

## FIRST PART PRELIMINARY CONSIDERATIONS

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In the wake of a poll on the culture of the Constitution we analyze here some basic concepts that spawned this book, along with its title. The book purports to study in greater depth one of the most serious recurring stumbling blocks of our reality, which is the conflictive relationship between society and norms, especially juridical norms.

It has been a joint endeavor of the Asociación Argentina de Derecho Constitucional and International IDEA. The Association, over which we preside, is an institution that concentrates more than 450 teachers of public law—especially constitutional law and provincial and municipal public law. Its tasks include a commitment to teaching civics that defer to the highest principles of our constitutional democracy. International IDEA is an international inter-governmental organization that has the participation of more than twenty countries from five continents. Headquartered in Stockholm, Sweden, its mission is to promote and develop sustainable democracy worldwide.

This interdisciplinary effort, unprecedented in our country, seeks to formulate a tight diagnosis for such an urgent subject, and at the same time come up with concrete proposals to try to raise the quality of our institutions and achieve an authentic “constitutional feeling.” In regard to the concepts, we will focus on two that we think are fundamental: “anomy” and “culture of the Constitution”.

### I. THE CONCEPT OF ANOMY

Our idea of anomy is “failure to obey juridical, moral and social norms,” says Carlos Santiago Nino in his well-known written work *Un país al margen de la ley* [A Lawbreaking Country].<sup>1</sup>

The term originates from the Greek *anomos*, meaning “lawless,” and was used 25 centuries ago by Herodotus of Halicarnaso (484-406 B.C.) in his *History of the Medical Wars* between Greeks and Persians.<sup>2</sup> The well-known historian considered that anomy could be social or individual. The latter he divided into three meanings: *a*) when an individual person is violent, terrible and has no positive human qualities; *b*) when referring to a breach of religious norms, and *c*) when social mores are not respected. It is a question, then, of an ignorance of rules of conduct, as Professor Chamorro Greca de Prado well concludes.<sup>3</sup> The concept of anomy was later used by Thucydes and Plato, and there are references to it in the Old and New Testament, in Judaism and Hellenism.<sup>4</sup> Later, the term would be used in legal texts in 1635 by the English lawyer William Lambarde to infer a lack of norms or

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<sup>1</sup> Nino, Carlos Santiago, *Un país al margen de la ley. Estudio de la anomia como componente del subdesarrollo argentino* [A Lawbreaking country. A study of anomy as a component of under-development in Argentina], Buenos Aires, Emecé, 1992.

<sup>2</sup> As mentioned by Doctor Hilda Eva Chamorro Greca de Prado, professor *emeritus* of the Universidad Nacional de Córdoba, in her speech on her incorporation into Córdoba's National Academy of Law and Social Sciences as a numbered academic. The speech, titled “El concepto de anomia, una visión en nuestro país” [The anomy concept, a perception in our country], was made on May 3, 2005. Thus far unpublished, it is due to appear in the Academy's *Anales*.

<sup>3</sup> See Chamorro Greca del Prado, Hilda Eva, aforementioned unpublished lecture, p. 1, note 1, where she claims this to be a broad concept that gradually changed over time.

<sup>4</sup> Thucydes, teacher of Pericles, referred to the term in his work *History of the War of the Peloponense*; and Plato in *The Republic*, where he assigned it the meaning of anarchy and intemperance. *Cfr.* Aforementioned conference, pp. 2-4.

laws, until the word acquired its final connotation through the thoughts of the father of French sociology Emile Durkheim in his books *About the Division of Social Work* (1893) and *The Suicide* (1897). Nevertheless, the sociologist from Cordoba, Chamorro Greca de Prado,<sup>5</sup> concurring with Anthony Giddens, maintains that it was Jean Marie Guyau who re-introduced the term. Durkheim thought that anomy or the weakening of norms emerged with a greater division of labor and could reach the point of disorganizing society. Similarly, to that phenomenon he also attributes the production of a certain type of “anomic” suicides resulting from the social impact on the behavior of individuals.<sup>6</sup> This French author’s influence was later felt in United States sociology through Elton Mayo, Talcott Parsons and Robert K. Merton.<sup>7</sup>

In 1968, Parsons said, when citing Durkheim’s work, that anomy had become one of the few core concepts of contemporary social science.<sup>8</sup> Whereas Merton maintains that:

- a) Anomy does not imply a lack of norms, because every society, no matter how rudimentary, has a more or less systemized, more or less integrated set of rules, mores, customs and juridical norms.
- b) A minimal degree of law infringement in a legal system cannot be considered anomy.
- c) There are levels and types of anomy. “Simple” anomy is the state of confusion of a group or society subjected to antagonism in a system of values, which results in a certain amount of uneasiness and the sensation of separation from the group.
- d) “Acute” anomy is extreme deterioration and disintegration of a system of values, resulting in marked anxieties.
- e) Anomy can apply more to some sectors of the population than others.
- f) Socially divergent or deviated behavior results from anomy.<sup>9</sup>

The concept of anomy continues being used by modern sociology and other disciplines,<sup>10</sup> sufficiently substantiating our reference to it in this survey.

## II. THE CONCEPT OF CULTURE OF THE CONSTITUTION

We owe the most in-depth studies on connecting the dots between culture and Constitution to the German professor Peter Häberle.<sup>11</sup> The author sustains that the “Constitution is not

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<sup>5</sup> Chamorro Greca de Prado, Hilda Eva. Her aforementioned unpublished lecture, p. 6, mentions Giddens and his work *Capitalism and Modern Social Theory*, Cambridge University Press, 1971, in which he refers to the following books by Guyau: *Sketch of a Morality Without Obligation or Sanction* (1885) and *The non Religion of the Future* (1887), again using the term anomy.

<sup>6</sup> Cfr. Chamorro Greca de Prado, Hilda Eva, *cit.*, pp. 7 and 8.

<sup>7</sup> *Ibidem*, p. 8. The author mentions as representatives of U.S. sociology Elton Mayo and his book *Problemas humanos de una civilización industrial* [Human Problems of an Industrial Civilization], Buenos Aires, Nueva Visión, 1956; Talcott Parsons and his *La estructura de la acción social* [The Structure of Social Action], Madrid, Guadarrama, 1968, and *El sistema social* [The Social System], Madrid, Alianza Editorial, 1988; and Robert K. Merton with *Teoría y estructura sociales* [Social Theory and Structure], Mexico, Fondo de Cultura Económica, 1964.

<sup>8</sup> Cfr. Chamorro Greca de Prado, Hilda Eva, *cit.*, p. 9.

<sup>9</sup> Cfr. *ibidem*, pp. 9-11, based on Robert K. Merton’s book *Teoría y estructura sociales* [Social Theory and Structure], Mexico, Fondo de Cultura Económica, 1964.

<sup>10</sup> On the anomy concept, we also emphasize Carlos Santiago Nino’s book *Un país al margen de la ley* [A Lawbreaking Country], to which we shall later refer.

<sup>11</sup> In particular to his work *Teoría de la Constitución, como ciencia de la cultura* [Theory of the Constitution as the Science of a Culture], translation and introduction by Emilio Mikunda, Madrid, Tecnos, 2000. In the original edition, in 1982 in Berlin, Germany, titled *Verfassungslehre als Kulturwissenschaft*, Duncker & Humblot, the distinguished lawyer condenses his thinking into ten theses.

limited to just being a set of legal texts or a mere collection of laws, but that it expresses a certain degree of cultural development, a means of an entire people's personal self-representation, a mirror of their cultural legacy and the bedrock of their hopes and desires."<sup>12</sup> And he adds "...the juridical reality of every constitutional State is only a fragment of the reality of every living Constitution which, throughout its entire text and context, is only one of that State's cultural expressions. That is why the actual texts of a Constitution must be literally "cultivated" (the noun culture comes from the Latin verb *cultivare*) in order to become an authentic Constitution."<sup>13</sup>

So the eminent lawyer defines constitutional culture as "the sum of attitudes and ideas, subjective experiences, scales of values, subjective expectations and the corresponding objective actions both at the personal level of a citizen and his associations, as well as at the level of government entities and any other institution related to the Constitution."<sup>14</sup>

Logically, then, this survey is targeted at finding out citizens' attitudes, perceptions and values regarding the fundamental law and legality in general, to determine what our culture of the constitution is like.

### III. VIOLATION OF THE LAWS IN ARGENTINA

People have pointed to the anomaly problem in our country from different perspectives,<sup>15</sup> but we shall concentrate especially on those who have done so from the legal viewpoint.

In his well-known book *La ciudad indiana* [Indian City], focused on research of our history in the 17th and 18th centuries, Juan Agustín García, professor of the Law Faculty at the Universidad de Buenos Aires, indicated that one of the four sentiments of that era was "contempt or disregard for the Law."<sup>16</sup>

In reference to the Law in colonial times, he said:

...theoretical law was admirable for its charitable benevolence; the royal letters patent recommended good treatment, education and conversion of the Indians. But, alas, all over Hispanic America consultation of written law is the least important and illustrative: the Law, good or bad, grows and develops from the ground up, amid conflict of passions and interests, and protecting the most powerful inhabitants. Generally despicable, biased and cruel, it is propelled by ignominious sentiments and fierce self-interests.<sup>17</sup>

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<sup>12</sup> Häberle, Peter, *op. cit.*, above-mentioned footnote, p. 34.

<sup>13</sup> *Ibidem*, p. 35.

<sup>14</sup> *Ibidem*, pp. 36 and 37.

<sup>15</sup> Noteworthy among our most representative literary works is *Martín Fierro*, by José Hernández, in which references are made to unjust laws—that benefit the rich and powerful—to the need to befriend judges, and to "native cleverness," in an outstanding story about the life of a gaucho at odds with society and its laws in the 19<sup>th</sup> century. And in Argentine folk music, no one can ignore the trenchant lyrics of Enrique Santos Discépolo's tango "Cambalache," that constitutes a sociological description and appraisal of the breakdown of our laws and values in the 20<sup>th</sup> century.

<sup>16</sup> García, Juan Agustín, *La ciudad indiana* [Indian City], 2nd edition, Buenos Aires, Ángel Estrada y Cia. Editores, 1909. José Manuel Estrada raised this sharp observation at the beginning of the book: "If we could truly know the ins and outs of the colonial society, we would solve three quarters of the problems that weigh us down." The first reference to contempt for the Law being a national sentiment is included in the preface of the book, p. 7.

<sup>17</sup> *Ibidem*, chapter on "Las campañas" [Campaigns], pp. 34 and 35.

Besides pointing out the arbitrariness of councils in their regulation of trade and monopolies, he mentioned paternalism as another characteristic, which forced the population to depend on a monarch viewed as an “incarnation of Providence on earth”<sup>18</sup> García described the practice of the all-embracing power of the colonial authorities, with no rights for the gaucho, which kindled...

deep within the Gaucho soul a feeling of contempt for the Law: in his imagination the Law is the symbol of arbitrariness, the use of capricious and discretionary brute force, incarnated in a bossy, somewhat cruel, greedy extortionate official, a “petty mayor”... always willing to bend justice in favor of the prestigious hacienda owner with connections in the capital... He knows he has no rights, that is, he has the clear impression that his welfare, his things, his family are minutiae that the official machine tramples over without the slightest concern.”<sup>19</sup>

Later the author wrote of the struggle that began in the colonial era between the individual and the Government: “...it reached a peak with the caudillos, troops of mounted rebels and anarchy, a supreme victory for individualism.”<sup>20</sup> In conclusion, he indicated that the essential traits of our political law are “...the predominance of the classical State-providence concept, political centralization, inferior and subordinate role of assemblies; and in the population, accentuating and fortifying those traits, a disregard for the law converted into instinct, into a motive for free will.” He followed by saying: “One can state, without fear of falling into a paradox, that the country has not come out of the old regime.” We end this brief recollection of his thoughts with a sentence we also believe to be decidedly and disturbingly contemporary: “Now, as before, higher-learning studies have dropped off, especially law studies! Does that make it a bad thing, for heaven’s sake, to broadcast the Law?”<sup>21</sup>

Undoubtedly the best study of anomy made in our country is that of Carlos Santiago Nino, law professor at the Universidad Nacional de Buenos Aires, in his book *Un país al margen de la ley* [A Lawbreaking Country].<sup>22</sup> Using an interdisciplinary perspective, Nino demonstrated with irrefutable intellectual brilliance why Argentina had a lawless history and how that also produced our under-development.<sup>23</sup> The book’s main thesis purported to show how anomy in itself worked to produce deficiency.<sup>24</sup>

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<sup>18</sup> *Ibidem*, chapter on “*La administración de la ciudad*, [Administration of the City], p. 151. The author claims that town councils were a “sad parody of the Castilian councils destroyed by Charles V after Villamar (p. 157), and that councilors were appointed by their outgoing predecessors, with approval from the governor, who also sometimes appointed them.” (p. 164). In addition, the author compares them with those of the United States, underscoring the contrast with a reality evidenced by constitutional letters and political practices that showed an eager defense of ideals, interests and government itself.

<sup>19</sup> *Ibidem*, in the chapter on “*El proletariado en las campañas*” [The proletariat in the campaigns], pp. 262 and 263.

<sup>20</sup> *Ibidem*, in the chapter on “*La administración de la capital*” [Administration of the capital], pp. 298 and 299.

<sup>21</sup> *Ibidem*, “*Conclusión*” [Conclusion], pp. 365 and 366.

<sup>22</sup> Nino, Carlos Santiago, *op. cit.*, note 1.

<sup>23</sup> Nino said: “This trend towards anomy, or more specifically towards lawlessness, largely involves factors marked as pivotal for explaining the involution of Argentina’s development, not to mention their having a separate causative effect” (*ibidem*, p. 24). He maintained that anomy in Argentina was quite easy to perceive as it gradually arose from the massive violation of human rights in the 1970s through government terrorism and left-wing terrorism. But he also mentioned a less dramatic case: that of the society’s external image projected during transit in streets and highways, in the cleanliness of public places or in urban aesthetics (p. 25). Then, after referring to other aspects like corruption or the involution of economic growth, he mentioned political instability in these terms: “Such political instability culminated in the *coups d’état* which obviously marked the height of Argentine lawbreaking. But there are other more indirect ways in which political instability was related with lawbreaking: the electoral frauds, like those practiced prior to the Sáenz Peña Law and during the infamous decade; also, the electoral proscriptions such as the one that occurred first with the radicalism of that same decade, and again with Peronism from 1958 to 1973. The abuse of federal interventions, the president’s usurpation of Congress’s

Quoting Jon Elster's idea that "laws are the cement of society," he maintained that laws "make the integrity and subsistence of societies possible," and therefore "lawlessness and anomy in general affect social productivity, at least in a capitalist system," as Max Weber showed.<sup>25</sup>

Furthermore, he introduced a new assessment of anomy to explain the Argentine case; he named it "dumb," because disregard for laws was affecting values like security and the ability to make forecasts, and was producing a deficient collective action.<sup>26</sup>

With stinging precision he then referred to anomy in the institutional and social life of our country, to laws that are like tools for cooperation. To escape from the anomy trap he was proposing a process of public discussion and education of the masses to promote loyalty to the Law.<sup>27</sup> Finally, Nino described anomy as antidemocratic because it involves violation of laws that must be sanctioned by a majority ruling after a debating process. And in our case it meant a deficiency in the materialization of democracy by insinuating the existence of pockets of authoritarianism.<sup>28</sup>

In our book *Las emergencias y el orden constitucional* [Emergencies and Constitutional Order] we hold the thesis that throughout history emergency institutions have usually been used to violate the constitutional system, republican order and the enforcement of human rights.<sup>29</sup>

In the initial words of that book we say:

Over the last few months, we Argentines have lived through a tremendous crisis that has shaken the structure of all aspects of national life. Faced with this situation, we have been thinking for quite some time that we need to look inside ourselves to see what we are like, both individually and as a society, so as to understand how one of the countries with the greatest prospects at the beginning of the 20th century could end up in the embarrassing situation we now find ourselves. And then, after formulating a diagnosis, we must try to plan a different future more in keeping with the projects and dreams we initially had as a country.

We are convinced that such a formidable task will take humility, decisiveness and exemplary ethics to change individual and mass behavior and values. Consequently, education, science and technology must become key instruments for this process, in tune with the information age we live in.

Taking into account our responsibility as constitutional law professors and lawyers committed to defending the affected individual rights of , we consider that the best action

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faculties, the manipulation of justice, abusive martial law, seriously affected the partisan legitimacy of Argentina's political system and, consequently, also contributed to society's weak support for it— a prerequisite for its subversion by force." (p. 28).

<sup>24</sup> *Ibidem*, p. 28

<sup>25</sup> *Ibidem*, pp. 31 and 32. He quoted Max Weber in his book *La ética protestante y el espíritu del capitalismo* [Protestant Ethics and the Spirit of Capitalism], where he says: "...modern, rational industrial capitalism needs both the technical means for job calculation, as well as foreseeable rights and an administration guided by formal regulations. Without this, adventurous, commercial, speculative capitalism, not to mention every kind of political capitalism, is indeed possible; but private commercial industry with fixed capital and safe calculation is impossible."

<sup>26</sup> *Ibidem*, p. 40

<sup>27</sup> *Ibidem*, chapters 2, 3, 5 and 6, respectively. We particularly recommend reading them.

<sup>28</sup> *Cfr. Ibidem*, "Epílogo" [Epilogue], p. 272.

<sup>29</sup> Hernández, Antonio María, *Las emergencias y el orden constitucional* [Emergencies and Constitutional Order], in its two editions: Buenos Aires, Rubinzal-Culzoni, 2002, and 2nd extended edition, Mexico, Rubinzal-Culzoni Editores, UNAM, Instituto de Investigaciones Jurídicas, 2003, with prologue by Diego Valadés.

we can take in this painful situation is to contribute to the study and discussion of one of the problems that harms us the most: anomy.

Not long ago, in a remarkable must-read book titled *Un país al margen de la ley* [A Lawbreaking Country], Carlos S. Nino clearly showed—using a mixture of law, philosophy and sociology—why Argentina is a country with a pronounced general proclivity for lawlessness and why it was one cause of our under-development.

Now, with the same intention he had, but from a more juridical-constitutional perspective, this essay of ours will focus on analyzing emergency processes and constitutional order, to try to demonstrate from this standpoint how and why our rule of law decayed during our institutional history, and how we can make changes now and in the future to permanently uphold the values of the constitutional and democratic rule of law.

We are convinced that, while this particular experience cannot be applied to other Latin American countries, it can, however, be said that emergency situations and constitutional order in general have been common to our constitutional realities, bringing about similar outcomes as far as the unrestricted enforcement of the rule of law is concerned.<sup>30</sup>

#### IV. THE ORIGIN OF THIS PROJECT

The 7th Latin American Congress of Constitutional Law, held in Mexico City in February, 2003, featured the presentation of the book *Cultura de la Constitución en México. Una encuesta nacional de actitudes, percepciones y valores* [Constitution Culture in Mexico. A national poll of attitudes, perceptions and values] by its authors Hugo A. Concha Cantú, Héctor Fix-Fierro, Julia Flores and Diego Valadés.<sup>31</sup>

Among the book's preliminary considerations, Valadés says:

With this poll, the Juridical Research Institute hopes to contribute further data and analysis to the institutional development of Mexico.

...To shrink the gap between society and Constitution requires not only overcoming the legal and political problems that led up to that situation. We must also understand that the relationship between Constitution and society is a cultural phenomenon. It is precisely in that direction where we wanted to head our poll.<sup>32</sup>

That was when this distinguished Mexican lawyer came up with the idea of extending the study to other countries in Latin America to be able to make a comparative analysis of such an important matter, based on the findings to be published by the Institute. So, as president

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<sup>30</sup> Cfr. *Ibidem*, pp. 1 and 2 of the 2nd edition. This section analyzes the emergency situations in the institutional history of our country via a study of the emergency measures pre-planned by the Constitution, such as federal intervention, martial law, urgent decrees of necessity and legislative delegation; as well as of banned institutes like those under Article 29, and emergency institutes not foreseen by the Constitution. Special consideration is given to the non-constitutional nature of the financing and banking "*corralito*." It is suggested that emergencies be subordinated to the constitutional order to prevent deterioration of our rule of law.

<sup>31</sup> Published jointly by the Universidad Nacional Autónoma de México, the Tribunal Judicial de la Federación [Federal Judicial Electoral Tribunal] and the Comisión Federal de Mejora Regulatoria [Federal Commission of Better Regulations], through the UNAM's Instituto de Investigaciones Jurídicas [Juridical Research Institute], directed by Diego Valadés. All the authors are teachers and researchers at said university.

<sup>32</sup> *La cultura de la Constitución en México*, "Consideraciones preliminares" [The Constitution Culture in México, "Preliminary considerations"], p. XV.

of the Argentine Association of Constitutional Law, we pledged to try to carry through this important project with the support of our executive committee.

We immediately invited the prestigious institution International IDEA to join us, with the intervention of its regional director for Latin America the eminent political analyst Doctor Daniel Zovatto. Without him we would not have been able to undertake this initiative, and I extend to him my sincere personal gratitude and on behalf of our Association.

Subsequently, we had Ipsos-Mora y Araujo conduct the poll, given their ample experience in that field. The sociologist Manuel Mora y Araujo directed the job under the valued coordination of Luciana Grandi.

As explained further on, the project and the poll adhere to the procedure used in Mexico, with adjustments to fit our reality.