Abstract

One of the basic characteristic of a modern pluralistic democracy is the existence of political parties and an organized opposition. Aside the importance of a representative and functioning government, we cherish the existence and functioning of an institutional minority within the Congress – the minority party, the opposition. Dwelling into the constitutional concept of opposition reviles a more complex and perhaps self-contradicting picture. We all agree that there should be a minority party, an organized political alternative. This party is supposed therefore to oppose the majority party. However, must it oppose the majority? Is there a limit to its oppositional activity for reasons of majority rule? Are there circumstances where the opposition should be loyal and patriotic and refrain from opposing? All these questions are connected to a basic tense in modern representative democracy, the one between the majority and the opposition within the Congress. This paper seeks to address this problem both theoretically and practically and to analyze the constitutional role of the opposition in a democracy.

Furthermore, the understanding of the role of the opposition in democracy becomes even more important as we are witnessing national crises and emergencies. Especially in these circumstances, opposition behavior is more problematic and deserves a special analysis. Should the opposition help the majority in times of crises and suspend its activity or must it maintain its political struggle also in these harsh times? Which of these behaviors – cooperation or opposition – should be seen constitutionally as loyal or patriotic behavior? This paper will seek to address this constitutional problem and answer the question, "how patriotic the opposition be?".

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How Patriotic Can the Opposition Be? The Constitutional Role of the Minority Party in Times of Peace and During National Crises

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If, in times of crisis, the opposition party does not function, free government can not work. The party in power does not have account for its functions. The public does not know what is going on. To rely on the right to vote to preserve liberty, when the party in power has no real opposition, is like depending on a jury system to preserve justice, when one side is represented by a battery of clever and popular lawyers, and the other by a tried and confused old man.[1]

I. The Problem

One of the basic characteristic of a modern pluralistic democracy is the existence of political parties and an organized opposition.[2] Aside from the importance of a representative and functioning government, we cherish the existence and functioning of an institutional minority within the Congress – the minority party, the opposition.

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[1] Edna Lonigan, *Where Is The Opposition Party?* THE HUMAN EVENTS PAMPHLETS No. 10, 6 (1946).

[2] Robert A, Dahl, *Preface*, at VIII, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES (Robert A. Dahl, ed.1968).

Dwelling into the constitutional concept of opposition reviles a more complex and perhaps self-contradicting picture. Hence, pluralism is seen as an important value, but extreme pluralism is perceived as a danger.[3] Political consensus is considered to be a desirable outcome, but over-consensus may result in instability and misrepresentation of large parts of the society that are not part of the consensus.[4] In other words, we all agree that there should be a minority party, an organized political alternative. This party should therefore oppose the majority party. However, must it always oppose the majority? Is there a limit to its oppositional activity for reasons of majority rule? Are there circumstances under which the opposition should be loyal and patriotic and refrain from opposing? All these questions are connected to a basic tension in modern representative democracy, the tension between the majority and the opposition within the Congress. This paper seeks to address this problem both theoretically and practically and to analyze the constitutional role of the opposition in a democracy. Understanding the role of the opposition in a democracy becomes even more important in the context of national crises and emergencies. Particularly in these circumstances, opposition behavior is more problematic and warrants a special analysis. Should the opposition help the majority in times of crisis and suspend its activity, or ought it maintain its political struggle even in these harsh times? Which of these behaviors – cooperation or opposition – should be seen constitutionally as loyal or patriotic behavior? This paper will seek to address this constitutional problem and answer the question, "how patriotic can the opposition be?".

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[3] Giovanni Sartori, *A Typology of Party Systems*, in THE WEST EUROPEAN PARTY SYSTEM 316 (Peter Mair, ed. 1990).

[4] *See* Robert A. Dhal, *Reflections on Oppositions in Westerns Democracies*, 1(2) GOVERNMENT AND OPPOSITION 7, 13 (1965).

1. Demonstrating the Problem: The Patriot Act Enactment Proceedings

In order to demonstrate the problematic constitutional status of the opposition in a democracy, especially in times of crises, we might use the American legislative response to the September 11 attack. Indeed, one of the immediate outcomes of the September 11 tragedy was the enactment of the Patriot Act.[5] This law can be seen as an initial legislative response to the terror challenge faced by the American nation. It includes a variety of provisions intended to provide better tools to combat the threat of terrorism.[6] Important as it was to improve the ability of the United States to protect itself from terrorism, at least some of the law's provisions place a heavy burden upon civil liberties and basic human rights. The law expands the power of the executive in the long-term. One might even question the constitutionality of the law itself[7] or of the broad discretion it grants to the executive.[8]

Obviously, the content of the Patriot Act is important, and each of its provisions is likely be analyzed by the courts. It is important to note, however, not only the content of this law but also the way it was enacted. The Bush administration proposed the legislation just eight days after September 11, 2001, and Congress passed it just six weeks later. The

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[5] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act Of 2001, Pub.L.No.107-56, 115 Stat 272 [Hereinafter *The Patriot Act*].

[6] *See generally* Michael T. McCarthy, Note*: Recent Developments – USA Patriot Act*, 39 HARV. J.ON LEGIS. 435 (2002); *See also* Sara Sun Beale & James E. Felman, *Responses To The September 11 Attacks: The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J.L. & PUB. POL'Y 699 (2002).

[7] Ronald Dworkin, Rights and Terror (unpublished manuscript, on file with the author); Jenifer C. Evans, *Hijacking civil liberties: The USA Patriot Act of 2001*, 33 LOY.U.CHI.L.J 933 (2002); Shirin Sinnar, Note*: Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN.L.REV. 1419 (2003).

[8] Philip Shenon, *Report on U.S. Antiterrorism Law Alleges Violations of Civil Rights*, N.Y. TIMES, July 21, 2003, at A1. For a discussion of the dangers to civil liberties resulting from executive discretion in counter-terrorism, see Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002).

vote in the House was 357-66, and in the Senate, 98-1. There are two possible ways of understanding the relatively fast enactment and the overwhelming majority in which the law passed: The first is that despite the time shortage, Congress was intensively involved in all the details of the proposal and seriously discussed each one of them, taking into account their potential significance on the powers of the executive as well as their infringement upon basic human rights. On this reading, a broad consensus formed through elaborate discussions and compromises achieved in the committees and on the floor of each house. Despite the fact that the Congress is dominated by the same political party as the president, the minority party struggled and opposed any attempt of the executive to come up with a *carte blanche* type of legislation. Undeterred by the national crisis, the minority party – the opposition - used the legislative process to restrict the executive's ability to go too far.[9] Evidence of this oppositional activity can be found in the fact that the final version of the law includes a "sunset" provision which terminates the effects of major provision of the law by 2005, making temporary most of the authority given to the executive.[10] Further evidence is the refusal of the Congress to enact further legislation at this stage ("Patriot II").[11]

There is, however, a second way of understanding the passage of the Patriot Act: Congress acted almost as a rubber stamp. The executive issued an urgent demand for a legislative framework responsive to the national crisis, claiming that any delay might invite another terror attack. Under these circumstances, no one wanted to be seen as

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[9] Samuel Issachroff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime* (forthcoming at 5 THE. INQ. IN L. (2004))(on file with the author) at 43-44, available, at: http://www.law.nyu.edu/centers/lawsecurity/samfinal.pdf

[10] The Patriot Act, § 224(a).

[11] *See* Audrey Hudson, *Patriot II' bid garners little favor on Hill*, THE WASHINGTON TIMES, September 12, 2003, at A1. Patriot II is a law draft initiated by the Bush administration to further empower the executive with counter terrorism measures ("Domestic Security Enhancement Act of 2003") – see David Cole, What Patriot II Proposes to Do?, *available at*: http://www.cdt.org/security/usapatriot/030210cole.pdf.

hindering the national effort to overcome the tragedy and to prevent further attacks. The minority in Congress demonstrated loyalty to the national interest and did not place sticks in the wheels of the legislative machinery. The outcome was legislation passed so quickly, one might even question the extent to which Senators and Congressional representatives comprehended its long-term effect.[12] Indeed, this scenario can explain not only the fast enactment but also the sweeping majority in both chambers.

True or false – or partly true and partly false - the second scenario raises a serious problem faced by many democracies, especially in times of national crisis. While it is understandable that the legislature supports the executive when the President and the Congressional majority are from the same political party, it is harder to reconcile the support of the Congressional minority. This minority – the Opposition – is supposed to oppose. Its role is to represent and articulate an alternative set of values and policies. This role becomes perhaps more important in times of national crisis, when there is a fear of excessive use of power by the executive. History provides many examples of executive over-reaction in times of national panic.[13] This over-reaction is reflected not only in executive action but also in rush legislation passed without substantive debate.[14] It is plausible to inquire, therefore, into the scope of the minority party's responsibility to check and balance the legislature majority and the executive power. Surely, opposing *per se* cannot be the one and only role assigned to the opposition. We expect the opposition to oppose but also to be "loyal" and "responsible". There are moments in which

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[12] *See* Dworkin, *supra* note 7, at 2 ("[Bush Administration] pressured Congress to adapt that Act before most Senators and Representatives had had a chance to read it").

[13] *See* Dworkin. *id*, at 1. For a detailed analysis of the reasons for executive over-reaction in times of national crisis, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional*, 112 YALE.L.J. 1011, 1022-1042 (2003).

[14] *See id*, at 1032-1033.

disagreements and political ambitions should be left aside, so that all national powers can be directed toward a single aim. This is, again, especially true in times of national crises when national unity and safety are at stake.[15] In these times, the executive often enjoys increased popular support.[16] Public opinion and voters - especially the median voter - expect the opposition to cooperate with the government. Failing to do so – and opposing an effort viewed as being in the national interest – might seriously damage the popular support of the opposition party. Voters might vote out a disloyal opposition. The dilemma poses questions of constitutional theory and practice: How loyal - or patriotic - can the opposition be? What degree of opposition activity is acceptable and even required, and when does the opposition go too far?[17] Trying to answer these questions on a theoretical level rather than the factual one, will be the main focus of this paper.

2. The Historical and International Scope of the Problem

The problems of opposition loyalty are not unique to the post-September 11 American experience. Other national crises, like the Civil War[18] and the Second World War[19], created similar issues. Neither are these problems unique to the United States. Different countries tend to face the same dilemma in times of crises. In Britain, for

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[15] A different set of problems, which will not be addressed in this paper, is the role of the opposition and the legality of its activity in matters such as judicial nominations or budget. For instance, we might ask whether the filibustering of President Bush's nominations by the minority Democratic party constitute obstruction of the majority rule and an excessive use of the minority power within Congress. *See* Mike Allen, *GOP Plans 'Marathon' On Judges Debate to Spotlight Blocked Nominees*, THE WASHINGTON POST November 8, 2003, at A01.

[16] *See* Lee Epstein et al., The Supreme Silence During War (unpublished, manuscript on file with the author), available, at: http://gking.harvard.edu/files/crisis.pdf

[17] A different question that will not be analyzed here is the argument that courts also tend to become too loyal in times of national crisis and war. *See id*, *passim*; Gross, *supra* note 13, at 1034.

[18] *See* MARK E. NEELY, THE UNION DIVIDED, *passim* (2002).

[19] On this loyalty of the Republican Party and its intra-party influences, see RICHARD E. DARILEK, A LOYAL OPPOSITION IN TIME OF WAR, *passim* (Greenwood Press, United States, 1976).

instance, the two main parties formed a joint cabinet throughout the two World Wars. The same had happened during various crises in other democracies like Austria[20], Germany, Italy, Sweden and Israel[21]. Moreover, opposition loyalty manifested itself not only during times of war but also in the context of counter-terrorism. The English legislative response to terrorism is procedurally quite similar to the enactment of the Patriot Act – speedy deliberation and broad support by the opposition.[22] The problem of opposition loyalty exists not only in times of national crisis but also in the daily functioning of various democracies. Indeed, even in times of peace and tranquility one might question whether the opposition has a right to oppose or a duty to do so. If it has a right to oppose – what is the nature of this right and how can it be protected? If it has a duty to oppose – what is the content of this duty and who should enforce it? In sum, there are good reasons to analyze the role of minority party opposition and loyalty, particularly in times of national crisis. The enactment procedure of the USA Patriot Act is only an example, thus, to a more profound constitutional problem.

3. Lack of Theoretical Attention to the Problem

Studying political opposition as a constitutional institution is a modern phenomenon, dating back to the end of the 1960s. Questions were posed mostly in political science literature, though it is still regarded as a neglected issue even there.[23] Legal analysis of opposition parties is almost nonexistent. Jurists tend to avoid this issue,

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[20] Otto Kirchheimer, *The Waning Opposition in Parliamentary Regimes*, in COMPARATIVE POLITICAL PARTIES 310, 319 320 (Andrew J. Milnor, ed. 1969).

[21] Robert A. Dahl, *Patterns of Opposition*, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES, *supra* note 2, at 332, 346 ; Klaus von Beyme, *Parliamentary Oppositions in Europe*, in OPPOSITION IN WESTERN EUROPE 31, 41 (Eva Kolinsky, ed. 1987). In Israel there was a temporary unification of the two major parties in a joint cabinet, for instance, during the 1967 Mideast War.

[22] *See* Gross, *supra* note 13, at 1033-1034.

[23] *See* von Beyme, *supra* note 21, at 31-33.

classifying it as a political one. Only a very few democracies refer to the opposition in their laws, mostly indirectly or tangentially.[24] Perhaps the most basic reason for this theoretical lacuna is our tendency to focus on winners rather than losers. We prefer to study the use of force and governance, not the problems of the second best.[25] Another reason for this theoretical lacuna is a deeply-rooted concept of efficient political markets which holds that the way a representative votes is not a legal issue. If the opposition or minority party decides to cooperate with the majority party, there is no legal dilemma. It is simply a political behavior, motivated by political aspirations. If the public does not like it, it will show its disapproval in the next elections. In the same vane, according to this argument, if the opposition behaves in an obstructionist manner, it will pay the price in the voting boxes. Public opinion and democratic competitions are, according to this argument, the checks and balances of opposition behavior, and therefore the problem of opposition loyalty is a political, rather than a constitutional, issue.

However, is the answer that simple? If we tend to justify the mere existence of an organized minority in our representative assemblies by the most basic constitutional principles of liberalism, equality and pluralism than why is the malfunctioning of this mechanism merely a political problem? Furthermore, the whole notion of judicial review is based on an idea that politics and public opinion do not constitute a sufficient control mechanism in a democracy. Courts are willing to intervene in political decisions in the name of human rights and basic values, even when the public supports the legislature's action. If the legal system is willing to intervene in the decisions and actions of the majority, why should it not intervene in the decisions of the minority? The role of

[24] *See, for instance*, Parliament of Canada Act, R.S.C. 1985, c.p-1, S. 19.1 (Can.); Ministerial and other Salaries Act 1975, Ch. 27, s.2 (Eng.).

[25] *See* Eva Kolinsky, *Introduction*, in OPPOSITION IN WESTERN EUROPE, *supra* note 21, at 1, 1-2.

political opposition has more legal implications than might be apparent, and those implications require further analysis.

4. The Proposed Analysis of the Problem

The starting point of this paper is that the minority party – the opposition - plays a vital role in modern democracy, not only in terms of its theoretical importance but also because it is a crucial part of the legislature's procedures and decision making. Furthermore, I will argue that important as the opposition role is, there are indeed some situations in which it is acceptable that the opposition should be "loyal" and refrain from opposing or obstructing the majority will. However, there are limits to the possibility of mute opposition. In cases of an unconstitutional proposal of the majority party, I argue that the minority party – the opposition - must not remain loyal and even has a *duty* to oppose. The occasional need for political loyalty cannot discharge the political opposition from its constitutional duties. The opposition should be regarded therefore, not just as a numerical minority but also as a constitutional entity with a specific role - to oppose unconstitutional activity by the majority. This role, I will argue, is especially significant in times of national crisis and war. Thus, despite the popular pressure to act quickly and dramatically in support of majority response to a crisis, the opposition should remain alert and maintain its role as a guardian of the constitution.[26]

[26] My starting point will be therefore that the war against terrorism and the reaction to situations of national crises must take place within the law and not as an exception to it. Constitutional law, values and human rights should be taken into account even in times of war. *See* Aharon Barak, *Foreword: A judge on Judging: The role of a Supreme Court in a Democracy*, 116 HARV.L.REV 16, 148-160 (2002); Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003); *For a different approach*, *see* Gross, *supra* note 13, *passim*.

Obviously, this argument raises many questions, primarily regarding the applicability and enforceability of this role. It also raises questions about the role of the political opposition within the concept of separation of powers and the role of the courts in this context. These issues will be discussed below.

Part II of the paper explains the idea of "opposition" in modern democracies, taking into account structural differences particular to each country. It also focuses on the existence of an opposition in the American presidential democracy while trying to challenge the common argument that "there is no opposition in the United States". This definition of an opposition will be followed, in Part III, by an analysis of the role of the opposition in democracy. In this context, I will try to parse some of the common features of opposition behavior examined in political science, such as democratic opposition, constructive opposition, responsible opposition and loyal opposition. These different roles of the opposition will help shed light on the notion of opposition loyalty, especially in times of national crisis or emergency. In Part IV, I will argue that the opposition has a further distinctive role – constitutional opposition. It will explain the theoretical basis for the role of the opposition as well as address the need for constitutional opposition to protect the constitution from the majority party. I will also explain why such a mechanism is necessary, especially in times of national emergency, and why courts are not a sufficient mechanism in this regard. It will be argued also, that there are strong reasons for characterizing the role of the opposition as a legal duty, yet not an enforceable one. I will conclude, in Part V, by emphasizing the importance of recognizing the legal status of the minority party in general, and in times of national crisis, in particular. In this context, I will suggest reformsthat may promote this goal.

II. Why Opposition?

1. Definition and Justifications

The term "opposition" may relate to many kinds of activities within a democracy.[27] If opposing is about manifesting disagreement with a policy or function of another, then many activities can be seen as "opposition". Courts "oppose" governmental policy when they overrule it. Individuals "oppose" when they demonstrate against government policy. Opposition in the constitutional sense, however – referring to organized action against the government – is often restricted to parliamentary or legislative opposition by the minority party or parties. Our focus will be on this kind of opposition, which may be defined as the opposition of the political group (or groups) which constitutes the minority, to the actions of the group (or groups) which constitutes the majority, within the representative legislative branch (the congress, national assembly or parliament), on the basis of different ideologies.[28]

Britain was probably the first nation to establish a distinct constitutional concept of parliamentary opposition. As early as 1826, Sir John Cam Hobhouse noted in the House of Commons that in addition to the government, one might also find "His

[27] There are also oppositions within non-democratic regimes and transitional regimes. In these situations, the opposition is either illegal or insignificant, and in any case, it will not have a meaningful role within the national assembly or parliament. I will therefore not focus on these types of oppositions. For a more detailed description of the role of oppositions in non-democratic states, see Alfred Stepan, *Democratic Opposition and Democratization Theory*, 32 GOVERNMENT AND OPPOSITION 657 (1997); Alfred Stepan, *On the Tasks of a Democratic Opposition*, 2 JOURNAL OF DEMOCRACY, 41 (1999).

[28] For a broader definition of opposition which includes any activity of one group against another, see Robert A. Dahl, *Preface*, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES, *supra* note 2, at I. This definition uses the terminology of minority groups or majority groups, since in multi party systems we willusually find a coalition of some parties which constitutes together the majority and also a group of political parties which constitute the minority. Another feature of multi party regimes is that the largest party in the parliament is not necessarily the majority of the House, as some smaller parties might constitute a coalition without it. These distinctions are mostly irrelevant for two parties systems like the United States or England. where a coalition is a rare phenomenon and by definition, when there are only two parties, the winning party will always be the largest party in the Congress and will also constitute the majority party.

Majesty's Opposition".[29] Thus, the representative entity – be it the parliament, the congress or a national assembly – consists not only of the majority but also of a legitimate minority. This minority does not necessarily represent an ethnic or socioeconomic minority within the society but rather an organized *political* minority facing the majority in the legislative assembly.[30]

Obvious as it might seen, acknowledging the existence of an opposition of this kind was not natural, even in Britain, which is seen as originating the concept of opposition. Indeed, in the British tradition, opposing the government was regarded as treason and could physically endanger those who practiced it.[31] Representatives were allowed to raise issues affecting their local constituencies, but they could not express disagreement over national policy. The legitimacy of dissent is traceable in part to religious thinking at that time, which encouraged resolving problems and disagreement internally, not through public debate.[32] In the 18th century, the idea of balanced constitution arose, according to which power should be restrained and balanced by a few distinctive organs, in order to maintain liberty. Opposing is seen in certain cases, therefore, as promoting liberty. However, organized opposition in the parliament or systematic dissent was still seen as disloyal activity.[33] The American approach to

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[29] Some even date this development to the end of the 18th century – see Nevil Johnson, *Opposition in the British Political System*, 32 GOVERNMENT AND OPPOSITION 487, 487-489 (1997).

[30] *See* Marie-Claire Ponthoreau, *L'opposition Comme Garantie Constitutionnelle* [The Opposition as a Guardian of the Constitution], REVUE DE DROIT PUBLIQUE 1127 (2002).

[31] Thomas. A. Hockin, *The Roles of the Loyal Opposition in Britan's House of Commons: Three Historical Paradigms*, 25 PARLIAMENTARY AFFAIRS 50, 52-54 (1971-1972).

[32] Allen Potter, *Great Britain: Opposition with a Capital 'O'*, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES, *supra* note 2, at 3, 5.

[33] For a detailed analysis of the attitude towards the opposition in the 18th century, see J.A.W. GUNN, FACTIONS NO MORE: ATTITUDES TO PARTY IN GOVERNMENT AND OPPOSITION IN EIGHTEEN CENTURY ENGLAND (1971).

opposition did not differ significantly during these periods.[34] Though transfers of power – government alterations - occurred as early as 1801, the leading ideology was still the Madisonian concept articulated in the Federalist Papers, describing factionalism as an evil [35] Political parties and organized debate were perceived as a negative phenomenon, driven by small, disloyal interest groups. The opposition was seen not as a legitimate party that might one day be in power but rather as a disruptive and potentially seditious body.[36] The legal implication of this approach was manifested in the Sedition Act of 1798 which was used as a partisan weapon.[37]

It was only when legitimized political parties entered the picture in the 19th century that the idea of organized opposition achieved its modern and current meaning. If political parties are the main actors in modern democracy, then the winning party has the right and responsibility to rule and form the majority in parliament while representing the interests of its voters. On the same basis, the second-most popular party, the loser of the elections, has the right to oppose while representing the interests of its own voters. The minority party becomes an *official opposition* with a distinctive role of presenting an alternative to the majority and controlling the majority's activities.[38]

The emergence of the concept of "opposition" in the parliament is not just a side effect of partisan democracy but also a necessary consequence of more general requirements of liberty and pluralism. Obviously, if the essence of democracy is a

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[34] *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 1-39 (1969).
[35] The Federalist No. 10 (James Madison).
[36] *See* Richard Hofstadter, *On The Birth of American Political Parties*, in STUDIES IN OPPOSITION 146, 146-149 (Rodney Barker, ed. 1971). *See also* Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U.CHI.L.REV. 1479, 1484-1496 (1994).
[37] Richard Hofstadter, *On The Birth of American Political Parties*, in STUDIES IN OPPOSITION 146, 149-150 (Rodney Barker, ed. 1971).
[38] *See* GERHARD SCHMID, POLITISCHE PARTEIEN, VERFASSUNG UND GESETZ [Political Parties, Constitution and Law], 33-34 (Basel, 1981).

"general will" type of representative government, as Rousseau defined it,[39] then there is no place for organized dissent in the legislature, a dissent which is wrong *by definition.*[40] Hence, political theories which emphasize the role of the parliament as representing the nation as a whole will view the concept of a legitimate opposition as a negative one.[41] Why should there be an opposition in such an ideal type of representation? Furthermore, even a minimal definition of democracy as an express of the people's sovereignty does not entail the existence of a minority party or an organized opposition in the legislature. In theory, the people's sovereignty can be exercised by a single political party which claims that it represents the interests and will of everyone.[42]

In a liberal democracy, however, debate and dissent are essential parts of deliberation. There are a few justifications for the existence and activity of an opposition within a democracy: First, the assumption is that the best and most just outcome is achieved through free and open discussion in which different views and interests are expressed.[43] This assumption is driven not only by concerns of efficiency but also of pluralism. It acknowledges not only the existence of different political views but also that

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[39] *See* JEAN-JAQUES ROUSSEAU, THE SOCIAL CONTRACT 70-74 (Penguin, London, 1968)(1762).

[40] Jérôme Léron, Pluralisme et Partis Politiques en Droit Public Français [Pluralism and Political Parties in the French Public Law], 36-37 (Thèse de Doctorat en Droit, Lyon, 1999)(unpublished Ph.D thesis, on file with the author). The same hostility toward opposition exists in general interest Hegelian state theory. *See* William E. Paterson & Douglas Webber, *The Federal Republic of Germany: The Re-Emergent Opposition?*, in OPPOSITION IN WESTERN EUROPE 137, 139 (Eva Kolinsky, ed. 1987).

[41] GHITA IONESCU & ISABEL DE MADARIGA, OPPOSITION – PAST AND PRESENT OF A POLITICAL INSTITUTION, 30-36 (1968). These theories – of national will and national sovereignty – are regarded as one of the reasons for the negative approach towards oppositions in France. *See id*, at 58-61.

[42] This argument was categorically rejected by modern theories of political parties – arguing mainly that a party is a part of a whole and there is a party only when there is more than one party in the system. See: GIOVANNI SARTORI, PARTIES AND PARTY SYSTEMS 39-50 (1976). For other perspectives, *see* JEAN BLONDEL, COMPARATIVE GOVERNMENT 156-164 (2nd. ed. Cambridge, 1995); Brantly Womack, *Party-State Democracy: A Theoretical Exploration*, 25(1) ISSUES & STUDIES 37 (1989).

[43] DANIEL A. FARBER , PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE - A CRITICAL INTRODUCTION 59-62, (1991); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 295-308 (1989).

these views are legitimate and important in their own right.[44] Political rationality depends on a plurality of alternatives and their free discussion.[45] Furthermore, we acknowledge thattrue representation of the various groups within the society can be achieved only by pluralism in the representative entity itself.[46] In other words, the existence of the opposition is an essential part of meaningful voting and representation.[47]

Second, in order to reconcile personal liberty and political equality on the one hand and majority rule on the other hand, we must assume real participation of the minority in political deliberation.[48] Such participation will not only justify why one must abide by a law with which he or she does not agree,[49] but it also fulfills other goals of democratic participation such as personal virtue and democratic education.[50] The existence of an intra-parliamentary minority is important therefore to legitimate majority rule and ensure democratic participation. Majority rule is legitimated by the existence of a minority that can object and opine on the issues at hand. Furthermore, a deliberative process based on debating different legitimate views will foster compromise and consensus, which serve as important elements of democracy by balancing the inherent problems of majority rule.[51]

A third important idea which underlines the existence of the opposition within the legislature is political competition. As modern democracies increasingly focus on the electoral phase and less on the daily and long-term representation of the individual, it

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[44] SARTORI, *supra* note 42, at 15-16.
[45] JOHN STUART MILL, ON LIBERTY 26 (Prometheus, New-York 1986)(1859).
[46] RICHARS S. KATZ, DEMOCRACY AND ELECTIONS 64-65 (1997).
[47] For the idea of meaningful voting, see Adam Winkler, *Expressive Voting*, 68 N.Y.U L.REV. 330 (1993).
[48] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 286-287 (1949).
[49] Dahl calls this duty to obey the "political obligation" seen as the "unfreedom" of the individual. See: Dhal, *supra* note 4, at 9.
[50] *See* RENÉ CAPITANT, ÉCRITS CONSTITUTIONNELS [Constitutional Writings], 402 (1982).
[51] *See* HANS KELSEN, LA DEMOCRATIE SA NATURE - SA VALEUR [Democracy – Its Nature, Its Value], 59-60 (Présentation de Michel Troper, 1988)(1929).

becomes important to maintain real competition within the political market. The existence of opposition in the legislature promotes political competition. The opposition can and should serve as a check on the majority and organize an alternative to the majority for the coming elections. Because it sits within the decision-making mechanism, it often enjoys better information than other players in the political arena. Democracy means majority rule, but that does not exclude the minority's role.[52] The fact that there is a distinct political minority in the legislature might also promote another important idea, the one of separation of powers. In parliamentary regimes, where there is often complete identity between the legislative majority and the executive branch, a separation between the legislature and the executive actually refers to a separation between the opposition and the majoritarian government. The separation of powers rationale for the existence of an organized minority – a minority party - is also relevant to a presidential democracy like the United States . In cases when the same party holds the presidency and dominates both houses of Congress, the real separation of powers exists between the majority party and the minority party – not between the branches themselves.

In sum, one can argue that there is no majority without a minority,[53] and that the presence of the opposition in the legislature is not only an important functional feature of democracy but even a hallmark of its existence.[54]

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[52] Leron, *supra* note 40, at 315.
[53] HANS KELSEN, *supra* note 48, at 287.
[54] Dahl, *supra* note 2, at VIII.

2. Opposition to Whom?

Thus far, we have focused on a relatively narrow definition of opposition, including the minority party or parties within the legislative branch. This definition requires further explanation and fine-tuning. The term "opposition" is inherently relative, since it assumes an *altera pars* which is opposed. Therefore, one might find different answers to the question, what is the opposition all about? There are different types of oppositions. The most basic distinction, for our purposes, lies in the difference between opposing the executive branch on the one hand and opposing the majority party within the legislature, on the other hand.

Indeed, the British concept of opposition – "His Majesty's Opposition" – was based on opposing the executive branch. Thus, in the Westminster model of democracy – the parliamentary regime – the majority in the House nominates the leader and Cabinet of the executive branch. The term "opposition" refers to the members of the House who oppose the government or executive branch. The British opposition therefore performs a dual function: It opposes the parliamentary legislative majority, and it opposes the executive branch. This phenomenon is typical of parliamentary regimes. The executive branch is nominated and removed by the parliament. It is responsible to the legislature. The legislative minority party simultaneously opposes both the majority party and the government or executive branch. The goal of the opposition is therefore to replace the government and also to gain a majority in parliament. The opposition can also be easily identified as the party that is not in government, because Britain has a two-party system in which it is clear that there is a winning party and an opposition party. This feature,

combined with the relatively strong coherence and discipline of the British parties, leads to theconclusion that Britain's opposition is an opposition with a capital "O".[55]

In a presidential democracy like the United States, the opposition is divided between the different branches of government. In the Congress, the opposition can be regarded as the minority party in the House and Senate. This is the legislative branch minority. If Congress is dominated by the president's party, then the situation resembles a parliamentary democracy, in which the same party serves as the opposition both to the executive branch and to the legislative majority. If, however, the government is divided, such that the president's party controls one or none of the chambers, we may speak of an opposition only in terms of the minority party within Congress.[56] This opposition does not necessarily oppose the executive branch since it may belong to the same party as the president.[57]

In a broader sense, it can be argued that the *minimal* concept of opposition requires the existence of a recognized minority party within the legislature. It is a minimal concept since in a parliamentary democracy, the opposition is usually regarded not only as the minority party within the legislature but also as the opposition to the executive branch which constitutes an alternative to the government. This feature –

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[55] Potter, *supra* note 32, *passim*. There is, however, an argument that throughout the years, Britain deviated from this classic model of opposition, not in the institutional feature of its two-party system but rather in the actual political strength of the British opposition in parliament. *See* David Denver, *Great Britain: From an Opposition with a Capital "O" to a Fragmented Opposition*, in OPPOSITION IN WESTERN EUROPE, *supra* note 21, at 78.

[56] The situation in which the same party dominates both chambers and holds the presidency ("full authority") is quite rare, especially taking into consideration the fact that in the Congress, not all members are elected at the same election. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV.L.REV 633, 648-653 (2000). *See also* David A. Crockett, *The President as Opposition Leader*, 30(2) PRESIDENTIAL STUDIES QUARTERLY 245, 250-252 (2000).

[57] There is obviously the possibility, within the American presidential democracy, for a supermajority in Congress to impeach and remove the president – see Constitution, Article II Section 4. This procedural tool, however, is different – theoretically and practically – from a non confidence vote in a parliamentary democracy.

opposition to the executive - does not characterize presidential democracies, in which there is a strong separation of powers and thus a clear distinction between the minority party within the legislature and opposition to the president by the opposing party. Indeed, in a presidential democracy, when the government is divided, opposition to the executive is manifested by the majority party within the legislature. This kind of "opposition" is part of the separation of powers and checks and balances of a presidential democracy. It cannot exist in a parliamentary democracy, in which the majority party would lose its power if it opposed the executive branch on a regular basis. I will therefore focus on the minimal definition of opposition, i.e. the minority party within the legislative branch.

3. "Opposition" In The American Democracy?!

The above distinction between types of democracies, as well as the refinement of the definition of opposition, are necessary to refute the common belief, held mostly in political science circles, that there is no opposition in the United States or in other presidential regimes except in highly exceptional conditions. Perhaps this perspective is one of the reasons that American jurisprudence has ignored the legal status of the minority party in Congress or the opposition.

Indeed, there are significant differences between oppositions in various democracies.[58] Oppositions vary in *concentration***,** which is the extent to which the opposition exists in one major organization, as opposed to being dispersed among several organizations; in *competitiveness*, which is the amount of cooperation or competition between the political rivals; in the *site* of activities, which is where the opposition activity

[58] *See* Dahl, *supra* note 21, at 332. For further classifications, see Jean Blondel, *Political Opposition in the Contemporary World*, 32 GOVERNMENT AND OPPOSITION 462 (1997).

takes place (elections, legislative activity, NGO activity, etc.); in *distinctiveness*, which refers to the extent of difference between the opposition and the government or the majority; in the *goals* of oppositions, such as replacing the current government or changing its socioeconomic philosophy; and in the different *strategies* employed by different oppositions.

Based on these parameters, and others, it had been said, *descriptively*, that in the Unites States, "To say where the "government" leaves off and "the opposition" begins is an exercise in metaphysics".[59] On this view, opposition exists not within Congress but rather in the separation of powers; each branch balances another branch, thus "opposing" it[60]. This argument about the lack of opposition in the United States was based primarily on specific features of American democracy: oppositional activity is dispersed among institutions such as the White House, the House of Representatives, the Senate and the judiciary. American federalism means that opposition is also dispersed among state and federal entities.[61] This lack of concentration weakens the opposition. Furthermore, in American society there is broad consensus over core values, such that political cleavages are usually minor and are resolved through ad-hoc coalitions, deals and negotiations, not necessarily according to party lines.[62] Uncompromising parties are preserved as

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[59] Robert .A. Dahl, *The American Oppositions: Affirmation and Denial*, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES, *supra* note 2, at 34.

[60] Nelson. W. Polsby, *Political Opposition in the United States*, 32 GOVERNMENT AND OPPOSITION 511, 511-512 (1997).

[61] For a further discussion of the influence of federalism on the power of oppositions, see: Carl .J. Friedrich, *Federalism and Opposition*, 1(3) GOVERNMENT AND OPPOSITION 286 (1966). Friedrich argues that federalism creates new sites for oppositional behavior within parties and also within other institutions, providing the interests of local entities with better representation as oppositions.

[62] *See* GORDON G. HENDERSON, AN INTRODUCTION TO POLITICAL PARTIES 286 (1976). There are perhaps stronger disagreements and cleavages within nongovernmental politics – the NGO's, the civil society and interest groups. *See* Dahl, *supra* note 21, at 343. These, however are not part of the legislature and due to the First Past The Post electoral system, can not really pose an opposition to the existing parties. *See* Robert A. Dahl, *Some Explanations*, in POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES, *supra* note 2, at 348.

Extremists.[63] There is, of course, political competition around elections, but the competition is subsequently replaced by a high degree of cooperation.[64] Major political reforms tend to be achieved on a long-term basis, through consensus and broad public support.[65] Among different political parties in government there is generally an agreement over the goals, and the differences in their ideologies are limited to the means to achieve these goals. Another factor reducing American opposition is the fact that political parties are relatively weak and decentralized, oriented toward the center of the political spectrum and competing for the median voter.[66] These parties lack cohesive power and fail to exercise internal discipline over their delegates. Standing committees in Congress are very powerful and thus grant the individual representative independence from his party. Minority parties, in particular, have a weak leadership and negative incentives to oppose the majority party in a meaningful manner.[67] Thus, the argument goes, despite the fact that the United States, like Britain, has a dual party system, which can foster a strong and distinctive opposition, American opposition is significantly weaker than British opposition.[68]

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[63] *See* Nancy L. Rosenblum, *"Extremism" and anti Extremism in American Party Politics*, 12 J. CONT. LEG. ISSUES 843, 873-879 (2002).

[64] Robert A. Dahl, *Party Systems and Patterns of Opposition*, in THE WEST EUROPEAN PARTY SYSTEM, *supra* note 3, at 296, 301.

[65] *See* Polsby, *supra* note 60, at 518.

[66] *id*, at 515-516. On further features and reasons for the weakness of the American political parties, see John E. Owens, *From Committee Government to Party Government: Changing Opportunities for Amendment Sponsors in the US House of Representatives, 1945-1998*, in THE UNEASY RELATIONSHIP BETWEEN PARLIAMENTARY MEMBERS AND LEADERS 75 (Lawrence D. Longley & Reuven Y. Hazan eds. 2000); Roderick D. Kiewiet & Mathew D. McCubbins, *Parties, Committees, and Policymaking in the U.S. Congress: A Comment on the Role of Transaction Costs as Determinates of Governance Structure of Political Institutions*, JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 676 (1989). *See also* CHARLES O. JONES, THE MINORITY PARTY IN CONGRESS 9-19 (1970).

[67] *See* CHARLES O. JONES, THE MINORITY PARTY IN CONGRESS 190-192 (1970).

[68] Dahl explains that there is a direct link between the degree of consensus inside the political structure and the existence of an opposition. The broader the consensus, the less legitimate is the opposition. Thus, changes within society will be channeled to the political system gradually and not through a distinctive opposition with a clear alternative. This might also be a problematic result of a very broad consensus since

It is important to note these features, but we must emphasize their descriptive character. They may explain why the American opposition is weak and not institutionalized. They cannot completely negate its existence.[69] Indeed, recent studies show that over the years, American parties have become stronger. At the beginning of the 21st century, hence, there is more Congressional party cohesion, organization and leadership.[70] Even if there are indications that American political parties are inherently weak, the actual fact of this weakness does not obviate the need for an opposition party within a democracy. The fact that a certain institution in a certain state is weak does not lead to the conclusion that it is superfluous and has no role. On the contrary, on a normative level, the weakness of the opposition may lead to a call for change.

My view is that every democracy has an opposition, but structural and social differences create different patterns of oppositions. The fact that we find different patterns of oppositions should not change our normative legal point of view on the role of oppositions in democracies. Parliamentary and presidential systems both require a plurality of views within the legislature; control over the majority's power; open public debate; and a real alternative to the policies and actions of the majority. The constitutional status of the opposition is important in any democracy. Even in presidential democracies, opposition exists. There is always a minority party in the Congress.[71] The structural differences within various regimes are expressed primarily in the strategies

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it might indicate a political system that is not responding fast enough to social preferences. *See* Dhal, *supra* note 4, at 9-13.

[69] *See* Charles O. Jones, *The Minority Party and Policy Making in the House of Representatives*, in COMPARATIVE LEGISLATIVE SYSTEMS 431, 431-432 (Herbert Hirsch & M Donald Hancock, eds. 1971).

[70] *See* Barbara Sinclair, *The Dream Fulfilled? Party Development in Congress, 1950 – 2000*, in RESPONSIBLE PARTISANSHIP – THE EVOLUTION OF AMERICAN POLITICAL PARTIES SINCE 1950, at 121 (John C. Green & Paul S. Herrnson, eds. 2002); ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 267-271 (7th ed. 2000).

[71] *See* JONES *Supra* note 66, at 1.

which oppositions employ, as well as in their power and effectiveness. But these differences do not necessarily mean that the opposition does not have the potential to be strong, and they certainly do not remove the normative justifications for the presence of an opposition.[72] Furthermore, a strong separation of powers is not equivalent to a strong opposition party. These are different concepts and different mechanisms. There is a difference between a situation in which one branch checks and balances another and a situation in which there is an internal opposition within a specific branch.[73] The legislature's checks and balances on the president in a presidential democracy do not preclude the checks and balances by the minority party in the legislature. This is especially true, taking into account the fact that the majority party in the legislature is in the end of the day an essential part of the government as it is the one which enacts the laws. The minority party – the opposition – is external to the government.[74] Thus, it may sometimes be in a better position to criticize both the legislative majority as well as the president. In sum, in a modern democracy there is always an "opposition" and we should – at least from a legal point of view - focus not on its de facto existence but rather on its normative role.

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[72] Other factors, however, might cause a situation where there is no opposition at all. It has been argued, for instance, that in a system with no constitutionally distinct institution that has independent responsibilities – like the EU – there is no opposition, not even within the European Parliament. *See* Karlheinz Neunreither, *Government and Opposition: The Case of the European Union*, 33(4) GOVERNMENT AND OPPOSITION 419 (2000).

[73] Furthermore, there is an argument that in the United States, the separation of powers tends to lead to cooperation between the two parties and not to checks and balances. Internal opposition within the Congress is therefore even more important. *See* Theodore J. Lowi, *President V. Congress: What the American Two-Party Duopoly Has Done to the American Separation of Powers*, 47 CASE W.RES. L.REV. 1219 (1997).

[74] *See* Armel Le-Divellec, *Le Parlementarisme en Autriche* [The Parliamentarism in Austria], 1-1998 REVUE DU DROIT PUBLIC 145, 168.

III. Limits and Duties of Oppositions

Analysis of the nature of opposition, the justifications for its existence and its role in different types of regimes is indeed crucial in order to understand what the opposition is. This analysis, however, does not by itself enable a better understanding of the exact role of the opposition and its interaction with the majority. Even if we assume that it is important to have an organized opposition within the legislature, it is still not clear what its role is and whether it is limited. The mere idea that the minority party's role is "to oppose" might seem simplistic at first glance. One might wonder whether there is a duty to oppose or merely the possibility of doing so, and whether the oppositional behavior is more of a political phenomenon than a legal concept. Furthermore, though there may be good justifications and reasons for the existence and function of an opposition in a democracy, it is clear – even intuitively – that at a certain point, the opposition should be restrained. Excessive oppositional activity might result in a majority decision to ignore the minority, which is seeking only disagreement at the expense of consensus. In other words, there is a delicate equilibrium between consensus and dissent.[75] These questions become even more troubling in times of national crisis. Does the fact that the opposition has the *option* of opposing the majority imply an *obligation* to do so? And should not we speak also of an obligation of the opposition to be *loyal*, to put aside political ambitions and refrain from oppositional activity during national emergencies? Answering these questions requires further understanding of the idea of opposition in modern democracies and its justifications.

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[75] *See* Dhal, *supra* note 4, at 13.

1. Democratic Opposition

Perhaps the most basic restraint on the minority party in the legislature is its democratic character and its adherence to democratic values and ideas. Democracy encourages pluralism and diversity. The ideas of pluralism and diversity are based on the legitimacy of the different alternatives. Hence, a non-democratic party or opposition is not a legitimate one.[76] If it does not accept the rules of the game – as a matter of principle[77] - it can not play it at all. The opposition should oppose the government and not the democratic system itself [78] Its legitimacy is based not on the fact that it rejects the existence of the state but rather on the fact that it seeks to promote the general good by proposing an alternative plan to the one offered by the majority.[79] Hence, we expect the opposition to be a *democratic opposition.*[80] There are a number of justifications for requiring opposition to be democratic. One is that democracy has the right and responsibility to protect itself from its enemies.[81] Another is the liberal idea that one cannot exploit the freedom granted by a democracy as a platform for destroying that very freedom. This requirement that opposition be democratic is a substantive, rather than

[76] Though it might be seen as legitimate by some of the voters and by parts of the public opinion ("Exogenous Legitimacy") as well as by its supporters and activists ("Endogenous Legitimacy"). *See* Raphael Zariski, *The Legitimacy of Opposition Parties in Democratic Political Systems: A New Use For An Old Concept*, 39(1) THE WESTERN POLITICAL QUARTERLY 29 (1986).

[77] Kirchheimer's classification of such a party is, thus, "opposition in principle". *See* Kirchheimer, *supra* note 20, at 317-319.

[78] There may, however, be a variety of interim situations and classifications. *See* Hans Daalder, *The 'Reach' of the Party System*, in THE WEST EUROPEAN PARTY SYSTEM, *supra* note 3, at 78, 83-84.

[79] Geraint Parry, *Opposition Questions*, 32 GOVERNMENT AND OPPOSITION 457, 458 (1997).

[80] Other terms are used sometimes to describe the same concept – the one of *normal opposition* (see Dahl, *supra* note 59, at 35) and the one of *constitutional opposition* (see Giovanni Sartori, *Opposition and Control – Problems and Prospects*, 1(2) GOVERNMENT AND OPPOSITION 149,151-152 (1965). Further in the paper, I will suggest a distinctive meaning for the term, constitutional opposition.

[81] *See* Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, (in), GERMANY AND ITS BASIC LAW 173, 180 (Paul Kirchhof & Donald Kommers, eds. 1993).

procedural, requirement of democracy; it looks not merely to the equal representation of all views but also at their content.[82]

Comparative legal analysis shows that many democracies which have faced threats to their existence have absorbed this concept of democratic opposition by enacting constitutional provisions imposing a duty on political parties to be democratic and enabling courts to dissolve an undemocratic party.[83] These provisions do not relate to the opposition as such but rather to political parties. However, they obviously have consequences for the activities of parties as an organized opposition.

It is obviously difficult to define when exactly an opposition becomes non-democratic. An overly narrow definition of "democratic" could serve the interests of those in power and exclude important calls for change arising from society. It is not easy to find a single, comprehensive definition of democracy.[84] Furthermore, democracy faces a strategic dilemmaof whether to absorb extremists into the democratic arena, thus rendering them transparent and getting them used to playing by democratic rules, or to exclude them, forcing their activities underground, where they are almost de facto immune from control. Disqualifying an opposition party causes also the loss of its effect as moderating social pressure.[85] On the other hand, an integrated non-democratic

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[82] *See* Gregory Fox & Georg Nolte, *Intolerant Democracies* in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 389, 395 (Gregory Fox & Brad R. Roth, eds. 2000). It is on this basis that it can be argued that a non democratic party is an anti liberal party, objecting core values of democracy, such as personal security; personal liberty; religious tolerance; freedom of speech; free elections; separation of powers and limits on police usage of force. *See* Rosenblum, *supra* note 63, at 852-856.

[83] *See* Germany – GG, §21(2)[Ger.]; Spain - C.E. §6 [Spa.]; Italy – Cost. §49 [Ital.]. The New Democracies in Eastern Europe have mostly similar provisions. See: Hungary – A Magyar Koztarsasag Alkotmanya §3(1) [Hun.]; Romania – The Constitution (1991) §8(2); Astonia – The Constitution (1992) §48(3); Poland – The Constitution (1997) §. 13. On the relative weak incentive for such a provision in the United States, *See* Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence With That of the United States and Germany*, 10 HASTINGS INT. & COMP. L.REV. 347 (1987).

[84] Martti Koskenniemi, *Whose Intolerance, Which Democracy?*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 82, at 436.

[85] *See* IONESCU & DE MADARIGA, *supra* note 41, at 78-79.

opposition has its own dangers. It might help extremists use legislative means to legitimize their ideas. It might also adopt an irresponsible policy, making groundless promises to the voters in the knowledge that there is no real chance it will have to follow through.[86] This tendency might also force other parties to become more extremists, trying to avoid a leak of voters to the political extremes.

Because it is so difficult to know where to draw the line, it is rare for a democracy to exclude the opposition as non-democratic.[87] The call for "change" by a party or faction is not – by itself – non-democratic. Similarly, it is legitimate to oppose the personal composition of the government and its policies. Opposition parties such as the Communist party or other extremists are generally not excludedfrom the democratic competition, despite their problematic agendas, either because of a gap between these parties' goals and their actual practice or because of a certain degree of tolerance of non-

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[86] *See* Sartori, *supra* note 3, at 333, for a discussion of the tendency of opposition parties to behave irresponsibly.

[87] There are a few examples of democracies who have dissolved political parties, always parties from the opposition. See for example cases, from Germany and from Turkey, that reached the European Commission of Human Rights or the European Court of Human Rights. *See* The Communist Party Case, 1 YEARBOOK OF EUROPEAN CONVENTION ON H.R. 222 (1955-1957); United Communist Party of Turkey v. Turkey, 62 Eur.Ct.H.R. 1 (1998); 26 *Eur.H.R.R*ep. (1998) 121; The Socialist Party and Others v. Turkey, 75 Eur.Ct.H.R . 1233 (1998); 27 *Eur.H.R.R*ep 51; Case of Freedom and Democracy Party (Özdep) v. Turkey, 8 Eur.Ct.H.R.333 (1999); Case of Refah Partisi (The Welfare Party) and others v. Turkey, (Apps. No. 41340/98, 41342/98, 41344/98) Eur.Ct.H.R. (2001) (Third Section) unpublished, at: http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=9&Action=Html&X=112213208&Notice=0&Noticemode=&RelatedMode=0; followed by Refah Partisi (The Welfare Party) and Others v. Turkey, (Apps. 41340/98, 41342/98, 41344/98 Eur.Ct.H.R. (2003)(Grand Chamber), unpublished, at: http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=13&Action=Html&X=112213359&Notice=0&Noticemode=&RelatedMode=0; The Case of Yazar and Others v. Turkey ,(Apps. No. 22723/93, 22724/93, 22725/93, Eur.Ct.H.R. (2002) unpublished, at: http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=10&Action=Html&X=112213325&Notice=0&Noticemode=&RelatedMode=0; The Case of Demokrasi Partisi v. Turkey, 25141/94 Eur.Ct.H.R. (2002)(unpublished, at: http://www.echr.coe.int/Eng/Press/2002/dec/DICLE(DemocraticParty)judepress.htm
It should be noted that not in all the cases the court had actually authorized the ban. The cases where this practice was not authorized were cases in which the court had found that there were not sufficient evidence for disqualifying the political party and thus the mean used was not proportional to the danger. *See for instance*, Case of Freedom and Democracy Party (Özdep) v. Turkey, 8 Eur.Ct.H.R.333 (1999)

democratic groups.[88] However, violence, incitement to violence, or a declared goal of destroying the state are often considered non-democratic and unacceptable oppositional behavior.[89] Terrorist activity or support of terrorism is impermissible and contradicts the basic values of democracy.[90] There is no conclusive definition of a non-democratic opposition. We acknowledge, however, that this concept does exist and might, in certain rare situations, lead to actual sanctions against this kind of opposition. Despite the structural importance of the very existence of an opposition in a democracy, as well as the added value of pluralism and competing ideas, democracy limits the scope of opposition to democratic opposition.

2. Constructive Opposition

There is more to legitimate oppositional behavior than just the requirement that an opposition be democratic. We might think that the main and perhaps only role of the opposition is to oppose and therefore expect the minority party to vote against *any* legislative proposal of the majority and to use all available procedural tools to hinder the majority's ability to rule. However, ongoing oppositional behavior of this kind would eventually make it very difficult to govern. Furthermore, if the outcome of such behavior is obstructing the power of the majority, what is the democratic justification for it? After

[88] More problematic examples in this context of "anti system" parties and oppositions might be the Nazi opposition party and the Communist party during the Weimar Republic or the Communist party in Italy in the 1950's and 1960's. *See* Gordon Smith, *Party and Protest: The Two Faces of Opposition in Western Europe*, in OPPOSITION IN WESTERN EUROPE, *supra* note 21, at 52, 59-63; William E. Paterson & Douglas Webber, *The Federal Republic of Germany: The Re-Emergent Opposition?* in OPPOSITION IN WESTERN EUROPE, *id*, at 137, 139-141; Geoffery Pridham, *Opposition in Italy: From Polarised Pluralism to Central Pluralism*, *id*, at 169.

[89] Sartori, *supra* note 80, at 149.

[90] This idea became part of specific laws in democracies threatened by terrorism. Thus, both Spain and Israel enacted provisions banning political parties who support terrorism. *See* Basic Law: The Knesset, §7A(3)[Isr.]; Ley Organica 6/2002, de 27 de Junio - Ley de Partidos Politicos [Spa].

all, the majority's electoral triumph makes its rule legitimate. It might be even foolish to dissent from any majority proposal, since the majority has the power to regulate the minority party's procedural rights and could even deny these rights totally.[91] On the other hand, if the majority has full legitimacy to govern and rule, what is the point of having an opposition that is not supposed to oppose?

Indeed, there is serious tension between the minority's right - and even duty - to dissent, and the majority 's right to govern. The resolvment of this tension can be based on the Roman distinction between *potetas* (oppose) and *imperium* (govern). It is difficult to justify the existence of the minority if its sole function is to oppose (*potetas*). There is no point to an institution that exists in order to say "No" to any initiative of the majority. Such behavior is ineffective, anyway, because the opposition is a numerical minority. A consistent opposition can also be regarded as undemocratic if it regularly obstructs the majority on any matter. We should therefore speak not simply about an opposition but rather about a *constructive opposition*. This kind of opposition does not oppose any matter as such but rather proposes an alternative ideology or plan. Such an opposition is aimed toward governance (*imperium*) and not mere dissent. It does more than just oppose, by combining and even explaining its opposition with its own alternative plan.[92]

Opposition should be constructive not only to avoid preventing governance by the majority, but also to serve some of the justifications for the existence of an opposition in first place. Diversity and pluralism are about having different sets of ideas and ideologies,

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[91] Brazier points out that this is a case where "Parliamentary realities and constitutional duty in this sense go happily hand in hand". *See* Rodney Brazier, *The Constitutional Role of the Opposition*, 40 NORTHERN IRELAND LEGAL QUARTERLY 131, 138 (1989).

[92] For the distinction between *potates* and *imperium* and its implications on opposition behavior, see IONESCU & DE MADARIGA, *supra* note 41, at 13.

not just an ideology and an objection to the ideology.[93] If we need an opposition because we need an alternative plan and the possibility of replacing the government, then the opposition must be constructive and offer a real alternative to the majority.

The concept of constructive opposition has some interesting legal implications. In Germany, for instance, though the opposition has the right to vote a non confidence vote removing the chancellor, it can do so only if it produces an alternative government - or even an alternative policy[94] - which enjoys sufficient support.[95] A similar mechanism exists in other countries.[96] Another example is the concept of *bone fide* use of procedure. Indeed, the opposition can use procedural techniques in parliamentary rules and regulations in order to place a burden on the ability of the majority to rule effectively. It is hard to distinguish, however, between a *mala fide* usage of a certain technique in order to obstruct and a *bone fide* usage in order to advance a legitimate goal of the opposition.[97] One possibility is to check whether the procedure was used not only in order to cause difficulty for the majority (oppose – *potetas*) but in order to rule (*imperium*) and be constructive.

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[93] This idea can also be explained in decision making theory: If the opposition has no agenda, then the only agenda which exists is that of the government, which decides what matters will come to a vote. This power, of setting the agenda, is of a crucial importance and can distort the relative power of the different parties. *See* FARBER & FRICKEY, *supra* note 43, at 38-41.

[94] *See* Arnaud Martin, *Stabilité Gouvernementale et Rationalisation du Parlementaire Espagnol* [Governmental Stability and the Rationalization of the Spanish Parliament], 41 REVUE FRANCAISE DE DROIT CONSTITUTIONNEL 27, 54 (2000).

[95] Grundgesetz [GG][constitution] art. 67 [F.R.G.].

[96] *See* Basic Law: The Government, [constitution][Isr.] art 28; La Constitución Española 1978 [constitution][Spa] art 113. *See also* Ackerman, *supra* note 56, at n.46.

[97] *See* KELSEN, *supra* note 51, at 64; *See also* Ponthoreau, *supra* note 30, at 1152-1156.

3. Responsible Opposition

The notion of constructive alternative as one of the oppositional functions lays a foundation for a further feature of oppositional and party behavior – *responsible opposition*. If we really want to give the voter - or the public as a whole - the possibility of choosing, political parties should offer distinct ideologies for important matters, while responding to social changes and cleavages. They should therefore be responsible to the voters and the political system as a whole. The opposition, under this idea, must have its own agenda which is clear and includes a reference to the main governmental policies and activities. It must offer alternative ideas on important matters and highlight the differences and distinctive marks of its policy.[98] This kind of opposition can be seen as accountable.[99] Just as the majority is accountable for its policy and functioning, so is the opposition. It has a duty toward the public - and not only its voters – to oppose and offer a real alternative. Only if the parties have a clear policy, can the voter decide whether to vote them in or out, based on their promises. Therefore, we expect a responsible

[98] The concept of party responsibility was first framed in the famous Note: *Towards a More Responsible Two Party System* 44 AM.POL. SCI.REV. supp. (1950). It was later on developed both in the United State and in Europe. See: Michael Marsh & M., Pippa Norris, *Political representation in the European Parliament*, 32 EUROPEAN JOURNAL OF POLITICAL RESEARCH 153 (1997); Richard D. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 345-350; Daniel H. Lowenstein, *Associational Rights of Major Political Parties*, 71 TEX. L.REV. 1741, 1761-1763 (1993). Its desirability and moreover, its theoretical and practical basis, was debated over the years. See: John C. Green & Paul S. Herrnson, *The Search For Responsibility*, in RESPONSIBLE PARTISANSHIP – THE EVOLUTION OF AMERICAN POLITICAL PARTIES SINCE 1950, at 1, 5-9 (John C. Green & Paul S. Herrnson, eds. 2002). It is important to note that though the original doctrine referred to party responsibility in general and not necessarily to the minority party as such, it is obvious that the same justifications for party responsibility – such as meaningful voting and competitiveness – are applicable to the minority party. *See, for instance*, James MacGregor Burns, *Bipartisanship and the Weakness of the Party System*, 4 AMERICAN PERSPECTIVE 169 (1950).

[99] Guy Carcassonne, *The Rights and Duties of the Opposition* in RELATIONS BETWEEN MAJORITY AND MINORITY PARTIES IN AFRICAN PARLIAMENTS 32 (Inter Parliamentary Union, Pub. No. 33 Geneva 1999).

opposition to keep its promises to the voters.[100] Indeed, this approach of responsibility assumes that parties and ideologies are the main actors in an efficient and meaningful democracy.

Having discussed this concept of responsibility, we can understand why oppositions sometimes tend to behave irresponsibly. If, for instance, an opposition party knows that there is no real chance that it will be called into government or gain a majority, it might adopt an irresponsible policy.[101] It is not really accountable and therefore not responsible. The opposite situation can also arise. Parties might have an interest in camouflaging their real ideologies in order to attract the maximum number of voters. They then become "catch all" parties, supermarkets of ideologies that can hardly be distinctive and cannot be held accountable.[102]

Perhaps the best example of the concept of opposition responsibility is the British practice of "Shadow Government". The opposition party has its own leader who has important intra-party powers.[103] He or she is actually presented and referred to as an alternative prime minister.[104] The opposition also forms a "cabinet", which includes leading parliament members, each of whom functions as an alternative to one of the

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[100] *See* Sartori, *supra* note 80, at 149. It should be mentioned, however, that this is merely an expectation that is not actually fulfilled in the political reality, for different reasons. *See* Manfred G. Schmidt, *When Parties Matter: A Review of Possibilities and Limits of Partisan Influence on Public Policy*, 30 EUROPEAN JOURNAL OF POLITICAL RESEARCH 155 (1996); Bruce T. Coram, *Why Political Parties Should Make Unbelievable Promises: A Theoretical Note*, 69 PUBLIC CHOICE 101(1991); Kay Lawson, *Partis Politiques et Groupes D'intérêt* [Political Parties and Interest Groups], 79 POUVOIRS 35, 44-46 (1996).

[101] *See* Sartori, *supra* note 80, at 152; Another case of irresponsible opposition is one in which there is extreme fragmentation of the political system. This might lead to an opposition which is composed of extremist parties which have contradicting ideologies ("bilateral opposition") and thus know that there is no chance that they would form a future government together. *See* Sartori, *supra* note 3, at 316.

[102] *See* Otto Kirchheimer, *The Catch-All Party*, in THE WEST EUROPEAN PARTY SYSTEM, *supra* note 3, at 50.

[103] On the way which this leader is usually chosen, see M. Michaud, *Designing the Official Opposition in a Westminster Parliamentary System*, 1 J. OF LEGIS. STUD. 69 (2000).

[104] Max Beloff, *The Leader of the Opposition*, 11 PARLIAMENTARY AFFAIRS 155 (1957-1958).

"real" ministers. The opposition party forms its own agenda and presents it to the public as an alternative policy to the governmental one.[105]

4. Loyal Opposition?

Loyalty is one of the most problematic notions of opposition. Even if an opposition is democratic, and even if its functioning is constructive and responsible, it may adopt another behavior – that of a *loyal opposition*. Opposition loyalty assumes an incentive of the opposition to help the majority and to carefullychoose the cir cumstances in which it opposes it. Obviously, the opposition need not help the majority rule, since the majority has this power inherently, but it may sometimes have a tendency to facilitate the enactment procedure and grant a safety-net to the majority party by minimizing or avoiding a political debate on certain issues. Indeed, the phenomenon of majority-opposition cooperation is not rare by itself, as there are often situations in which political parties form a cartel which is aimed at advancing their own benefit or reducing the competitiveness of third parties. These are "party cartels", which are usually focused on party finance and the formation of entry barriers for competing parties.[106]

[105] The existence of the shadow government serves other important goals as well. It gives the opposition leaders and members an opportunity to experiment with governance and executive responsibility, and it builds public legitimacy for their actual governance in the future. *See* Carcassonne, *supra* note 99, at 33.

[106] For the phenomenon of party cartels, both in political science and law, see PIERRE BRECHON, LES PARTIS POLITIQUES [The Political Parties] 146-150 (1999) (describing the usage of party cartels for achieving state financing their activities); MOSHE MAOR, POLITICAL PARTIES & PARTY SYSTEMS 110-112 (1997) (analyzing the effect of party cartels and competition deficiency on the voters); Richard .S. Katz &, Peter. Mair, *Changing Models of Party Organization and Party Democracy*, 1 PARTY POLITICS 5 (1995)(describing the development of the cartel party); Samuel Issacharoff & Richard .H. Pildes, *Politics as Markets: Partisan Lockups of Democratic Process*, 50 STANFORD L.REV. 643 (1998) (describing cases of lockups in the political market due to party cartels); Chris Hocker, *Legal Barriers to Third Parties* 10 N.Y.U. REV. OF LAW & SOCIAL CHANGE 125 (1980-1981) (describing the usage of party power in order to undermine the chances of potential third party rivals).

Opposition loyalty is also a type of party cooperation. However, this cooperation is not a cartel aimed at reducing the political competition or achieving financial benefits, but rather a cooperation on the basis of mutual interests due to an exceptional social reality. These are situations, where the opposition and the majority have strong incentives, in terms of public opinion and their constituency, to cooperate one with the other. These are, very often, circumstances of an emergency or a national crisis. In these situations, the major political parties might cooperate in order to show the public that the enacted policy enjoys broad consensus.[107] The opposition will often justify this behavior in terms of loyalty to national interests. At the same time, the majority will make a real effort to cooperate with the minority. What are the incentives for this political cease-fire?

The majority needs the opposition's support in order to establish public confidence in its policies. This manifestation of consensus is also important as a signal to other entities – such as enemies during war or world financial markets.[108] As a matter of practice, the government or majority party might use all kinds of techniques to ensure opposition support and loyalty in times of crises. For instance, in addition to public calls for "opposition loyalty," the majority may consult with the leader of the opposition or some members of the minority party and even disclose classified information to them, on the basis of a "gentleman's agreement" not to use the information as opposition propaganda.[109]

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[107] Austria's coalitions after Second World War provide a good example of such a cartel agreement. *See* Kirchheimer, *supra* note 20, at 319-324. Further examples can be found in the American history (the Patriot Act of 2001, the Second World War, the Civil War), Sweeden, Italy, Germany and Israel. *See supra* notes 18-21.

[108] *See* Joe D. Hagan, POLITICAL OPPOSITION AND FOREIGN POLICY 3-8 (1993).

[109] Brazier, *supra* note 91, at 133-134; *See also* George H. E. Smith, *Bipartisan Foreign Policy in Partisan Politics*, 4 AM. PERSPECTIVE 157 (1950).

Opposition loyalty is an interest not just of the ruling party but also of the opposition itself. As foreign policy and governance become more complicated and demand dynamics and flexibility, it is obvious that not every matter can be decided throughout a majority-minority debate. There has to be, thus, a minimum amount of opposition confidence in the government.[110] Furthermore, during times of crises, public opinion might disfavor dissent, especially if the disagreement is seen as hindering the efforts of the majority to restore security and calm. Studies have shown an increase in support for the government in times of national crisis.[111] This political premium gained during a crisis is a factor that might deter the opposition from opposing the majority. This cooperative situation creates a paradox: political cost-benefit calculations might suggest that in order for the opposition to gain support – or at least not to lose it – it must cooperate with the government. Adopting this strategy for too long, however, will make it difficult for the opposition to persuade the electorate to give it power – why must there be a change in government, if the alternative is the same?[112] The opposition has an interest in cooperating in these situations in order to gain practical experience and public legitimacy as a potential future leader. In this state of affairs, the measures necessary for the opposition to play a future role as a leader paralyze its current role as an opponent.[113]

Indeed, there are many kinds of circumstances in which we would expect the opposition to be loyal, but the most obvious ones are national catastrophe or an external threat.[114] War and a massive terror attack are two examples in which the opposition is

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[110] *See* Kirchheimer, *supra* note 20, at 313.
[111] *See* Epstein et al., *supra* note 16, at 9.
[112] *See* IONESCU & DE MADARIGA, *supra* note 41, at 83-87.
[113] *See* Beloff, *supra* note 104, at 162.
[114] There are other cases of opposition loyalty which do not involve special circumstances but rather a strategic decision of the opposition to concentrate its effort on a few important matters or to avoid erosion of its image in the public opinion. For this phenomena, see von Beyme, *supra* note 21, at 41. Similarly,

expected to put aside its own political agenda and rivalries in order to help the country survive and strike back. Only when the clouds of danger have passed can the opposition resume its normal activity. In a sense, exceptional circumstances of emergency might base an expectation by which the opposition will temporarily sustain its regular opposition function. This expectation, as mentioned above, might be based not only on patriotic intuition but also on practical advantages such as efficient and responsive legislature proceedings, inducement of social consensus and strengthening of national unity.

There is also a further reason for this sudden cooperation of the major political rivals, in times of crises. This reason is connected to the type of interests and right that are often violated in times of national crises. In times of peace and tranquility, if the majority infringes upon basic rights and constitutional values, it would usually be in the interest of the opposition to object. The minorities within the electorate which the minority party represents would demand such objection.[115] In other words, political incentives for opposition behavior are strong enough. However, in situations of national crises, the "minority" at risk of oppression is not necessarily the parliamentary minority or a distinctive group within the society. More often, those threatened by the erosion of a constitutional value or infringement of a basic right will not be represented in the legislature as such. For instance, granting the police additional powers of detention, search and seizure will not necessarily infringe upon the rights of a distinct, represented

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opposition loyalties can also result from a political tradition and culture. I will focus, however, on the specific case of national crises, which is an extreme example of the problem of opposition loyalty.

[115] This kind of argument is based on the assumption that the opposition does represent minorities within society. Kelsen, however, pointed out that this is true only in a system of proportional representation and not in a two-party system. Kelsen viewed a minority opposition party within a two-party system as "artificial opposition". *See* KELSEN, *supra* note 51, at 62.

minority. These extra powers might even refer to people who have no electoral rights, such as illegal immigrants or POW's. These are the rights of the "others".[116]

Furthermore, many of the means that are used in times of emergency do not violate constitutional rights of a certain group in the electorate but rather burden an abstract, non-particular interest. This category includes cases of excessive delegation of powers from the legislature to the executive branch or laws that are aimed at bypassing the judiciary. For instance, the establishment of a separate tribunal system by the executive, with no congressional authorization, can be seen as violating the constitution.[117] Since there is no distinct constituency group which is directly inflicted by this kind of violations, the incentive of the opposition to oppose these violations decreases dramatically.

The conclusion is, therefore, that majority-opposition cooperation is feasible especially in times of national crises, for a vareity of reasons. The main question is, does this political reality match the constitutional role of the opposition in a democracy and the justifications for its existence?

IV. The Constitutional Opposition

Indeed, the political phenomenon of opposition loyalty to the majority raises a normative-constitutional challenge. Description aside, it is hard to find a normative justification for this intuitive expectation of cooperation in times of crisis. So long as the opposition is democratic, so long as it promotes public safety and the existence of the

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[116] *See* Ronald Dworkin, *Terror& the Attack on Civil Liberties*, THE NEW YORK TIMES REVIEW OF BOOKS, Vol 50, November 6, 2003, at 3; Dworkin, *supra* note 7, at 8.

[117] *See* Neal K. Katyal, Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 11 YALE L.J. 1259 (2002).

state, why should it suspend its activities in times of war? If the opposition is acting in a constructive manner, if it does not merely oppose but also proposes, why should it stop doing so during an emergency, when providing alternatives is arguably even more important? Opposition behavior takes on additional meaning in times of national crisis. If we add to this equation the fear of excessive use of force by majorities in times of emergency,[118] then one might argue that a loyal opposition in times of crises is an opposition which opposes rather than cooperates. The opposition should be loyal to the public and to democratic values, not to the existing majority and its policy. National unity, social consensus and an efficient legislature are important goals, but they can not replace the most basic role of the opposition and the reasons for its presence. Opposition loyalty, thus, may exist in certain cases but it must be limited. The opposition can not be too loyal, too patriotic.

But, when does an opposition become too loyal? What is the border line between understandable and perhaps desirable cooperation on the one hand, and unacceptable cooperation which results in opposition muteness, on the other?

My main argument, in reply to this dilemma, would be that the constitutional theory of opposition needs to take one step further. The opposition has a unique constitutional role, especially in times of national crises. This role is too important to be left aside for political considerations. Opposition loyalty might be, thus, understandable in certain cases politically, but unacceptable theoretically. The main argument is therefore that the opposition should be regarded not only as a political alternative and a part of the legislative machinery, but also as a constitutional institution. The opposition should be thus a *constitutional opposition*. The role of a constitutional opposition goes beyond

[118] *See* note13, *supra*.

being democratic, constructive, and responsible. A constitutional opposition plays a further role – namely as a guardian of the constitution and its basic values.[119] Thus, in cases where the majority acts in a potentially unconstitutional manner, infringing upon basic rights and values of democracy, the opposition should do all it can to obstruct this action.[120] If the majority party promotes a law which is *prima facia* unconstitutional, the minority party has not just an option but also a constitutional role of opposing it. Obviously, the representatives – majority and minority - have the freedom to criticize the constitution and even to amend it according to the procedures it lists. They cannot, however, violate the constitution unless this violation is according to the constitution itself Therefore, if the majority seeks to violate the constitution, the minority – the opposition – has a role of opposing this violation and guarding the constitution. Doing so is an expression of loyalty, not disloyalty. The opposition thus acts not against the constitution but rather as a guarantor of constitutional compliance. Hence, even if in some cases we would expect the minority party to facilitate majority action, it should not do so in cases involving an unconstitutional infringement on human rights and constitutional values. Political loyalty does not trump constitutional loyalty. Consensus, national unity and efficient legislatures are important but these can not outweigh basic constitutional values. Furthermore, the role of the opposition as a constitutional opposition does not

[119] The earliest articulation of the idea that the opposition has a role of guarding the constitution appears to be Prof. Ponthreau's seminal work, *supra* note 30. That paper focused mainly on the origin of opposition and the role of the opposition in political philosophy and in the French legal system. I seek to develop this notion further and to argue that there is a specific constitutional role of opposing unconstitutional violations by the majority and to analyze the meaning of it, the need for it and its legal implications, especially in times of national crisis.

[120] Obviously, the opposition cannot rule whether the law is constitutional or not. That is the role of the court. Furthermore, the mere fact that a law infringes upon basic rights does not make it unconstitutional per se. Therefore, I refer to the role of the opposition to oppose potentially unconstitutional laws, which represent not only prima facia violations of rights and values but also unjustified violations. This distinction is particularly important in times of national crisis, when it is obvious that basic rights are not absolute but need to be balanced against other public interests. *See* Barak, *supra* note 26, at 153-155.

depend on public support or a representative idea but is based on the functions and justifications of an opposition in a democracy. Therefore, theoretically, the opposition should oppose human rights violations or breach of constitutional provisions even if the public represented by the opposition does not request this objection and even wants the opposition to cooperate with the government. This role of the opposition as a constitutional guardian is not limited to times of national crisis but applies even in times of peace. The role assumes heightened importance, however, in times of national crisis, where human rights and basic values tend to be set aside for "security reasons". Especially in these situations, the constitutional opposition should not abandon its role of ensuring the proper application of basic constitutional norms.

The argument in favor of constitutional opposition raises many problems and questions that must be confronted. First, what are the theoretical grounds for an oppositional role of opposing violations of the constitution? Which doctrinal arguments justify it?

Second, the argument in favor of a constitutional role of the opposition raises many practical problems. Even if the opposition needs to oppose unconstitutional violations, how will it recognize these violations, especially when the majority will almost always deny any unconstitutional behavior? Furthermore, as a practical matter, we might ask whether there is any need for such a heavy constitutional burden on the opposition. By definition, the opposition is a minority. What is the point of establishing a constitutional role on the minority which it cannot carry out? How can the opposition use its inherently limited power to protect human rights and the constitution?

Third, even if the role of a constitutional guardian is justified, why is it necessary, given the existing mechanism for guarding the constitution and preserving human rights, namely the judiciary? If a law is allegedly unconstitutional, it can be challenged in a court which practices judicial review. What is the point in adding a further check by an institution which lacks substantial power to begin with?

Lastly, even if there are good theoretical and practical justifications for the constitutional role of the opposition, there is still a question regarding the nature of this role. Should it be characterized as a legal duty? Can it be enforced by the courts? Or perhaps it should be only a political directive or a concept of virtues opposition?

Indeed, these questions require an answer, which is actually the need for a further understanding of the constitutional analysis of majority minority interaction as well as the nature of the constitutional status of the opposition. We will address these questions in order.

1. The Theoretical Justification for Constitutional Opposition

We should first ask ourselves, on which grounds can we base the idea that the opposition has a role of opposing unconstitutional behavior by the majority? A partial answer lies in the justifications for the existence of an institutional minority party in the first place. One of the primary justifications for the presence of an opposition was the need to restrain the power of the government. The assumption is that a pluralism of ideas will limit the government's power to infringe upon basic rights. Thus, the opposition should have, in theory, an inherent interest in scrutinizing and criticizing governmental actions. It should have an interest to do so not only as a matter of protecting the interests

and rights of its constituency, but also as a part of its ongoing rivalry with the majority. Also, the competition between the minority party and the majority party forces the majority itself to consider the rights and interests of the minority, in order to maintain its electoral success. Thus, an opposition in the legislature functions mainly to control the use of power by the majority and to protect basic rights and constitutional values.

This argument, regarding the role of the opposition, is mainly an historical and conceptual one. It explains why oppositions were formed in the first place and what role was assigned to them. But there is a more profound justification for the role of the opposition as a constitutional guardian. It can be argued that the constitution itself imposes upon the opposition even a duty to oppose unconstitutional behavior of the majority. The same democratic constitution that makes it possible for the opposition to exist also imposes a duty to oppose unconstitutional violations by the majority.

Two arguments ground this complex yet fundamental idea of constitutional law. The first is constitutional supremacy. If the constitution is the supreme law of the land, than the legislature cannot breach the constitution unless it amends it according to the terms set by the constitution itself. In this context, we usually refer to the legislature as a whole and speak about its duty to adhere to the constitution. But who is this legislature? Is it only the majority? Why do we narrow this basic constitutional duty to the amorphous entity of the legislator, rather than impose it on specific members? More specifically, why can we not argue that the opposition has a duty to adhere to the constitution? Furthermore, if all state actors must respect the constitution, should not the opposition

within the legislature be seen as state actor?[121] Hence, the duty of the opposition to protect the constitution derives from the most basic concept of the rule of law.

The second argument is more axiomatic. It is based on a presumption that a system does not permit itself to be breached. Thus, if the constitution formed a legislative branch, it did not grant it the power to breach the constitution. The constitution is the norm that created the legislative branch and entrenched basic rights. There is no reason to interpret the constitution in a way that allows one part of it to prevail over another or to permit the legislature to infringe upon basic rights. One might even argue that basic rights trump legislative powers. If this is the case, then the opposition – which is the organized alternative within the legislature and is formed through the constitutional provisions regarding the legislator – has a duty to be constitutional. It should, therefore, protect the constitution.

In sum, basic notions of democracy and constitutionalism give a firm base to the argument that the opposition has a role and function of guarding the constitution.

2. Why Do We Need the Opposition to Oppose Unconstitutional Behavior?

Even if the proposition regarding the constitutional role of the opposition as a guardian of the constitution is theoretically sound, there are still many important practical questions which must be addressed. Assuming that the opposition should oppose unconstitutional violations by the majority, how can the opposition trace these violations?

[121] The precise constitutional status of political parties is a open for debate, and it is unclear whether they should be regarded as private entities or state organs. There is broader consensus for the premises that when political parties are represented in government – and not only in primaries or elections – their activities should be regarded as public. *See* Robert C. Wigton, *American Political Parties Under First Amendment*, 7 J. L. & POL. 411, 443-450 (1999). *See Generally* Yigal Mersel, The Constitutional Status of Political Parties (forthcoming 2004)[Hebrew].

It lacks the expertise of constitutional law analysis. Moreover, the majority will usually not admit that it violates the constitution. On the contrary, it will justify its policy as being completely constitutional.

It is true, that for reasons of lack of expertiseand the majority's constitutional rhetoric, the opposition faces a challenge in identifying unconstitutional violations of the majority. These obstacles, however, can be mostly overcome. The opposition may, for instance, establisha forum of experts in constitutional law who will evaluate any proposed law and opine on its constitutionalism. The opposition may receive assistance from NGO's and civil liberty associations. Furthermore, in some democracies, the opposition has a constitutional right of referring a law or even a bill to the constitutional court for a judicial opinion on its constitutionality.[122] Indeed, in most of the cases the majority will not admit that the proposed law is violating the constitution. Yet in some cases it might admit that the law is not necessarily constitutional. This might be the cases in stages of national emergency, when some tend to argue that there is a possibility of acting outside the ordinary laws and constitution.[123] In these cases, the "constitutional alarm" regarding the possible constitutional violation of the law, might be more apparent, enabling the opposition to fulfill its role as a guardian of the constitution. Therefore, the ability of the opposition to precisely decide which law is allegedly violating the constitution is not perfect. It still exists, however. It is applicable no less than is the

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[122] In France, 60 members of the National Assembly can ask the Constitutional Court to review the constitutionality of a law. This procedure takes place before the law had become final, as a part of the Franch system of pre-view. This provision was added to the 1958 constitution only on 1974, in order to fortify the status of the opposition. *See* La Constitution de 1958 [const.] art. 61 [Fra]. In South Africa, for instance, a third of the National Assembly members can apply directly to the constitutional court, challenging the constitutionality of a law. *See* The Constitution of South Africa [const.] art. 80.

[123] *See* Gross, *supra* note 13, *passim.*

general imperative of the rule of law. We must all respect the constitution even though we cannot always be sure when we violate it.

Even if the opposition can identify cases of *prima facia* constitutional violations, there is still another potential major problem with its constitutional proposed role. Arguably, there is no point to minority opposition. Even if there are good theoretical justifications for the constitutional role of the opposition, there is still a major difficulty with its effectiveness. Indeed, as a minority, the opposition cannot completely prevent the majority from violating the constitution. However, there is still a lot it can do. The opposition can, in certain cases, delay the legislative machinery by filibustering a proposal. It can make use of its powers within the committees and the standing committees. It also has the ability to gather important information about the proposed law and to force the majority to explain the need for the constitutional violation and to expose its scope. More importantly, the opposition can use the media and other means in order to alert the public and to create pressure on the majority to redraw its plans. The opposition might aim these tactics at specific members of the majority, in order to weaken their support of the unconstitutional proposal. Even if the law does pass, the opposition may still be able to challenge its constitutionality directly or indirectly in court.[124]

The opposition can use these oppositional activities to show not only the *malus* in the proposed law but also how its goals can be better achieved. Thus, a constructive and responsible opposition will give the public and the legislature an alternative plan which would achieve the relevant important national interests without violating the constitution. By providing an alternative, the opposition remains democratic, even as it opposes the

[124] For a "list" of the available techniques of opposition obstruction, see Yves Colmu, *Vade-Mecum du Député Obstructeur*, [The Obscuring Deputy], 34 POUVOIRS 121 (1985).

law. The opposition should take care not to obstruct the legislative procedure in a way that hinders the ability of the state to protect itself.

The ability of the opposition to set up an alternative coherent plan is particularly important in times of national crisis, when there is a demand for harsh legislation in order to restore security. Indeed, national crises are often characterized by a demand for sweeping executive powers and weakening controls over the use of those powers. Sometimes, the government tries to exaggerate the scope of the danger or hide the ways in which its policy violates the constitution. In these circumstances, the legislator plays an important role in controlling the executive while representing a broader swath of interests.[125] The opposition within the legislator plays an even more important role. It can show that there is a way to combat terror, for instance, while using more proportional means or without infringing upon human rights at all. It can question the factual assumptions which the government presents and present alternative data and information. It can also emphasize to the public that there is a long-term price to pay for violating the constitution and that it is dangerous to make it easy for the executive to infringe upon basic rights.

3. Why Judicial Review Is Insufficient?

The idea that the opposition has a role of being a constitutional opposition, i.e., monitoring and opposing unconstitutional violations of the majority, raises another difficulty. It can be argued, that the constitutional organ which guaranties compliance with the court is the judiciary. The concept of judicial supremacy places the burden of guarding the constitution upon the courts. This is correct - the argument follows- not only

[125] *See* Issachroff & Pildes, *supra* note 9.

in terms of constitutional theory but also in terms of qualification, expertise and power. Courts are experts in constitutional law and have also powers and procedures which give them better tools in analyzing the constitutionality of a law and in needed cases, to grant also a proper remedy.

Indeed, we would do well to distinguish between the role of the courts and the role of the opposition in protecting the constitution, especially in times of national crisis. Courts are the primary organ that can rule on the constitutionality of a law or an administrative act and grant an effective remedy in cases of violation. Courts can abolish a law or void an administrative act. The opposition cannot. Courts are professional, impartial reviewers and not political opportunists. Courts are a strong, independent, nonrepresentative, and counter-majoritarian institution. No one argues, therefore, that the opposition can or should replace courts as the guardians of the constitution.

However, oppositions play an important role independent of the function of the judiciary. Courts do not have the option of suggesting an alternative agenda or policy. They review the act but usually cannot suggest replacing it with another plan.[126] Though opposition leaders do not enjoy majority support within society, they do enjoy some support and legitimacy that courts may lack in certain cases. The opposition is thus a representative institution. It might have better information about certain issues than the courts, and it is not bound by institutional restraints. Thus, the opposition can advocate its opinion through a constant usage of the media. Opposition officials do not have to be impartial. The opposition is not bound by the "political question" doctrine or problems of justiciability and standing. Its range of action is not formally defined. These features assume heightened importance in times of national crisis. During these periods, courts

[126] *See* Ponthoreau, *supra* note 30, at 1135.

sometimes fail to see the whole picture. They face a problem of public confidence and support.[127] Furthermore, constitutional provisions and laws might weaken or disable the powers of courts during national crises, for instance, by forming alternative courts and tribunals or by explicitly immunizing certain activities from judicial review. These restrictions on the judiciary may demonstrate the importance of further checks and balances like the opposition. Furthermore, opposition leaders and members might have better knowledge and experience in assessing the needs and preferred policy. The opposition's activities within the legislature may succeed in blocking some of the majority's unconstitutional bills, by eroding the initial support for them. In doing so, the opposition will reduce the amount of pressure on the courts. In addition, the laws enacted will likely reach the courts only after a debate in Congress and in public. This debate will not only highlight the meaning of the law and the alternatives to it, but it will also delay the passage of the law and its eventual consideration before the court. This last feature – time – is significant in times of national crisis. The public and the majority tend to react very strongly in the short term. That period is the most dangerous in terms of constitutional violations and excessive use of force. Any justified delay in these circumstances will help the legislator and the courts arrive at a reasonable and balanced decision, rather than a decision driven by the emotions of the crisis.

The opposition does not provide an alternative mechanism to judicial review by the courts but rather supplements and facilitates the ability of courts to protect the constitution in times of national crisis. This role becomes even more meaningful in light of the argument that courts also tend to become too loyal in times of national crisis and to

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[127] *See* Eyal Benvenisti, *Inter Armas Silent Leges? National Courts and the "War on Terrorism"*, in INTERNATIONAL LAW AND TERRORISM (Andrea Bianchi ed.) (forthcoming), available, at: http://www.tau.ac.il/law/members/benvenisti/articals/Inter%20Armas%20Silent%20Leges-newest.pdf

give less protection to civil liberties.[128] If this is true, an additional check on the majority may even be a necessity. The opposition can serve this function in times of national crisis.

4) Should There Be a Legal Duty to Oppose?

The justification of the constitutional opposition concept, both theoretically and practically, raises a further question: Is this constitutional role of the opposition a legal duty or merely an idea of political virtue? Should there be a mechanism that reviews opposition behavior and enforces its constitutional role or that the political market - primarily elections - should be the one which regulates opposition behavior?

Indeed, the idea that there should be a *constitutional duty* to oppose might be seen as radical, for two primary reasons: The first one is our basic understanding of representative government and free mandate. We tend to think of representatives as special entities. Though they are a part of the state and constitute the legislature, we grant representatives privileges and immunities aimed at enabling them to engage in free and independent decision making. This theory is known as the free mandate theory and has several historical, practical and theoretical justifications.[129] One of the clear implications of this theory is that there are no legal restraints over the individual decision making of a representative. No court will order a legislative representative to vote this way or

[128] *See* Epstein et al., *supra* note 16; Gross, *supra* note13, at 1034; Benvenisti, *supra* note130. There are, however, judicial opinion – mostly minority ones – which demonstrate willingness to adjudicate governmental actions even in times of crises – *See* Burt Newborne, The Role of Courts In Times of War (unpublished manuscript, on file with the author).

[129] *See* HANA F. PITKIN, THE CONCEPT OF REPRESENTATION, 168-189 (1967); BERNARD MANIN, PRINCIPES DU GOUVERNEMENT REPRESENTATIF [PRINCIPLES OF REPRESENTATIVE GOVERNMENT], 260 (1995); GEORGE BURDEAU ET AL., DROIT CONSTITUTIONNEL [CONSTITUTIONAL LAW], 164-167 (26 éme. éd. Paris, 1999) 165-166.

another.[130] No voter will be able to sue a representative for his or her vote. Judicial review by the courts is exercised based not on the personal votes of the representatives but rather on their cumulative effect. Courts review legislative outcomes; they do not psychoanalyze the legislators. Therefore, it is problematic to impose a duty on a representative to vote in a certain manner, whether it is a duty of the majority party not to vote for a proposed law or the duty of the minority party to vote against a proposed law, even when the law is unconstitutional. Free mandate theory implies not only the freedom to oppose but also the freedom not to oppose.[131]

A second reason we may be reluctant to impose a positive *duty* to oppose stems from theoretical and practical aspects of separation of powers. A theoretical problem is that judicial review is usually limited to a final act of another branch and not of its internal management. Thus, courts do not review the voting itself but rather the anonymous legislative outcome which is the law. If courts were to review the individual vote, they would be seen as putting themselves in the place of each legislator – a violation of the separation of powers. There is a difference between instructing someone how to vote and reviewing the legality of the final decision on its merits. Hence, since a positive enforceable duty to oppose means that a court could order a representative how to vote, it is clear why such an order conflicts with the idea of separation of powers. In addition, there are practical reasons for courts to refrain from intervening in legislation proceedings that have not yet concluded. Courts review a law only when it is final. Until then, there is

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[130] Powel v. McCormick, 391 U.S. 486, 503 (1969).

[131] IONESCU & MADARIGA even argue that the functioning of the opposition as constructive was possible only due to the free mandate theory. Thus, so long as the opposition had a duty to obey the commands of its supporters, there was no real deliberation or alternative. Only when the opposition was free to form its own agenda independently – as part of the free mandate – did the opposition become constructive. Thus, the free mandate doctrine is one of the pillars of the existence of an opposition in a democracy. *See supra* note 41, at 43-45.

no reason to review it, because it might change or fail to pass at all. Practically, therefore, how could a court order the opposition to oppose? An ex-ante order of this kind is premature, and an ex-post order is irrelevant since the law is final and had the needed majority anyway.

Beside the theoretical obstacles for the concept of a *duty* to oppose, one might ask whether there is a real point in it? Hence, it might be argued that the concept of constitutional opposition can exist also without any duty attached to it. Therefore, the opposition should be evaluated politically and by the public on the basis of its actions and omissions. One might argue that opposing unconstitutional violations and protecting the constitution is important, but this is only a political option which the opposition may or may not adapt. The sanction for failing is therefore political and not legal. This argument against the legalization of opposition behavior might find strong support in the political analysis of opposition loyalty cases. If the political incentives for opposition-majority cooperation are so strong, especially in times of crises, then any imposition of a legal constitutional duty might be totally ineffective and lead to an erosion and dilution of the constitution itself.

Should the conclusion be that the idea of constitutional opposition ought to be seen as a political virtue rather than a legal concept? It is true that the argument against the imposition of a legal duty to oppose unconstitutional violations is a strong one, for its theoretical and practical reasons. I do think, however, that despite the theoretical and practical difficulties, there should still be a legal *duty* upon the opposition to oppose. However, this duty should be regarded as a non enforceable duty.[132] This is a duty that

[132] The idea of a non enforceable constitutional duty is might be seen as a conceptual problem especially in terms of positive law. It can be argued, hence that a duty which is not subject to an enforcement mechanism

has a firm legal and constitutional basis, but it is still a duty that courts will not enforce. Why should the constitutional role of the opposition be characterized, despite all the difficulties, as a legal duty?

First, in terms of rule of law and constitutional supremacy, it is hard to justify an exemption of the opposition. Problems of enforceability and the advantages of political market regulation cannot change the basic notion and understanding of constitutional supremacy and rule of law. They may explain why this role of the opposition should not be legally enforced, especially taking into account the pragmatic problems of deciding when the majority is violating the law and which is the best strategy to oppose it. However, the fact that courts do not review the votes of each individual representative does not change the representative's basic constitutional *duty* to act according to the constitution. In discussing the legislature as a whole, we say the legislature must abide by the constitution, but that if it fails to do so, courts will review the law. In the individual context, however, representatives must act according to the constitution, but there is no *direct remedy* for their failure to do so. Representatives have a duty to adhere to constitutional values in their voting, but they are immune from direct legal remedy for unconstitutional breach. It is therefore important to distinguish between the *duty* of a representative and the *remedy* for breaching it. Representatives must always adhere to constitutional values and provisions. This is a direct derivative of the concept of constitutional supremacy and the rule of law. If they fail to do so, however, there is no direct legal remedy against them as individuals, because of the concepts of free mandate

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seizes to be a legal duty at all. Yet it seems that this pure positivist approach is not always followed, as there are cases in which a duty still exists despite its lack of enforcement. *See for instance* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L.REV. 1212 (1978). Another example might be the Custom, which is usually seen as a norm despite the fact that it is not enforced,

and separation of powers, as well as other practical reasons Therefore, if an unconstitutional bill is proposed, the opposition has a constitutional *duty* to oppose it. There are no direct legal remedies if it fails to do so, but the lack of remedies does not vitiate the constitutional duty. The same duty applies also to the majority party representatives. However, in that case, a failure to respect the constitution will result in a final law subject to judicial review. Hence, on an outcome base level, there is a difference between the minority opposition's and the majority's duty. But on a theoretical level, both the majority and the opposition have the same duty – to adhere to constitutional values and provisions.

A second reason for characterizing the constitutional role of the opposition as a legal duty and not merely a political option is the important rhetoric value of such a duty. If opposing unconstitutional violations is mainly a political option, then it becomes also a part of the political controversy. Violating the constitution might even be seen as a legitimate option, as well as not opposing such a violation. In my point of view, this is a problematic outcome. The constitution can obviously be amended, and any debate over its scope and interpretation is not only possible but also essential in any pluralistic democracy. But as long as the constitution has not been amended, its violation is impermissible, politically and legally. The majority and the opposition might still come to a different conclusion and find sufficient incentives to cooperate while enacting a unconstitutional law. This fact should not change the nature of the law as unconstitutional and the activity of each member of the legislature who supported the law – or did not oppose it – as violating the constitution. Any other rhetoric might undermine the rule of law and constitutional supremacy. Furthermore, understanding the role of the opposition

as a legal duty – though unenforceable – might result in a better knowledge of the public and voters on the precise nature of its representative's activities. Thus, there is a difference between an opposition that cooperated with the majority out of loyalty to the national interest, and an opposition which did so while breaching its constitutional duty. The public might disapprove of unconstitutional behavior and thus create an incentive for the opposition not to cooperate but to oppose in cases of unconstitutional violations of the majority. Another plausible result could be that the political parties themselves would debate the adherence of each of them to the constitutional duty. The outcome of such debate could be the strengthening of the constitutional values and the political consensus over the constitutional supremacy.

Therefore, I am of the opinion that the role of the opposition as a constitutional opposition should be characterized as a constitutional legal duty. This duty is unenforceable for theoretical and practical reasons. However, it is still a duty that needs to be articulated and preserved despite the strong political incentives to ignore it, especially in times of national crises and emergency.

V. Conclusion

The role of the opposition in modern democracies is complex. I have shown that this notion is not a construct of political science but is one of the pillars of democracy. The opposition should be analyzed as a distinct institution with specific rights and duties, including the duty to be democratic, constructive and responsible. The more problematic notion of opposition is the one of opposition loyalty. Thus, we sometimes expect the opposition to be loyal to the majority, especially in times of national crisis. However, I

have argued that this loyalty must be limited by another role of the opposition – its duty to behave as a constitutional opposition. Hence, I have argued, sometimes even during national emergencies, the opposition has a role of opposing the majority. This is the case when the majority seeks to violate the constitution and infringe upon basic rights of individuals who may not be represented. A constitutional opposition must be loyal to the constitution. Particularly in times of national crisis, the existence of the opposition and its proper functioning are extremely important, since these times are characterized by the tendency toward excesses of power by the executive and violations of basic rights. The role of opposing constitutional violations has a firm theoretical and practical basis. It does not replace judicial review by the courts but is a supplementary device. It should even be seen as a legal duty, though not an enforceable one.

There is understandable concern over regulating and intervening in actions of "political" institutions. However, this fear should not lead jurists to ignore the existence and role of the opposition. So long as there is a majority, there will be a minority. If we want the majority to work well, we need to ensure that the minority works well, too. A better understanding of the role of the minority party can have significant implications for the legal status of the opposition. Acknowledging the importance of a strong and functional opposition, especially in times of national crisis, can result in reforms that strengthen the minority party within the legislature. Since the duty to oppose is not an enforceable duty, constitutional law should focus on creating the proper institutional incentives for oppositional behavior. Such institutional incentives might grant the opposition better tools to challenge the minority and narrow the situation of opposition loyalty to the majority. Thus, one might reconsider internal congressional rules, for

instance, to check whether they give the minority party a fair opportunity to oppose.[133] We might ask whether the current constitutional theory and court's rulings regarding primaries laws and party autonomy fit the desired role of the minority party; whether they encourage strong and distinctive responsible parties or rather promote individual non-partisan politics. We might question, for example, whether the opposition has sufficient time to debate the issues and even use filibustering;[134] if it has enough resources to cope with the majority and the its control of government bureaucracy;[135] and if the powers of the House or Senate chairperson or speaker are overly partisan.[136] Further questions that might be asked are whether the opposition party has a fair chance to access the media and express its view; whether it has sufficient information and tools to check and balance the majority power;[137] whether it can seek redress in court if the majority denies its rights or uses oppressive tactics.[138] Furthermore, it can be argued that there should be special

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[133] Research shows that most of the internal rules of Congress are the product of partisan needs and competition, not created for politically neutral reasons such as efficiency or fairness. *See* SARAH A. BINDER, MINORITY RIGHTS MAJORITY RULES – PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS (1997). Even if the rules are fair, the majority often decides to deviate from them, oppressing the Congressional minority. For a game theory approach to cases in which Congress decides to follow its own rules or to deviate from them, see Stanley Bach, *The Nature of Congressional Rules*, 1989 J.L. & POLICY. 725, 730-731.

[134] On this practice and its constitutionality in the United States, see Catherine Fisk & Erwin Chemerinsky, *Filibuster*, 49 STAN.L.REV. 181 (1997).

[135] *See* IONESCU & DE MADARIGA, *supra* note 41, at 139-140. In Britain, for instance, the opposition receives an annual sum of money from the state depending on the number of votes it won in the national elections and the number of seats it holds in the in House. This sum is to be used only for intra-parliamentary purposes, and it is not granted to the party which controls the executive branch, since it is assumed that the governmental party has sufficient resources. *See* Johnson, *supra* note 29, at 493. Another way is to pay salary to the leader of the opposition while recognizing its special status. *See* The Knesset Law, 1994, Sec 16 [Isr.]; Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 62 [Can.].

[136] *See* Ranajit Basu, *The Role of The Opposition*, 243 CONTEMP. REV. 35 (1983). For a more thorough analysis of chairperson neutrality or partisanship, including comparative data, see Marcelo Jenny & Wolfgang C. Müller, *Presidents of Parliament: Neutral Chairmen or Assets of the Majority?*, in PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE 326 (Herbert Döring, ed. 1995).

[137] On the risk of information manipulation by the majority, see Patti Goldman, *Combating the Opposition: English and United State Restriction on the Public Right of Access to Governmental Information*, 8 HASTINGS INT'L. & COMP. L.REV. 249 (1985)

[138] Comparative law has a lot to contribute in this context. Some European constitutions are interpreted to grant special standing to the opposition in courts – see La Constitution de 1958 [const.] art. 61 [Fra];

mechanisms to amplify the power of the opposition party, especially in times of national crisis. For instance, we might advocate for a constitutional reform requiring a supermajority to declare a national emergency,[139] thus granting the opposition party a veto power in some cases. All these means – and others – should be considered in each democracy, according to its specific features and constitutional traditions. Together, they can form a "code" of rights and duties of the opposition.[140] The underlying principle behind all of them is that the opposition minority party has an important role in a democracy, especially in times of crises and that the legal community cannot – and should not – ignore this role.

True, there has been a decline in the role of parliaments in general and oppositions in particular. Direct democracy – initiatives, recall and referendum have helped weaken the parliaments and parties. The constant pursuit of consensus has undermined the legitimacy and role of the opposition.[141] The increasing power of interest groups, the media and government bureaucracy have weakened both political parties and

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Grundgesetz [GG][const,] art. 93 [F.R.G.]. *See* Philippe Ardant, *Les Développements Récents Du Parliamentarisme* [Recent Developments in Parliamentarism], 46 REVUE INTERNATIONALE DE DROIT COMPARÉ, 593, 601 (1994). The Jurisprudence of certain European constitutional courts is also interesting for its demonstrated willingness to protect the opposition. *See, for example*, the German case voiding a governmental expenditure to be used to fund propaganda by the majority, based on reasons of resource equality - The Official Propaganda Case (1977), 44 BVerfGE 125, *translated in* DONALD KOMMERS, THE JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 177-181 (1997); A decision invalidating the refusal to allow the minority party's representatives to become members of a standing committee - The Green Party Exclusion Case (1986)[Germany] 70 BverfGE 324, *translated in* KOMMERS *id*, at 170-173; The Wuppesahl Case (1989)[Germany], 80 BVerfGE 188, *translated in* Kommers *id*, at 174-177; A decision invalidating the refusal to allow the minority party's representatives to become members of an investigation committee - The Schleswing-Holstein Investigative Committee Case (1978)[Germany], 49 BverfGE 70, *translated in* KOMMERS *id*, at 167-169. Similar trends have emerged in the Spanish constitutional court. See: Suzie Navot, *The "Sarid" Test After Twenty Years: Re-Examining Judicial Review of Parliamentary Decisions*, 19 BAR ILAN STUDIES IN LAW 721 (2003)[Hebrew].

[139] On this idea, including a supermajority requirement, see Bruce Ackerman, Constitutional Principles for a State of Emergency, (unpublished manuscript, on file with the author).

[140] An example of this kind of code can be found in the Inter Parliamentary Union. *See* GUIDELINES ON THE RIGHTS AND DUTIES OF THE OPPOSITION IN PARLIAMENT, THE INTER PARLIAMENTARY UNION, 1999, available, at: http://www.ipu.org/splz-e/gabon.htm

[141] *See* IONESCU & DE MADARIGA, *supra* note 41, at 92-94.

oppositions.[142] Globalization also plays a role in weakening national parliaments and oppositions while subjecting the ability of a party to implement its ideology to regional and global constraints.[143] However, there is still a need for a pluralism of ideas within the legislature; there is still a need for a group within the parliament that constitutes a legitimized alternative,[144] a group which channels public opinion to the legislature and the executive in an open and transparent manner.[145] Strengthening the status of the opposition should be seen therefore as an important element in preserving parliamentarianism and democracy.[146] This is especially true in the era of terrorism, when it is particularly important to make sure that responses are rational and take long-term considerations into account. The heaviest burden is on the majority and the government which are accountable. But democracy is not only about the best use of power but also about the safeguards and limits on this power – even in times of national crisis. Constitutional opposition should be regarded therefore not as a numerical fact but rather as one of the checks and balances in a modern democracy.

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[142] *See* MANIN, *supra* note 129, at 279-299; Lawson, *supra* note 100, at 37-45; JAMES JUPP, POLITICAL PARTIES 55-59 (1968).

[143] *See* PIERRE BRECHON, LES PARTIS POLITIQUES [The Political Parties], 144-145 (1999). On the influence of the European Union on the role of the opposition in Britain, see Johnson, *supra* note 29, at 507-508.

[144] Ponthoreau, *supra* note 30, at 1138-1139.

[145] Hockin, *supra* note 31, at 64.

[146] *See* Hans-Peter Schneider, *Developing Trends of Parliamentarism in Germany*, in 7 JAHRBUCH ZUR STAATS- UND VERWALTUNGSWISSENSCHAFT **225** (Theodore Ellwin, Dieter Grimm et al. eds. Baden-Baden, 1994).