance of individual freedom in the form of autonomy of the will, the perfecting of decisions through procedure, the encouragement of reciprocal collaboration through contract, and respect for dissent all help us become better humans.

Being basic pillars of our civilization, they can be redefined in light of new contributions on behavior—psychological or neurological discoveries that

call into question the dogmas of free will, rationality, altruism, and non-conformity in the face of power.

They should not be conceived and explained solely from the perspective of lawyers, nor even of jurists. To understand deeply what freedom is, the drive to arrive at the right decision, communication for mutual support, and the guarantee of tolerance requires turning to more than one science.

Placing autonomy of the will as the first topic is neither arbitrary nor thoughtless. Our concept of the person as a bearer of rights is bound up with the idea of agency—being capable of deciding and acting motivated by one's own intentions, and therefore disposed to choose freely.

Today, however, we know that free will is intensely conditioned by neurological and physiological impulses within the person that they themselves are often unable even to detect. The truth of this premise is once again being debated philosophically, which unsettles us.

We are not entirely free, but we need to be. If we individuals believed that the future is already written, at every moment we might let ourselves be carried along by sheer inertia; circumstances would drag us where they would, leaving us unable to resist the consequences of the course of events, resigned to an inescapable *fatum*.

For this reason, it is absolutely essential to vindicate both personal freedom and the responsibility associated with one's own acts. We prefer people who are conscious of the repercussions of their preferences, aware of the significance of their capacity to choose, for how they choose is anything but a matter of indifference.

The negative personal and social impact of excessive prohibitions reveals the inadvisability, or exceptional character, of this technique of regulation. Extreme limitation should be reserved for the most harmful behaviors, those with irreparable effects on the rights and interests of others.

Prohibition presents several drawbacks. Besides igniting the impulse to disobey noted by Freud, it deprives the person of the opportunity to learn from their own mistakes—so important for progress and for the realistic adjustment of conduct to genuine needs.

To avoid this, society must carefully calibrate external restraint, favoring the preferable alternative of self-control. This is the original role of education, followed by rules (religious, moral, and finally legal), which will accompany and condition us throughout our entire lives.

The second topic I will analyze is that of rationality and getting it right in human subjective decisions. A premise of both economic and legal theory, it has long been assumed that each person acts motivated by their own

interests—which is true only up to the point of errors in perceiving those very interests.

We are not maximizing, rational economic beings, but beings affected by our surroundings and by the conditioning architecture around us. The application of cognitive psychology to the science of decision-making, together with behavioral economics, exposes our many mistakes and cognitive biases.

We know that we make errors over the long run, that we tend to confuse reality with partial views of it, that we import our own particular preferences into the false image of objectivity. We try to deceive ourselves with self-satisfied stories that justify each of our actions.

Recognizing these biases should have an impact on regulation and public intervention aimed at preventing risks and correcting abuses—if indeed we are able to correct these same cognitive biases when it is public authority that decides, since even experts get it wrong more often than we think.

In the effort to avoid error, procedure and process have been designed as institutional techniques that guarantee the incorporation of the greatest number of relevant points of view. Having those who may be affected by a decision take part in it—*Audi alteram partem*—prevents unconscious bias.

The value of information must also be noted, all the more so in a social context that heightens it. One of the human talents that distinguishes us is the capacity to gather data and manage it intelligently in order to meet the needs that arise, solving problems or creating opportunities.

A third chapter will address the human capacity to collaborate, interacting on the basis of a sense of altruism and reciprocity. Identifying the keys to cooperation and mutual support will help us pinpoint the foundations of contract, alongside other institutions designed to tune positions to one another socially.

Today we know that we are altruistic only up to a point. We tend to act with full generosity toward those who share our genes, but the degree of empathy decreases with distance and finally turns into mere exchange. The design of institutions and networks of solidarity should not overlook this tendency.

That said, we must underline the importance of communication and language. The account of the reasons for mutual consideration without immediate reciprocity must be constantly tended by those who manage society. Eusociality and reciprocity arise from the consideration of everyone.

For this same reason, trust and safeguards against deception must be protected, penalizing manipulation and distortion, since violating good faith upends many social relationships. We will see how important it is to main-

tain this perception, which is key to belief in communication and collaboration.

The final chapter will deal with matters of public law, presenting an updated version of certain constitutional guarantees. The protection of minorities and ideological dissent, together with tolerance, prove to be indispensable cultural contributions to human progress.

There is a universal sentiment in our species by which we react against abuses of power, yet paradoxically we display conformist tendencies out of the incentive to act with the majority (we are chameleon-like). We reject dissent, minorities, and those who think differently.

A first impulse (the fight against injustice) preserves democratic hope, but the second represents a threat to it, because societies need dissent. So many times in history, those who were regarded as offenders later became the leading figures of the principal progressive changes.

Social psychology has pointed to the risks of the so-called Lucifer effect, a group dynamic observable in schools and in prisons. It is also, with increasing accuracy, identifying techniques to counteract it, beginning from the need for its recognition and its legal and psychological prevention.

We need to correct chameleon-like ethics, whose reason for being is adaptation to living alongside others. Although conformity can foster equilibria of relative satisfaction and stability, it also often conspires against the innovations required to adapt or to seize opportunities.

The guarantee of the protection of minorities, constitutionally upheld in environments of tolerance, has functioned as a reserve of the capacity for alternatives and change in relatively open societies. The possibility of opting for different models, contrary to the hegemonic current, offers the advantage of adaptability.

Our culture of freedom, procedure, contract, and the guarantee of dissent shows us that rules can transform the human being and the societies in which we live together. The virtuous circle of a natural external restraint even guides our evolution, transforming us for the better in several ways.

Of course, law does not achieve this on its own. An entire social context is required, one in which education and other institutions play a key role, with rules being only one of the ropes along the towpath of civilization—the channel that guides our conversion, after thousands of years of evolutionary logic.

But then, which rules humanize us? Those marked out by our nature, or others dictated by power? Must we accept unjust laws, or act according to our own judgment? Can we, from our knowledge or intuition, point to

rules and laws better suited to humankind? Can we characterize natural law?

2. The Natural Instinct for Justice

I am going to deploy an arsenal of erudition to answer the crucial question, seeking the source of justice loaded down with the backpack of history, philosophy, rational thought, and the commonplaces of our culture. Perhaps in this way I will avoid falling into the errors of others—or perhaps I will simply repeat them.

The Greek thinkers set out the debate with their dilemmas: Critias, Callicles, Thrasymachus, and Gorgias upheld the *law of the strongest* as a reflection of the dictates of nature, later checked by the majority of the weak through legal strategies for domesticating the powerful.

Opposing both the self-control and the external control of the “supermen,” the Sophists just cited characterized the risks of abuse in the exercise of power, while also identifying the “natural” with excessively stark visions of the will to domination (later inherited by Nietzsche).

When Thrasymachus identifies law with the will of the strongest, natural law and positive law merge into one. Socrates’s opposing position offers a different, “natural-law” alternative not tied to power: what is just is to do no harm. It aspires, instead, to self-knowledge.

Of course, we must affirm that not everything innate is best. Many very natural human tendencies must precisely be reined in by law: the impulsive and immoderate drive for personal revenge, or prejudices based on prior positive or negative experiences (part of our original imprint).

Is an eye for an eye a natural law? Do all societies punish homicide with death? In what cases? Do we find common transgressions? Is there a human universal that marks out the domain? Is there any justification for inflicting pain on others? Do we need it, or do we think we need it? Is revenge human?

In some way we have evolved from the acceptance of brutality as a technique for relating to one another toward the recognition of alternative and refined modes of expressing certain instincts. In this way, culture has, over time, built up a natural-law concept grounded in otherness: others are ourselves.

The best Greek roots of our civilization do not display a natural law of pure passions and feelings. On the contrary, they are grounded in *paideia* and in the contributions of the Stoics, beginning with Diogenes, whose messages of ataraxia and self-control are shared by the Epicureans.

The influence of Diogenes and Stoicism would pass to Panaetius and, from him, to Scaevola. The work of Panaetius of Rhodes on duties, together with other texts concerning the magistrates, would be reflected in the writings of the Roman jurist, pointing to nature as a norm of moral conduct.

Stoic philosophy derived natural law from the ideas common to all men and from a life lived in accordance with nature. Experience and common sense would be the source of shared opinions—the *consensus gentium* later invoked by Cicero as the finest expression of the Roman law that followed.

In *De Legibus*, he offers the primary source (with antecedents in Plato and Aristotle) of the concept of natural law, associating it lucidly with human intelligence, a universal capacity for reasoning that would allow almost everyone to recognize it in common.

Such *recta ratio* must be projected onto laws and onto their interpretation, which should likewise be in accordance with nature and oriented toward the satisfaction of human needs. This would be achieved through several techniques of implementation: *bona fides*, *iusta causa*, and, of course, *aequitas*.

Further on, he spells out certain universals of the human essence: “Is there any people that does not love courtesy, kindness, gratitude, and the acknowledgment of good deeds?”

Is there any that does not hate and despise the arrogant, the wicked, the cruel, and the ungrateful?” For Cicero, “law is equivalent to nature.”

To the question, “Do you think that the science of law is to be grasped not from the praetor’s edict, as most do now, nor from the Twelve Tables, as the ancients did, but from the deepest principles of philosophy?” he answers: “...the nature of law...must be sought in the nature of man...”

Law, by contrast, can unjustly contradict nature, in a classical dialectic reflected in Sophocles’s *Antigone*, whose conflict with Creon exemplifies the tension between the prohibitions of authority and the need to satisfy the deepest human feelings, of which Antigone is an archetype.

Like Antigone, for the Greeks *Themis* was the representation of natural equilibrium, opposed to the one imposed by the power of men. *Dike* too watched over human conduct, personifying the response to injustice. It is no accident that we speak of natural law and justice, both in the feminine.

The original concept of *Dike*, moreover, evokes the natural path, that which is not crooked, what must be done to keep conduct in line with virtue. It would inspire the just to behave as they should, while punishing the deviant, thus protecting the sense of what is right and fitting.

On the other side stands bad positive law, when the law tyrannizes man and forces him into many things contrary to his nature, subverting his moral

genes. Ever since Solon, Greek culture vindicated the lawgivers capable of expressing in their codes the sentiment of justice.

At the extreme of the claim to a biological universality of the legal stood Ulpian: "Natural law is what nature teaches all animals; for this law is not proper to the human race but is common to all animals that are born on the land, in the sea, and also to the birds."

After the fall of the Roman Empire, its vast political and intellectual space would be occupied by the Catholic Church—first the Church Fathers and later Saint Thomas Aquinas. They would make the discourse of natural law their own, bringing it into the ideological heritage of religion, stripped of part of its original meaning, narrowing the genus to a single species.

From Lactantius to Saint Thomas there occurs the transmigration of natural law into the Ten Commandments, with which it is identified in a religious synecdoche that equates *lex naturae* with *lex divina* (in its Catholic version) and also incorporates the idea of justice alongside the other cardinal virtues.

Reformation and Counter-Reformation would leave their mark on the understanding of this message, with the protection of the divine and natural order identified more or less with the State and the Church, reaching, in certain notable versions, the justification of tyrannicide on the basis of the sovereignty of the people and the social contract (Mariana).

The conviction that a natural law exists is reinforced by the so-called School of Salamanca. Its defense of free will (Molina) and of the rights of the inhabitants of America (Vitoria) would forever change the principles of public law and the law of nations.

In the center of Europe, and after Vitoria, Thomasius would affirm with conviction: "the whole of morality can be demonstrated from nature," distinguishing natural law from divine revelation and holding that it is written in the heart (today we would say the brain) of all men (human beings).

Many years later, another great thinker also upheld an innate concept of law, in a work on the contribution of Rome. Law, according to Ihering, pre-exists the will of the legislator, and indeed any human intention—which, he tells us, finds it rather than creates it.

Is there an instinct for law just as there is an instinct for language? The contributions of Chomsky, later followed by Pinker, show the innate character of speech and the expression of meanings. Can we point to similar elements in the original imprint of the human being? Are we born with a propensity for justice?

Would inheritance, for example, be natural? It is an institution in which property and family converge, two of the phenomena around which pri-

vate law is built. All cultures seem to share rules about inheritance (with variations), so we might believe we are dealing with a “natural” institution, in a certain sense.

But we have already cited Moore’s critique of equating the natural, or what is considered good, with “the good.” In reality, inheritance may be accepted by all cultures in different forms, but that does not mean it is an unquestionable institution in some of these expressions.

A different example: is the reaction of rejecting non-cooperative behaviors natural? Freeloaders and those who fail to pull their weight are punished in most human groups, since fostering their proliferation would end up undermining the group’s chances of success, if each person looks only to gain an advantage.

Do legal universals really exist? Pinker ends his book *The Blank Slate* with a list of those he considers scientifically proven, several of which could easily be linked to legal institutions—which, by virtue of their inclusion on the list, would have to be considered natural.

This list is taken from Donald Brown’s book *Human Universals*: mediation of conflicts; collective decision-making processes; inheritance; institutions of collective action; law (as a compendium of rights and obligations); sanctions for harms to the community; and resistance to the abuse of power and excessive domination.

If they are real, here would lie the foundations of the natural-law tradition. But the positions of dozens of theorists who dispute the concept of natural law have nothing to do with this list, generating a body of literature at times as tedious as it is difficult to follow in detail.

I lay claim to Aranguren’s functional concept of natural law: “a pure principle of heuristic significance and value, like an impulse toward a good that is always ‘sought,’ as a concept more intentional and functional than material, and, in short, as dialectical and essentially problematic.”

The most important thing about this view is its emphasis on the “function of openness” it attributes to natural law: “...to keep law open to the totality of culture (...) and of society (the people).” The natural-law tradition would serve both to correct the positive rule and to inspire it against outdated *mores*.

In this sense, it would serve not only to “find the law” but also to “make the law,” allowing for institutional and social models that are alternatives to those upheld by a given *status quo*. Legal technique must necessarily have humanist roots, always, on pain of losing its way.

We need this natural-law approach, grounded in the knowledge of the innate tendencies of the human being and in the search for the legal solutions

and institutions best suited to foster the finest developments, encouraging empathy, mutual respect, collaboration, and the flourishing of people.

How is it that human beings come to consider one another and refrain from attacking each other? Where does the key to collaboration lie? What factors influence the development of cooperative societies, with a majority of individuals willing to renounce harming others? What is the secret to forming this kind of person?

3. Living Together Adapts Us to Rules

The natural relationship between human beings entails an acceptance of the other's position. I can never be entirely right, nor always get my own way. The more I acknowledge that the other person is right, the more I will get things right myself. Accepting that I may be mistaken helps me realize myself as a person, in relation to others.

The phrase inscribed on the pronaos of the Oracle of Delphi, "*Know thyself*," has been a commonplace ever since Plato put it in the mouth of Socrates. Joined to the call for moderation—"Nothing in excess"—it evokes our deepest cultural roots. Both ideas reflect Apollonian messages of self-control.

Those who traveled to the navel of the world, in antiquity, needed answers to their private and civic uncertainties. Private individuals and representatives of governments questioned the Pythia about the right decisions to make; they sought to get it right, they sought the pristine source of wisdom.

We have still not found it, perhaps because it does not seem possible to attain *areté* and become better without first understanding what we are. And this despite the fact that we might seem, today, to be in favorable conditions to achieve it, thanks to the advances of anthropological and genetic knowledge, of neurology, sociology, and psychology.

Neither the inward gaze nor the self-examination of conscience allows us to know what the proper course of action is in each case. Even when meditation might facilitate mental states well suited to tranquility, focusing us on predetermined goals, we can often fail to consider others.

The answers are not found in the self alone, since the conduct of each person is inseparable from their surroundings and circumstances. The "field" matters a great deal, as defined by social psychology—one of the areas of research to be reckoned with in any study of human behavior.

The key to the rules of conduct is coexistence, with its corollary of external safeguarding for social harmony. From this matrix are born culture, civilizations, religion, and, as the product of them all, law—the limit designed by those very forces for external measure and control.

In Skinner's radical version, we would be dealing with a meme used to repress actions: "*If there is any purpose or direction in the evolution of a culture, it has to do with bringing people more and more under the control of the consequences of their behavior.*"

Not far from this diagnosis lies Freud's thesis set out in *Civilization and Its Discontents*, surpassed by Marcuse when he offers a solution that integrates the pleasure and reality principles. It is hard to accept from a Marxist explanation of law as the will of the dominant class erected into law.

This is a mistaken analysis, in my opinion, because it is not necessary for anyone to reign in order for law to be born. All societies perceive the need for rules, whose reasons for being are proximity, shared life, and interrelations. Parameters of behavior are the price of sharing.

Coexistence, not force, is the explanation. Anthropology does not necessarily link the birth of the legal with the power of a hegemonic caste. Here two visions clash, heavily conditioned by a bookish gaze upon the Roman tradition, as against others that warn of an ethnocentric bias.

Among the former, there is the account of imposed ancient law in the work of Henry James Sumner Maine. *Ancient Law* is a classic book from 1861 on the formation of legal orders, originally tied to custom and religion, in aristocratic hands.

Among the latter is Bronisław Malinowski, already in the twentieth century, having come to know the institutions of the argonauts of the western Pacific. He describes primitive law and order in his account *Crime and Custom in Savage Society*, whose first part is devoted to questioning the dogma of automatic submission to custom.

In his view, reciprocity and self-interest must be regarded as fundamental elements in the observance of rules. The emphasis on the individual perspective calls into question the sociological visions of an original communism, a prior state of nature according to Durkheim.

The pursuit of private benefit and advantage, tempered by a pressing need for collaboration to protect against the elements and against enemies, seems to be the most plausible description of a primitive society. Even today, though, Kropotkin's visions clash with those that emphasize self-interest.

When do human groupings arise with such a degree of exchange and interdependence that we can speak of a society? Accepting the classical aphorism *Ubi societas, ibi ius*, we would need to identify the origin of societies in order to date the birth of law.

The emergence of the first agricultural societies made possible an increase in the number of individuals in groups, feeding back into communication

and collaboration among them. In Dunbar's thesis, this is the origin of language, from grooming to gossip, evolved into narrative for describing stories and behaviors.

Groupings, culture, and restraint develop together: "...without the foresight and conscious discipline that Neolithic culture introduced into every sphere, it is doubtful that the more complex social cooperation that developed would have appeared..." The *mores*, morality, arise as customs in the village.

The most sophisticated techniques of "mind reading" would be the result of an evolution: "...the fifth order of intentionality, and all the complex social phenomena that depend on it, did not appear until anatomically modern humans came on the scene barely two hundred thousand years ago."

To what extent could this revolution of social fields have fostered cerebral developments and genetic modifications in the human being? This is a key question, because it may allow us to forecast future developments in which we transform ourselves as a species, both culturally and biologically.

Although the possibilities offered by biotechnology may strike us as dystopian, in reality they merely enable more incisive means, acting directly on genetic material. The selective social action favoring particular types of people has been going on, eugenics aside, since the beginning of time.

Not only environmental pressures but also the cultural conditioning factors derived from them have shaped the physiognomy of human beings. What we know more clearly today is that they have done so upon the human psyche, making it evolve from a tribal mentality to a far more advanced one, which continues to change.

Our brain has been described in modular terms, as an accumulation or superposition of layers. Its disproportionate dimensions would explain the extended need for parental care when our young are born, imprinting a greater educational stamp in the earliest and most precarious stages of development.

It is not only genes that have conditioned us. These have interacted with culture in a decisive way, and continue to do so. The process of evolution presents a cultural factor whereby everyday behaviors affect the course of human development. And among these determinants, rules too have been noted.

Authors such as Cavalli-Sforza and Marcus Feldman have analyzed, with mathematical models, the influence of culture on evolution—a reconsideration in a Lamarckian key that transcends the classic controversies between genetic inheritance and environmental variables, since the two interact.

This is the synthesis of the theory of gene-culture coevolution, upheld by Wilson and Lumsden, also situated in the Neolithic changes: "...human populations increased considerably in density, concentrating in villages and then in city-states," fostering an interaction between genetics and culture.

"It is a complicated and fascinating interaction in which culture is generated and shaped by biological imperatives, while its biological traits are simultaneously altered by genetic evolution in response to cultural innovation."

This process would catalyze the virtuous circle of external restraint. Social coexistence fosters pressures that orient conduct in order to adapt it to the best common outcome. And this social intervention would favor advantageous epigenetic adaptations: individuals who are more restrained, less aggressive, and more collaborative.

In what contexts do the restrained prosper, and in what environments do the unrestrained triumph? There can be no objection to the relationship between certain institutional developments and the reduction or increase of behaviors that show a disregard for others. That is what law is about.

The biological explanation lies in the thesis of self-domestication, which makes us docile and apparently younger. The reduction of testosterone and cortisol, together with other consequences (feminization and paedomorphic traits), would have allowed us to evolve and become a cooperative species.

Our species may be predisposed to violence and aggression, but it has also developed the capacity to repress these impulses through techniques of mental restraint essential to the coexistence of groups. Culture (from law to cooking) has been the lever of this talent for transformation.

Such rules take shape after the passage from *ethos* to *mores*. Ethics would be the distillation and source of socially oriented habit and custom, sooner or later turned into law. The source would be a personal ethics described by Aranguren: "psychogenetically, the internalization of the community's moral tribunal."

Similar progress is observed in the development of each individual, through social pressure, since character begins with the "terrible twos," at the very threshold of infancy, when tantrums and fits of rage accompany the self-recognition of personality, in contact with others.

It is not surprising that this moment coincides with the most common decision to enroll the child in nursery school or daycare, bringing them into a context of socialization in which their demands must inevitably be coordinated with those of their peers, so that they become architectonically aware of not being alone.

The role of socialization and education is therefore crucial. Schooling fulfills the purpose of steering the person still in formation toward compliance with a considerable number of rules, outside the family sphere: schedules, respect for classmates, obedience to teachers, and acceptance of rules of conduct.

Is education natural? If we heeded Rousseau's reflections in *Emile* (and in *Julie, or the New Heloise*), we would consider it preferable to leave children to their own devices, relating directly to their surroundings—but we do not abandon our children to the elements. We educate them.

Law and external rules can be regarded, like education, as something artificial—the same is true of technology—but just as machines condition our cognitive development, the frameworks of public instruction and legal rules guide human biological progress.

These considerations bear on the very origin and meaning of law, including its “natural” roots, in an integrative understanding of the positive rule, social convention, and the human instinct derived from one's own sense of justice, in the effort to find the first common source of both rules and education.

The two share their capacity to shape and adapt us to a social environment, their orientation of one's own desires in tune with the aspirations and needs of many other individuals. They recognize persons, but within groups, not in isolation and not solely by their particular interests.

What is the principal characteristic of our present-day societies? We keep learning throughout our whole lives. Rules change, knowledge evolves, each of us must advance together with everyone else, which obliges us to keep training ourselves continuously, to remain capable of adapting.

In a certain way, we remain childlike. Thirty is the new twenty. Fifty is no longer considered old age. Our heterochrony recalls the axolotl, a species of salamander that retains paedomorphic traits and a capacity for regeneration with notable adaptive advantages.

Another distinguishing feature of our present-day social fields is transparency. We are not only exposed to the surveillance of public authority; we also reveal ourselves to others through social networks, with a new intensity. Everyone's behavior is known to others, who of course will judge it.

Although these developments were already foreseen by Giddens, Vattimo, and others, today it is the Korean-born philosopher based in Germany, Byung-Chul Han, who is the champion of the discourse critical of transparency, since it does indeed entail coercive risks for the free development of a personality that would be born of privacy.

We must be highly alert to these risks, which constitutional culture does not ignore—from those who formulated *the right to be left alone* to the safeguards against the abuses of information technology in the Spanish Constitution. That said, let us also consider the cognitive and behavioral impact of these transformations.

People have always been influenced, to a greater or lesser degree, by what others think or say. Today, the impact of social interaction has grown exponentially, which means that these “field” conditioning factors may be greater than ever before, even as individualism also grows.

Is this a paradox? In our societies we observe profiles that are ever more eccentric and insistent on their difference, all the more present the larger the communities into which they are inserted. Peculiarities proliferate in megacities, not in villages. Is it not true, after all, that human development is bound up with the growth of groups?

Our social surroundings change over time, but there are certain pillars that sustain the whole evolutionary process, just as it has led us toward civilization. This is the thesis of the present work, written from the conviction of the importance of culture (in its legal manifestation) for the course of our species.

Chapter One. Individual Freedom, Social Conscience, and the Limits of Prohibition

In understanding freedom, we must bear in mind the possible cultural and evolutionary connections between our concept of the individual—the autonomous person—and a whole series of philosophical and legal presuppositions that determine its realization in society: free will, responsibility, and the effects of prohibitions.

Curiously, the awareness of individuality may have developed thanks to the emergence of large human groups, in which recognition of the other would have fostered introspection. From there to the capacity to decide for oneself, as an epistemology, would be a great cultural leap with evolutionary repercussions.

Social norms have assigned to the free autonomy of the will its correlate of personal responsibility, overreaching the limited cognitive capacities of the human being. But those societies in which prohibitions sought to supplant the individual's own judgment in deciding did not prosper as much as freer ones.

Today we behold a triumph of full-blown individualism, to a degree never before seen throughout history. We must be aware of its positive contribution to the human course, but also remember that it has been possible only in social environments worth sustaining—collaborative and at the same time respectful of personal identity.

Social pressure toward self-control, or its strategies of external control, must be limited so as not to nullify freedom; but it is equally necessary

to keep using, with social intelligence, techniques that foster individual growth mindful of the importance of shared life (education).

The role of law in these processes has been crucial, accompanying other efforts of social construction with impacts on the kind of persons we become. People in each place feel more or less free and responsible depending on frameworks and sustained trajectories of respect for their individuality bound to the group.

How do we foster the growth of a human being who is autonomous and at the same time committed to his community? Education is of course one of the key cultural techniques for accomplishing this purpose, but we must not lose sight of the role of norms, whose transmission is one of education's distinctive ends (going beyond mere instruction).

Training in principles and values may be one of the foundations for the full development of a socially responsible personality. Neither exacerbated individualism nor extreme social conformity produced by excessive normative conditioning are models conducive to progress.

What should we aspire to in recognizing rights? The aim is to make the most of the human capacities for creation, coexistence, integration into the environment, and adaptation to changing circumstances across many places and times—and to be able to enjoy this, both individually and in free societies.

1. Personal Identity, Social Conscience, and the Defense of Freedom

When a young person finally discovers freedom, the risks of abuse are inherent. It is no accident that mishaps, excesses, and even grave harm occur at this stage of life, once access to a wider range of possible actions is achieved—all the more dangerous the less aware one is of the consequences.

Unfortunately, adolescence and youth cull a considerable number of extremely reckless individuals: dead or excluded on account of their driving whims, drug use, or other rash practices. The less immoderate reach adulthood better than the wild.

This is so even though the profile others find attractive is that of the “rebel without a cause” or the transgressive leader. In a stage of learning and trial, the one who experiments most captures attention, while at the same time running the risk of erring or failing. In the end one comes to understand the need to restrain oneself with rules, even when acting as a group.

The entire human race may have developed thanks to a culture of social external restraint with evolutionary and genetic repercussions, creating institutions among which law occupies a predominant place. If so, it would have achieved this while also producing a specific type of individual.¹

The idea of the species' self-domestication seems to accord with a series of paedomorphic traits observable in the most advanced societies; but such genetic drifts neither entail nor foster losses of identity or the feelings of free individuality, which feed back into new developments.²

In fact, those who prove able not to give free rein to their instincts find themselves in better positions to dominate social environments. The reward for bending to external restraint through self-control would be a degree of vital and reproductive success greater than that of one who does only as he pleases.

Thanks to man's capacity to rebel against his own genetic biases, it is possible to correct what might be the natural tendency of his being. Evolution is not indifferent to the choices a human being may make by virtue of his autonomy, so we ourselves influence our own mutations, resisting inertia.³

It is worth reflecting on the roots of the feeling of freedom—as we have done with that of justice—to try to determine whether it, too, may be considered a human universal. And whether, as in the case of the idea of equity, it might also belong to other animal species, including our own ancestors.

Accepting from the outset many details of the theory of evolution, when did the human being become free? Was he always free, even in his earlier stages? Did he become free in some way in his state of nature? Perhaps, but not in the way we understand today, with our consciousness.⁴

Interest in the evolution of hominids has grown exponentially in recent years. Once-scientific knowledge about Neanderthals, Cro-Magnons, and the missing link has been popularized. Without identifying ourselves with the descriptions of their groups, ways of life, and savage practices—would we consider them free?⁵

The origin of the mind has been the object of thorough studies, pitting Darwin's hypothesis—defending the progressive acquisition of cognitive

¹See WILSON, Edward, *Sobre la naturaleza humana*, Fondo de Cultura Económica, 1980.

²Similarities could be theorized between these processes of social development and the biological phenomenon of heterochrony, linked to neoteny and the origin of individuality. See BUSS, Leo, *The evolution of individuality*, 1987.

³See DOBZHANSKY, Theodosius, *The Biological Basis of Human Freedom*, Columbia University Press, 1956.

⁴See CARBONELL, Eudald, *El nacimiento de una nueva conciencia*, Ariel Llibre, 2007.

⁵See BERMUDEZ DE CASTRO, *La evolución del talento*, 2009.

capacities—against that of other scientists such as Wallace, Klein, Gould, or Chomsky, who favor a sudden and even collateral account of language.⁶

It is still very difficult to know exactly when and how our brain changed to make us as we are, or whether we are still changing today as a result of environmental pressure (the volume of information) or the vagaries of the genes. The idea of a process of transformation of the mind—disruptive or gradual—is in any case relevant.⁷

Might Neolithic societies have fostered developments of the neocortex? Can we reasonably link the awareness of individuality to the multiplication of personal interrelations, since these would force people toward greater capacities of self-control?⁸

We must bear in mind that, as groups grow, contacts with strangers multiply. In the family or the village, the sense of community is more intense; there is scarcely an “other.” The town or city amplifies otherness, indirectly emphasizing the self against the third party in relationships.⁹

Life in society offers the individual multiple opportunities for self-realization. We are insofar as others see us and we see others, who likewise acquire their condition through our recognition. The development of relationships among humans could be one of the factors in the growth of intelligence.¹⁰

It is of course by no means clear that this is the reason for the cerebral neocortex, whose development may be much earlier. Nor do we know whether mutations occurred owing to the growing complexity of groups, although the profile of individuals had to change, with the percentage of time devoted to socialization multiplying.¹¹

According to Dunbar’s theses, there are correlations between the volume of the neocortex and the number of individuals with whom one can interact, which for the original human groups would imply communities of around 150 individuals, as the combined statistical analyses seem to show.¹²

The internal relations of these groups fostered the development of social skills that would require a more evolved brain, driving the necessary de-

⁶See ARSUAGA, Juan Luis / MARTÍNEZ DE MENDIZÁBAL, Ignacio, “El origen de la mente”, *Investigación y Ciencia*, noviembre 2001.

⁷See JANES, Julian, *El origen de la conciencia en la ruptura de la mente bicameral*, cit.

⁸See GORDON CHILE, V., *La evolución social*, Alianza, 1973.

⁹See MUMFORD, Lewis, *La cultura de las ciudades*, Buenos Aires, 1945.

¹⁰See FLYNN, James R., *¿Qué es la inteligencia? Más allá del efecto Flynn*, 2009.

¹¹See DUNBAR, Robin, *Grooming, Gossip and the evolution of Language*, Harvard University Press, 1997.

¹²See DUNBAR, Robin, *La odisea de la humanidad. Una nueva historia de la evolución del hombre*, Crítica, 2007.

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