

## **A Welfarist Approach to the Constitutional Analysis of Security Policies**

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*Whoever proposes to draw any profit from our submission, must engage himself,  
either expressly or tacitly, to make us reap some advantage from his authority;  
nor ought he to expect, that without the performance of his part  
we will ever continue in obedience.*

David Hume

### Introduction

During the summer of 2001, I dedicated a portion of the free time my bicycle and the beach left me to the preparation of one of the courses I was teaching the next fall: “Law & Globalization. Reality, Doctrine, and Ideology.” I had already decided that one of the themes the last part of the course would revolve around was the admission of China into the WTO – a process whose negotiations were in fact finalized on the 17th of September and which led to China’s membership effective December 11th the same year. I was certain the course had been organized into relevant themes and, moreover, that it harmonized nicely with the pace of accelerated global changes, but then all of a sudden the scenario changed. The events of September 11 definitively modified the relevance of a course on the role of law in global transformations. Although I spent that summer in the United States, I had been living in Spain for almost ten years and so had daily contact with the effects of the terrorism which had been incrustated into that society for decades; and although my hometown and country had changed during my absence, acquiring a hostile and dangerous ambience due to the increase in criminality (assaults, kidnappings, robberies, etc.) following the deep, prolonged economic and social crisis of the two previous decades, like many other millions of people in the world I clearly realized

that the attacks in New York, Washington, and Pennsylvania implied an historic step backwards for planetary security expectations. The reactions that ensued from this terrible experience lamentably did not contribute towards greater hope for a possible strengthening of institutional order for peace and security, but rather on the contrary aggravated impressions that these issues were being badly managed: Guantánamo, the infamous Azores “summit” in the lead-up to the Iraq invasion, the archaic dysfunction of the Security Council, Abu Ghraib; all were events that contributed to our justified concern.

Years later, in the summer of 2008, I was at it again, trying to dedicate some free time during a torrid Mediterranean summer to put together a theoretical “map” of economic regulation, a late-coming product of my interest in the relationship between law and globalization that I wanted to use as material in another course the following school year. As my proverbial luck would have it, the topic that had my attention then was the relationship between regulation and constitutional law, particularly the well-known problem of when administrative (technical) organs had to take political decisions – mainly in circumstances like those in Mexico where, because of inefficient economic management, government activity suffers from a significant deficit of democratic legitimacy. My summer passed peacefully as I serenely went on with my study of a topic that had undeniable theoretical, and moreover, practical interest, until again developments took me by surprise... on September 15, Lehman Brothers declared bankruptcy, an event which served as the precursor to the first “global economic crisis” that would detonate in the weeks to come. Once again, the perceptions of the consequences of the “sub-prime” crisis, and in particular of the massive injections of public funds into financial markets to contain the crisis’ “dissipation of government reserves” made it clear that, in capitalist economies, the exigency of the “too big to fail” principle alters any discussion over the

democratic distribution and control of political power that, in principle, guides our constitutional arrangements. And again, I had to go back to more basic questions related to the fundamental nexus between constitutionalism, democracy, and capitalism that furnish the normative “keys” of modernity, and leave for a later date the “technical” problem of the constitutional engineering of the constitutional competencies of regulative agencies.

This brief anecdotal narration was not only meant to warn the reader of my limited, if not inexistent, powers of clairvoyance, but also to describe in broad strokes how I conceptualize the relationship between the notions that top the agenda of SELA 2010: security, democracy, and law. Specifically, the pertinence of these anecdotes stems from my having realized, in the course of my experience as an academic studying the theory of law, economic regulation, and constitutional law, that security is not a “discrete” variable that can be isolated and therefore is not easily analyzed in its own terms; rather it is a notion related to systemic and interdependent social phenomena, whose ties with democracy and law is essentially communicated through government action and its relationship to the welfare of the individuals within state structures.

These are the coordinates, to put it one way, within which I want to formulate a “welfarist” argument as regards the design and implementation of security policies in constitutional states. I will divide the argument into two parts. In the first, I will focus on making explicit the notions of constitutional state and security policy that I will use for the purpose of this piece’s argument. In this section I will draw on constitutional analysis from the perspective of an operative constitutional state (1.1), and an analysis of security policy from the perspective of risk management (1.2). In the second part, my intention is to illustrate some of the limitations of some of the most common strategies for analyzing the constitutionality of security policies – the strategies I call the “emergency model” and the “guaranteeist model” – (2.1), and propose as

an alternative the possibility of “turning” towards a “welfarist” perspective based on a “coordinated balance model” (2.2), making note in elemental terms of the implications of a constitutional analysis of security policies in terms of welfare (2.3).

## 1. The operativity of the constitutional state in the face of security risks

As I noted earlier, in this section I want to detail how I configure the basic notions that my argument is based on: the notions of operative constitution and risk management.

### 1.1 Constitutional operativity

As is well known, contemporary discourse regarding the constitutional state develops alongside the opposition between formal and substantive conceptions of the principle of the rule of law (Craig 1977). From the first perspective, mention of a constitutional state is generally made in reference to the institutionalization, through the evolution or adoption of a constitution, of a specific form of government that can be identified by the presence of arrangements that organize, authorize, and control public power through specialized organs and systems of checks and balances. Thus, in contrast to perspectives favoring the “substantive” implications of the constitutional type of government (Allan 2001), the “minimum” constitutional commitment to the rule of law “must not be confused with democracy, justice, equality (before the law or of another type), human rights, or with respect for individuals or for the dignity of man” (Raz 1979: 211), but rather is circumscribed, in the end, by what Hayek considered the nucleus of this form of government:

Stripped of technicalities [the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge. (Hayek 1944: 54)

On this occasion I want to delimit the concept of constitutional state to the minimal notion of “rule of law” as necessary condition, but not sufficient, for an “operative constitution” ; in the sense that, as reflected in institutions, the previous definition denotes an institutional arrangement (the constitutional state) whose justification depends in the end on its instrumental relationship with the organization, orientation, and control of collective action or with a specific form (the law) “of carrying out governmental tasks by the means of the institution of the state” (Loughlin 2003: 6)<sup>1</sup>.

Seen this way, for the purposes of my argument I consider a constitution operative when the exercise of public power by means of institutional arrangements within it allows society to achieve its objectives *qua* constitutional state to some reasonable degree.<sup>2</sup> Put simply, a constitution is operative when it enables the goals of the state to be met *the way* that it determines: through government.

Now then, as is easy to see, in this ordering of ideas the relationship between the constitutional state and public policies in general, and security policies in particular, do not appear to depend exclusively – or even primarily – on the actual adoption of a constitution. Instead, the relationship comprises two normative variables of “effectiveness”: on the one hand,

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<sup>1</sup> Soy consciente de que, al retrotraer mi argumento hasta esta noción mínima de estado de derecho, dejo a un lado interesantes e importantes líneas de argumentación amparadas por el título de la ponencia. Las relaciones causales entre el bienestar de los ciudadanos y la seguridad –o más bien, entre la falta de uno y de la otra– ha sido ampliamente explorada, y también se ha reflexionado y debatido, aunque no en la misma medida, en torno al contenido sustantivo de bienestar requerido para una noción normativamente coherente del estado constitucional –vid, por ejemplo, (Holmes 1995: cap. 8). Aunque no voy a entrar a estos temas espero, sin embargo, que al presentar en las próximas páginas el núcleo de la noción de constitución operativa en conjunción con la aproximación bienestarista al constitucionalismo, quede claro que no me son ajenas las implicaciones distributivas de la inseguridad, sino sólo que en el contexto actual considero prioritario ocuparse de las condiciones de posibilidad del estado constitucional. En todo caso, dado que, como no cuesta ningún trabajo reconocer, la inseguridad es un mal que se distribuye de manera inversamente proporcional a la capacidad de los individuos para protegerse por sus propios medios, un argumento sobre la eficacia del estado *es* también un argumento sobre las posibilidades de una sociedad justa.

<sup>2</sup> Esta es, por otra parte, una aproximación muy difundida al cambio institucional. *Vid.*, por ejemplo, (Elster 1989). Para el tema de esta ponencia es particularmente importante la ambiciosa aproximación al tema en (North *et al.* 2009: en especial, cap 4).

effective constitutionality, and on the other, effective government. Put another way, in contrast to the standards of constitutionality formulated in terms of distributing state functions and, consequently, of the system of competencies assigned each branch of government and the of the assembly of basic rights regulated by the constitution itself, the criteria of effectiveness for a constitution reflect the degree to which two types of *facts* are verified, facts which determine, in turn, the degree of operativity of the constitution: the subordination of public action to the constitution *and* the enforcement of the legal order that is derived from the constitution. Neil MacCormick succinctly expresses these ideas in the following way:

The possibility of maintaining a functional constitution that is truly compatible with the formal constitution is conditional for the *very substantial fulfillment of the loyalty obligation* by the great majority of officials for most of the time. When this occurs we can consider that that a state possesses a ‘constitution in the fullest sense.’ This condition is of crucial importance for the constitution to be, in Kelsen’s terms, by and large efficacious [...]

There is another aspect of the effectiveness of the constitution and laws. This regards more their applicability than their obligatory character as such [...] If the state must be the theatre for relative civil peace, and if law must be a right to peace that promises protection to citizens and other residents, then *it is necessary for the majority of people, for most of the time, to abstain from doing what the law qualifies as illicit*. This is why it is also necessary for the state to maintain effective institutions for the enforcement of law (MacCormick 2007: 52, italics added).

So then, to go back to the minimal notion of rule of law in conjunction with the criteria of effectiveness which I have just described, I hold that security policy is formulated and expressed in the context of an operative constitutional state when, on the one hand, public power is exercised in the context of an effective order whose origin lies in the constitution and, on the

other, the efficacy of the institutions allows us to predict reasonably well the consequences of implementing the legal order.<sup>3</sup>

As is easily seen, the minimal definition of rule of law necessary for the idea of operative constitutional state that I have just outlined has consequences on the normative (constitutional) *status* of security that take the notion back to its original position in the justification for the state in the liberal tradition. From this position, as is well known, security is not conceptualized as a prerogative of the state nor as a right of the citizens, but rather as the primacy of *states of things* (peace, order, civil society, etc.) that justifies the state in any circumstances to the degree that it ensures the enjoyment of rights.<sup>4</sup>

In my opinion, rehabilitating the *de facto* character of security entails a healthy “denormalization” of the concept that has predominated in recent years and enables an enriching— although, I confess, unoriginal — illustration of the relationship between security, law, and democracy: security is considered, then, as a state of things resulting from an effective rule

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<sup>3</sup> De hecho, desde una concepción normativa del orden constitucional, la efectividad no sólo depende de que las personas (y el estado) se abstengan de las conductas ilícitas, sino de que realicen las conductas obligatorias. Esta es también una tarea del derecho y, particularmente, del gobierno. Por ello, quienes para apaciguar sus conciencias, alimentar sus ilusiones, o cualquier otra razón, favorecen el reconocimiento simbólico de derechos sin prestar la suficiente atención a la operación de las instituciones necesarias para su implementación, tendrán que asumir, al menos, la imposibilidad de sostener un concepto normativo de constitución y, consecuentemente, concepción coherente del valor del estado constitucional. Espero que, al menos para quienes no practiquen la hipocresía, éste resulte un precio demasiado alto a pagar por la corrección política.

<sup>4</sup> Las referencias obligadas aquí son Hobbes (en particular, al cap. XIII del *Leviatán*) y Locke (en particular, cap VIII del *Segundo tratado sobre el gobierno*). Desde mi punto de vista, lo que quizá haga que en este contexto la posición de Hobbes resulte más consistente que la de Locke, es que su argumento de seguridad a favor del contrato social —y por tanto, de la autoridad del estado— se formula dentro de una construcción “interna” de su teoría de los intereses como justificación del “estado constitucional”, prescindiendo del elemento deontológico de los derechos — en particular, a la problemática configuración del derecho de propiedad en Locke—, y apoyando su lógica en un mínimo “normativo” —la obligación “racional-instrumental” de cada uno de actuar según sus intereses— en conjunción con la verificación, por demás plausible, de ciertos hechos psicológicos: la pasiones que inclinan a los hombres a la paz —el miedo a la muerte; el deseo de las cosas necesarias para una vida cómoda, y la esperanza de obtenerlas mediante la propia industria (*Leviatán*, cap. XIII, § 14). Se trataría, como ha sostenido Russell Hardin, más que de la obligación deontológica de cumplir los contratos, de una “elemento normativo general” —que, en mi opinión, puede describirse apropiadamente como “obligación pragmática”— que posibilita la coordinación para la autoridad como fórmula de ventaja mutua: la “eficiencia hobbesiana” (Pareto superior) que refleja el paso de al anarquía al estado. Vid., en general, (Hardin 1999: 41 ss.), y para un desarrollo más puntual del argumento, (Hardin 1996 y 1992).

of law, which in turn makes the emergence of democratic society possible. Put in other words, locating security along the instrumental axis of constitutional democracy allows to approach security policies from a platform free of the rhetorical extremes of belligerent diatribe and naive legalism.

More concretely, as noted above, in its relationship with the instrumental character of the constitutional state, security is considered the task of a governor whose worth depends on the degree to which the governmental regime (constitutional state) is an effective means for reaching the primary objective of the social organization *qua* state.<sup>5</sup> Consequently, in terms of security, a constitution can be considered operative when citizens, on the basis of the regime's provision for effective governance produced by the institutionalization of the constitutional state, can "manage their affairs."

## 1.2 Security as risk management

As can be deduced, in terms of substance, the previous considerations do not stray far from the *locus classicus* formulated by Cicero, *Salus populi suprema lex esto*, that Hobbes translated into the four tasks of government: establishing means for defense against external enemies; maintaining internal peace; enabling citizens to generate wealth as long as it is compatible with public safety; and promoting the enjoyment of freedoms among citizens.<sup>6</sup>

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<sup>5</sup> Este es el sentido en el que se recoge la seguridad, por ejemplo, en el Art. 67.3 de las versiones consolidadas del Tratado de la Unión Europea y del Tratado de Funcionamiento de la Unión Europea: "La Unión se esforzará por garantizar un nivel elevado de seguridad mediante medidas de prevención de la delincuencia, el racismo y la xenofobia y de lucha en contra de ellos, medidas de coordinación y cooperación entre autoridades policiales y judiciales y otras autoridades competentes, así como mediante el reconocimiento mutuo de las resoluciones judiciales en materia penal y, si es necesario, mediante la aproximación de las legislaciones penales".

<sup>6</sup> Cf. *De Cive*, n. 13, xiii. 6. *Vid.*, la aproximación más conocida de Hobbes en *Leviatán*, I, cap. XIII, § 10. A propósito *vid.*, también, (Loughlin 2003, 8 ss.). Desde luego, no es de extrañar su coincidencia con el argumento general de Hamilton y Madison en los primeros capítulos de *El Federalista*. A propósito, *vid.*, por ejemplo, (Hardin 1999, 81 ss.).



Security is considered, then, a basic task of government. What changes through time are the causes of insecurity. In contrast to the societies in the 2<sup>nd</sup> to 17<sup>th</sup> centuries when Cicero or Hobbes wrote, what characterizes security problems in contemporary society is the systemic nature of the causal relations: today, among the great number of dangers and threats that we confront daily<sup>7</sup>, the security with respect to life, to physical integrity, or to the heritage of a citizen depends on a complex network of actions and omissions from a broad set of agents that, among other things, are impossible to identify as exclusively political, economic, or ideological phenomena; that go beyond any effective territorial boundary – and thus beyond the control of any sovereign power; that dissolves the traditional division between public and private, etc.. The keys for constitutional democracy appear inoperative in such circumstances; and this explains, in my opinion, a good part of the pertinence of the theme for this year's Seminar.

In light of these factors, it seems reasonable to look for alternatives that would enable us, in time, to give an account of the systemic character of the security risks and come up with plausible responses for the formulation and implementation of security policies in a constitutional state. My proposal is, as I remarked, to put forward the most elemental traits of a welfarist argument. And to do this, keeping in mind everything that has been said until now, I want to treat, on the one hand, security policies as risk management strategies<sup>8</sup> and, on the other, treat their constitutionality as an element in security risk regulation regimes.<sup>9</sup>

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<sup>7</sup> *Vid.*, por ejemplo, (Power, 2007), (Bernstein 1996) y (Beck 1992).

<sup>8</sup> Esto supone que la intervención del gobierno en las distintas esferas de la vida de los ciudadanos es, en principio, una acción racional para controlar potenciales consecuencias adversas en el bienestar de los propios ciudadanos (vida, salud, disponibilidad de alimentos, etc.). Por otro lado, respecto de la “racionalidad” de la acción pública, aludo a una noción mínima de racionalidad común a las acciones individuales y colectivas: adecuación medios fines (efectividad) y maximización de resultados (eficiencia). Dahl y Lindblom condensan estas ideas en los siguientes términos: “Una medida es racional en la medida en la que está ‘correctamente’ diseñada para maximizar objetivos, dado el objetivo en cuestión y el mundo real existente”, (Dahl y Lindblom, 2000, 38).

Por otro lado, no desconozco que el “lenguaje” de la gestión de riesgos y, en particular, su racionalidad implícita, conlleva por sí mismos los “riesgos” de un régimen disciplinario-tecnocrático que, lamentablemente, por

From my point of view, the principal advantage of approaching the constitutionality of security policies from the perspective of risk regulation regimes is that it allows us to analyze the constitutional operativity in “systemic” terms that are analogous to the characteristics of contemporary security problems. Set out in a very basic way, this advantage consists of the possibility of analyzing constitutional operativity as regards security policies in two dimensions: the basic components as a control system and the instrumental and institutional properties of these policies.

Inasmuch as a control system, the operativity of a constitution in terms of the design and implementation of security policies can be analyzed using three basic elements: the processes by which the system obtains information; the procedures by which the systems standards are established (ends, objectives, principles); and the capacity of the system for modifying relevant behaviors in order to meet the system standards.

Meanwhile, as regards the instrumental and institutional properties, the levels of analysis involve, on the one hand, the context in which a security regime is developed and, on the other,

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razones de espacio no podré tratar aquí. A propósito, *vid.*, por ejemplo, (Foucault 1980: 78-108.) y (Foucault 1991: 53-104).

<sup>9</sup> Tomo la idea de “régimen de regulación de riesgos” de Hood, Rothstein y Baldwin así que, para abreviar, conviene citarlos directamente:

“We use the term ‘regime’ to denote the complex of institucional geography, rules, practices, and animated ideas that are associated with the regulation of a particular risk or hazard. Institutional geography can vary in features such as scale, from international to nacional to local jurisdiction; integration, from a single agency handling all features of regulation to high fragmented administration and complex overlapping systems controlling related aspects of risk; and specialization, from risk-specific and hazard-specific expertise to general-purpose administration [...] Three basic features of the regime approach deserve to be noted briefly here.

First, we see risk regulation regimes as *systems*. We view them as sets of interacting or at least related parts rather than as ‘single-cell’ phenomena. So we are interested just as much in what ‘street bureaucrats’ and front-line people do on the ground as in the activity of standard-setters and policy-makers, and in the relationship, if any, between the too.

Second, we see regulation regimes as entities that have some degree of continuity over time. Of course, regulatory systems seldom if ever completely static. Risk regulation regimes have their sudden climacterics as well as their incremental adjustments and steady trends [...]

Third, as with any system-based approach to organization, regimes are conceived as relatively bounded systems that can be specified at different levels of breath”. (Hood *et al.* 2001: 9 ss.)

the content of the regime. Thus, while the contextual dimension involves the scenario in which the regulation takes place – in which arise, among other factors, the different kinds of risk that must be confronted, the attitudes towards those risks, and the reactions of the various agents involved – the substantive dimension involves the public political establishment and the configuration of the relevant agents – for example, the form of the state (central or federal) and other organs (the legislative, executive, and judicial branches; the intelligence agencies, security forces, etc.).<sup>10</sup>

Because of space limitations I will not elaborate on these categories or show how the security problems I refer to in my initial narrative – terrorism, criminality, squandered national wealth, etc. – can be considered “government defects” or, more specifically, consequences of “poor management of systemic security risks.” I want to emphasize, however, that conceptualizing security in terms of risk management does not imply at all “neutralizing” the appropriate moral and legal importance of actions relevant to the behaviors in question – inciting, committing, or reacting to harm. Rather than displacing the principles of the constitutional state as valuable standards, what the risk management perspective suggests is analyzing the same systemic variables (of institutional and instrumental control) such that, in the first place, criteria for correction *and* efficacy converge in the constitutional evaluation of security policies and, in the second place, the security risk management policies themselves can be evaluated, in turn, as risk factors.

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<sup>10</sup> Respecto de las categorías anteriores, *vid.*, (Hood *et al.* 2001: 20 ss.). Una perspectiva más amplia que, lamentablemente, no podré explorar aquí, pero que en cierto sentido está “*at the back of my mind*” es la del análisis de las constituciones como regímenes regulativos. Al respecto, *vid.*, por ejemplo, (Scott 2004). Y para una aproximación más amplia respecto de las consecuencias del “enfoque” regulativo para nuestra concepción del estado constitucional y del derecho, *vid.*, por ejemplo, (Larrañaga 2009a, en particular, cap. 5).

That said, I believe that this section offers the conclusion that security policy, in order to be compatible with the standards of a constitutional state, must simultaneously satisfy the following conditions:

- a) it must be formulated and implemented within the framework of the effective order for the exercise of public power contained in the constitution.
- b) it must lead to adequate responses (i.e., effective and efficient) to the security risk in question.

## 2. Constitutionalism and security

As I indicated in the introduction, in this section I will specifically concern myself with identifying the location of security policies within constitutionalism. Of course, the risk management perspective enables a broad approach to the topic that encompasses a wide range of risks or causes of it – from biotechnology to accidents in the home, with radioactivity and pandemics somewhere in between<sup>11</sup> – and an enormous panoply of “methods for risk management” – from criminalization to social communication, with border protection and uniform accounting systems somewhere in between. To follow the tone of our Seminar, however, going forward I will limit my welfarist approach to possible harms resulting from the actions of violent organizations that threaten basic human goods such as life, integrity, freedom, etc.. To provide some background for my argument, then, I turn to contemporary debate

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<sup>11</sup> Una excelente aproximación a este “universo” se encuentra en el Centre for Analysis of Risk and Regulation de la LSE (<http://www.lse.ac.uk/collections/CARR/>).

regarding systemic risks related to the activities of transnational criminal organizations, including for example, terrorist organizations, drug cartels, arms and people traffickers, etc.<sup>12</sup>

## 2.1 Two non-operative approaches to the constitutionality of security policies

It seems evident that there are two relatively clear positions as regards how a constitutional state might confront systemic risks produced by transnational organized crime, although they can and should be distinguished by virtue of their conception of the value of “constitutional order” and also conflict, in my opinion, with the premises of the constitutional analysis of contemporary security policies from the perspective of constitutional operativity.

On the one hand, arguments that can be generalized under the rubric of “emergency model” tend to favor “exceptional” security policies – like the concentration of power in the Executive, “signaling” potential criminals, lowering standards for due process as part of “justice for enemies,” etc.

On the other hand, arguments that can be grouped under the “guaranteeist model” tend to reject security policy restrictions on certain rights and liberties – for example, freedom of movement, the freedoms of expression and assembly (generally political in character), the right to privacy (for example, regarding financial information), etc..<sup>13</sup>

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<sup>12</sup> Soy consciente de que en esta “acumulación” paso por alto significativas diferencias en la caracterización tanto de los riesgos como las medidas de gestión. Para una aproximación a la cuestión, *vid.*, por ejemplo, (Edwards y Gill 2003). Por otra parte, también soy consciente de que la noción de “riesgo sistémico” es notablemente ambigua refiriéndose, al menos, a tres cosas distintas: la causa del riesgo (p. ej. riesgos provenientes del “sistema” económico, del “sistema” de producción alimentaria o de las alteraciones al “sistema” climático); la respuesta al riesgo (p. ej., respuestas provenientes del “sistema” jurídico, del “sistema de seguridad del estado”, de los “sistema” de cooperación internacional, etc.) y la naturaleza del riesgo (p. ej., riesgos para la continuidad del “sistema” político o económico, riesgos para los “sistemas” de control social, etc.). Creo que en este contexto sería excesivo distinguir con propiedad estas categorías y que su especificación, en todo caso, no aportaría significativamente a hacer más persuasivo el argumento.

<sup>13</sup> Lamentablemente, por razones de espacio no podré describir puntualmente los modelos no operativos a los que hago referencia. Este es, no obstante, un déficit que no considero de mayor importancia en este contexto, pues mi propósito no es formular una crítica de estos modelos, sino sólo contraponerlos con mi argumento con finalidades de

As is easily appreciated, the set of these two models presents an apparent dilemma between “state security” and “citizen security” that, in my opinion, gives rise to two important limitations for the analysis of constitutionality of security policies.

In the first place, the dilemma impedes a pertinent analysis of the nature of the security risks. In my opinion, even the best versions of the emergency model<sup>14</sup> mask the fact that, in the current conditions in which systemic risks are confronted, the “constitutionality” of security policies is not only – and perhaps not even primarily – a problem of determining the limits for legitimate exercise of authority, but also a problem that affects the very conditions of state “justification” – i.e., its supremacy over other types of organization, particularly with regards its monopoly over the use of force. Put in other words, to the degree that there exists risk that an action by the government might fail to lead to stable expectations of the institutionalization of the constitutional state – i.e., to say it another way, the systemic security provided by the state itself is in risk – emergency constitutionalism offers incomplete control systems that make it difficult to effectively plan and coordinate for the risks in question. As I remarked earlier, contemporary security risks do not only affect the normative conditions for the legitimacy of authority, but also, more seriously, affect the *de facto* preconditions for the “justification” of the constitutional state itself.

In second place, there is no room for a useful analysis to exploit the “constitutional” possibilities of public opinion. In my opinion, even the most developed formulations of the

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claridad expositiva. En todo caso, dejando a un lado las precisiones que serían necesarias en un ejercicio crítico serio, buenos ejemplos los “modelos” que tengo en mente como contraposición al “modelo” que postulo serían, por un lado, el criticado por Stephen Holmes en *The Matador’s Cape. America’s Reckless Reesponse to Terror* (Holmes 2007) –en particular, Parte IV- y, por otro, el teorizado por Luigi Ferrajoli en *Derecho y razón. Teoría del garantismo penal* (Ferrajoli 2005).

<sup>14</sup> Vid., por ejemplo, (Ackerman 2997).

guaranteeist model<sup>15</sup>, when they go beyond observing a mere “tension” between security and rights – in general, between safety and freedom – to express a set of “absolutely sacrosanct” elements, they result in technico-institutional tools that are inadequate for confronting systemic security risks. Put in other words, even in the most robust expressions of guaranteeism, the recognition of fundamental rights and the constitutional control of security policies via jurisdictional protection of them (guaranteeism), are inefficient and comprise an insufficient method for managing contemporary security risks.<sup>16</sup>

It seems, then, that in the face of the need to manage the systemic security risks produced by transnational organized crime without foregoing the institutional arrangements we hold dear, there are good reasons for looking for alternatives within the liberal tradition underlying the ideology of constitutionalism. The alternative I suggest is the “model of coordination” which can be associated with authors such as D. Hume, J. Madison, and F. Hayek.

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<sup>15</sup> Vid., por ejemplo, (Denninger 2009) y (Lepsius 2006 y 2002).

<sup>16</sup> En otra ocasión, he explorado tentativamente el problema compatibilidad del control de constitucionalidad de las políticas públicas con una concepción normativa de la constitución, anclada en los presupuestos de la “autonomía” del derecho respecto de la política y la moral –i.e., con los presupuestos del positivismo jurídico- (Larrañaga 2009b). Aunque por razones de espacio no podré detenerme en este punto, creo que la contraposición de fondo entre los “modelos” no se ubica sólo, ni siquiera principalmente, en la relación entre seguridad y orden constitucional, sino que alcanza su punto álgido en las respectivas concepciones de la política o, quizá mejor dicho, de la respectiva “autonomía” del discurso jurídico respecto de la política y la moral respectivamente. Mientras que, para el primer modelo, la seguridad es un valor político dependiente de la preeminencia del Estado frente a sus enemigos, para el segundo, la seguridad es un valor jurídico dependiente, a su vez, de sus condiciones de validez. Como es sabido, aunque por vías distintas, ambos modelos llegan callejones sin salida, abocados bien al decisionismo bien a la circularidad. Esta es una de las razones, subyacente al tema de esta ponencia, por las que el modelo sociológico del equilibrio me parece superior a sus alternativas.

Desde luego, la referencias obligadas aquí son, por una parte, Hans Kelsen y Karl Schmitt -y en particular su famosa polémica respecto de la Constitución de Weimar (Schmitt y Kelsen 2009) y (Dyzenhaus 1999) y, por otra, Habermas (Habermas 1998) y Ferrajoli (Ferrajoli 2005). Sin duda, explorar esta veta sería de gran interés para integrar en mi argumento el tercer elemento que encabeza este seminario, la democracia. Pero, naturalmente, no intentaré hacerlo en esta ocasión.

## 2.2. Interests and coordination

To speak of a “welfarist turn” in constitutionalism would certainly be an exaggeration. It would be more correct to speak of rehabilitating a central element of liberal ideology that is common in political and economic liberalism but that over time slowly abandoned the former and was concentrated in the latter. In this order of ideas, Russell Hardin (Hardin 1999) distinguished two “variants” of liberalism: a deontological variant and a welfarist one. For the first, a liberal principle (such as, for example, constitutionalism, democracy, or property) is judged on the basis of its very content, whether that be in terms of our moral intuitions or its relationship with other principles such as individual autonomy. For the second, a liberal principle is judged on the basis of the good it produces or, in other words, of its effects on the welfare of individuals regardless of how it is implemented. As Hardin illustrates, and as I have noted with regards the function of security in the constitutional state, although originally liberalism was fundamentally instrumentalist and did not find value in government of itself but rather in terms of human welfare and, thus, includes welfarism in its normative nucleus<sup>17</sup>, in the theoretical development of the political aspect of this current, fundamentally due to contractualist arguments, deontological elements were introduced that caused a “mutation” in the liberal discourse that led to predominance of the deontological elements; for example, via the introduction, by Locke, of a theory of property rights and democratic restrictions on the legitimate exercise of the government and, by Kant, of the consubstantial restrictions on the free exercise of autonomy or, put in other words, of natural rights.<sup>18</sup>

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<sup>17</sup> *Cfr.*, *supra*, nota 4. *Vid.*, también, (Holmes 1995: caps. 1 y 2) y (Hart 1983).

<sup>18</sup> *Vid.*, en general, (Vitale 2007) y (Simmons 2001).



Most likely, the welfarist element remained clearest in the framework of the theory of social order as coordination that, as is known, David Hume opposes to the contractualist strategies of Hobbes and Locke; in particular, as Hardin himself remarks (Hardin 2007), while proposing corrections to political sociology of Hume and rejecting, not without signs of satisfaction, Locke's theory in its entirety.<sup>19</sup> In my opinion, for our topic the correction might be more interesting than the refutation, since even though the theory of social order of both orders share the common justificatory premise of mutual benefit, Hume does not consider that this is possible using a strategy for conflict resolution based on contract, but rather that it is produced through reiterated *coordination* of reciprocal recognition of interests, which gradually gives rise to a stable social organization or, put in other words, a social coordination or equilibrium.<sup>20</sup> So, for Hume, social order is explained because:

Once coordination is reached in a permanent or reiterated context it has great stability because it is self-reinforcing. Achieving collective action does not lead to this stability; coordination is the dominant element in a stable organization. By consequence, our success in achieving collective actions is often dependent on the previous coordination in some organization or structure that enables us to cooperate or even obliges us to cooperate (Hardin 2007: 84).<sup>21</sup>

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<sup>19</sup> *id.*, (Hardin 2007, 209 ss.)

<sup>20</sup> En este punto la cita parece oportuna:

I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And it may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part. Two men, who pull the oars of a boat, do it by agreement or convention, tho' they have never given promises to each other, (Hume [1740] 1992: Libro III, Parte II, 490).

Como puede apreciarse, en este contexto, la estrategia de Hume es aún más consistente que la de Hobbes –y, como he señalado, naturalmente, que la de Locke (*cf.*, *supra*, nota 6)–. Sin renunciar a la estrategia de la ventaja mutua central en la justificación liberal, el argumento de Hume prescinde de cualquier elemento deontológico asociado al contractualismo; por ello, se le puede caracterizar como un argumento puramente “bienestarista”.

Por razones de espacio no me detendré en las diferencias entre los contratos y la coordinación como estrategias para resolver problemas de acción colectiva, pero para un tratamiento preciso del tema, *vid.*, (Hardin 1999: 82 ss).

<sup>21</sup> De hecho, como señala el propio Hardin, la estructura en dos fases del argumento de Hume es replicada en lo que puede llamarse el “utilitarismo institucional” de Rawls; primero, en “Two Concepts of Rules” y más adelante en su *A Theory of Justice*: en la primera fase se justifican los principios institucionales (artificiales) y luego se juzgan las acciones individuales de función de su ajuste con estos principios. *Cf.*, (Hardin, 2007: 47 s.)

In this way, then, projected onto the constitutional plane, coordination and, above all, coordination of organizations and structures for coordination arises in two different senses or levels: the coordination *for* the constitution – i.e., related to the affirmation, for example, that a constitution is the product of a “pact” between certain social forces – and the coordination *under* the constitution – i.e., related to the affirmation, for example, that the government act within the bounds of the constitution.<sup>22</sup> Naturally, keeping in mind what has been said up to this point, I believe it is clear that both types of coordination are *preconditions* for constitutional operativity: the actions on which constitutional operativity depends – i.e., the subordination of public action and the implementation of a legal order – are foreseeable if, and only if, a certain degree of social coordination *for* and *under* the constitution is confirmed.

### 2.3 Constitutional coordination and security

Synthesizing from the previous point, it can be said that, in contrast to contractualist and natural rights premises, underlying the coordination model are “welfarist” premises in which standards for state legitimation and legitimacy of public action instrumentally converge. Keeping in mind the previous assessment of the preconditions for constitutional operativity, then, it is possible to outline the basic elements of a security model based on the idea of constitutional coordination in the following terms.

In the first place, while justification for the central exceptionality in the “emergency model” rests on a contractualist notion of justification (the coordination of interests *for* the constitution), in the coordination model the legitimacy of security policies arises from the result or product of government activity within the system of constitutional coordination and is

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<sup>22</sup> Respecto de esta distinción, *vid.*, (Hardin 1999: 103 ss.).

characterized by the existence of inter and intra-institutional checks and balances (the coordination of interests *under* the constitution) whose efficacy and efficiency, by the way, fundamentally depend on the operativity of the constitution. In other terms, from this perspective, justification for public action does not only depend on its origin in the authority of the state, but also on the instrumental character of the procedures of a “government *sub constitutione*”<sup>23</sup> themselves.

In the second place, in contrast to the notion of limits associated to basic or human rights reflected in the “guaranteeist model” as a corresponding position of the right of citizens to security against the state’s obligation to “guarantee” this right, from an instrumental perspective the legitimacy of relationships between governors and governed can be examined in terms of the “welfare probabilities” of the individuals involved.<sup>24</sup> This de-deontologization of the discourse in

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<sup>23</sup> Aquí el nexo entre Hume y Madison resulta patente. Por una parte, Hume escribe en su *Tratado*:

Men are not able radically to cure, either in themselves or others, that narrowness of soul, which makes them prefer the present to the remote. *They can not change their natures. All they can do is change their situation*, and render the observance of justice the immediate interest of some particular persons, and its violation their more remote” (Hume [1740] 1992, Libro III, Parte II, Sección VII, 537. Énfasis añadido).

“The same self-love, therefore, which renders men incommodious to each other, taking a new and more convenient direction, produces the rule of justice, and is the *first* motive of their observance (Ibid., Sección VIII, 543).

Por otra parte, en *El Federalista* 51, Madison expresa bien conocida formulación principio de “equilibrio” *bajo* la constitución en los siguientes términos:

Si los hombres fueran ángeles, el gobierno no sería necesario. Si los ángeles gobernaran a los hombres, saldrían sobrando lo mismo las categorías externas que las internas del gobierno. Al organizar un gobierno que ha de ser administrado por hombre para hombres, la gran dificultad estriba en esto: primeramente hay que capacitar al gobierno para mandar sobre los gobernados; y luego obligarlo a que se regule a sí mismo.

El hecho de depender del pueblo es, sin duda alguna, el freno primordial indispensable sobre el gobierno; pero la experiencia ha demostrado a la humanidad que se necesitan precauciones auxiliares.

*Esta norma de acción que consiste en suplir, por medio de intereses rivales y opuestos, la ausencia de móviles más altos, se encuentra en todo el sistema de asuntos humanos, tanto privados como públicos* (Hamilton *et al.*, [1780] 2006: 220 s. Énfasis añadido).

<sup>24</sup> En principio, la posibilidad de expresar tanto las demandas de seguridad como las consecuencias de las medidas dirigidas a satisfacer esas demandas en los mismos términos –i.e., como “probabilidades de bienestar”– es un requisito “técnico” de la aproximación es este tema desde la perspectiva de la “estandarización” de la gestión de riesgos –*vid.*, (Power 2007: 66ss.)–. Sin embargo, también conviene llamar la atención respecto de su relación con la doble vertiente de la legitimidad democrática –sin dejar de apuntar, por cierto, que es fundamentalmente a la segunda a la vincula el argumento de esta trabajo–. Fritz Scharpt ha descrito esta dualidad en los siguientes términos:

favor of a welfarist approach leads to, among other things, two important steps forward: on the one hand, it makes clear that, to be legitimate, the authority relationship must result in concrete benefits that are measurable in terms of welfare and not only in transformations of the normative system. This is why, as far as security is concerned, recognition of a “right to security,” if it does not entail the constitutional implementation of institutional mechanisms necessary for people to expect free exercise of substantive rights (life, physical integrity, freedom of expression and movement, property, etc.) is, in the best of cases, irrelevant, if it is but clearly ideological and, even worse, carries very high social costs in terms of opportunity costs for the collective action.<sup>25</sup>

On the other hand, following the same lines, if government is instrumentally conceptualized as a system of institutional arrangements for solving problems of collective action – and, in particular, controlling violence – it is natural that in the design and implementation of security policies be included, on the one hand, an efficiency calculation for alternatives to improve the system’s efficiency – i.e., identifying the best relationship between costs and benefits of the policies – and, on the other hand, an evaluation of how the social costs and benefits of security will be distributed.<sup>26</sup>

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En la teoría democrática, el ejercicio de la autoridad se legitima como manifestación de la autodeterminación. Pero, como el propio concepto de democracia, el de autodeterminación es un concepto contestado, complejo y con gran carga valorativa. Sin embargo, en la historia de la teoría política normativa es posible identificar dos perspectivas distintas pero complementarias –una que enfatiza la primera parte del término compuesto y otra que enfatiza la segunda-. En mis trabajos he descrito estos elementos como creencias legitimadoras orientadas al insumo (“*in-put oriented*”) y orientadas al producto (“*out-put oriented*”). El pensamiento democrático orientado al insumo enfatiza el ‘gobierno *por* el pueblo’. Las decisiones políticas están legitimadas en la medida en la que reflejan ‘la voluntad del pueblo’ –esto es, si se puede creer que reflejan las auténticas preferencias de los miembros de la comunidad-. En contraste, la perspectiva orientada al producto enfatiza el ‘gobierno *para* el pueblo’. Aquí, las decisiones políticas se legitiman en tanto que promuevan efectivamente el bienestar de la comunidad en cuestión (Scharpt 1999: 6).

<sup>25</sup> Por ello, no resulta ocioso recordar que una estrategia de seguridad que se limita a la “defensa del estado” y a la “declaración de derechos” no tiene un costo social equivalente, exclusivamente, al papel y tinta necesarios para su “consagración” o a los “muertos por la patria”: supone también un importante costo de oportunidad en términos de fijar y ejecutar las prioridades sociales en términos del bienestar de los individuos. Sin embargo, en este momento no podré entrar a considerar el costo de las retóricas de la soberanía y de los derechos.

<sup>26</sup> En un contexto que no estuviera tan embelesado por el lenguaje de los derechos, quizá no sería necesario recordar, con Holmes y Sunstein, que:

In the third place, consequent to the previous steps, in the “coordination model,” security policies are presented as state policies, yet to underscore that, in a “constitutional” state, the democratic legitimacy of any “public policy” depends on its formulation, on the one hand, in the framework of the inherent normative restrictions of this form of government (rule of law) and, on the other, the *de facto* conditions imposed in reality (systemic security risks). Therefore, this theoretical configuration of the question opens interesting possibilities for controlling the “rationality” of security policies in terms of the best means (possible coordination *under* the constitution) to render the constitutional security regime more efficient in terms of its control system and of its instrumental and institutional properties.

In the fourth place, security policies in a constitutional state can be as a question related to welfare maximization on the various levels of formulation and execution of the policies for the short, medium and long term as a result of distinct “security equilibriums” compatible with the criteria a) and b) described in the first section. Thus, although on some occasions there are inevitably tradeoffs between the degrees of satisfaction of these criteria at a given moment, in my opinion, a coordination model makes it possible to formulate a constitutional security regime whose normative and functional properties can be analyzed in their entirety in order to detect crises, deteriorating processes, and substantive mutations in the constitutional security system itself.<sup>27</sup>

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We can obtain costly goods and services only by relinquishing something else of value. The world of value is complex and the world of available possibilities is larger than the world of co-available possibilities.

There is nothing cynical or degradating about admitting as much or acknowledge that this pattern applies to basic rights as well as to ordinary commodities (Holmes y Sunstein 1999: 102).

<sup>27</sup> Esta análisis versaría sobre lo que puede llamarse la “resiliencia” del régimen constitucional de seguridad, es decir, su capacidad de “recuperarse” o “reponerse” ante acontecimientos súbitos y dramáticos. Naturalmente, este análisis puede llevarse a cabo respecto de los distintos elementos del régimen: sistema de control, instrumentalidad e institucionalidad. Aunque en otros términos, este tema es tratado brevemente en (Holmes 2007: 232 ss.).

In synthesis, the coordination model makes it possible to formulate a constitutional security regime analyzable in terms of welfare, which has the following advantages over the alternative models in the constitutionalist tradition.

In the first place, it is a realistic model, because it addresses circumstances when systemic security risks put in question the very justification for the state and not only, nor fundamentally, problems concerning the legitimate use of authority.

In the second place, it is a normative model, because it incorporates, as a result of government activity, the objective conditions of a constitutional state.

In the third place, it is a useful model. On the one hand, because developing it makes it possible to identify criteria for public action on the basis of a transversal criterion for assessment – i.e., the welfare of the population – and, on the other hand, because we can identify the magnitude of *settlements* or *balances* between a) and b) by evaluating, in terms of welfare, the effects of specific security policies on the stability of the constitutional security regime itself.

Furthermore, from the perspective of risk regulation regimes, this “welfarist” reconfiguration of the constitutional state could be broadened to apply to other elements in the complex relationship between constitutional democracy and security.

In the first place, in contrast to the notion of *ex ante* legitimation associated with the democratic mechanisms for formulating collective decisions, democratic control can only be seen as an *ex post* control based on the substantive appreciation and validation of the results of public action in terms of its effects on the “welfare probabilities” for the people involved.

In second place, in contrast to the general notion of “legality” associated with the ideas of proportionality in the “public reaction” – basically concerning dissuasive and punitive measures – and of a “correct balance” of constitutional principles and/or basic or human rights as regards the goods protected by security policies, the relationship between legitimacy and efficacy must no longer be evaluated exclusively using quantitative standards – relative, for example, to the amount of drugs confiscated in police raids, of arrests, of convictions, etc. – and/or qualitative – relative, for example, to the degree of “resistance” to specific state actions that run up against basic controls of constitutionality, for example, against the standards of due process – in order to take into account an additional dimension of consideration, a notion of control as “constitutional equilibrium of security policy.” This notion, which would add to the test of constitutionality for security policies a consideration of their predictable results – i.e., how much they would increase the welfare probabilities for the population in the short, medium, and long term, would also create what could be called a “systemic proportionality test,” understood as the sustainability of the constitutionality of the security policies – i.e., the stability of the probability of the efficacy of the security system as a whole.<sup>28</sup>

Finally, the two advantages just described enable us to see how a welfarist perspective and, in particular, the coordination/equilibrium model associated with it is compatible with a primary trait of systemic risk management: the impossibility of predicting future conditions. In contrast to the dilemma situation between “state security” and “citizen security” that arises

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<sup>28</sup> Este principio, que tuvo gran importancia en la teoría social de la ilustración escocesa, fue sintetizado por Ferguson cuando en 1767, en su *An Essay on the History of Civil Society*, afirmaba que muchas de nuestras instituciones “son el resultado de acciones humanas, pero no la ejecución de ningún plan”. Esta idea se puede encontrar con claridad, décadas antes, en la teoría de la utilidad social o bien público de Hume (1740) y, pocos años después, en la famosa –aunque no siempre bien interpretada– metáfora de la mano invisible de Smith (1776). Al respecto, vid., por ejemplo, (Haakonsen 1996: 100 ss.) y, con mayor amplitud, en (Haakonsen 1981). Respecto del problema de la incertidumbre y, más particularmente, respecto de la descentralización del conocimiento, este principio fue retomado por la teoría social de escuela austriaca de la que se nutre, como es bien sabido, la noción “mínima” de estado de derecho en la que se sustenta mi argumento. Al respecto, vid., por ejemplo, (Hayek 1983).

between the emergency and guaranteeist models that posit security as an intentional result of constitutional “order,” this model, based on the balance of coordination for and under the constitution, is intimately related to the notion that intentional acts have unintended consequences. Thus, the “constitutionality” of security policies is not only seen, or even with priority seen, as a question of finding a “settlement” for the systemic security risk management regime – the control system, institutionality, and instrumentality – as regards reality (see *supra*, § 1.2.). Unfortunately due to the limitations on length these topics will have to be developed in another article.

### Conclusion

A few months ago, a Mexican government official told me that, in his opinion, the main security problem in Mexico lay in the divorce between the State and society. Sadly, I could not disagree; but I responded by building on his metaphor: the tie between society and the state is the government, and it is not a religious or civil regime, but rather constitutional. It should not be surprising, then, in my opinion, that the primary security risk in Mexico would be the inoperativity of the constitutional state; specifically, the systemic incapacity of the government regime to generate the kind of coordination *of* the constitution that would strengthen coordination *for* the constitution. The systemic character of the risk I refer to traverses public policies, from economic policy to environmental policy, with the policies for energy, health, education and others somewhere in between. For the time being, because of length limitations and because of the topic of the presentations of other colleagues, I am not going to enter into discussion of the constitutionality problems of the current security policy in Mexico. I hope, however, that what I have said up to now has clear relevance to consideration of a constructive approach to them.



Writing about how the Senate should be formed, in his witty strategy for arguing in favor of the benefits of coordination *under* the Constitution in order to achieve coordination *for* the Constitution, in *The Federalist*, No. 62, James Madison wrote:

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert, that in American governments too little attention has been paid to the last. The federal Constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first. (Hamilton, et al., [1780] 2006: 264)

In my opinion, Madison's thought might encapsulate the best expression of operative constitutionalism. For this reason, I find encouragement in the idea that we would both be convinced that an ineffective government is the most penetrating form of injustice: the antithesis of security, of law, and democracy. That is why I hope, when I do take on this problem, this time with a presentation outlined, however tentatively, on a theme that is simultaneously of current import and "undeniable" theoretical and practical importance.

## Bibliography

Ackerman, Bruce (2007), *Before the Next Attack. Precerving Civil Liberties in an Age of Terrorism*, New Haven, Yale University Press.

Beck Ulrich (1992), *Risk Society*, Londres, Sage.

Bernstein Peter (1997), *Against the Goods. The Remarkable Story of Risk*, Nueva York, Wiley.

Craig, Paul (1997), “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework”, *Public Law*, Otoño, 467.

Dahl, Robert y Lindblom, Charles [1953] (2000), *Politics, Economics & Welfare*, New Brunswick, Transaction Books.

Denninger, Erhard (2009), “Prevención y libertad. Sobre el orden de la libertad”, *Libertad y seguridad*, Granada, Anales de la Cátedra Francisco Suárez, 43, 39.

Dyzenhaus, David (1999), *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford, Oxford University Press.

Edwards, Adam y Gill, Peter (eds.) (2003), *Transnational Organised Crime. Perspectives on Global Security*, Londres, Routledge.

Elster, Jon (1989), *The Cement of Society*, Cambridge, Cambridge University Press.

Ferrajoli, Luigi (2005), *Derecho y Razón. Teoría del garantismo penal*, Madrid, Trotta.

Foucault, Michel (1991), *The Foucault Effect. Studies in Governmentality*, [Burchell, Graham et al. (eds.)] Chicago, University of Chicago Press.

— (1980), *Power/Knowledge: Selected Interviews & Other Writings*, [Gordon Colin (ed.)], Nueva York, Pantheon.

Haakonsen, Knud (1981), *The Science of Legislator. The Natural Jurisprudence of David Hume & Adam Smith*, Cambridge, Cambridge University Press.

— (1996) *Natural Law and Moral Philosophy. From Grotius to the Scottish Enlightenment*, Cambridge, Cambridge University Press.

Habermas, Jürgen (1998), *Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, Madrid, Trotta.

Hamilton, Alexander et al. [1780] (2006), *El federalista*, México, Fondo de Cultura Económica.

Hardin, Russell (2007), *David Hume: Moral & Political Theorist*, Oxford, Oxford University Press.

— (1999), *Liberalism, Constitutionalism, and Democracy*, Oxford, Oxford University Press.

— (1996), “Magic on the Frontier: The Norm of Efficiency”, *University of Pennsylvania Law Review*, 144 (mayo), 1987.

- (1992), “The Morality of Law and Economics”, *Law and Philosophy*, 11, (noviembre), 149.
- Hart, H.L.A. (1983), “Between Utility and Rights”, en *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 198.
- Hayek, Friederich (1944), *Road to Serfdom*, Londres, Routledge.
- (1983), *Law, Legislation and Liberty. Vol. I. Rules and Order*, Chicago, Chicago University Press.
- Hood, Christopher *et al.*, (2001), *The Government of Risk. Understanding Risk Regulation Regimes*, Oxford, Oxford University Press, 226.
- Holmes, Stephen (2007), *The Matador’s Cape. America’s Reckless Response to Terror*, Cambridge, Cambridge University Press.
- (1995) *Passions & Constraint. On the Theory of Liberal Democracy*, Chicago, Chicago University Press.
- Holmes, Stephen y Sunstein Cass (1999), *The Cost of Rights. Why Liberty Depends on Taxes*, Nueva York, Norton.
- Hume, David [1740] (1992), *A Treatise of Human Nature*, [L.A. Selby-Bigge (ed.)], Oxford, Clarendon Press.
- Larrañaga, Pablo (2009a), *Regulación. Técnica jurídica y razonamiento económico*, México, Porrúa.
- (2009b), “Justicia constitucional, argumentación jurídica y control de las políticas públicas”, en Ferrer, Eduardo y Molina César (coords.), *El juez constitucional en el Siglo XXI*, México, UNAM-SCJN.
- Lepsius, Oliver (2006), Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act, *German Law Journal*, Vol. 7, No. 9., 761.
- (2002) “Liberty, Security, and Terrorism: The Legal Position in Germany”, *German Law Journal*, Vol. 5, No. 5, 435.
- Loughlin, Martin (2003), *The Idea of Public Law*, Oxford, Oxford University Press.
- MacCormick, Neil (2007), *Institutions of Law. An Essay in Legal Theory*, Oxford, Oxford University Press.
- North, Douglass *et al.* (2009), *Violence and Social Orders. A Conceptual Framework for Interpreting Recorded Human History*, Cambridge, Cambridge University Press.
- Power, Michael (2006), *Organized Uncertainty. Designing a World of Risk Management*, Oxford, Oxford University Press.
- Raz, Joseph (1979), “The Rule of Law and Its Virtue”, en *The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon Press, 210.
- Scharft, Fritz (1999), *Governing Europe. Effective or Democratic?*, Oxford, Oxford University

Press.

Schmitt, Carl y Kelsen, Hans (2009), *La polémica Schmitt / Kelsen sobre justicia constitucional*, Madrid, Tecnos.

Scott, Colin (2004), “Regulating Constitutions”, en Parker, Christine *et al.* (eds.), *Regulating Law*, Oxford, Oxford University Press, 226.

Simmons, John (2001), *Justification and Legitimacy. Essays on Rights and Obligations*, Cambridge, Cambridge University Press.

Vitale, Ermmano (2007), *Derechos y Razones. Lecciones de los clásicos y perspectivas contemporáneas*, México, UNAM.