The normalisation of exception in the biopolitical security dispositif

Gonzalo Velasco Arias

Introduction

In this article, I attempt to analyse the way in which the world order that resulted from the terrorist attacks of September 11, 2001 has altered the relationship between security and the future. Security entails an epistemological relation to the future, on the basis of which the present is shaped. The radically unprecedented nature of the new terrorism has called into question the possibility of ordering the present in relation to knowledge of the future. The terms of the political have, since 2001, been redefined due to a fear and uncertainty that have modified even the logic of criminal law. That the contemporary preventive state exercises excessive control over civil society, in which security and rights enter into conflict, is a fact that the social sciences have been dealing with in the past few years. The specificity of my approach in this article lies in an understanding of the present and of the organising capacity of politics on the basis of the type of epistemological relation that is established with respect to the future.

My final objective is to try to clarify whether the contemporary preventive logic responds to a specific need of our times or whether, on the contrary, it reveals a structural trait of our political and juridical configuration. To this effect, I shall first examine the political–juridical state of exception, a mechanism whereby the law is suspended in order to neutralise circumstances that are unforeseen in the ordinary provisions of the law. According to Italian philosopher Giorgio Agamben (2003), the state of exception has become a paradigm for government. This thesis, which has greatly engaged current academic reflection, implies that the obsession with protecting order from any contingency not envisaged in the regulatory and criminal codes entails the generalisation of decisions that, in seeking to protect law and order, lie outside the law. The dire consequence is that they end up denying what they sought to protect. The scope of my analysis is the conflict between civil rights and security in the United States, not only because of its obvious geopolitical relevance, but also because the idiosyncrasy of US constitutional logic radically reveals the conflict between the normativity of the law and the unpredictability of the future. Nevertheless, my objective will be to outline the connections between the concrete case of the United States and the international reality of this issue.

Another approach I shall take into account are the recent *critical security studies*, which, despite their internal diversity, share a development and an application to the present of the research carried out by Michel Foucault on governmentality and biopolitics. From this perspective, contingency becomes the principal reason of government, an occasion to legislate.

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ISSJ 205–206 © UNESCO 2013. Published by Blackwell Publishing Ltd., 9600 Garsington Road, Oxford, OX4 2DK, UK and 350 Main Street, Malden, MA 02148, USA.

Through the analysis of these two theoretical approaches, I intend to provide the conceptual tools for a critical understanding of what could perhaps be called the most significant experience of our times: the urgent need for security and the impossibility of political contingency.

The state of exception: the certainty of the law in the face of uncertainty

The political–juridical state of exception has been justified throughout history on the basis of the adage "*necessitas non habet legem*" (Agamben 2003). The state of necessity is that for which there is no response envisaged in the law; therefore, it requires a political action not subject to the law. This prevents the pure fact of necessity from becoming a source of law, thus preserving its normative autonomy. When such an exceptional political reaction is envisaged in a constitutional code, the paradox then arises of a legal mechanism that includes that which cannot have legal form: the state of necessity, emergency, or exception. In this section, I shall focus on this constitutional accommodation of the state of exception by tracing some of its historical institutions, in the light of two excellent studies on the topic: *Dictatorship* by Carl Schmitt, and *Constitutional Dictatorship* by Clinton L. Rossiter.[1] Subsequently, I shall examine its logical paradoxes in the legislative context of the United States, not only for the obvious current geopolitical reasons, but also because the idiosyncrasy of its legislative production and its precedents in the interpretation of exception make it an especially significant case.

The state of exception at the boundaries of constituted power

In *Dictatorship*, Schmitt justifies the juridical mechanism of the state of exception through a distinction between law and realisation of the law. This distinction implies that the law requires certain conditions for its application, which are considered to be the normal conditions. If these conditions are not met, then, by definition, it would not be possible to apply a legal mechanism in order to resolve the problem. On the contrary, it would be necessary to suspend the law in order to implement the measures aimed at re-establishing the normal conditions for application of the law. The state of exception is thus the acknowledgment by the law of its insufficiency in cases of necessity. However, it must be noted that necessity is not an absolute value, but rather one that is relative to that which the law establishes as normal. The normativity of the law involves not only determining the limits for coexistence, but also establishing acceptable conditions for its own application.

In that same essay, Schmitt distinguishes between two types of dictatorship, *commissarial dictatorship* and *sovereign dictatorship*. The purpose of the former is to re-establish the normality required by the prevailing legal order. The latter, on the other hand, has to do with the employment of extraordinary powers to establish a new political order. They differ with respect to the decision regarding the legitimacy of the anomie resulting from suspension of the law: for commissarial dictatorship, the prevailing order is legitimate and, consequently, the anomie must be suppressed; in contrast, for sovereign dictatorship, legitimacy resides in the not yet established order towards which the exceptional situation tends. Commissarial dictatorship would be subsumed under *constituted power* while sovereign dictatorship would represent a *constituent power*. Nevertheless, both of them presuppose the need to institute a legitimate normative order (Huysmans 2006).

Given its recognition of the legitimacy of constituted power, commissarial dictatorship is the precedent of the clauses regarding the state of exception found in the constitutions of liberal political regimes. Both Schmitt and Rossiter trace its historical origin back to an institution in republican Rome, prior to the designation of Caesar as dictator for life in 46 BC. Before that transformation, the Senate granted the title of dictator to an individual responsible for the execution of a specific mission, within a pre-established period of time, usually six months. During that period, the dictator was not subject to ordinary law and had full power over life and death, but he could not modify existing laws or enact new ones, nor could he amend the republican Constitution or reorganise public authority. As Rossiter points out, the consuls who elected the dictator could not perform that role, for purposes of keeping decision and execution separate (Rossiter 2007, p.25). Sovereignty, therefore, remained with the Senate, and the dictator was merely an executor of the mission he was charged with.

Schmitt identifies Jean Bodin as the main link between that ancient institution and modernity. In the context of the theoretical legitimisation of absolute and perpetual sovereignty, which constitutes the essence of his magnum opus, *The Republic* (1576), the commission is the way to allow contingency into the legal order. In contrast with the official, whose position is for life and whose duties are envisaged by the law, the commissar "is designated *selon l'occasion* and his activity ends upon execution of the mission" (Schmitt 1994, p.375). The necessity that motivates the conferral of a commission links its action to the concrete requirements of the facts and to the instructions given by the conferring party, as opposed to the case of the official, whose duties are envisaged by the formality of the law, thus allowing him greater discretion. Through the commission, the legal order, which under normal circumstances is organised around the civil servants, prevents the unpredictable, the contingency of facts. That is, it strengthens and inoculates sovereignty, without ever questioning it. Even in John Locke's system, which is totally derived from the law, to the point that he considers everything that does not conform to the law to be the way of beasts, the necessity of the state of exception is assumed through the recognition of a royal prerogative that leaves those things not envisaged by the law to the discretion of whoever holds executive power. It is also significant that Montesquieu, the theorist of the balance of power, should recognise that "there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods" (Schmitt 1994, p.259). With respect to Rossiter, the meaning given to the term "dictatorship" must be seen in the light of the historical context in which he wrote his work. Drawing on this tradition, his proposal for situations of emergency, that is "constitutional dictatorship", is "unlimited in its nature and limited in its principles". Thus, he achieves a suspension of the constitutional order within the constitutional order itself, which, therefore, does not cease to exist during the exceptional exercise of unlimited executive power.

The works of Schmitt and Rossiter cited above are responses to the experience of crisis of liberal parliamentary systems. They confirm the insufficiency of the legislative power to respond to and control the emergence of crises that put the very legitimacy of the system into question. The figure of temporary despotism with prerogatives well-defined by the constitution reveals a structural necessity of liberal systems for their own perpetuation. Hence the reference to the Roman institution, to the separation of the decision regarding the state of exception from its execution, and to the restrictions imposed on the constitutional dictator regarding the modification of existing legislation and ordinary institutions. Exceptional measures in situations of crisis would not then be mere reactions to immediate situations. On the contrary, it is precisely those situations that make evident the structural dysfunction of the system, the insufficiency of the law to protect itself.

The dilemma between constitutional control of the arbitrary and flexibility in responses to the unpredictable

The models of accommodation (Gross and Ní Aoláin 2006, p.9) of the state of exception in contemporary constitutions respond to that principle, albeit stripped of the personal nature that characterises the state of exception in the works of Schmitt and Rossiter. They are mechanisms for the prevention of the unpredictable through the suspension of the regular functioning of institutions and of the balance of power. After the excessive use of exceptional prerogatives in the face of the political, war-related, and economic crises of the first half of the twentieth century, most Western constitutional systems opted for a diversified recognition of the emergency situations that could require the exceptional suspension of the normative order. Once again, a detailed comparative constitutional analysis would not be pertinent here. Suffice it to say that the possible states of emergency were diversified on the basis of the individual context. For example, the constitutions of states in turmoil, both for political and natural reasons, such as those of Latin America, have included other categories in addition to the classical ones of "state of siege", "state of war", and "state of emergency", such as "state of alarm", "state of prevention", or "state of defence" (Gross and Ní Aoláin 2006, p.46). This diversification of the cases in which the ordinary functioning of laws and institutions would not suffice for their own protection seeks a greater effectiveness in terms of prevention. At the same time, it seeks to prevent the *arbitrary* suspension of the civil order in conditions that do not require such a suspension. However, it could be immediately objected that the wider defi-

nition of situations that can give rise to exceptional measures increases vulnerability to contingency. No matter how ample their frame of reference is, the constitutional categories of exception cannot foresee or prevent the demands of future emergency situations. From this standpoint, it would be naive to expect the established exception mechanisms to be able to respond to new threats, to new metamorphoses of crisis. Therefore, the formulas for the constitutional accommodation of the state of exception would be violating the principle of *necessitas non habet legem*: the state of necessity, that is, the state that jeopardises law and order, cannot, by definition, have a legal correlative. The conditions for exceptional action, if the latter is to be truly effective, cannot be established by the constitution, but rather by the specific characteristics of the emergency.

The case of the United States: emergency as source of law

In brief, the capacity of reaction to an unforeseen and unpredictable emergency is inversely proportional to the degree of constitutional specification of the cases in which the state of exception is applicable. The cost of greater discretion is the risk of greater arbitrariness in the declaration of the state of necessity, which, in turn, entails fewer guarantees of rights and freedom. The US constitution lies at one of the extremes of this equation. In contrast with the above-mentioned accommodation models, the Constitution of the United States does not contain any specific clauses on states of emergency. Responsibility, in the face of the contingent emergence of an exceptional situation, is a matter of interpretation of some of its fundamental amendments, which is possible given the ambiguous terms in which they are drafted. Thus, Article One, Section Nine envisages the possibility of suspending the writ of *habeas corpus* in cases of rebellion or invasion that jeopardise public safety. The legitimate authority responsible for deciding whether situations of risk legitimise said suspension is not specified. This ambiguity is reinforced by the "grey zone" which arises between Article One, Section Eight, which grants Congress the power to raise and support armies and provide and maintain a Navy, as well as to declare war, and Article Two, which declares the President Commander in Chief of the armed forces. The incomplete separation of powers is therefore made clear when crises strike. Another one of the provisions that has been fundamental in the current implementation of exceptional measures for the prevention of terrorist attacks is the 14th Amendment, which prohibits depriving an individual of life, liberty, and property, without due process of law, although it does not specify the limits of those procedural due process rights (Posner 2006, p.9).

I would like to examine this last case further, since it makes possible the current tendency to suspend civil rights through the preventive policies implemented after the terrorist attacks of September 11, 2001. In the non-originalist legal tradition of the United States, it is the Supreme Court that, in the last instance, passes judgment on civil rights, through its interpretation of the text of the Constitution. From this pragmatist standpoint, the Justices of the Supreme Court may act as a sort of link between constituted power and constituent power, which, in this way, is protected against petrification in the mere formality of written law. Therefore, in practice, it is impossible to distinguish between a law and its interpretation: the law *is* its interpretation, an interpretation inevitably marked by the subjectivity of the Justices, the particularity of their historical and social context, or by moral and religious meta-principles with respect to which there could never be consensus. The law is, thus, always *contemporary*. As examples of non-originalist judges could be mentioned Justice Harry Blackmun, Justice William Brennan, Justice William O. Douglas, or Judge Richard Posner, whose current thesis about the role of law in times of crisis will be subsequently commented on. The main argument they hold states that no written Constitution can anticipate all the means that government might need in the future, so it is sometimes necessary for judges to fill in the gaps. As intentions of framers were sometimes transient, ambiguous and often impossible to determine, why not produce the result that will best promote the public good, with the proper support of judicial precedents? As a result, non-originalism allows judges to head off the crises that could result from the inflexible interpretation of a provision in the Constitution that no longer serves its original purpose. On the opposite standpoint, originalists such as Justice Antonin Scalia, Justice Clarence Thomas, or Judge Robert Bork, have argued that only the understanding of the framers and ratifiers of a constitutional clause could provide the neutral and objective criteria to legitimate judges' decisions.

Otherwise too much room would be led for judges to impose their own subjective values.

This controversy cannot be understood from a conservative–progressive political frame, as a European observer would tend to do. If the originalist stance may appear the most conservative, in circumstances of political emergencies it sets itself as the grant of legal neutrality. As I shall argue below, when this situation is accompanied by a regime in which the discourse of fear, safety, and precaution prevails, the non-originalist interpretation of the limits of those due process rights that the 14th Amendment leaves unspecified may jeopardise the *formal* guarantee of those rights. The problem with this system is that the objective reference, the text of the constitution, is what has to be interpreted. The role of the precedent, another one of the sources of law in common law systems, plays a small role in this logic, as Judge Richard Posner argues (Posner 2006, p.28). And this is so not because the constitution was drafted under the security and risk conditions of the eighteenth century (mainly violations of territorial borders and internal rebellions), but because the terrorist attacks constitute an absolutely new threat that invalidates the categories that had prevailed until this moment. Guaranteeing basic due process rights to a criminal is one of the pillars of political liberalism. Nevertheless, according to this point of view, a terrorist attack does not conform to the ordinary stipulations for ordinary crimes or war crimes. The mere reasoning by analogy with the precedent cannot give meaning to a *radically unprecedented* situation. In this specific moment, Posner argues, faced with the ambiguity of the constitutional provisions, the Supreme Court Justices will proceed pragmatically by comparing the effects of their rulings. According to this view, with respect to the suspension of the writ of *habeas corpus* and of due process rights, the guarantee of individual freedoms and national security will have to be weighed in the balance. And the Supreme Court Justices will not have the sufficient information to do so. Only the Executive will be able to decide whether the suspension of the writ of *habeas corpus*, indefinite detention without proven charges, or even torture can be truly valuable for national security. Thus, in emergency situations, the balance of power shifts in favour of the Executive.

This line of argument might seem to be coherent with the justification of constitutional or commissarial exception as a structural need of the liberal system, in which the law does not suffice in order to protect itself. Nevertheless, the conditions outlined above, and required in order to keep the state of exception within the bounds of constitutionality, have not been clearly met in the political decisions adopted after September 11. In the first place, the US Executive has been the one to declare the state of exception and, at the same time, to make itself its executor. On the other hand, this violation of the principle of separation between decision-maker and executor is rooted in the presidential tradition of the United States, starting with Abraham Lincoln who, on 12 April 1861, at the beginning of the Civil War, declared himself the protector of the Union, unilaterally raised an army, decreed a blockade of the Southern states, and authorised the Commander of the Navy to suspend the writ of *habeas corpus*, initially between the cities of Philadelphia and Washington, and, later, between Washington and New York. The authorisation of Congress was only obtained after the fact, in a special session held on 4 July, in which Lincoln justified his decisions as a response to "a demand of the people and to a state of public necessity" (cited by Agamben 2003 [2005, p.36]). On the basis of that precedent, the history of the United States has been marked by the vindication of full powers for subsequent presidents in situations of crisis. This unilateral nature of decisions made by the Executive becomes evident in the pressure exercised by the latter on the representative bodies so that they expedite their decision-making, without the pertinent deliberative mediations. Responses in the name of security usually force institutions to face dramatic dilemmas, in which the only solution is to approve the urgent measures decided on by the Executive. For example, two weeks after the September 11 attacks, Attorney General John Ashcroft proclaimed: "Every day that passes with outdated statutes and the old rules of engagement is a day that terrorists have a competitive advantage. Until Congress makes these changes, we are fighting an unnecessarily uphill battle" (cited by Huysmans 2004, p.332). The urgency with which security measures are appealed to delegitimises the institutional mechanisms for representation, deliberation, and control of the branches of government, by concentrating all decision-making authority in the executive.[2] This, added to the call for national unity and acceptance of the Executive as its unequivocal representative, leads not only to discrediting institutions as the genuine representative instances, but also to the

impossibility of dissent, to the absolute depoliticisation of society.

Sovereignty beyond the constitution

The second factor that prevents the reaction of the United States to the terrorist attacks from conforming to the criteria of constitutional or commissarial exception is the fact that the preventive measures adopted since 2001 are not extraordinary, valid for a specified period of time and for very specific purposes, but rather, have been validated as part of the ordinary code. Thus, for example, if in times of peace and stability, a judge could declare unconstitutional the detention of a suspect without evidence, in times of crisis, this interpretation of Article One, Section Nine of the Constitution could be deemed totally constitutional because it is required by national security. Let us recall that this clause envisaged the possibility of suspending the writ of *habeas corpus* in cases of danger to national security, which was combined with the fact that the 14th Amendment does not define the minimum due process rights. This leads to the justification of indefinite detention without evidence on the basis of the need to obtain information that could help prevent new attacks, as well as to relaxing the requirement of evidence in times of exception (Posner 2006, p.73). Judge Posner goes even further: although the United States is a Party to the International Convention against Torture, its Constitution does not explicitly prohibit it. Therefore, the use of torture for the acquisition of preventive information might not be justified by the law, but, at the same time, it is not unconstitutional.

In this respect, David Dyzenhaus distinguishes between "black holes" and "gray holes" in ordinary legislation (Dyzenhaus 2006, p.42). The latter are the exceptional measures adopted by the Executive and to which the Supreme Court confers validity *ex post*, in conformity with the Constitution. The "black holes", on the other hand, are exceptions that are recognised as such, and which, because they are limited in their duration and objectives, do not affect political and legal normality (Gross 2003). Indefinite detentions and cases of torture *in the name of* ordinary code are "gray holes" that tinge the ordinary application of the law with exceptionality, which goes against the principles of any constitutional state of exception.

An analogous case is the use of ordinary laws for preventive objectives for which they were not conceived, as has frequently been the case with immigration laws over the past few years. A constitutional or commissarial exception involves the adoption of extraordinary measures in order to re-establish the normal conditions for application of the law, which have been altered by the emergency. But, in this case, it is precisely the ordinary laws that are being used exceptionally in order to re-establish the conditions of their normal application. Such is the case of the Immigration Law after the enactment of the USA Patriot Act. The latter provides a double definition of terrorist activity: one for American citizens, in keeping with universal criteria, and another for foreign nationals, which makes an ordinary crime or violation of immigration law equivalent to an indication of terrorist activity (Cole 2005, p.87).[3] Even before that, nine days after September 11, the Attorney General changed the regulations regarding the arrest of immigrants: the previous law required their release if charges had not been pressed within 24 hours. The new ordinance authorised detention without charges in times of emergency, for an unspecified, "reasonable" period of time (Cole 2005, p.31). The self-serving use of immigration law as a pretext for preventive detention reaches its most paradoxical extreme in the fact that if the non-citizens accept their deportation, there is no reason to keep holding them. But, given that the Government's interest since 9/11 is not expulsion, as usual, but rather, prolonged arrest, the acceptance of deportation by the affected parties posed a problem that was solved through the use of the Material Witness Law, a law that simply authorises the detention of material witnesses who are reluctant to testify in court, in order to prolong the detentions until the investigation is completed. The average duration of these investigations was 80 days, and their maximum duration, 244 (Cole 2005, p.33). This use of the law *to evade the law* is no longer a commission or a temporary exception. On the contrary, it implies sovereignty beyond the law, not subject to the reciprocal control of the branches of government.

A present ready for catastrophe

Preventive detention entails an absolute inversion of the logic of criminal law. On occasion, the supporters of sovereign decisionism in situations of crisis justify it by analogy with the preventive

confinement of potentially dangerous psychotic patients (Posner 2006, p.66). However, in these cases, it is possible to provide objective proof of that danger. In contrast, the preventive mechanisms that were implemented after the September 11 attacks did not require any actual evidence of terrorist activity: in the case of foreign nationals, an ordinary crime or the violation of immigration law was enough. Even in those cases in which the defendants accepted the ordinary application of the law for those violations, for example, deportation, the defendants could be retained through mechanisms such as the Material Witness Law, until the competent authority deemed convenient. "Petty sovereigns abound" (Butler 2004). The burden of proof no longer falls on the prosecution, but rather it is the defendants who have to prove that they are not going to commit the crime that has not yet been perpetrated. Their liability is thus uncertain and previous to the potential commission of the act with which they are charged (Aradau and Van Munster 2008, p.31).

Risk as dispositif

In the previous section, I explained the political–juridical logic of the exception in relation to the preventive control of contingency, as well as the type of sovereignty that is associated with it, in the case of the anti-terrorist measures adopted after 9/11. It is now time to explain the discourse regime that lays the ground for that political–juridical state to be possible and perceived as urgent. This objective presupposes a certain understanding of the order of discourse that is related to the idea of a *dispositif*. In Foucault's famous formulation, a dispositif is an ensemble of "discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions" (Foucault 1980, p.194). For purposes of the topic of this article, that is, security and prevention in the face of unpredictable contingency, it is important to understand the dispositif of *risk*. Critical studies on security policies, which interpret risk as a dispositif, part ways with the current initiated by the sociologist Ulrich Beck in the 1990s (Amoore and de Goede 2008; Prieto 2003). The dispositif of risk implies a type of relation to the future that determines interventions in the present aimed at controlling its potential harmful effects (Aradau and van Munster 2008, p.25). Risk management is a way of organising reality, domesticating the future, disciplining contingency, and rationalising individual behaviour. The political–juridical mechanisms studied in the previous section can then be the result or part of a dispositif of risk, and, more specifically, following Claudia Aradau and Rens van Munster, of risk understood as precautionary risk and not as insurance. Insurance requires a certain degree of identification of the risk and an estimated calculation of the event yet to come. In contrast, precaution is a risk dispositif that accepts the absolute uncertainty of the future, on the one hand, while structuring the present on the basis of the prevention of a future catastrophic event, on the other. Precaution *disposes* reality according to the possibility of a catastrophic contingency whose occurrence cannot be known. The risk it represents is that of the worst case scenario, in which irreparable damages will occur. Consequently, there is zero tolerance for risk and the burden of proof is shifted to the suspect before he or she has committed any crime whatsoever (Aradau and van Munster 2008, p.30).[4]

In sum, uncertainty, and, at the same time, the certainty that an absolute catastrophe is possible, justify the need for preventive penal measures that lie outside the law and break with ordinary penal logic. Moreover, when the future becomes unpredictable and the unpredictable is deemed catastrophic, the only possible government in the present with respect to the future is decisional rather than deliberative.[5] Because there are no elements for deliberation, arbitrariness imposes itself in the face of the risk of an irreparable catastrophe, with the depoliticising effects we have already spoken about. The decisionist sovereignty that characterises the state of exception after September 11 is based on this paradoxical relationship to the future (impossibility of both denying and knowing the catastrophe).

The security dispositif creates contingency

At the international level, the human security dispositif is a variation of the risk dispositif that makes possible the exercise of decisionist sovereignty (De Larrinaga and Doucet 2008). The notion of security as dispositif derives from Foucault's research on biopolitics and governmentality, which I shall briefly refer to.

Foucault's study of the changes in the technologies of government since the eighteenth century revolves around the change in the perception of contingency. Like the necessity referred to in the first section with respect to the justification of exceptional political interventions, contingency in itself is not an absolute value. It requires a pre-existing institutional and discourse apparatus that makes it possible to perceive the state of things as normal, in some cases, and as extraordinary or contingent, in others. The change observed by Foucault comes about due to the appearance of a new type of knowledge and scientific metrics whose object is the population. Since then, the political problematisation of security has shifted from territory to population. The contingent events that can be detected in the context of this new episteme are politically relevant phenomena: "phenomena that are [random] and unpredictable when taken in themselves or individually, but which at the collective level, display constraints that are easy or at least possible to establish" (Foucault 1997 [2003, p.246, translation modified]). This is so because they motivate creativity in government measures aimed at improving the quality of life of the members of civil society: contingency is thus an opportunity for government. Health, work, and birth rates become some of the preferred fields for regulation. Government thus comes to represent the power of giving life, of making it possible to live, as opposed to sovereignty understood as the power to suppress life (Foucault 1997 [2003, pp.240–247]).

Despite the tendency to establish an epochal caesura between a biopolitical paradigm of government, which would be specifically modern, and the preceding paradigm of sovereignty, I believe it is much more accurate to interpret the former as a transformation, an adaptation, and even a more sophisticated statement of the latter. Let us go back to the analysis of exception for a moment. For a normative system, an anomaly is an indication of the need for an exceptional intervention, outside the law itself, in order to re-establish the conditions for the application of the law. The "here" (anomaly) and the "beyond" (sovereignty) of the law are connected *without the mediation of the law*. In the terms of biopolitics, the unpredictable contingency turns into information for a new government regulation, thanks to the techniques for knowledge of civil society. Contingency does not prevent government; on the contrary, government exists *in* and *because of* contingency. Mediation by the law has disappeared, fading away into an apparatus that sees life as a constant emergency in need of decisions. The biopolitical paradigm organises life in such a way that it is understood as constant contingency, which, thus, constantly requires exceptional measures. In theory, this would be a commissarial sovereignty, given that it operates on contingency in order to preserve normality. But, in practice, normality is reconfigured in each intervention. In sum, biopolitics constitutes a new form of sovereignty in which both power and life are immanent (Dillon and Reid 2009, p.9).

Returning to the international field, this logic of exception is made possible by the human security *dispositif*. As at the national level, this concept entails identification of risks and management of contingencies in order to protect and improve the lives of populations subject to international action. Health and welfare of populations pave the way for international intervention. Going even further, it could be said that there has been a shift in emphasis, from security to insecurity, as a justification for intervention, especially since 2001 (De Larrinaga and Doucet 2008, p.528). This leads to the legal mechanism that most significantly embodies the general *dispositif* of human security, that is, the international community's right to intervention. In its 2001 report, *The Responsibility to Protect*, the International Commission on Intervention and State Sovereignty (ICISS) outlined the necessity of international intervention "in cases of violence which so genuinely 'shock the conscience of mankind', or which present such a clear and present danger to international security, that they require coercive military intervention" (ICISS 2001, p.31). The need for intervention in cases of objective damages to a population whenever the sovereign measures of the affected nations do not suffice is unobjectionable. But the problem in this case, just as in the case of national legislations such as that of the United States, referred to in the first section above, is that without a clear delimitation of the circumstances that require that exceptional intervention, this mechanism can end up legitimising arbitrary interventions. The International Coalition for the Responsability to Protect, in its 2005 World Summit Outcome Document, stated that the international community, through the United Nations, has the responsibility to use appropriate diplomatic, humanitarian, and other *peaceful* means, in accordance with Chapters VI and VIII of

the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, "*on a case-by-case* basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . bearing in mind the principles of the Charter and international law". Even though the bearing in mind of international law is distinctly stated, the "case-by-case basis" turns essential to take into account the risk and precaution prism, which, as we have analysed, is based on the worst case scenario, a catastrophe that causes irreparable damages, and absolute uncertainty. In that hypothetical situation, in which it is impossible to deny or know the catastrophe, any circumstance can be perceived as exceptional, thus legitimising interventions.[6] There would be no discretion here since human security, the international community's right to intervene, and precautionary risk *dispositifs* make it possible to perceive any circumstance as exceptional, as a state of exception that requires actions beyond those envisaged by international law.

The dilemma is the one we have been dealing with throughout this article. The less limitation and control of discretion there is, the greater the flexibility of political reaction, which, in turn, benefits security. But the problem is that any contingency can be seen as an emergency or a risk, as a state of necessity that calls for exceptional intervention. Mediation by the law thus becomes a mere formal anachronism that is not binding for actually prevailing sovereignty.

In conclusion, the same paradox of sovereignty reappears at the international level (Agamben 1995). Who authorises the suspension of international law in the name of human security if the latter is governed by international law? Who decides to give priority to human security over international law? Without expecting to exhaust the complexity of the answer that questions such as these require, this article has shown how the dynamics of creation of constitutional legislation regarding individual rights is subordinated to national security (hence the famous phrase: "*The Constitution is not a suicide pact*", cf. Posner 2006). American society, like most of the Western international community, is immersed in an institutional and discursive apparatus that predisposes it to face the future as an uncertain yet plausible catastrophic risk. This inability to deny a catastrophe that cannot be known implies the repression of any type of relation of uncertainty to the future: the level of risk tolerance is equal to zero. At the same time, the United States is one of the permanent members of the United Nations Security Council. Therefore, it can transfer the priority it has granted to security and to zero-tolerance for risk to the international field by resorting to the international community's right to intervene. The question which arises once again concerns who has the authority to decide that in fact the necessary emergency conditions are met, as if that person were outside that international law and had an objective point of view. A member of the UN Security Council with veto rights has such an authority, and is, therefore, simultaneously outside international law yet subject to it.[7] It can even be the State itself that decides on and executes the international exception, as in the cases of the preventive interventions carried out in the Middle East since 2001. With this, I believe that it has been clearly established that international sovereignty lies beyond international law itself.

The immunity paradigm: between historical *dispositif* and ontological aporia

In this brief closing section, I shall not add anything new to what has been stated. I shall limit myself to highlighting the constant logic that underlies the different characterisations of the political that we have dealt with and to try to elucidate their philosophical status. I propose the term *immunity* to characterise such a logic; "immunity" is both a legal and a medical term that, in a broad sense, implies the protection of an agent who, for purposes of that protection, ceases to be bound by certain obligations considered to be normal. The agent is thus exonerated in order to be protected. This is the principle of the constitutional or commissarial exception, a prerogative that introduces measures that lie outside the system in order to protect the system. From the medical point of view, acquired immunity results from the development of antibodies in response to an antigen, as from exposure to an infectious disease or through vac-

cination. The state of exception, which is simultaneously within and outside the system (and acknowledged as that which is *not* normal) also plays such an immunitarian role in the medical sense: the exposure to the danger entails a redefinition and a strengthening of the legal order when facing other dangers to come. However, as we have tried to show, the catastrophic perception of risk turns every future tense in a danger which requires present redefinition of law (Aradau and van Munster 2011). Compelling to a radical constitutional pragmatism, the state of exceptions is therefore normalised.

This use of the term "immunity" has been elaborated mainly by the Italian philosopher Roberto Esposito. Although Esposito has participated in the debates initiated by Michel Foucault and continued by Giorgio Agamben, his work has not been appropriated by academic research, particularly in English, that focuses on the problem of security in the contemporary world order.[8] The novelty of Esposito's intellectual project resides in his characterisation of the convergence of the legal and biomedical fields in the configuration of contemporary discourse on security. Thus, he makes visible the reciprocal influence of different semantic families, which produces a new level of discourse, by means of complex historical interferences.[9] In so doing, Esposito makes evident that immunity is a *dispositif* in the Foucauldian sense, a discourse regime in which we dwell and which must be discovered by critical exercise. This article, albeit in a modest and merely indicative manner, has participated in this genealogical intent by pointing out the role that certain discursive and institutional apparatuses play in the understanding of our security and in the relation to the future that it entails.

Nevertheless, I would like to suggest that although this immunitarian orientation is manifested in concrete historical *dispositifs*, it responds to a transhistorical logic inherent in the relationship with the future, which entails security and protection. I had suggested this in passing when I commented on Schmitt's distinction between the law and the realisation of the law, which implied the insufficiency of the law and, in general, of every system when it came to protecting itself by means of actions deduced from itself. The state of exception would not be an exception, but rather a structural expression of the need for protection. This introduction of something external to the system into the very heart of the system is, according to Esposito, inherent to the political in the form of sovereignty. Since Hobbes, sovereignty has implied the legitimate use of violence in order to keep violence out of the political system. Thus, the violence that is typical of the state of nature is preserved at the very core of the political (Esposito 2008).

From this, it could be deduced that the law is grounded in a generalised state of exception. The law would be dependent on a sovereignty that lies outside the law and that would only be made evident in emergency situations, that is, in those circumstances in which what occurs does not conform to what had been foreseen. But, at the same time, as indicated in the last works of Derrida, this relation can be inverted. It might seem that law-preserving violence is a remnant of the foundational natural violence. In the end, all violence would be sovereign violence not subject to the law. However, at the very moment that it occurs, sovereign violence iterates itself. And in iterating itself, it becomes something other, that is, a law, and therefore, defers its occurrence. In other words, sovereign violence cannot have duration because at the very moment in which it *ex*-sists, it is representing its own act of irruption and thus postulating itself as a norm, which, by definition, demands its own preservation. According to Derrida, all actually existing violence is law-preserving violence (Derrida 2002).

In summary, sovereignty needs the law for its own preservation, just as the law needs sovereignty in order to protect itself from menacing contingencies. Sovereignty needs to discharge itself, exonerate itself in the law, while the law requires sovereign decisions in order to immunise itself against the unpredictable. Although they are seen as two different interpretations of the law, normativity and sovereignty not subject to the law are two expressions of the same logical problem: that of the law, which postulates the durability of its own validity in relation to a future that cannot be totally certain. The state of exception analysed in the first section of this article, in both its sovereign and commissarial versions, presupposed the validity of a normative order to be immunised through prerogatives that allowed for some flexibility in the face of the unpredictable. On the other hand, the governmentality paradigm analysed in the second section envisages a form of regulation that does not attempt to impose a formal law, but that takes

shape on the basis of the life of the population, understood as a constant state of emergency.

In conclusion, I believe that both paradigms are extreme ways of interpreting the same problem. In this sense, I agree that genealogical approaches to the issue of security are necessary, if not urgent, since they expose the institutional and discursive apparatuses that condition our interpretation of reality with respect to risk, and allow us to adopt a critical position toward these *dispositifs*. But I think that they are only a preliminary step towards the discovery of the aporetic limits to which the issue of security in relation to the future inevitably lead. These aporias, which have been illustrated through the notion of immunity dealt with in the last part of this article, do not constitute an insurmountable barrier to critical action. On the contrary, knowing that the law cannot defend itself without resorting to a type of sovereignty that transcends it can help prevent recourse to naive defences of international law, for example in cases in which it is the interests of a specific national sovereignty that are operating under the protection of international law. To conclude, I would like to propose a "diplomatic realism" (Huysmans 2006) that interprets international law not as an unconditioned presupposition, but as an object of negotiation and relation of interests among national sovereignties, without denying its necessity as a symbolic mediation. This would make it possible to overcome several of the difficulties we have analysed: on the one hand, it would make it impossible to conceal the sovereignty that acts under the protection of international law, without falling into a mere decisionism, which is the objection usually made to positions that question the validity of the international legal order. On the other hand, it would make it possible to accept that international legislation must be prepared to adapt to contingent emergencies, multilaterally and jointly, thus making it impossible for sovereign states to execute exceptional intervention clauses unilaterally in the face of catastrophes that can neither be disregarded nor confirmed. With Derrida, I would like to finish by recognising that a truly responsible decision is one made without the support of a programme that pre-establishes the measures to be adopted according to certain circumstances. But that decision is not a decisionist one if it accepts the inevitable intervention of others; therefore, it will not establish a new sovereign order, but rather crystallise in a law that reconciles the necessity of the facts and the sovereign interest of each party. This and nothing else is the secret of heteronomy.

Notes

1. Schmitt is the classical reference that the tradition accepts as an almost exclusive authority. With his famous definition of sovereignty, Schmitt generated a double debate: on the one hand, a theological–political debate, and on the other, a strictly juridical–political debate. In spite of this, his study on Dictatorship has not been published in English until 2013. This essay is a key to understanding the history of the concept independently of its later theologico-political version. Rossiter's (2007) excellent and almost forgotten essay participates in the latter, although it is cited by Agamben, the main promoter of the revival of the debate in the present. That juridical–political current, situated in the context of the crisis of the different parliamentary systems and the experience of fascist regimes during the first half of the twentieth century, is finally being recovered, especially in North America, due to the peremptory need to question the role of the law in times of crisis after the September 11 attacks. See, for example, Dyzenhaus (2006), Gross and Ní Aoláin (2006), and Posner (2006).

2. Both the USA Patriot Act of October 2001 and the British ACTSA of December of the same year were approved by the respective houses by restricting the normal voting mechanisms. Another example is the centralisation of information regarding security that has taken place with the creation of the US Department of Homeland Security, which reports that information directly to the President in order to guarantee greater speed in the adoption of measures aimed at preventing new threats. The reduction of mediations also reduces diversity of opinion and the possibility of dissent (Huysmans 2004, p.332).

3. According to declarations by Attorney General John Ashcroft in October 2002, it was the judges' duty to neutralise "potential terrorist threats by getting violators off the street by any lawful means possible, as quick as possible. Detain individuals who pose a national security risk for any violations of criminal or immigration laws" (cited by Cole 2005, p.22).

4. A significant example of the rationality expressed by this type of risk is the following statement by US President George W. Bush in 2002: "Many people have asked how close Saddam Hussein is to developing a nuclear weapon. Well, we don't know exactly, and that's the problem. . . Facing clear evidence of peril [the attacks of September 11], we cannot wait for the final proof – the smoking gun – that could come in the form of a mushroom cloud . . . Understanding the threats of our time, knowing the designs and deceptions of the Iraqi regime, we have an urgent duty to prevent the worst from occurring" (cited by Aradau and van Munster 2008, p.30).

5. Then UK Prime Minister Tony Blair said the following in 2004 regarding the impossibility of grounding his decisions about the war in Iraq in expert knowledge: "Sit in my seat. Here is the intelligence. Here is the advice. Do you ignore it? But, of course, intelligence is precisely that: intelligence. It is not hard fact. It has its limitations. On each occasion, the most careful judgment has to be made taking account of everything we know and advice available. But in making that judgment, would you prefer us to act, even if it turns out to be wrong? Or not to act and hope it's OK? And suppose we don't act and the intelligence turns out to be right, how forgiving the people will be?"(cited by Aradau and Van Munster 2008, p.32).

6. See the justifications for the intervention in Iraq given by former US President George W. Bush and former UK Prime Minister Tony Blair, cited above in notes 4 and 5.

7. This makes it a "rogue State" in the terms defined by Noam Chomsky and Jacques Derrida (Chomsky 2000; Derrida 2005).

8. With the exception of Campbell (2006).

9. Its insufficiency resides precisely in the one-sidedness of its reconstruction in his work: he limits himself to reproducing the formation of a biomedical discourse with political intentions from the nineteenth to the twentieth century, without considering the previous use of biological metaphors for political discourse, or the documented historical precedent of juridical terms that were later institutionalised in medical science, as is the case with the term *immunitas*, the origins of which date back to Roman law. Without an integrated development of this genealogical project, his position within this field of historical research is limited to simulating the image of flawless scientificity that derives from the personality and the work of Michel Foucault (Dubrueil 2006).

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