

## Constitutions, Democracy, and the Rule of Law

### Do Constitutions Constrain?

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#### **Antanas Mockus Sivickas, Mayor of Bogotá, Colombia** **Legal, Moral, and Cultural Self-Bindings to Prevent Shortcuts**

##### Different Kinds of Bindings

**Antanas Mockus Sivickas:** I wish to express my gratitude to Columbia University and to Professor John Elster for inviting me to participate in this forum. The short title of my presentation is “Do Constitutions Constrain: Self-Bindings to Prevent Shortcuts.” The longer one is “Legal, Moral, and Cultural Self-Bindings to Prevent Shortcuts.” I will present and discuss the relationship between the Colombian constitution and my personal work as mayor of Bogotá, taking into account the results of my research on the peaceful coexistence of youngsters in Bogotá. I will refer to the relationship between the constitution and the construction of moral and cultural self-bindings. I will argue that such bindings, along with legal ones, helps to prevent what I will call *shortcut culture*—the privilege of shortcuts, or of short-term results, blindness about long-term consequences, and about consequences for people that are different from us.

First, I will present the three main regulation systems that help to prevent shortcut culture.

The first regulation system is the legal system, which includes constitutions, and this I will call, following Douglass North, formal rules. The second regulation system is morale, that is to say ethical behavior, while the third regulation system is culture, which is in partly composed of social norms. Both morale and culture are informal rules. There is an additional contention system that I call agreements, which consists of particular arrangements between individuals. The latter frequently helps also to avoid opportunities and create rationality, create persecution of objectives by subjects. Individuals obey these three regulation systems and honor agreements either on good terms or on bad terms.

When Colombians are asked to determine which of these mechanisms most regulate their behavior, they usually say that moral principles (the second column) are what most regulate them, whereas the law is what regulates other

people. And also they say that they understand norms on good terms, whereas other people understand norms only on bad terms, that is to say through fear and punishments. Conscience for me, law for you. Good terms for me, bad terms for you. Strong asymmetry.

### **Law, Morale, and Culture**

Usually discussions about the rule of law consider its enforcement only through the threat of legal punishment. In this regard, I remember something I heard from a Colombian philosopher in the seventies who said, "If one does not want to have a society full of jails and prisoners, one has to face strong feelings of guilt." Now, I know that social norms can also promote compliance with the law, and that a series of positive mechanisms can support obedience of moral principles and social norms. This model of law, morale, and culture is useful to deal with the problems that arise when the regulation systems diverge; that is, when they contradict each other.

These four columns can be read as means of self-binding. Below can be understood as a means of self-binding to democratic procedures, at least in democratic societies, of course. Moreover, morale can be understood as a means of self-binding to the construction of personal identity or of personal moral principles. Additionally, culture can be understood as a means of self-binding that results from a sense of belonging to a specific group. It is a sort of collective self-binding or implicit mutual binding based on shared identity.

Finally, agreements are clearly self-bindings and mutual bindings through the free decision of the parts. The latter bindings may help to attain ethical consistency, and to avoid opportunistic behavior. Let me know if I'm not consistent; it's one of the rules.

All of these agreements can be subject to change. In this sense they can be very versatile. The parts involved in an agreement, for example, can willingly introduce transformation, or make modifications to the agreement. Sometimes agreements include conditions and procedures to either make such modifications easier, or to make them more difficult.

The most interesting aspect of the question about self-bindings and mutual bindings is that the constitutional self-binding appears to be the most stable. Perhaps in reality, the cultural self-binding—the identity binding—is more stable. But in the first instance we can think about constitutions as the most stable self-binding—the most difficult to transform. However, constitutions do establish procedures to make amendments within their framework. Individuals or communities can attempt to transform the [constitutional order] through democratic procedures.

On the second column, in a post-Nietzschean perspective for example, individuals can freely transform morale. Or from more Kantian perspectives, at least they can engage in moral development. In this regard, some schools of ethics consider that there is a sort of universal path for moral development. An example of this is the work of Lawrence Kohlberg. Other theories of ethics are more relativistic or realistic. Moreover, the discussion of moral dilemmas, as we are promoting it in schools in Bogotá, can be helpful for example to stimulate moral development. But in democratic constitutions there is a very wide margin for moral pluralism.

Culture can also be transformed, and in fact it generally is, through spontaneous cultural change, often in unpredictable directions. More importantly, I believe culture can be transformed at least on very specific issues through collective processes such as the civic culture program implemented in Bogotá from 1995–97 and from 2001–03.

### **Harmony or Divorce**

The obedience of formal rules and to formal rules, and the coherence between these two kinds of rules reduce the cost of making agreements; that's the Douglass North thesis. If we accept this frame of ideas we can differentiate between types of behavior that are legally approved, and those that are not, outside the rectangle, the illegal. In a society where there is harmony between culture and law, culturally accepted behavior is part of legally approved behavior. Thus, merely behaving according to what is culturally accepted will immediately lead to uphold the law. And as you can see in this diagram of harmony between law, morale, and culture, morale is, in the case of the harmony, more demanding than both cultural and legal norms.

Consequently, merely by being morally correct, one is behaving according to the legal regulations. This can help one understand why people obey laws without having, in a lot of cases, a concrete or detailed knowledge of them. But the harmony of law, morale, and culture is an ideal case. It allows for pluralism because both the culturally and morally accepted behavior can vary from one group to another, from one person to another.

The other case is when there is a divorce between law, morale, and culture. In this situation, certain types of legal behavior are culturally accepted and sometimes even morally justified, setting the conditions for corruption and violence. This is especially problematic when instead of being isolated from society, illegal behavior is accepted by an individual's morale, and a group's internal cultural rules.

The divorce of law, morale, and culture becomes apparent at three different levels. The divorce can take place concretely in behavior, regarding behavior. This happens when people engage in illegal activities that a certain community

approves and which individuals deem morally acceptable. The divorce can also take place at the level of justifications. For example, when people behave according to the law, but justify either other's illegal behavior in actual situations, or their own in hypothetical ones. Finally, on a third level, the divorce of the systems can become visible in the inconsistency of bindings. A person can make a commitment to follow the constitution and the law, and at the same time make illegal, explicit agreements, for example with a political group, or implicit commitments to the group's rules. Even if the person does not have concrete conflicts after doing this, in that moment, he has made two bindings—one legal and one by agreement, or one legal and one cultural—that are not compatible.

### Initiatives in Bogotá

The following are some examples of programs carried out by the city government in Bogotá for the harmonization of law, morale, and culture. They have all promoted moral and cultural self-bindings, and mutual bindings.

One example: recently we have applied this model in a legal text. It may seem strange to create a legal text with cultural and moral prescriptions, but this is precisely the case of the new police code of Bogotá. The code supports specific types of behavior that promote coexistence. These are constitutional and legal bindings, which correspond to minimum legal requirements. For example, every hospital in the city has the legal obligation of giving medical attention to an injured person. The failure to comply with these norms may lead to penalties such as fines. On the other hand, the code includes duties that are basically moral and cultural self-bindings that entail maximum ethical obligations. One of these general duties is to help victims and cooperate with the authorities in an emergency. Not fulfilling such duties does not lead to legal punishments. In this sense the code is an invitation to adopt higher ethical standards than those required by the law.

We have also made efforts to promote self-binding in different institutions and city companies to what we have called *probity pacts*. Probity pacts are public commitments to prevent corruption. These are public statements on the adoption of certain rules. Although these rules are frequently legal norms, the parties involved explicitly and publicly on the rights of such regulations. Probity pacts promote moral and cultural self-binding, regarding the constitutional principle of transparency in public administration. Employees are sometimes not very happy or have to underwrite exclusively the following of the rule in the face of a specific contract process. They say, I always do so. It doesn't matter, please, undersign in the face of other people. This is underwriting the law.

Another attempt to enact on legal, cultural, and moral bindings was carried out by means of the program *110 % with Bogotá*. Last year over 63,000 and this year over 46,000 families and/or companies have paid an extra 10 percent over the legal tax. By participating in this initiative, citizens explicitly commit to the city's

development and to social inclusion to the democratic and redistributive mechanism of taxation. Such moral and cultural bindings are based on the constitutional principle of solidarity.

In my opinion, the civic-culture program in Bogotá has had a strong constitutional foundation. During inauguration day, the mayor of Bogotá, as with any other public officer, begins his term in office by making an oath to obey and to make others obey the constitution and the law. In this context, my approach regarding the problem of law enforcement has been to promote a pedagogical form of enforcement. I assume this approach in order to fulfill my commitment of achieving greater compliancy with the law. Specifically this is an explicit and open intervention on moral and on cultural references when they are not consistent with legal dispositions. One of the ways to make the rule of the law effective is by changing such cultural or moral preference. On the other side, all constitutions that I know protect moral pluralism and cultural pluralism, so there is a strong tension between the mandates of enforcement and the respect of diversity. The diversity does not allow a place for corruption or for violence.

### **Finding the Antidote to Anomy**

The work on the divorce between law, morale, and culture led me to study the behavior of youngsters and specifically how they justify violent behavior and how they justify the violation of legal dispositions. The main hypothesis of this research is the recognition of what I call shortcut culture. We Colombians pride ourselves in being very ingenious and corrective, and in being able to get out of specific problems with great ease through our own capacities. This ability for innovation frequently leads to generate costly consequences or to affect other people in undesirable ways. I define shortcut culture, the social acceptance and even promotion of actions that are primarily aimed at obtaining immediate results. Without taking into account future costs or negative effects on socially or culturally distant individuals or communities. It implies a sort of difficulty to foresee consequences and to have consideration for those who are distant and different.

One could explain shortcut culture in the following way—according to Jon Elster's work in social sciences—first as the result of high discount rates when applied to future consequences. Also as an inability to project, what is a kind of shortsightedness. Moreover, certain emotions can also induce people to take short cuts. Here, for example, can make people disregard consequences and only focus on the problem at hand. This is sometimes the case with issues related to personal security. Shortcut culture can also be reinforced by certain social norms such as those of machismo, in which revenge is an imperative in certain situations. And another mechanism, which is perhaps the basis of shortcut culture, is that of unrestricted rationality, in which case the individual's optimization of results is not sufficiently controlled, neither by law, by morale, by culture, or by agreements.

In the research on coexistence of youngsters we were able to identify the manifestation of shortcut culture in relation to the law. We call this *anomy* in the sense that this inspired by some of the Robert Merton's writings. Anomy is defined as the pursuit of goals—frequently good goals—through unrestricted methods. Having conversation with corrupted leaders or with criminals, a lot of times you can find that they have good goals. This unrestricted pursuit of objectives is empirically associated with practical and cultural justifications for breaking the law. The typical responses of the youngsters classified as anomic were, I quote, "I justify breaking the law when it is a way to obtain great economic profit. Or when it is the only way to reach a goal. Or when it is socially accepted. Or when others who disobey obtain results."

In the empirical research we did a sample of youngsters, we also found that the antidote of anomy is the capacity to reach honor and specifically repair or mend agreements. Non-anomics are people able to mend agreements. Youngsters with this capacity have a low probability of justifying disobedience of the law, and of using violence to respond to violence or of taking justice into their own hands.

### **Clientelism and Violence**

I will illustrate two kinds of shortcuts in strategic interaction: clientelism, which is a sort of political patronage, and violence. In both of my terms as mayor, I have had to deal with these types of shortcuts.

Clientelism is the tendency to make appointments to government jobs and contracts for economical or political advantage. This is the use of public resources to make private favors in exchange for political support or particular decisions. Violence is the threat to use or the effective use of force in order to achieve a goal or to communicate a message.

Violence is clearly a shortcut in the face of nonviolent methods. In the Colombian context, people very rarely make the effort to build a threat-free relationship and reach a peaceful agreement. People do not negotiate with the benefits of agreements in mind, but rather they search for a mechanism to have the possibility of making threats or of harming others. This sort of relationship is doomed, because none of the parts communicate with each other and they just interact by means of threats or by harming others, resulting in a precarious equilibrium.

Now I would like to refer to some of the bindings against clientelism. Our initiatives in this matter were partially based on an approach akin to that of Jurgen Habermas. Through a team commitment, we decided to base the relationship between the mayor's office and the city council on deliberation rather than on any form of improper negotiation.

The Colombian constitution binds strongly against clienteles on the national level. I quote: "Congress must not interfere, neither by law nor by resolutions, in issues that are of the exclusive competence of other authorities." The same statement, with a small but very important modification, is made in the special law that orders Bogotá institutions. This is a law that has a constitutional basis, a constitutional status. This law, sanctioned in 1993, prohibits the council to interfere in any way, not only by decree or by resolution, in any way in issues that are of the exclusive competence of other authorities. Accordingly, city council members were completely excluded from the boards of city companies, and furthermore, the very powerful contracting board of which they were members was abolished. These are the legal bindings. In clientelistic culture, legal restrictions are commonly used to increase the value of complicity at the moment of violating the binding. In Colombia, the stronger the rules against clientelism get, the stronger the complicity among those engaged in clientelism becomes. This could be seen as a kind of perverse social capital. Clientelism is legally prohibited, but widely accepted in our culture. This is a very clear case of divorce between law and culture.

### **Proactive Self-Bindings**

In relation to these rules, I have made personal and collective self-bindings by public declarations. The second time I ran for mayor, I made this kind of statement along with all other candidates. It was a mutual binding and a public commitment to establish a transparent relationship with the council and no negotiation under the demands and pressures of clientelism. Similar public commitments against clientelism have also been included in the current development plan. This is like saying the law establishes this restriction, but I commit explicitly with this legal obligation.

We have also made self-bindings against the shortcut of violence. The constitutional bindings in this matter are very clear. "The right to life is inviolable." That's a quotation. Consequently, there is no death penalty in Colombia. The enforcement of the law and the use of weapons must be exercised, with some exceptions, exclusively by the state. Colombia bound itself in the year 2000 to the Rome Statute, and we have worked in a similar resistance campaign, inviting people to make personal precommitments against extortion, against kidnapping, against vengeance, and against private justice. We have also carried out initiatives for the cultural enforcement of the legal obligation to inform authorities on criminal activity and specially on possible terrorist actions. We tried to change the social stigma that exists in our society against informers. It's not easy. *Croactivity* instead of rat or snitch or frog, as it is called in Colombia, was one of the central ideas. *Croactivity*—because the frog goes "croak croak"—is to be proactive with communication.

### **Fighting Shortcut Culture**

The kind of work we have done can perhaps be well illustrated by one particular example of shortcut culture, not in the strategic field—jaywalking. This is in everyday life. In Bogotá about four hundred pedestrians per year are killed in traffic accidents. When people jaywalk, they literally take a life-threatening shortcut. We have been trying to build moral and social bindings against jaywalking. In 1994, we put into effect an initiative that involved the pedagogical guidance of mimes on the streets. They couldn't put fines, they just could instruct people. This year we have marked by means of stars with a question mark inside, the places where pedestrians have died as a result of traffic accidents. There are nearly 1,500 stars on the places where people died during the last four years. These stars appeal to the citizen's conscience and they promote mutual regulation. This is how the thing looks on the street. It is about 3 feet long.

Now I would like to comment on some actions the city government has put into effect as part of the city culture programs, which are also related to the fight against shortcut culture. We have worked on the idea that civilians should not carry firearms, guns. Not even with a legal permit. When the ministry of defense withdrew its support for the major initiative to suspend fire-gun permits, an invitation to voluntary disarmament was made with support of Catholic Church. This disarmament can be understood as a unilateral and unconditional moral self-binding. It is an attempt to encourage the protection of life beyond what is established in the law. In this context, we also promoted the idea that private justice or the private use of violence is not valued or acceptable under any circumstance.

Furthermore, we put into effect our restriction on alcohol consumption. In the city it was culturally accepted to spend the whole night drinking or to stay up in parties and celebrations until three o'clock in the morning without taking the necessary precautions to drive safely. We prohibited the sale of alcohol and its consumption in public places after one o'clock in the morning. This law was put into effect for six and a half years. Recently, the mayor's office established the "optimistic hour," moving the restriction from one to three in the morning as an appeal for self-regulation, that is, for an opportune selection of safe behaviors. The combination of legal, moral, and cultural bindings has been effective in modifying people's drunk-driving habits. We have a very good information system that reports every month if this change has had bad consequences.

On another matter, we prohibited the use of fireworks by nonprofessionals. In this case there was an evident conflict between the widespread custom of using fireworks on Christmas, holidays, and the constitutional protection of life and the physical integrity of children. That's one of three or four cases where I made a decree just invoking constitution without having a regulametary law between constitution and my decision. Through campaigns showing the consequences of firework use, the city government stimulated moral and social support of the prohibition, achieving a substantial decrease of this custom and a 70 percent reduction of children injured by fireworks, from 204 in 1994 to 61 in 2002.

A final example is the city government's initiative for the respect of public urban spaces. In Bogotá the occupation of public spaces by informal commerce, fences, uncontrolled parking on sidewalks, etcetera, was an alarmingly frequent practice. The city government has managed to recover such spaces through construction and renovation efforts, but also by means of pedagogical strategies aimed at rising citizen awareness, by stimulating self-regulation and mutual-regulation mechanisms to achieve moral and conscious support of the law.

Two of the most outstanding achievements of Bogotá in the past years are related to the protection of life. On the one hand, there was a significant homicide reduction from 4,452 homicides in 1993 to 1,902 in 2002. On the other hand, fatalities in traffic accidents also descended.

### **Constitutions Bind, But Also Guide**

Clearly my work has found a great deal of support and guidance in the constitutional imperatives of protecting life and of protecting the independence between the branches of the state. However, I must also acknowledge the fact that I have stumbled into constitutional restrictions. For example, when we were organizing the first Woman's Night Out, we wanted to impose a curfew on men, partly to show that violence is gender related, but this violated individual rights. During the Christmas holidays in 1996, in order to prevent the use of firearms, I decided to declare the whole city the sight of public performances because in public performances, the mayor has the power to restrict firearms. I was legally crushed on this decision by the chief of the armed forces in the courts, but fortunately I had other means of limiting the bearing of firearms during this festivities. In another example of how constitutions can restrict government action, the Colombian constitutional court banned anti-kidnapping laws to defend the individual right to life, and presumably through the same line of reasoning it would also ban anti-kidnapping precommitments—commitments of not paying ransom, for example. In this sense, we believe individual or group commitments to immobilize bank accounts and properties in case of being kidnapped would be probably invalidated by the constitutional court.

To sum up, I would say that constitutions bind, but they also guide and support very strongly governance, even if effecting cultural regulations or moral corporations that have constitutional protection. Thank you.