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The Role of Courts in the War on Terror

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The Role of Courts in the War on Terror

Abstract: The normative position of the judiciary under the traditional conception of democracy as self-legislation by the people is too weak to protect in an effective way the rights of suspects in the global War on Terror. Drawing on arguments elaborated by Hans Kelsen and Karl Popper, we shall attempt to devise in this paper an alternative democracy conception that could serve as a much more solid foundation for the judicial branch of government in a democratic state. Through this jurisprudential strategy, we hope to be able to maintain the balance of normative power among the Trias Politica, which, in turn, may contribute to the preservation of the legal rights of every person during the struggle against terrorists.
Key words: War on Terror, Courts of Law, Democracy, Hans Kelsen, Karl Popper

I. The Quicksand Basis of the Trias Politica

Ever since the French Revolution, the event that inaugurated the codification of human and civil rights, the legal encroachment on these rights has been a common response by Western democracies to the emergence of security threats.[1] Given this historical pattern, we should not be surprised at all by the increasingly draconian measures to which governments in both the United States and the European Union (EU) resort in an attempt to ward off the dangers that have become apparent since the al-Qaeda attacks on September 11, 2001.

By and in itself, the restriction of rights for the sake of national security does not need to be problematic. If it could be established that restrictive measures were necessary to deal with emergency situations that may threaten either the state or its population, then democratic governments would be wholly justified in making recourse to them. The difficulty, however, is the general inclination among these governments to exaggerate the gravity of the dangers they have to face in order to legitimize the deprivation of rights that can only be legitimately deprived in real cases of emergency.[2] Governments, wrote Oren Gross in an article published shortly before September 11, "tend to use the language and rhetoric of emergency in

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[1] G. Agamben [K. Attell (transl)], *The State of Exception* (Chicago: Chicago University Press, 2005), 11-22.

[2] For recent surveys of the academic debate on the use of emergency powers, see, for instance, W. Scheuerman, "Emergency Powers and the Rule of Law After 9/11" (2006) 14 (1) *Journal of Political Philosophy* 61-84 and D. Dyzenhaus, "Emergency, Liberalism, and the State" (2011) 9 *Perspective on Politics* 69-78.

situations which may have a certain bearing on the state's security interests, but which cannot be said to rise to the level of a real emergency."[3]

Such a tendency has usually led to unwarranted rights deprivation, sometimes on a massive scale. The fate that befell Japanese Americans and Japanese citizens in the United States during the Second World War speaks volumes in this regard. As Giorgio Agamben has noted in his survey of emergency measures taken by the US government from the outbreak of the American Civil War in the nineteenth century to the War on Terror President George W. Bush recently initiated:

"The most spectacular violation of civil rights (all the more serious because of its solely racial motivation) occurred on February 19, 1942, with the internment of seventy thousand American citizens of Japanese descent who resided on the West Coast (along with forty thousand Japanese citizens who lived and worked there)."[4]

Traditionally, the solution to this problem has been sought in the separation of powers. In order to avoid the illegitimate deprivation of basic rights, it is, so the well-known Trias Politica doctrine runs, imperative that the different branches of government both operate separately from each other, and are authorized to keep each other in check. Rights, therefore, should only be restricted by laws the legislature has enacted and the actual enforcement of this restriction by the executive branch of government must, in turn, be subject to oversight by independent courts of law.[5]

The case can be made that the role played by the judiciary is crucial in this institutional arrangement. As the mass internment of people of Japanese descent has clearly indicated, basic rights of unpopular minorities become extremely vulnerable once the state of emergency in a polity had been declared. In such a situation, elected members of both the legislative and executive branches would most likely be tempted by public opinion to strip such minorities of their rights, even though recourse to such a drastic measure may not be warranted by the polity's actual conditions. As life-tenured officials who are not accountable to the electorate, judges, then, have the task of resisting the elected branches of government in order to prevent

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[3] O. Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception Dichotomy'" (2000) 21 *Cardozo Law Review* 1858.

[4] Agamben, *State of Exception*, *op cit* n 1 *supra*, 22. See also T. T. Kunioka and K.M. McCurdy, "Relocation and Internment: Civil Rights Lessons from World War II" (2006) 39 (3) *PS: Political Science and Politics* 503-511.

[5] J. Madison, "The 51st Federalist Paper", in A. Hamilton, J. Madison and J. Jay, *The Federalist Papers* (New York: Bantam Books, 1982), 261-265.

them from yielding to those majoritarian sentiments that tend to prevail during times of crisis.[6]

In the present paper, however, we shall argue that the legitimacy basis upon which the judiciary could offer this institutional resistance is shaky at best within the theoretical confines of democracy understood as popular self-legislation – the orthodox conception of democracy upon which the Trias Politica system has been founded. Its normative position under this conception of democracy, according to our argument, is too weak to protect in an effective way the rights of suspects in the global War on Terror that is being waged today.

In order to strengthen the judiciary's normative position, it is, then, necessary to replace the orthodox conception of democracy. After having explained why this conception is unable to provide a sufficiently firm foundation for courts of law, we shall, therefore, draw on a sustained discussion of arguments elaborated by Agamben, Thomas Hobbes, Carl Schmitt, Hans Kelsen and Karl Popper, to devise an alternative conception of democracy that could serve as a much more solid basis for the judicial branch of government in a democratic state. Through this jurisprudential strategy, we hope to be able to help maintain a more equal balance of normative power among the Trias Politica, which, in turn, may contribute to the preservation of the legal rights of every person during the worldwide struggle against terrorists.

II. Judicial Power under Democracy as Popular Self-Legislation

Democracy, as a general concept, refers to a system of government designed to preserve as much as possible the autonomy of all citizens who (have to) live under its jurisdiction.[7] It is based on the principle that everybody is free and equal, and that, therefore, nobody should possess the right to impose his or her will upon others.[8] The specific conception of democracy as self-legislation by the people attempts to accomplish this general goal of autonomy preservation through the principle of consent. "From the seventeenth century onward," writes Robert Dahl, "the notion of consent was used to provide a moral foundation for the idea of a democratic state."[9] Since the people include all citizens of such a state, only laws enacted with

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[6] G. Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History" (1975) 27 *Stanford Law Review* 725.

[7] I. Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2006), 3.

[8] J. Habermas [W. Rehg (transl)], *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 2d Printing, 1999), 496.

[9] R. A. Dahl, *Toward Democracy: A Journey. Reflections: 1940-1997* (Berkeley: Institute of Governmental Studies Press, 1997), 445.

the consent of this body can be said to be self-imposed laws that would not violate the autonomy of any individual.[10]

It may be wise to make clear from the outset that the consent account of democracy is not a straw man argument that tends to be invoked only by novices still uninitiated in political philosophy. The discourse theory of law and democracy Jürgen Habermas has elaborated in his massive *Between Facts and Norms*, for instance, is, if anything, the most sophisticated attempt to establish that this traditional conception of democracy is still relevant in the marketplace of ideas today.[11] The principle of democracy, Habermas contends,

"should establish a procedure of legitimate lawmaking. Specifically, the democratic principle states that only those statutes may claim legitimacy that can meet with the assent ...of all citizens in a discursive process of legislation that in turn has been legally constituted."[12]

The sophistication of democratic theories like that of Habermas is what may have helped sustain the political primacy of both the legislative and executive branches of government. Precisely because members thereof are usually elected by law subjects, they can argue credibly that their legitimacy is rooted in the assent or consent the governed have given them at periodically held elections. This argument, in turn, enables them to assert that they have received from the people the mandate to take those measures they deem necessary for the well-being of the polity as a whole during their terms of office. When they decide that particular restrictive measures are required to guarantee the survival of the democratic state, their decision would, therefore, appear at first sight to be legitimate, whereas attempts made by the non-elected judiciary to subject such a decision to control would seem to constitute an unwarranted interference in their rightful exercise of power.[13] This is especially true during times of war and other national crises, when courts of law come under enormous pressure to give deference to the drastic measures that elected government officials decide to enact in the name of national security and public safety.[14] The judiciary's structural fragility in the face of such pressure was dramatically revealed by, for instance, the case of *Korematsu* v. *United*

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[10] A. Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Palo Alto: Stanford University Press, 2003), 9.

[11] Cf. M. Rosenfeld, "Law as Discourse: Bridging the Gap Between Democracy and Rights" (1995) 108 *Harvard Law Review* 1163-1189.

[12] Habermas, *Between Facts and Norms*, *op cit* n 8 *supra*, 179.

[13] Madison, "51st Federalist Paper", *op cit* n 5 *supra*, 263: "But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates."

[14] O. Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112 *Yale Law Journal* 1034.

States,[15] in which the U.S. Supreme Court decided to approve the aforementioned internment of people of Japanese ancestry rather than to stand up for their basic rights.[16]

In the current War on Terror, the judiciary in both America and Europe has *so far* proved to be more willing to resist comparable attempts by the elected branches to render rightless those designated as suspects or "enemy combatants." See, for instance, the decision by the U.S. Supreme Court in the 2006 case of *Hamdan* v. *Rumsfeld*,[17] a decision that is widely interpreted as a judicial effort to block the strategy of rights deprivation pursued by the Bush Administration in the prosecution of this War.[18] "President Bush has," in David Cole's words,

"authorized the National Security Agency to conduct warrantless wiretapping of American citizens, despite a comprehensive statute that makes such surveillance a crime. He has approved the "disappearance" of al-Qaeda suspects into secret prisons where they are interrogated with tactics that include waterboarding, in which the prisoner is strapped down and made to believe he will drown. He has asserted the right to imprison indefinitely, without hearings, anyone he considers an 'enemy combatant,' and to try such persons for war crimes in ad hoc military tribunals lacking such essential safeguards as independent judges and the right of the accused to confront the evidence against him."[19]

In *Hamdam*, the Court has ruled that these ad hoc tribunals are illegal. "Salim Hamdan, a citizen of Yemen, … was charged with conspiracy to commit war crimes by serving as Osama bin Laden's driver and bodyguard, and by attending an al-Qaeda training camp."[20] He was detained at Guantanamo Bay, where he would be tried in a military tribunal established by an executive order that President Bush issued at the end of 2001.[21] As Cole has pointed out, the rules governing a trial conducted before this tribunal are, if anything, draconian.[22]

"They permit defendants to be tried and convicted on the basis of evidence that neither they nor their chosen civilian lawyers have any chance to see or rebut. They allow the use of

[15] *Korematsu* v. *United States*, 323 U.S. 214 (1944).
[16] For an apologetic defense of this decision by the sixteenth Chief Justice of the U.S. Supreme Court, see W. H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Knopf, 1998). See also A. C. Yen, "Introduction: Praising with Faint Damnation - The Troubling Rehabilitation of *Korematsu*" (1998) 40 *Boston College Law Review* 1-7 and M. Tushnet, "Defending *Korematsu*?: Reflections on Civil Liberties in Wartime" (2003) *Wisconsin Law Review* 273-307.
[17] *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006).
[18] D. Cole, "Why the Court Said No" (2006) LIII (13) *New York Review of Books* 41-43.
[19] Ibid, 41.
[20] Ibid.
[21] Ibid.
[22] Ibid.

hearsay evidence, which similarly deprives the defendant of an opportunity to cross-examine his accuser. They exclude information obtained by torture, but permit testimony coerced by any means short of torture. They deny the defendant the right to be present at all phases of his own trial. They empower the secretary of defense or his subordinate to intervene in the trial and decide central issues in the case instead of the presiding judge. And finally, the rules are predicated on a double standard, since these procedures apply only to foreign nationals accused of acts of terrorism, not US citizens."[23]

Precisely because of these draconian rules, the Court concluded that the military tribunal set up at Guantanamo Bay by the Bush Administration violates, among other things, the rights guaranteed by Common Article 3 of the Geneva Conventions.[24] Under the regime of this provision, detainees must be put on trial in a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

A similar commitment to the protection of rights has been affirmed by the European Court of Justice (ECJ) in its 2008 case concerning Mr. Yassin Abdullah Kadi and the Al Barakaat International Foundation.[25] In the *Kadi* case, the Court struck down an anti-terror regulation promulgated by the Council of the EU on the grounds that it had impermissibly infringed upon the fundamental rights of persons and entities designated as being "associated with Osama bin Laden, the Al-Qaeda network, and the Taliban."[26] Among the specific reasons the Court decided to invalidate this regulation was the failure of the Council, its author, to include therein any procedures through which both Mr. Kadi and Al Barakaat could be informed of the incriminating evidence adduced against them.[27] As the ECJ put it,

"Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants' rights of defence, in particular the right to be heard, were not respected."[28]

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[23] Ibid.
[24] Ibid, 42.
[25] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* [2005] E.C.R. II-3649.
[26] Council Regulation 881/2002.
[27] *Kadi*, 2005 E.C.R. II-3649, 346.
[28] Ibid, 348.

There are scholars and politicians in the West who claim that the effective enforcement of basic rights by independent courts of law is an asset rather than an impediment in the struggle against terrorism. Such enforcement would, according to them, render this struggle legitimate in the eyes of the world at large.[29] The question whether their claim is valid or not lies beyond the scope of the present paper.[30] But should we, for the sake of argument, assume the validity thereof, then it becomes necessary to strengthen the normative foundation of the judiciary in a democratic state. For however significant *Hamdan* and *Kadi* may be in the legal sphere, these decisions do not in any way enhance the jurisprudentially weak position of courts *vis-à-vis* the legislative and executive branches. The traditional democracy conception, with the consent principle at its core, still provides elected government officials with a decisive advantage in terms of legitimacy over non-elected judges.

Since the normative weakness of the judiciary stems from the fact that judges are very often appointed and life-tenured officials, whereas legislators and key members of the executive branch are electorally accountable power holders, one may be tempted to think that the democratic legitimacy of courts could be strengthened by an elected judiciary. But it would be a grave mistake to yield to this temptation. The reason why the judiciary of a democratic state must be shielded from electoral politics is the generally valid assumption that insulation from majoritarian pressures would enable it to act as a countermajoritarian force in defense of minority rights.[31] If prospective members of the judiciary must rely on support from the majority to be voted into office, or if its incumbent members have to maintain the same kind of support in order to preserve their judicial position, then that would fatally compromise the ability of courts to protect minorities in general, and disliked minorities in times of crisis in particular.[32] Therefore, should we want to enable the judiciary to protect minority members like Japanese Americans during the Second World War or Muslims of Arab descent in Western societies today, then we must attempt to justify its power to defend them in terms of democratic theory, rather than trying to enhance the judiciary's normative position *vis-à-vis* the two other branches of government through the device of elected judgeship.

In order to accomplish this justification, it is, as already intimated, imperative that democracy understood as popular self-legislation be replaced by an alternative conception of

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[29] Cole, "Why the Court Said No", *op cit* n 18 *supra*, 43.

[30] And the abilities of its author, for that matter.

[31] R. H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchtone, 1991), 5.

[32] Ibid: "Federal judges, alone among our public officials, are given life tenure precisely so that they will not be accountable to the people. If it were otherwise, if judges were accountable, the people could, when the mood seized them, alter the separation of powers, do away with representative government, or deny basic freedoms to those out of popular favor."

democracy as the normative basis for the Trias Politica system. Only then may the jurisprudential case for judicial power become strong enough to allow courts to uphold in a structural way the principle that measures enacted by elected branches of government *cannot* escape judicial review, even though "it has been claimed that the act laying them down concerns national security and terrorism."[33]

III. State of Nature and State of Exception

The analysis of rightless life by the aforementioned Giorgio Agamben probably offers the best point of departure for our efforts to solidify the jurisprudential position of courts. Should we approach the rights deprivations to which democratic governments tend to resort from the perspective of his analysis, then we may understand the root cause behind this tendency, which, in turn, will enable us to devise a more persuasive justification for the judicial attempt to block it.

"Bare life" is actually the term Agamben himself uses to designate life that is deprived the safeguard of all rights.[34] Under the laws of ancient Rome, this form of rightless life is embodied by the *homo sacer*.[35] To summarize Agamben's erudite elaboration on this enigmatic figure in a very crude way,[36] *homo sacer* or sacred man was a man so impure that his killing did not constitute homicide. His life was beyond the protection of law. Everybody could, therefore, kill him without committing a crime.[37]

The fate of the *homo sacer*, Agamben argues, is a fate that would befall everybody in the world today, should he be stripped of all the protection afforded by legal rights.[38] This argument, in turn, makes it possible for Agamben to arrive at a more nuanced interpretation of Thomas Hobbes' theory on the origins of law. As is well known, the author of *Leviathan* sought to explain the advent thereof through a hypothetical state of nature, that is to say, a condition that is supposed to pervade in a literally law-less situation. If there is no sovereign who creates and enforces law in defense of everybody, then, so Hobbes reasoned, we all

[33] *Kadi*, 2005 E.C.R. II-3649, 343.

[34] G. Agamben [D. Heller-Roazen (transl)], *Homo Sacer: Sovereign Power and Bare Life* (Palo Alto: Stanford University Press, 1998).

[35] The concept of bare life has been rendered more explicit as rightless life by: P. Fitzpatrick, "Bare Sovereignty: Homo Sacer and the Insistence of Law", in A. Norris (ed.), *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's* Homo Sacer (Durham: Duke University Press, 2nd Printing, 2005), 69.

[36] Agamben, *Homo Sacer*, *op cit* n 34 *supra*, 71.

[37] Ibid, 71-90.

[38] Cf. N. Werber, "Die Normalisierung des Ausnahmefalls: Giorgio Agamben sieht immer und überall Konzentrationslager" (2002) 56 *Merkur* 618-622.

would be condemned to live in a permanent state of war, "where every man is Enemy to every man."[39]

"In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."[40]

This all too familiar passage from *Leviathan* bears repeating in full here, because it helps drive home the precarious character of human life in the state of nature, where law is completely absent. Under this law-less condition, it is possible for everybody to kill anybody without committing a murder and having to suffer the harsh punishment the commission of this crime would usually entail. The protection of life, which the criminalization of killing implies, can only take place once a legal order has been established.[41] "The Hobbesian state of nature," therefore, "is not so much a war of all against all as, more precisely, a condition in which everyone is bare life and a *homo sacer* for everyone else…"[42]

Agamben next connects this insight to the state of exception, a concept developed by Carl Schmitt during the years of the Weimar Republic. The connection he forges between the law-less state of nature and Schmitt's state of exception is what will ultimately enable us to understand the strong inclination among democratic governments to resort to rights deprivation to combat emergency situations - real or perceived. "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law."[43] Since the law is not able to determine in advance when and how this emergency situation will occur, and perhaps more importantly, what kind of measures should be taken to neutralize it, attention must necessarily be shifted to the question as to who ought to possess the competence to counter such a threat under a

[39] T. Hobbes, *Leviathan* (C. B. MacPherson ed., London: Penguin Books, 1981), 186.
[40] Ibid.
[41] Ibid, 188.
[42] Agamben, *Homo Sacer*, *op cit* n 34 *supra,*106.
[43] C. Schmitt [G. Schwab (transl)], *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: MIT Press, 1988), 6.

democratic constitution.[44] “The precise details of an emergency,” writes Schmitt, “cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated.”[45] In order to combat this state of exception, the authority designated to execute that task must be invested with the sovereign power to suspend the entire legal order, should such drastic a measure prove to be necessary.[46] After all, an order based on the rule of legal norms presupposes the existence of normal, that is to say, stable and predictable situations that can be regulated in advance.[47] A state of exception, however, is a situation that is inherently chaotic and unpredictable. Precisely for this reason, the authority charged with the neutralization thereof cannot be hampered at all by either constitutional norms or institutional controls.[48]

“The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited…The most guidance the constitution can provide is to indicate who can act in such a case…He decides whether there is an extreme emergency as well as what must be done to eliminate it.”[49]

Since the eventual elimination thereof may require that the entire legal order be suspended and “situational law” be created to respond to circumstances that cannot be anticipated,[50] the authority to deal with the state of exception could only be assigned to the highest power in the state. Under the Constitution of the democratic Weimar Republic, that power is the *Reichspräsident*, Schmitt argues.[51] Article 41 of this basic law stipulates that the President of the Reich be elected “by the whole German people,” while Article 48 grants him the competence to deal with emergency situations. As opposed to the judiciary that is merely appointed and unlike the legislature that is characterized by divisive struggles among political parties, the President, so Schmitt continues, is elected by universal suffrage but remains untainted by party politics. He, therefore, is the independent political authority in full possession of the popular mandate to decide on the life-and-death question as to whether the

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[44] Ibid, 10: “Who assumes authority concerning those matters for which there are no positive stipulations (…)? In other words, Who is responsible for that for which competence has not been anticipated?”
[45] Ibid, 7.
[46] Ibid.
[47] Ibid, 13: “Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations.”
[48] P. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (Durham: Duke University Press, 1997), 171-172.
[49] Schmitt, *Political Theology*, *op cit* n 43 *supra*, 7.
[50] Ibid, 13.
[51] C. Schmitt, *Der Hüter der Verfassung* (Berlin: Duncker & Humblot, Vierte Auflage, 1996).

state of exception has occurred and been overcome.[52] There is no need to subject the President to any form of checks and balances during the execution of this task, "because the unity of the people's sovereign will is charismatically embodied within him and his emergency action is thus necessarily legitimate."[53]

The legal and jurisprudential validity of Schmitt's argument regarding the Weimar Constitution does not need to concern us here.[54] What is relevant to the present paper is his claim that the authority to decide on the state of exception amounts to the sovereign authority to suspend the whole existing legal order, as a result of which, "all the law that existed before does not apply anymore."[55] This total suspension of law is, according to Agamben, what renders Schmitt's state of exception virtually identical to the state of nature envisioned by Hobbes. Precisely because the rule of law has been suspended, everybody within a polity under the state of exception is again reduced to the unenviable status of the *homo sacer* in the law-less state of nature.

Hobbes, to reiterate a familiar point, argued that the desire to terminate the war of all against all in the state of nature is the main reason why the rule of law has been established. In order to put an end to it, individuals who live in this condition decide to subject themselves to a sovereign power by means of a social contract concluded among all of them. The sovereign will offer them protection in exchange for their obeisance to him. Agamben now points out that the state of nature does not disappear after the contractual birth of the sovereign and the transformation of the prelegal condition into a polity governed by law. It continues to be operative in suspended form within the polity, for it is contained in the legal competence of the sovereign to put the polity under the state of exception, rendering it once again a law-less space.[56] This analysis thus permits the obvious claim that both democracy's rule of law and "the legal black hole" established by the Bush Administration at Guantanamo Bay to detain

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[52] Ibid, 156-159. See also, Caldwell, *Popular Sovereignty, op cit* n 48 *supra,* 171-172.

[53] J. P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1999), 145, summarizing Schmitt's argument.

[54] For a thorough critique of Schmitt's argument, see H. Kelsen, "Wer Soll der Hüter der Verfassung Sein?", in: H. Kelsen, A.J. Merkl & A. Verdross, *Die Wiener Rechtstheoretische Schule*, Her. H. Klecatsky, R. Marcic & H. Schambeck, Band 2 (Wien: Europa Verlag, 1968), pp. 1873-1922.

[55] B. van Klink, "Does Necessity Know no Law? Application of Law in a State of Exception", in J. R. Carrecedo (ed.), *Political Philosophy. New Proposals for New Questions*, *Archiv für Rechts- und Sozialphilosophie*, Beiheft Nr. 107 (Stuttgart: Franz Steiner Verlag, 2007), 130.

[56] Agamben, *State of Exception*, *op cit* n 1 *supra*, 50-51; Agamben, *Homo Sacer*, *op cit* n 34 *supra,* 109: "The state of nature is, in truth, a state of exception, in which the city appears for an instant (which is at the same time a chronological interval and a nontemporal moment) [as if it were dissolved]. The foundation is thus not an event achieved once and for all but is continually operative in the civil state in the form of the sovereign decision." See also Hobbes, *Leviathan*, *op cit* n 39 *supra*, 227-228.

and try prisoners in the War on Terror share the same contractualist roots.[57] Through the creation of this local state of exception, it is, in any case, the intention of the Bush Administration to make the Guantanamo detainees as rightless as the *homines sacri* in the precontractual state.[58]

Viewed from the perspective of the contractualist theory of democracy,[59] it, then, starts becoming clearer why democratic governments are so inclined to deprive individuals of basic rights in order to fight emergency situations. Although the social contract is supposed to have transformed the law-less state of nature into a constitutional democracy, that transformation is not irreversible. The state of nature is still preserved within the figure of the sovereign through whose creation this law-less condition is supposed to have progressed into a legal order based on the consent of law subjects. At the apex of the democratic state, therefore, resides a dormant danger that its rule of law may fall back into the prelegal condition, where persons were the mere embodiment of bare life. Whereas everyone was a *homo sacer* for everyone else in the state of nature, all residents inside a democratic polity become rightless in the eyes of the sovereign once the state of exception has been declared.[60]

Thanks to this insight, the case can be made that the Trias Politica system is, in fact, an institutional attempt to prevent the suspended danger of regress from actually materializing. As John McCormick has pointed out in his Schmitt study, if there is no mechanism of mutual control, then the ordinary combat of emergency situations could easily degenerate into a total state of exception. The defense and restoration of normal conditions as they existed before the occurrence of the exception have been cited by Schmitt to justify the unlimited powers that the *Reichspräsident* ought to enjoy in the state of exception. "Such unlimited powers pertain both to his unfettered discretion as to whether an exception does, in fact, exists, as well as to what measures ought to be taken in order to counter the concrete threat."[61] The problem inherent to the approach prescribed by Schmitt, however, is its built-in tendency to go astray. Once it is accepted that the President should possess the sovereign right to wield these exceptional powers, it becomes virtually impossible to distinguish the state of normalcy from the state of exception. "According to Schmitt's formulation," McCormick comments,

[57] J. Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 53 *International and Comparative Law Quarterly* 1-15.
[58] Agamben, *Homo Sacer*, *op cit* n 34 *supra,* 84. See also U. Raulff, "Interview with Giorgio Agamben – Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life" (2004) 5 *German Law Journal* 610.
[59] D. Lefkowitz, "A Contractualist Defense of Democratic Authority" (2005) 18 *Ratio Juris* 346-364.
[60] Agamben, *Homo Sacer*, *op cit* n 34 *supra,* 84.
[61] Gross, "Normless and Exceptionless Exception", *op cit* n 3 *supra*, 1844.

"in all cases of emergency, it would seem necessary to have recourse to a unitary institution with a monopoly on decisions, so that no… confusion or conflict occurs. Because the likelihood of such an occurrence is great (especially in the Weimar context), and because the same figure who acts on the exception must first declare that it exists, it would seemingly be best to have such a person vigilant even during normal times. Thus... normalcy and exception are collapsed, and ordinary rule of law is dangerously encroached on by exceptional absolutism."[62]

Schmitt's method, in other words, requires that the competence to combat the state of exception includes the competence to nip this danger in the bud. Since the state of exception, as Gross has pointed out, may occur at any given time and without any prior warning,[63] the authority assigned the task to combat it must, at any given moment, have the unlimited powers as well to identify and eliminate such a danger before it could fully materialize. "What ought to count is not the actual occurrence of an exception, but rather the *possibility* of its taking place."[64] This logic, then, is what probably constitutes the main explanation for the strong inclination among democratic governments to exaggerate the danger they have to face in order to justify the expansive scope of rights deprivation that can only be justified in real cases of danger.

Despite its inherent tendency to degenerate into a wholesale violation of rights, many may still find appealing Schmitt's prescription that the government official who has been assigned the task to fight emergency situations must also be granted the legal competence to determine whether such an emergency situation has occurred. McCormick, however, has made the case that contrary to what Schmitt seemed to think, it is far from necessary that the person who is authorized to decide whether an emergency situation has come into existence must be the same person as he who is entitled to decide what ought to be done in order to eliminate it. Under the Roman Republic, for instance,

"it was the Senate that proclaimed an emergency: usually a foreign invasion, an insurrection, a plague, or a famine. It then asked the consuls to appoint a dictator, who could in fact be one of the consuls themselves. The dictator had unlimited power in his task, acting unrestrained by norm or law, while being severely limited beyond the specific task in that he could not change or perpetually suspend the regular order. Instead, he was compelled to return to it

[62] McCormick, *Carl Schmitt's Critique*, *op cit* n 53 *supra*, 137.
[63] Gross, "Normless and Exceptionless Exception", *op cit* n 3 *supra*, 1845-1846 (internal footnote omitted).
[64] Ibid, 1846 (emphasis supplied).

through the functional nature of his activity and the time limit placed on him. However, in the performance of his duty, the dictator knew no right or wrong but only expedience…"[65]

The way in which the Roman Republic had institutionalized the use of emergency powers is, according to McCormick, politically superior to the strategy suggested by Schmitt.

"The genius of the classical notion of dictatorship… is this: The normal institution that decides that an exceptional situation exists (for instance, the Roman Senate) itself chooses the one who acts to address that situation (for instance, the dictator through the consuls). This has the obvious practical advantage that a collegial body of numerous members, like the Senate, commissions a smaller body, such as the consuls, to appoint a single individual to more expediently deal with an emergency than could a multimembered body. But there are more subtle ramifications as well: For instance, the initiating institution cannot so readily declare an exception that it might in turn exploit into an occasion for the expansion of its own power, because emergency authority is placed in the hands of another institution. Moreover, given how jealous political actors are of the boundaries of their own authority, the fact that the normal institution decides to give up its own power in the first place will probably ensure that a real emergency exists. This technique also helps guarantee that an agent is chosen who is sufficiently trustworthy to relinquish power. This external authorization on the execution of emergency powers works simultaneously as a kind of check on, and compensation for, the relinquisher of power who declares an emergency, as well as a potentially astute selection device for the executor of the exception. This technique, neglected by even the more sophisticated formulations of emergency provisions in modern constitutions, is worth reconsidering."[66]

It can be argued that the Trias Politica is based on exactly the same insight as was the Roman strategy for combating emergency situations - the insight that emergency or danger must be narrowly defined and that institutional arrangements to effectively resist the reckless expansion of its definition ought to be made.

This insight is what may explain why the right to restrict rights must belong exclusively to the legislature. Being elected by citizens to constitute the sovereign body in a democratic state, legislators, after all, are dependent on the continuing support of the citizenry to retain

[65] McCormick, *Carl Schmitt's Critique*, *op cit* n 53 *supra*, 123-124.
[66] Ibid, 154 (internal notes omitted).

their office. In turn, this dependence would, arguably, prevent them from abusing their right to restrict the rights of citizens, lest they be removed from office by those same citizens at the next election.[67]

It has long been assumed that the legislature's exclusive competence in matters of rights restriction would constitute a key safeguard for the basic rights. The fear of being voted out of office would dissuade them from enacting too expansive encroachments upon these rights. It is through this electoral mechanism that the rule of law, to a significant extent, can be prevented from sliding back into the law-less state of exception, where - to reiterate the point - basic rights may be recklessly suspended in the name of national security and public safety.

The case, however, can be made that this assumption is not tenable or valid anymore. Whereas the appointed dictator would always remain subordinated to the Senate, the undisputed locus of sovereignty under the Roman Republic in its heyday,[68] the normative position of the executive branch in security matters is not necessarily weaker than that of the legislature under modern conditions of democratic politics. This branch, after all, is not merely composed of state servants charged with the technical task of implementing emergency laws enacted by the parliament. By virtue of the fact that they are often elected officials, leading members thereof can rely on their popular mandate to challenge the rule of established laws and the legislative monopoly of lawmakers in the struggle against possible threats to the polity and its population.[69] Arguably thanks to its democratic basis, the Bush Administration, for instance, was able to brush "aside legal objections as mere hindrances to the ultimate goal of keeping Americans safe."[70] In order to prosecute its War on Terror, this Administration had, as previously alluded to, embraced the doctrine

"that domestic criminal and constitutional law are of little concern because the President's powers as commander in chief override all such laws; that the Geneva Conventions, a set of international treaties that regulate the treatment of prisoners during war, simply do not apply to the conflict with al-Qaeda; and more broadly still, that the President has unilateral authority to defy international law."[71]

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[67]J. Madison, "The 52nd Federalist Paper", in A. Hamilton, J. Madison and J. Jay, *The Federalist Papers* (New York: Bantam Books, 1982), 267: "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."

[68] Gross, "Normless and Exceptionless Exception", *op cit* n 3 *supra,*1836.

[69] Cf. W. Scheuerman, "Emergency Powers" (2006) 2 *Annual Review of Law and Social Science* 263-264.

[70] Cole, "Why the Court Said No", *op cit* n 18 *supra*, 41.

[71] Ibid.

The progressive democratization of politics, which demands that both the executive and legislative branches of government be elected by all eligible citizens of a particular state, therefore, seems to have produced an exceedingly corrosive effect on the legislature's monopoly to encroach upon rights and the corresponding assumption that this monopoly would safeguard those rights.[72]

There may be yet another reason why the legislature's exclusive competence to restrict rights is no longer able to provide a sufficient level of protection to them: The fact that the real targets of emergency measures are often marginal figures whom the society at large may have come to regard with deep suspicion, if not outright hostility.[73] Precisely because persons actually targeted by their laws do not in any way pose an electoral threat to incumbent legislators, they have become much less reluctant to yield to the executive branch's demand for forever more draconian measures in the fight against terror and other security threats. Agamben even goes so far to suggest that the legislature has effectively degenerated into a rubber stamp for emergency measures the executive branch deems necessary.[74] "This means that the democratic principle of separation of powers has today collapsed and that the executive power has in fact, at least partially, absorbed the legislative power. Parliament is no longer the sovereign legislative body that holds the exclusive power to bind the citizens by means of the law: it is limited to ratifying the decrees issued by the executive power."[75]

After having made this observation, Agamben moves on to lament: "At the very moment when it would like to give lessons in democracy to different traditions and cultures, the political culture of the West does not realize that it has entirely lost its canon."[76] Agamben's lament strongly suggests that this loss is just an unfortunate aberration that has occurred recently in the Occidental world - a *Betriebsunfall* or factory accident, so to speak.[77] His own analysis of Hobbes and Schmitt, however, has revealed that this is decidedly not the case. The partial absorption of legislative power by the executive branch, like the creation of a legal

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[72] Leo Strauss has observed: "If we may call liberalism that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties, of man and which identifies the function of the state with the protection or the safeguarding of these rights, we must say that the founder of liberalism was Hobbes." Should we combine this observation with Schmitt's thesis that "Bolshevism and Fascism… are, like all dictatorships, certainly antiliberal but not necessarily antidemocratic," then it would become understandable why a democratically elected government like the Bush Administration could at times constitute such a grave danger to civil and human rights. See L. Straus, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 181-182 and C. Schmitt [E. Kennedy (transl)], *The Crisis of Parliamentary Democracy* (Cambridge: The MIT Press, 1985), 16.

[73] D. Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis" (2003) 101 *Michigan Law Review* 2591.

[74] See also Scheuerman, "Emergency Powers and the Rule of Law After 9/11", *op cit* n 2 *supra*, 76.

[75] Agamben, *State of Exception*, *op cit* n 1 *supra*, 18.

[76] Ibid.

[77] H.A. Winkler, "Der lange Schatten des Reiches: Eine Bilanz deutscher Geschichte" (2002) 56 *Merkur* 221.

black hole at Guantanamo Bay, is a development that follows directly from the Western tradition of social contract theory upon which the dominant conception of democracy as popular self-legislation is founded.[78]

The consequence of this development, then, is that courts of law have, in fact, become the last institutional defender of basic rights.[79] Their Achilles heel, of course, is the imbalance of normative power between the elected legislative and executive branches of government on the one hand and the non-elected judiciary on the other. In order to keep hated outsiders whom we have met in cases like *Korematsu*, *Hamdan* and *Kadi* from becoming rightless, judges would have to stand up not only to a hostile public opinion, they would have to resist as well the enormous pressure coming from power holders who are elected by the majority of the electorate and whose emergency measures, therefore, seem to be democratically legitimate by virtue of that mere fact.

Since there is no guarantee whatsoever that the judicial resistance in defense of basic rights will not collapse under this pressure,[80] it is imperative that the position of the countermajoritarian judiciary *vis-à-vis* the majoritarian branches of government be made as strong as possible. In order to do so, we must, to start with, construct a new normative basis for the separation of powers. This means, to reiterate the point once again, that the traditional conception of democracy as popular self-legislation should be replaced by an alternative.

IV. Democracy as Legislative Self-Restraint

Despite the theoretical dominance of the traditional conception of democracy as popular self-legislation, laws are never made by the people themselves.[81] They have always been enacted with the consent of either the majority of voters or that among their elected representatives. But in spite of the gap between theory and practice, majority legislation has been accepted as democratic, in the sense of self-imposed, in virtually every democratic polity from ancient Athens to present-day America.[82]

This acceptance may have been made possible by the well-known argument that majority rule is fundamentally consistent with the autonomy of outvoted minority members. Under a democratic system - it has been argued by political theorists in the West - the defeated

[78] Agamben, *Homo Sacer*, *op cit* n 34 *supra,*109: "The time has come, therefore, to reread from the beginning the myth of the foundation of the modern city from Hobbes to Rousseau… All representations of the originary political act as a contract or convention marking the passage from nature to the State in a discrete and definite way must be left wholly behind."

[79] Cole, "Judging the Next Emergency", *op cit* n 73 *supra*, 2592-2594.

[80] Ibid, 2594.

[81] C. Lefort [D. Macey (transl)], *Democracy and Political Theory* (Cambridge: Polity Press, 1988), 227; H. Lindahl, "Sovereignty and Symbolisation" (1997) 28 (3) *Rechtstheorie* 357.

[82] D. Held, *Models of Democracy* (Cambridge: Polity Press, 2nd Edition, 2002), 21.

minority is not permanently deprived of the right to make its own laws. Rather, it is given a chance to become a new majority and to achieve that aim at a later moment in the cycle of periodically held elections. Implicit in the right of every citizen to participate in the democratic process, in other words, is the right of the vanquished minority to continue its efforts to transform into laws its political designs for society as a whole through the process of majority formation. The legally guaranteed right of minority members to carry on the struggle for legislative power, and the inherent right to win it at the end of the day,[83] are what constitute the key distinction between democratic majoritarianism and the tyranny of the majority. Democracy as popular self-legislation, therefore, amounts in the daily practice of political life to a system of government in which the majority of either eligible citizens or elected legislators are entitled to govern the whole state through the laws that they enact, on the condition that members of the oppositional minority are granted a legally institutionalized opportunity to transform themselves into a new legislative majority.

The theoretical device that underlies this whole argument in defense of majority rule is the social contract. Laws enacted by the majority could, according to social contract theory, be construed as self-imposed laws, if it could be assumed that the majority principle has been unanimously accepted at the contractual creation of the democratic state by those who henceforth are going to be governed by such laws. In a democracy understood as popular self-legislation, this initial unanimity is what constitutes the source of legitimacy for majority legislation. "In fact, if there were no earlier agreement, how… could there be any obligation on the minority to accept the decision of the majority," Rousseau rhetorically asked in *The Social Contract*.

"What right have the hundred who want to have a master to vote on behalf of the ten who do not? The law of the majority-voting itself rests on an agreement, and implies that there has been on at least one occasion unanimity."[84]

Implicit in the contractualist case for majority rule is, as we can see, the acknowledgement that unanimous consent to the enactment of laws is, in fact, the only way to secure the political autonomy of every law subject. Unforced unanimity, as Robert Burt has pointed out, is the only legitimate basis for an equal relationship among all polity members.[85] The

[83] G. F. Will, *The Pursuit of Virtue and Other Tory Notions* (New York: Simon & Schuster, Inc., 1982), 85.
[84] J-J. Rousseau [M. Cranston (transl)], *The Social Contract* (London: Penguin Books, 1968), 59.
[85] R. A. Burt, *The Constitution in Conflict* (Cambridge: The Belknap Press of Harvard University Press, 1992), 45.

problem, however, is that this state is almost impossible to obtain in practice. “Unanimous consent,” he continues, “is itself… not a working rule that satisfies democratic principles so long as one dissenter, by withholding consent, can impose his will on others.”[86] The majority principle, therefore, must be accepted as the second best strategy to approach the ideal of popular self-legislation.

This conventional justification of the majority principle has been challenged by Hans Kelsen,[87] a legal philosopher who was Schmitt’s main intellectual opponent during the Weimar years. His alternative defense of this principle is what may give rise to the new democratic foundation for the Trias Politica that we are looking for.

In his theory of democracy, Kelsen also seeks to reconcile the principle that every citizen in a democracy is politically autonomous with the fact that laws in such a polity are usually enacted by the majority. A politically autonomous individual is, in Kelsen’s view, one who is only subject to the laws that he or she has enacted him- or herself and not to those made by others. The fact, however, is that virtually nobody is autonomous in this sense when he or she enters the world. Everyone is born into a legal order that already exists, a legal order that one, for obvious reasons, could not have helped to create but that one is nevertheless compelled to obey. Thus, from the very moment of their birth, citizens are already ruled by laws that others have enacted before they have the opportunity to enact their own laws themselves. They are, in other words, already governed before they get the chance to be governors. In order to be politically autonomous, each of these citizens must, therefore, have the possibility to abolish or amend the legislative decisions that others have taken and that he or she does not like.[88] Or to reverse Rousseau’s famous aphorism, man was not born free but tends to be born “in chains” so his liberation must be the ultimate aim of democratic politics.[89] The essence of political autonomy, then, is not primarily the ability to make one’s own laws, but rather the capacity to replace laws that others have made with self-legislation. Viewed from this perspective, from the perspective of those who want to liberate themselves by changing the existing legal order, the majority principle constitutes, Kelsen points out, the shortest route to their goal. Under the reign of this principle, the number of votes that those who want to achieve legal change are required to get is considerably smaller than it would have been the case if unanimity were the principle by which the game were played. It is true that, viewed from the perspective of democracy understood as popular self-legislation, an individual could

[86] Ibid, 374.
[87] H. Kelsen [B. Cooper and S. Hemetsberger (transl)], “On the Essence and Value of Democracy”, in A.J. Jacobson and B. Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press, 2000).
[88] Ibid, 84-87.
[89] Rousseau, *The Social Contract*, *op cit* n 84 *supra*, 49: “Man was born free, and he is everywhere in chains.”

only be considered as really autonomous if the legal norms governing him or her were enacted on the basis of unanimity. The drawback of the unanimity principle would, however, reveal itself in a dramatic manner at the moment that amendments to these norms had to be made. It would, then, turn out that change in the legal regime would be virtually impossible to achieve if unanimous consent were required.[90]

"Here we see a highly peculiar ambiguity of the political mechanism. That which earlier, at the founding of the state order, served to protect individual freedom..., becomes its shackle if it is no longer possible to escape the order."[91]

Kelsen, therefore, concludes that it is the majority principle, rather than the unanimity principle, which is most conducive to the right to self-determination that every citizen in a democratic state is entitled to enjoy. The fact that majority legislation is accepted as democratic could, on the basis of this conclusion, no longer be attributed solely to the impossibility to accomplish unanimity in practice. The acceptance thereof may be based as well on the insight that under the majority principle, citizens are actually more politically autonomous than under the unanimity principle, which means that it is much easier for them to escape from the laws that others have enacted and to make their own laws themselves.

In light of Kelsen's reinterpretation of the majority principle, we can argue that this principle should primarily be viewed as a mechanism of liberation that enables minority members to break free from the alien will expressed in the laws that others have imposed upon them, rather than as a device through which the familiar ideal of popular self-legislation could be realized. This, in turn, suggests that the legitimacy of majority legislation could be established on the basis of a conception of democracy other than the traditional one. Within the framework of that alternative conception, laws promulgated by the majority are considered legitimate, not because they can ultimately be traced back to the consent of the minority that opposes their promulgation, but rather because the majority principle in accordance with which they are promulgated boils down to the relatively easiest way via which members of the out-voted minority can liberate themselves from these laws by changing them.

The essence of this alternative conception is, in fact, already discernible in the argument that law's democratic legitimacy resides in the opportunity law subjects have to accomplish

[90] Kelsen,"On the Essence and Value", *op cit* n 87 *supra*, 87.
[91] Ibid.

their liberation therefrom: This opportunity must be granted to them by those who happen to possess the power to impose it upon them in the first place. The changes in the existing legal order can, in other words, only be accomplished through the process of majority formation discussed above if governing lawmakers are willing to permit those who are subject to their laws to amend them. The willingness of incumbent law authors to allow law addressees to achieve liberation from laws that are imposed upon them could, then, be construed to signify an exercise of *self-restraint* on the part of these law authors, which means that they do not intend to make their legislative imposition upon others permanent. Quite the contrary, they intend to provide those who are subject to that legal regime the opportunity to escape therefrom through the majority formation process. If self-restraint by law authors toward law addressees is what makes laws democratically legitimate, then we may call a democracy within the normative framework of which the legitimacy of laws is conceived in terms of amendments that law subjects could make to these laws *democracy understood as legislative self-restraint*.[92] Since this conception of democracy requires that law authors make it possible for law addressees to amend or abolish the laws to which they are subject through the process of majority formation in order to render these laws legitimate, we may, on the basis of what has been discussed above, define democracy so understood as follows: It is a political system in which the majority among the polity's demos is entitled to govern the whole polity through the laws that it enacts, on the condition that defeated minority members are granted a legally guaranteed opportunity to become members of new legislative majorities.

This definition of democracy corresponds neatly to the way democratic government works in practice. The rationale behind that familiar practice, however, has changed. The legally institutionalized circulation of majorities and minorities is no longer intended to approach the ideal of popular self-legislation, but to make possible the liberation of law subjects.

V. A New Balance of Normative Power

Kelsen's reinterpretation of the majority principle and the related argument that legal norms owe their democratic legitimacy to the ease with which they could be either changed or nullified have not been able to convince everybody in the community of legal theorists.

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[92] Ibid, 101: "Where the people assembles, the presence of physical power is still too noticeable to allow more than submission to the *absolute* majority, and the absolute majority cannot refrain from imposing its will on a minority solely because it is somehow qualified. Only in parliamentary procedure is such rational *self-restraint* possible as a constitutional institution. It means that the catalogue of basic rights and rights of freedoms turns *from protection of the individual from the state to protection of a minority,* a *qualified* minority, from the *absolute* majority." (Emphases supplied.)

Wocjiech Sadurski, for instance, is particularly critical of the way in which Kelsen has attempted to establish the democratic credentials of legislation promulgated on the basis of that principle. “While it is an important virtue of a democratic law-making system that it leaves open the avenues for the revisions of enacted laws, it would be ironic,” he elaborates,

“to see the sources of political autonomy (as it was ironic to see the sources of legitimacy of laws) in the ease of the repeal of disliked laws. I find it an unattractive conception of political freedom to be told that, while the laws which govern my behavior are repulsive (ex hypothesi), I can nevertheless work towards repealing them, and the repeal is easier than in any other alternative system of law-making. This sounds to me like an excessively thin, negative, and defensive account of what political autonomy is grounded in.”[93]

But Kelsen is not alone in adopting this *via negativa* to democracy. His alternative theory of democratic legislation, after all, shares a remarkable similarity with the theory of democracy advanced by Karl Popper, who, like Kelsen, was a Jew that had to flee from Europe because of the massive rights deprivation committed by the Nazis. As is the case with Kelsen, Popper goes out of his way to emphasize that democratic legitimacy is to be generated in a negative way. The democratic essence of a government resides, according to him, precisely in the legally institutionalized opportunity that the governed possess to dismiss their governors.[94] It is through the threat of dismissal that citizens of a democratic polity may be able to influence the actions of those who rule them, he contends.[95]

The negative approach defended by Kelsen and Popper arguably constitutes an alternative tradition of democracy in the West, one which has long been overshadowed by the more affirmative doctrines elaborated by, for instance, Habermas. The conception of democracy as legislative self-restraint whose existence was theorized in the preceding section is nothing but a logical product of the Kelsen-Popper school. Should we look at the relation between the judiciary and the legislature from the perspective of this conception, then it would become clear that the position of appointed judges *vis-à-vis* elected lawmakers has become significantly stronger in terms of legitimacy.

[93] W. Sadurski, “Majority Rule, Legitimacy and Political Equality” (Florence, European University Institute Working Paper, LAW No. 2005/21, 2005), 17. This paper can be accessed via this link: http://cadmus.iue.it/dspace/handle/1814/3925, last accessed on 18 February, 2011.

[94] K. Popper, *The Open Society and Its Enemies*, volume 1 (London: Routledge, 1974), 124.

[95] Ibid, 125: “For although ‘the people’ may influence the actions of their rulers by the threat of dismissal, they never rule themselves in any concrete, practical sense.”

Democracy as legislative self-restraint, after all, gives rise to the insight that the main source of law's legitimacy has been relocated from authorship by the people to the liberation of law subjects. This implies, in the first place, that legislators who comprise the majority faction can no longer claim to have received from the people the mandate to take the measures they take. They will have to legitimize their laws themselves through the institutionalized respect they show for the political autonomy of minority members.

The second and related implication is that the jurisprudential basis upon which judges could offer resistance to the prevailing majority has become much more solid. The insight that the democratic legitimacy *of* majority legislation depends on the process of majority formation *by* minority members arguably requires that the judicial branch be authorized to invalidate legislation that members of the incumbent majority may be tempted to enact (a) to obstruct the electoral process by means of which they themselves could be removed from office by the oppositional minority or (b) to violate the rights of permanent minorities.[96] Permanent minorities, it should be pointed out, are minorities so hated or so unpopular among the rest of society "that they are virtually excluded from all attempts at coalition building," which means that they are "unable to marshal enough votes to protect their interest."[97] Since it is obvious that these minorities cannot escape from "the whims of the 'majority'," to which they may be subjected through the process of majority formation,[98] the case could be made that courts should be entitled to shield them from the laws that the majority decides to enact at their expense. After all, if the democratic legitimacy of majority legislation depends on the ability of a minority to become a new majority, then the mere existence of minorities who are not able do so may cast a shadow of illegitimacy over the rule thereof. Hence the argument that the judiciary ought to possess the authority to protect these minorities against laws the hostile majority may want to impose upon them.[99]

Judges could also act as defenders of the electoral process and as protectors of defenseless minorities under the traditional conception of democracy as popular self-legislation.[100] But in that case, the democratic basis for their action will always remain weaker than that of the legislative branch. Precisely because election by the "people" is what gives legislators the right to make laws, they are in possession of a decisive legitimacy advantage

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[96] Cf. J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1981), 103.
[97] L. G. Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" (1985) 73 *California Law Review* 1509.
[98] Ibid.
[99] R. M. Cover, "The Origins of Judicial Activism in the Protection of Minorities" (1982) 91 *Yale Law Journal* 1287-1316.
[100] Cf. Ely, *Democracy and Distrust*, *op cit* n 96 *supra*,105-116.

over non-elected judges within the normative framework of this conception of democracy. Laws they enact will, as previously noted, always appear to be democratically legitimate at face value, whereas the judicial invalidation of legislation often tends to be perceived as inherently undemocratic. Legislators, however, would no longer be able to enjoy this advantage if democracy were understood as legislative self-restraint. For, under that scenario, they would have to generate the legitimacy of the laws they promulgate through their *own* conduct, which would make it much easier for us to defend the resistance that the judiciary must offer them in order to protect the basic rights of minority members.

Basic rights - freedom of speech and freedom of association in particular - are the instruments upon which the minority must rely to transform itself into a new majority. When judges strike down laws that are deemed to have violated these rights, they may have thwarted the will of the incumbent majority. But their action is consistent with the majority principle itself. In doing so, after all, they are safeguarding the cyclical process of majority formation upon which the democratic legitimacy of majority legislation depends: If this process is somehow obstructed, then majority legislation will cease to be democratically legitimate. The obvious argument to be made, then, is that the legislative majority may actually need the institutional resistance offered by the judiciary in order to bestow democratic legitimacy upon the laws it enacts. In other words, it is through the judicial protection of minority rights that majority rule can be rendered democratically legitimate.

This basic argument is precisely what gives rise to a new balance of normative power among the three branches of government, which, in turn, will strengthen the jurisprudential position of the judiciary in its attempt to prevent the democratic rule of law from descending into the law-less state of exception during the fight against terror. Being the guardian of the basic rights that elected power holders in general must respect, lest they forfeit their claim to democratic legitimacy, the judiciary can now unabashedly demand that they explain why particular rights have to be infringed upon in order to secure public safety. Through this demand for accountability, judges may be able to limit the deprivation of rights by either the legislative or the executive branch to real cases of emergency, when such a deprivation is warranted.

It is true that terror cases like *Hamdan* and *Kadi* often involve suspects who are not citizens of the democratic state where they have to stand trial. But that does not mean that the judiciary should not act vigorously to enforce their basic rights. After all, if judges are able to ensure that even alien suspects do not become rightless in a democratic polity, then the citizens thereof can rest assured that their own rights will be well protected by courts of law,

should the need for such protection arise. The conception of democracy as legislative self-restraint would thus yield a dialectic interplay between the basic rights of citizens and those of aliens. As the normative power of the judiciary to protect the rights of citizens would become stronger under this alternative conception of democracy, judges would be in a much firmer position to safeguard the rights of aliens – a development that, in turn, would significantly enhance the protection of the rights enjoyed by citizens of a democratic state.

The jurisprudentially more solid position that judges would possess under the conception of democracy as legislative self-restraint obviously would not guarantee that they would actually stand up to either elected government officials or public opinion in defense of the basic rights to which terror suspects are entitled. In light of the historical record, Bruce Ackerman, for instance, remains quite skeptical about the judiciary's role as protector of these rights. "*Korematsu*," he reminds us,

"has never been formally overruled, a fact that has begun to matter after September 11. Even today, the case remains under a cloud. It is bad law, very bad law, *very, very* bad law. But what will we say after another terrorist attack? More precisely, what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the 'war on terrorism'?" [101]

Rather than relying "somewhat unrealistically" on courts to safeguard basic rights through the trial of individual cases,[102] Ackerman seeks to accomplish a more general protection for them through a legislative mechanism called the supermajoritarian escalator. In order to prevent the fight against emergencies by the executive branch from running amok, it should only be authorized by the legislature to act unilaterally for a short period of two or three months.[103] The support of a simple majority among lawmakers is enough for this initial period.[104] The continuation thereof, however, "should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter."[105]

By means of this requirement, the exceptional emergency regime could be put "on the path to extinction," Ackerman argues.[106] "As the escalator moves to the eighty-percent level, everybody will recognize that it is unrealistic to expect this degree of legislative support for

[101] B. Ackerman, "The Emergency Constitution" (2004) 113 *Yale Law Journal* 1043. (Emphases supplied, internal footnote omitted).
[102] Scheuerman, "Emergency Powers and the Rule of Law After 9/11", *op cit* n 2 *supra*, 77.
[103] Ackerman, "The Emergency Constitution", *op cit* n 101 *supra*, 1047-1049.
[104] Ibid, 1049.
[105] Ibid, 1047.
[106] Ibid, 1048.

the indefinite future. Modern pluralist societies are simply too fragmented to sustain this kind of politics -unless, of course, the terrorists succeed in striking repeatedly with devastating effect."[107]

Despite the fact that he has presented the supermajoritarian escalator as a more democratic alternative to judicial oversight, Ackerman's legislature-centered argument is, in fact, based on exactly the same normative premise as is the case we have made for courts of law: The right of minority members to oppose or even resist the majority's policy preferences. When judges invalidate as illegal an emergency measure promulgated by the majority, they do so in the name of this right. That can be said as well of the progressively decreasing number of lawmakers who would have to veto the extension of similar measures under the institutional arrangement designed by Ackerman.[108] For this reason, either the former or the latter could be expected to face the same majoritarian pressures originating from politics and society. Hence the conclusion that democracy as legislative self-restraint should in any case be adopted as the legitimacy basis of the Trias Politica, regardless of the question whether the judiciary or the cyclically shrinking minority in the legislature would eventually become the main guardian of basic rights in the Age of Terror.

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[107] Ibid.
[108] Ibid.