

Empire's Democracy, Ours (and Theirs)

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The Confiscation of Democracy

We must recover and repossess our democratic discourse and our democratic politics, which have been confiscated, taken over, co-opted, instrumentalized in an imperial project. (Those who believe that the meaning of the democratization struggles in Southern and Central Europe, Latin America, and South Africa has been nothing more than the building of imperial hegemony need not read any further!) The world today is not an empire, not yet in any case. As Jean Cohen has argued, the global legal political order is an uneasy and highly conflictual combination of two principles: international law and a new type of imperial hegemony.¹ I speak of hegemony because there is no question of directly dominating most of what the remaining superpower hopes to effectively control or strongly influence. I call it imperial because of that superpower's extreme solicitude for its own sovereignty coupled with its cavalier and aggressive attitude to the sovereignty of all others.² I insist on a struggle between two principles, because international law, while not a "legal order," remains a reality however threatened, and international organizations and regulations repeatedly stand in the way of imperial aspirations on both symbolic and policy making levels.³

During the late Cold War and in the years immediately following, "democratization"

¹ "Whose Sovereignty? Empire versus International Law" *Ethics and International Affairs* (2004) v. 18 # 3

² Zbigniew Brzezinski *Global Domination or Global Leadership* (Basic Books: New York, 2004) p.11

³ Cohen "Whose Sovereignty" p. . I believe that the system as a whole seems so chaotic at present because it incorporates competing rules of recognition.

belonged to the world of international law, with its key concept of sovereign equality.⁴ Not only were international agreements used to promote democratic change, and occasionally as sanctions against dictatorships, but new democracies sought to recover their sovereignty with respect to the two superpowers, Central and East Europe from the Soviet Union and Latin America from the United States. The international organizations they sought to join or revitalize, the European Union and the Organization of American States, were on balance sovereignty enhancing. Even today this trend continues to an extent, as the recent cases of Georgia and the Ukraine show. Of course, even in that epoch democratization was both an internal and an external political matter. From the 1970s in Spain and Portugal to the most recent cases, democratization involved significant outside influence or even “intervention” – positive and, in the case of Gorbachev’s withdrawal of support from some ruling Communist Parties, negative. Nevertheless, two salient facts characterized the outside-inside relationship: interventions were soft in the sense of remaining well within the UN Charter banning aggressive wars, even of liberation; and liberation and regime change were achieved on the whole by internal reformist, (most often) radical civil society or (rarely) revolutionary forces.

The war in Iraq and subsequent developments in that country indicate that we have entered a new period, where international law is no longer the primary framework or reference point for democratization projects. Indeed, the war occurred in the clearest possible violation of the UN Charter,⁵ one opposed moreover by the immense majority of citizens and governments the world over. In Iraq liberation was not endogenous, and, so far at least, neither was regime

⁴ Ibid. pp.

⁵ See Nehal Bhuta “A Global State of Exception? The United States and World Order” (September 2003) Supporters of the legality of the war used to cite Attorney General Lord Goldsmith’s “legal opinion” as the major piece justifying their views. We now know that his actual 13 page legal opinion given to the Blair government probably maintained either the contrary, or at least (the opinion has never been released) that (an) international court(s) would find the war without a new Security Council resolution illegal. The 1 page report to parliament, before the relevant vote, was in fact written by aides of the Prime Minister, Lord Falconer and Lady Morgan. For a summary of the events: see *The Guardian* March 10 and 12, 2005

change: they were both externally imposed.⁶ Even Afghanistan, after a Chapter VII authorized war, with the Northern Alliance doing the bulk of the fighting and international organizations (UN and EU) deeply involved in the political transition, turned out to be a transitional case. Iraq is a clear sign of something new, but it is not the only sign.

For almost four years foreign policy pronouncements from the US administration are repeatedly and increasingly clothed in the language of democracy, human rights, quite often civil society, and even women's rights. While the invasion of Iraq was initially justified (illogically and mendaciously) more in terms of the fear of WMDs, here too the minor motif, democratic regime change, has long since become the primary one. Since the motivations of all states can always be assumed to be primarily *raison d'état*, or, as here, particular political, i.e. sub-state interests, it is useless to point out that the real reasons for the war were different: geopolitical, institutional, party-political, or their likely combination. The ideology of justification carries its own particular force, especially where people suffer from dictatorships or have been recently emancipated from such rule. Given the self-image of Americans, and a shared reading of their history across the political spectrum as a shining city on a hill, a beacon to all others, the power of this language over both ordinary citizens and intellectual strata in this country should never be underestimated.

Thus, the recently announced struggle against tyranny, to many Europeans the seemingly pathetic successor to the failed Bush doctrine, and the mere renaming of the ongoing "war" against terror, represent in fact the most powerful challenge to all those to whom the norms and values of democracy, human rights, civil society, and the public sphere remain the unsurpassable meanings of the present historical epoch (the "us," "we," "our," and "ours" of this essay). While

⁶ See my three articles: "The Occupation of Iraq and the Difficult Transition from Dictatorship" *Constellations* (September 2003); "Sistani v. Bush: Constitutional Politics in Iraq" *Constellations* (June 2004); "Interim Imposition" *Ethics and International Affairs* (2004) v.18 # 4

the illegal and on the whole unjustifiable military intervention in Iraq already tested *us* (with many failing the test!), the defining feature of that adventure, the use of military force and its disastrous consequences, still allowed perhaps the majority of the veterans of recent struggles to draw a line between the *imperial* democratization project and *ours*. But now, when military force is, at least for the moment, no longer readily available for imperial democratization, we have every reason to expect that there will be an attempt, far more extensive and determined than any before, to alienate and instrumentalize the soft power and soft forms of intervention of civil society organizations.⁷ Indeed, this has already happened in the midst of the hard intervention in Iraq.

One possible response to alienation and instrumentalization is to leave the field and to tacitly concede the whole complex range of issues connected to political democracy to the other side. (Those who already “know” that this alone is the right answer and cannot be shaken in such article of faith may stop reading here!) Not only do I believe that we ought not concede defeat for very valid normative reasons, however – because our democracy is democratic and the imperial one is not – I also believe that we can win both the battle of ideas and influence over the relevant political processes. I would like to show this in the hardest possible case of Iraq, where “we” were only marginally present as an independent set of actors, where the imperial project could rely on all possible instruments at its disposal: hard as well as soft power of every conceivable variety. My thesis, based on the study of the Iraqi adventure, is that we can win only if we recognize that three democracies rather than two are struggling for the control of the shared political meanings: *imperial* democracy, *our* liberal democracy, and *their* autonomous but not necessarily liberal democracy. Whatever success the first, the imperial project of externally

⁷ Thus Paul Wolfowitz has been transferred precisely where the next battles are likely to take place, where the large scale funds for development will be allocated, and where the preferred civil society organizations and NGOs are likely to be targeted.

imposed democracy has had so far, it depended on a split on our side between *imperial* liberals and *anti-imperial* democrats, who have more or less withdrawn from the field. Its defeat will depend on not only healing that split, but also a new understanding, if not yet an alliance, between “our” democracy and “theirs” – namely, of people and groups fighting for autonomy and self-government under various forms of authoritarian rule ranging from the old dictatorships to dictatorial impositions by the external power.

Our Weakness and the Performative Contradiction of Imperial Democratization

We have been weak and indecisive in response to the crisis in Iraq because we faced the Scylla of instrumentalization and the Charybdis of passivity. All right, they said (to us, to governments, to the various NGOs, to the agencies of the UN), you opposed the war, but now it happened. Are you not ready to do what you did elsewhere? Come to Iraq and help, not us, but the Iraqis, to develop and establish the institutions of democracy, of civil society, to make a constitution. Help us redeem even what you think is unredeemable. Luckily, in their desire to secure jobs for mostly incompetent clients and acolytes, they did not ask too many of our friends. Of those asked, some refused. Some of those who did not refuse the imperial liberals eventually produced peculiar mea culpas in book form. Some still feel self-righteous, and deny having been used at all.

How difficult it was to get involved without being instrumentalized is shown by the very particular case of Lakhdar Brahimi's UN missions to Iraq, which I had the opportunity of briefly advising, if informally. After more or less fully disregarding the United Nations and paying only the slightest attention to Sergio di Mello before his tragic death, the US government suddenly needed the UN. The Grand Ayatollah Sistani was willing to accept the delay of elections in early 2004 only if so advised by a representative of the Secretary General. At a later date, the

legitimacy of interim governmental arrangements depended on Brahimi's imprimatur, and, as I was directly told, the diplomat and his team were initially very determined not to accept a mere transmogrification of the US-appointed Governing Council as a supposedly sovereign interim government. Moreover, the team was very interested in dramatically expanding the bargaining process in Iraq, leading to a transitional formula, and it is regarding this problem area that I repeatedly offered advice based on Central European and South African models.

The first UN visit, the "fact finding mission" of February 2004, did not go badly.⁸ In the conflict between the Americans and Sistani, Brahimi proposed a compromise formula that nevertheless put the Iraqi elections, with their probable Shi'a victory, safely after the US elections. Equally important, his team, pushing toward the election of a single legislative and constitutional assembly, "helped" Sistani quash the idea of creating an unelected, co-opted transitional legislature that would remain the seat of government through the making of the permanent constitution, through December 2005 at the very least. It was during second and third visits, when in fact American dependence on Brahimi's activities grew because of the US elections, that an independent UN role collapsed. Brahimi now accepted the American imposition of the TAL, the interim constitution, though sought rhetorically to devalue its significance.⁹ More fatefully, during the third visit in May 2004 he accepted the leading role of the Governing Council in establishing the interim government, its controlling role in organizing a (therefore) meaningless and unrepresentative national conference, and the prime ministership of Ayad Allawi, a prominent GC member reputedly close to the CIA (at least not the Pentagon!). Brahimi – and his sophisticated chief of staff, Jamal Benomar, whom I had previously advised – clearly had the opportunity, because of Bush's electoral vulnerability, and certainly the

⁸ See the excellent report: "The Political Transition in Iraq: the Report of the Fact Finding Mission" UN Security Council, February 23, 2004. I was gratified to find a trace of my proposals in paragraph 28.

⁹ See his report to the Security Council, April 27, 2004

diplomatic skills and superior knowledge of the situation, to obtain much more. Instead, they put up with their own instrumentalization without much complaining.¹⁰

Would it have been better to forget about Iraq altogether and not get involved, as the UN staff after di Mello's death would have liked? Or to try to support whatever force there attempted to throw the invaders out, no matter how ugly and dangerous? The latter option has been and remains almost unthinkable, and I don't know anyone belonging to the "we" label of this essay who wanted the defeat of the Bush administration to the extent of openly affirming it. The former option, however, was the way of most European governments and intellectuals who had previously opposed the war. Thus, contrary to Afghanistan, the American government and its civil allies, mainly semi-independent NGOs, were more or less the only foreign actors that mattered in Iraq for the last two years, if we don't count the inexplicably weak representatives of the UN, who privately explain their weakness by the lack of support they had for an independent stance even from the governments that opposed the war. The international conference of key members of the Security Council with the representatives of Iraq and neighboring countries at Sharm el Sheik just before the US elections was a case in point. Such a meeting on Iraqi peace and security should have taken place much, much earlier, but in principle it was still a good idea – even if called for by the US government probably in part to counteract John Kerry's electoral complaint of unilateralism. Michel Barnier, the French foreign minister, quite sensibly proposed some conditions for participation, like the inclusion of hitherto excluded Iraqi actors and the discussion of a schedule for the withdrawal of foreign troops. I had the good fortune to be able to

¹⁰ To be fair, Brahimi did complain a little, afterwards, moreover in sociologically accurate terms. See Terence Neilan, "U.N. Envoy Urges Iraqis to Give New Leaders a Chance," *New York Times*, June 2, 2004. "Mr. Brahimi struck a mildly surprising note when, in answer to a reporter's question, he referred to the American occupation administrator, L. Paul Bremer III, as "the dictator of Iraq." "He has the money," he said. "He has the signature. Nothing happens without his agreement in this country." These lines indicate that Brahimi blamed ultimately Bremer rather than the Governing Council for being outmaneuvered.

publicly ask his German counterpart Joschka Fischer (whom I would certainly include under the “we” of this essay) whether Germany would support this French initiative. To my surprise his answer was an unconditional no, thus making quite sure that the conference would amount to absolutely nothing. Here there was no question of instrumentalization, because the US could gain very little by having a meaningless meeting culminating in empty declarations. Rather, Fischer expressed a desire to remain as passive as possible, to avoid doing anything that might, in Habermas’s words, “redeem the unredeemable.” One can understand that desire, but the passivity was nevertheless wrong. An opportunity to prepare the ground for a broader Iraqi compromise was lost – not for the first or last time.

We should in our weakness not however imagine that the imperial project clothed in the language of democratization is itself all-powerful. Its own weakness lies in a fundamental performative contradiction. An empire, even an imperial project, cannot really afford democratic provinces. Democratic or even partially democratic states develop their internal and external policies in large or small part in response to internal actors, to whom they are to greater or lesser extents accountable. Depending on circumstances, these policies can oppose those of the imperial or hegemonic power even if the states in question owe their liberation to that power.¹¹ When the imperial state is a former or present occupier, the likelihood of conflict is even greater. Thus, the aim of democratization is self-contradictory to the extent that it seeks *both* democracies *and* countries friendly to the US and its policies; the procedural goals are in conflict with the substantive ones.

Undoubtedly, in an Orwellian imperial system non-democracy could be simply renamed democracy. While there are efforts in this direction, it is obvious that under current conditions of international publicity a negative utopia where war could be renamed peace and dictatorship

¹¹ Juan Cole op.ed. *LA Times*

democracy is not in the cards. More to the point, in a more traditional imperial system, like the late British empire, it would have been possible to resolve the contradiction through a variety of devices like colonial (partial) self-government formally deprived of the right to make foreign and defense policy or protectorates, where the dominance of the imperial center is established through powerful, institutionalized informal mechanisms. Mandates and trusteeships gave recognition to these devices in international law. In our epoch, however, the duality of imperial and international law arrangements means precisely that such limits to internal sovereignty can receive at best only very temporary world recognition. The language of democratization, though mobilized for an imperial purpose, thus lands the bearers of the discourse in an international legal field that does not allow democracy to be openly replaced by its opposite. The democratic justification to an extent binds even those who use it in bad faith.

Instead of arguing this point in general, let me show how it works in the case of Iraq. Here it was possible for a supposedly democratizing external power to argue, even if in a mendacious way, that elections could not be organized at a given time, but not that they would have to be postponed indefinitely. The Ayatollah Sistani's demand for elections to a constituent assembly could be thus delayed but not entirely denied. It was only very late in the game that elections were "spun" as a great victory for the American project. In the absence of any pressure from representatives of "our" democracy, Sistani was and remains (I hope) a great example of a political actor who has seen the performative contradiction of the American project of imperial democratization, the conflict between the norm and the practice, and utilized it as much for the purpose of Iraqi autonomy as he could (and can). In my opinion, it is only because of the unexpectedly ferocious Sunni insurrection (in part stoked by American repression), with its anti-Shia violence, that Sistani has not (yet?) emerged as the nationalist leader who could get rid of

the occupation altogether. But in any case he managed to push through his elections, and block (so far at least) the effort of American clients to steal it or to entirely deform it. The fight is not over as I write, because there is further opportunity for interference and deformation around the formation of a coalition government. Nevertheless, in principle, as I will argue, a very small window of opportunity is now open to Iraqi reconciliation and to ending the occupation.

What I am arguing for the moment, though, is that the democratic justification of the imperial venture also puts its proponents between a Scylla and a Charybdis, as illustrated by the case of Iraq. If they fail to establish something that looks like a democracy, they fail on the level of justification. This would interfere with other, similar future projects as presented in the 2005 Inauguration and State of the Union speeches. If they succeed to any extent, however, they probably won't get a friendly government, won't be able to stay and secure bases, and will thus fail in terms of their probable motives. Undoubtedly if they fail they will try to spin it as victory, in the sense that anything is better than Saddam. And if they are thrown out of Iraq, that too will be presented as a mark of incredible success. We, who hope to recover control of the discourse of democracy, must be ready, in either case, to offer our alternative interpretation of the whole process of (failed) imposed democracy.

Unfortunately, however, we cannot, like the owl of Minerva, satisfy ourselves with such post festum diagnoses. A failed state or a purely majoritarian and entirely illiberal democracy in Iraq will not and should not fill us with feelings of triumph. There is still time to contribute to something better than either. We, too, like Sistani, must try to enter the performative contradictions of imperial democracy, and even those of autonomous democracy, hoping for a productive dialogue between our democracy and theirs.

Imposing a Democracy?

Let us then look more closely at the performative contradiction(s) of “imposed democracy” in the Iraqi case, comparing it with a few others. Is the external imposition of democracy possible? Is it ever justifiable? If it is not justifiable, why is it nevertheless tried? I take the second and third questions first. Defenders of the Iraq adventure like to point to the post-Second World War French, Japanese, and German cases to support their claims. I will do them the big favor of forgetting the huge difference between just and unjust wars of liberation: France, Germany, and Japan were liberated or occupied as the result of the aggression of the latter two countries; Iraq was liberated or occupied in a war in which we were, like Napoleon’s France so often two hundred years before, the aggressor.¹² It is necessary in any case to distinguish, as did Hannah Arendt, between “liberation” and “constitution” in the process of democratic regime change. Assuming that external liberation can be justified in the three postwar instances, it does not follow that constitutional imposition by the liberating power can be as well. Indeed, international law forbids the latter.

In Iraq the case for external liberation cannot be said to be entirely without merit. What speaks for it is the apparent damming up of internal processes that in 1991, for example, showed themselves to have a great political potential – revolts which broke out because of our promises and failed, in the South, because of our lack of support. The American responsibility in subsequent repression of the Shi’a and in part even the Kurds is thus very serious. What speaks against external liberation in 2003, of course, are the lies needed to sell the policy, which are

¹² According to Benjamin Constant “The French revolution saw the invention of a pretext for war previously unknown, that of freeing peoples from the yoke of their governments which were supposed to be illegitimate and tyrannical...the worst of all conquests is the hypocritical one...” in *The Spirit of Conquest and Usurpation and their Relation to European Civilization* [1813/1814] in B. Fontana ed. *Political Writings* [Cambridge: Cambridge University Press, 1988) p. 65. In the same passages Constant vividly unmasks the lies used to justify pre-emptive wars.

entirely unacceptable in democratic countries; the weakness of the Saddam state, which could very likely have been made to collapse other ways; and the damage done to international law and mutual trust through the unilateral and illegal action of the US and the pathetic coalition of the willing.

Still, it is undeniable that in the midst of all that was wrong with the war, the overthrow of the Saddam regime, and the freeing of political energies in Iraq, was, abstractly considered, a good thing. From this judgment it does not follow that all the subsequent American attempts to control the pace and parameters of democratization, and to impose a series of quasi-dictatorial arrangements on the Iraqis, were also good, legitimate in any way, or even fully legal in terms of international law. In the case of the making and authorization of the Transitional Administrative Law, the interim constitution that is still in effect today and may remain so for a long time,¹³ international law was manipulated in order to barely satisfy Article 43 of the 1907 Hague Convention: “the authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety [civil life], while respecting, unless absolutely prevented, the laws in force in the country.”¹⁴

To this provision in international law I will return. While I consider it a case of almost hopeless under-regulation, its normatively valid core remains the idea that if there is to be the creation of a new legal and constitutional system in a country under foreign occupation, the decisions concerning how such a system is to be created belong to agents that can legitimately speak in the name of the country’s own population and not to the occupying power or its

¹³ Arato “Interim Imposition” and “How Many Methods Are There to Enact a New Constitution in Iraq?” at Juancole.com (Informed Comment) 2/21/05

¹⁴ The Avalon Project at Yale Law School, *Laws of War: Laws and Customs of War on Land* (Hague II), July 29, 1899 (Washington, D.C.: Government Printing Office, 1968).

agents.¹⁵ This idea converges with the common sense of democratic theory. We assume that democracy is a system that emerges from the autonomous activity of its (potential) citizens and is never, or rarely, the gift of political elites, who would seek to preserve undemocratic advantages hidden in new institutions.¹⁶ The theory of democratic legitimacy can further clarify the matter. Any set of modern democratic institutions have distributional consequences and imply the rule of political elites through mechanisms of representation. We therefore assume that strong legitimation requirements have to be satisfied during the beginning of a new democracy that do not require the mythological attribution of purely democratic constituent power as the source of the new regime, but which must go well beyond the idea that elites (especially foreign ones) have imposed it because they had the power to do so.¹⁷

This idea of the democratic legitimacy of constitutions is of course very well known to Americans from their own history, and they have taken it seriously during the few previous liberation-occupation regimes to which they now like to refer. Before Iraq they never openly pretended that constitutional imposition, direct or through a local agent, could be justified. Here comparisons of Iraq with France, Germany, and Japan should be helpful. In all three of these earlier cases external armies accomplished the main task of liberation. In France, where the internal liberation forces were strong and where the Free French contingent under de Gaulle was

¹⁵ The regulation actually is more broad, and seems to exclude not only the process of creating the new, but even the decision whether there would be a new order at all from the jurisdiction of the occupying power. However, where war is between regimes and not only governments, and can lead to the destruction of a regime before occupation, the decision concerning the creation of a new regime of some indeterminate type is taken with the overthrow of the old one. Any occupation government will therefore imply some new regime building, and it is this process that is poorly regulated by either the blanket negative rule or the phrase "unless absolutely prevented". For a different perspective, preferring a conservative interpretation of the Hague Conventin, see the outstanding article by Gregory H. Fox "The Occupation of Iraq" forthcoming in April 2005 in the *Georgetown Journal of International Law*. Fox shows that the radical evasion of Hague requirements has been much broader in Iraq than merely the matter of the imposing of the interim constitution, and extended to the economic and administrative fields as well.

¹⁶ Today a great external power certainly cannot take on the mantle of the disinterested foreign law-giver, a figure that has in any case been universally abandoned since the modern democratic revolutions.

¹⁷ See my "Forms of Constitution Making and Democratic Theory" in *Civil Society, Constitution and Legitimacy* (Lanham, Md.: Rowman & Littlefield, 2000) where I outline a set of procedural principles (consensus, plurality, publicity, fiction of legality and empirical veil of ignorance) that allow the attribution of democratic legitimacy.

in position to organize civil power in all liberated territories from the first day, there was no external imposition. The constitution of the Fourth Republic was the result of an unusually democratic process, in which the French Left played a dominant role. In Germany, especially in the American but later in the other Western zones, local, provincial, and regional democratic powers based on free elections were organized with unusual rapidity. The constitution-making process was rooted in freely elected provincial governments and newly organized “national” parties, and American interference was kept to a minimum.¹⁸ In Japan, where there was the clearest case for American constitutional imposition, the Japanese state structure, with its symbolic unification in the emperor, was nevertheless untouched, governments continued to be formed, and a new Imperial Diet involving women’s suffrage was elected in 1946 – all under the inherited Meiji Constitution. It was this new Diet that passed the American-imposed constitution under the amendment rule of that 1883 Constitution, formally satisfying the Hague 43 requirement. The fact of imposition was a carefully guarded secret.¹⁹

Thus, all three cases are dramatically different than that of Iraq, where (unlike in France) the Americans assumed direct occupation power, where (unlike in Japan) they destroyed the inherited state, where (unlike in Germany) they did not begin from the ground up and organize freely elected local governments, where (unlike in France and Germany they) imposed a constitution, though supposedly an interim one, and where (unlike in Japan) they made little effort to hide that imposition or the clientelistic nature of various interim governments.

It is worth asking why this difference, especially since the democratic justification of the Iraq war of “Operation Iraqi Freedom,” should have implied greater rather than lesser solicitude for local autonomy and self-government than in the “guilty” nations of Japan and Germany. The

¹⁸ Peter H. Merkl *The Origin of the West German Republic* (Oxford University Press: New York, 1963)

¹⁹ Koseki Shoichi *The Birth of Japan’s Postwar Constitution* (Westview Press: Boulder, Co., 1997)

first answer will not please many Left critics of US imperialism, who prefer to see the welfare state and international law as parts of the same overall strategy as neoliberalism and unilateral foreign policy. The US today is not the same as it was in 1945-48, when its politicians and even military leaders believed in the democratic welfare state and in the international institutions this country helped to create. Where in 1945 the rather new idea of the sovereign equality of states was still taken seriously, today it is not. Where in 1945 it was understood that an effective political community requires state integration, today this idea is rejected. Where in 1945 the US sought to create an effective alliance of states with itself as *primus inter pares*, today it is seeking imperial hegemony, and strong states, whether dictatorial or democratic, are in the way.

There is, however, another way to look at the matter – from the point of view of international politics. The cases mentioned occurred in different international constellations, as Japanese writers were the first to point out.²⁰ Leaving France aside, where the Americans ready to install an occupation government were entirely outmaneuvered by de Gaulle, Japanese constitution making occurred at a time when the US was unchallenged in the Pacific, before the victory of the Chinese Communists, and before the outbreak of the Cold War. The Japanese were not (yet, or mainly) thought of as potential allies, which explains their relatively rough treatment compared to Germany. In (West) Germany the making of the *Grundgesetz* was an intrinsic part of the Cold War division (of the country and Europe), and it was clear that the new Federal Republic would have to be an important ally on the very frontier between West and East. It was moreover important to demonstrate the superiority of American-supported autonomous democracy to Soviet-imposed pseudo-democracy next door, in the Eastern zone, and further to the East. Given this train of thought, we can see that in an epoch of unbalanced American

²⁰ Hideo Otake “Two Contrasting constitutions in the Postwar World: The making of the Japanese and the West German Constitutions” in Yoichi Higuchi *Five Decades of Constitutionalism in Japanese Society* (Tokyo: University of Tokyo Press, 2001)

dominance, Iraq is seen as its terrain rather than its partner. There is no other social-political model around that would require the demonstration of the superiority of ours. Moreover, the outcome of a genuinely democratic process in Iraq is likely to be very different from the point of view of American interests than in Germany in 1948 or Japan in 1946-47.

It is well and good to define democracy (according to me: as a minimum condition) as procedural uncertainty.²¹ Given the Japanese and German electorates, that uncertainty had sufficient built-in certainty that a generally pro-American and certainly anti-Soviet government would emerge in either country in free elections. The defeated right in both countries clearly preferred the Americans to the Soviets, and the same was true of all groups, including the democratic Left (with the exception of the small CPs of course). In Iraq the situation is very different. There is now no outside power threatening Iraq to whom the Americans are preferred. In the case of the majority Shi'ites, most of the people and the main political groupings would probably be on Iran's side in case of a conflict with the US. Even more importantly, with the exception of the Kurds, the main political forces in Iraq are anti-Israel, and the US is generally identified with that country and its policies. Most important, the liberation itself has been experienced by most Arabs as a humiliating occupation, even by Shi'ites, who remember the slaughter in 1991 and which country allowed Saddam to carry it out. Among the Sunni, anti-American feelings are much more intense. Moreover, the decentralized or loose federal framework demanded by the Kurds was bound to establish powerful local governments and parties intensely hostile to the United States in the Sunni triangle. Had there been fully open and generally contested elections, the chances of some of these parties making their way into the national assembly would have been excellent, and into a coalition government rather good. There was probably always this much certainty in the high uncertainty of a potential Iraqi democracy.

²¹ A. Przeworski *Democracy and Market* (Cambridge: Cambridge University Press, 1991) pp. 10ff; 40ff

But if I am right, democratization in Iraq linked to free elections always was and remains a questionable proposition for the United States. This point was first clearly articulated by Brent Scowcroft, who earlier probably opposed the war for the same reason: the US could not have gotten rid of Saddam only to bring new enemies like the friends of Iran to power in Iraq.²² Thus, in early 2003 free elections on the local level were either not permitted or, if they did take place, their results were quashed. And of course national elections were going to be delayed until the end of 2005 in favor of various provisional arrangements involving governments and rules of the game imposed by the occupying authority, eventually named the Coalition Provisional Authority, endowed with the full powers of a military dictatorship over most of Iraq (technically all, but the CPA in fact did not rule over Kurdistan).

A (foreign) dictatorship in the name of (indigenous) democracy? This is the performative contradiction I have in mind. Could it possibly work? Can democracy be externally imposed? Let me again admit that there have been conditions all over the world historically, like the various mandates after World War One, when this contradiction has been manageable. But I believe it is never manageable when a powerful enough actor supported by broad social strata steps into its framework and blows it wide open. This is the meaning of the phenomenon of the Grand Ayatollah Ali Al-Sistani, and this is precisely what he has done. An actor like Sistani is capable, in other words, of entering into a process of the imposition of liberal democracy and transforming it into both a much more autonomous and, alas, far less liberal one.

I have elsewhere detailed the series of fatwahs issued and mass actions promoted by Sistani to achieve his single-minded goal: relatively early free elections for a constituent assembly that would give Iraq its new constitution.²³ His statements echo the radical democratic

²² W. Gibbs "Scowcroft Urges a Wider Role for the UN in Post War Iraq" *NY Times* April 9, 2003

²³ "Sistani v. Bush" and "Constitution Making in Iraq" *Dissent* (Spring, 2004)

traditions of Paine and Sieyès. We have no way of knowing whether the style was adopted sincerely or for American and international consumption. I favor the former interpretation. In any case, it is not really worthwhile to say either that he was sure of his majority in free elections or that he hoped to establish some kind of Islamic republic through such a process. The first statement may be true, but does not detract from the justice of the demand. The second statement means only that he is a majoritarian democrat, not a liberal one. There is no evidence whatsoever that he wishes, Iranian-style, to have his majority make sure that the most important future incumbents will never be exposed to the contingency of free elections, that he wants to use democracy against democracy itself.

There is thus at the very least something on the procedural level in common between *his* democracy and ours, allowing a possible future interaction and mutual enrichment. From our point of view, crossing the two democracies would have the aim of liberalizing and constitutionalizing majoritarianism, and we do not know to what extent, if any, he would resist constitutional restraints on future majorities. What we do know, however, is that he has strongly, and in part successfully, resisted constitutional-type restraints imposed by the occupying power.

Imposing a Constitution?

The interim constitution, the Transitional Administrative Law, was the terrain on which the three democracies first met in Iraq, but, it appears, with liberal democracy as an ally of imperial democracy against autonomous democracy. How the given alliance came about is nevertheless not too difficult to explain.

From a normative point of view, sustained by experience from Spain to South Africa, the purpose of interim constitutions in contemporary democratic transitions is to introduce

constitutionalism into the process of making constitutions, to produce legitimacy for inevitably non-democratic beginnings, and to allow constitutional learning before later constitutional self-binding or insulation. I think I have demonstrated in other writings that the badly drafted, hastily imposed TAL accomplishes these purposes in a remarkably deficient manner.²⁴ I argue, however, that its motivations were rather different: to evade the requirements of international law and to give Sistani his elections for a constituent assembly while imposing a constitution that such an assembly would not be able really to change. It is the second dimension that produces the alliance between liberal and imperial democracy.

As to the first evasion, it involves a simple matter. As I noted, the Hague Convention forbids the occupying power from changing the legal order of the occupied country. This blanket requirement, which emerged for traditional European states still in a supposedly Westphalian order, is in fact rather absurd in cases of formerly totalitarian or violently repressive pseudo-legal orders, where any occupation would have to change the laws immediately. Even if only concrete measures were substituted for a definite period (like the CPA regulations and decrees), they would certainly have irreversible consequences. Thus, we need today an entirely new type of regulation of these matters, formulated so as to inhibit poorly motivated, illegal, or unjust interventions but regulate the consequences of all interventions more effectively than the radical Hague requirement. But now the Convention stands, as it stood in 1945-46 when General MacArthur's staff (SCAP: Supreme Commander for the Allied Powers) formed a "constitutional convention" in its own Government Section²⁵ and formally evaded it by passing the imposed draft through the legal and orderly inherited Japanese process. At that time, the Americans were forced to operate in the field of international law, and the Convention that was evaded therefore

²⁴ "Interim Imposition"

²⁵ Koseki *op.cit.* p.79

had consequences. Almost from the beginning, when the American draft was translated into Japanese, through the various parliamentary discussions, a unique Japanese interpretation of the imposed constitution developed that changed many of its meanings for better – or, from a liberal point of view, more likely for the worse.²⁶

In Iraq there was no orderly process, based on a normal parliament, that could be manipulated from behind the scenes. But here the international law prohibition (twice reaffirmed by the Security Council for the present case of Iraq!²⁷), taken together with Sistani's challenge, was to have a far more potent and conflictual result: the interim constitution. (Nothing similar to the mass mobilization promoted by Sistani could exist in Japan, where socialists and communists played a passive role after producing interesting constitutional drafts.) Again, this is what I mean by acting in a double legal field constituted not only by imperial dominance but also by international law. After trying various ridiculous formulas to impose a new constitution through its creature, the Governing Council, the Americans chose as their method of evasion an interim constitution to be drafted by the GC with CPA approval and authorization. Accordingly, it could be claimed that Iraq's legal order would be modified by Iraqis (this was legally worthless) and only temporarily, provisionally, and in a way fully reversible by the freely elected assembly, with the dates for the elections initially brought forward to March 2005 to placate Sistani.

Again, there were concessions within the evasion. Once a serious relevant demand from below emerges, earlier elections are better than later elections. If there are to be elections, they require rules of the game guaranteeing free competition and its prerequisites to all legitimate contenders. An interim constitution, had it been legitimately introduced, would have been the right legal instrument at that stage. Neither the promise of earlier elections nor the downscaling

²⁶ Ibid. chapters 6, 8 and 9

²⁷ SC Resolutions 1483 (5) and 1511 (1)

of the constitutional project to an interim one would have happened without the converging counter-pressures of international law and oppositional politics. Yet these concessions were also meant to keep the process in its original imperial framework, and thus represented evasions of the spirit of the law and of the democratic demand.

The Grand Ayatollah was, however, impossible to fool, especially since the CPA-GC agreement of November 15, 2003 that first pointed to an interim constitution would have involved the creation of a co-opted rather than elected national assembly. The freely-elected constitution-writing body would only have been a weak convention of the American type, one that would not have been the locus of the provisional government. Even after Sistani denounced the formula and obtained the junking of the co-opted assembly with UN help, the interim constitution was drafted and promulgated, in spite of a short protest by some of his adherents in the GC and his own attacks. And this interim constitution, the TAL, involved powerful procedural limits on the ability of the freely-elected constituent assembly (no longer a mere convention) to produce its constitution: amending the TAL required the votes of three-quarters of the members of the National Assembly and the consent of all 3 members of the presidential council, and the famous veto of any permanent draft was given to two-thirds of the voters of any three provinces. The likelihood of the interim becoming permanent was enhanced by the TAL's own failsafe provisions enacted for the possible or even likely failure of ratification or even the drafting a permanent constitution (TAL: Art. 61 E and G). This is the point where the international prohibition against an occupier changing the laws of an occupied country was potentially subverted. Assuming that a strong, regionally dominant minority is fundamentally attached to the American-imposed TAL – and this is the case for the Kurds – if the freely-elected drafters changed the TAL significantly, the new constitution would not be ratified and the TAL

would remain in effect. Thus, either way, the temporary would become permanent or quasi-permanent.²⁸

Let me note, however, what Sistani gained in this round by exploiting the performative contradiction of the American project: not only an even earlier date for elections (no later than January 31, 2005), but also a powerful, freely-elected rather than co-opted National Assembly that would be the seat of governmental powers. This concession can no longer be understood as mere evasion or subterfuge. Nevertheless, Sistani remained so dissatisfied with the imposition of the interim constitution that he went so far as to block its formal approval in Security Council Resolution 1546. What he objected to was the obvious legal condition that the constituent powers of the assembly he had fought so hard for and now attained would be bound.²⁹ In fact, this legal condition corresponds to the emerging model of “post-sovereign constitution making,” which has broken with the idea of unlimited constituent power or an assembly with the plenitude of all powers. The constitution-making assembly in South Africa, for example, had to put up with a far more restrictive set of limitations, including a series (34) of almost unalterable constitutional principles enforced by a new constitutional court. There was, however, one fundamental difference between the emerging model and what was done in Iraq: the restrictions in Iraq, very heavy on the procedural level, did not emerge in a legitimate, consensual, or broadly representative process, but were simply imposed by the fiat of the occupying power. It is hard to

²⁸ Professor Nathan Brown, whom I greatly respect, disagrees with my claim that the rejection of the new constitution and the preservation of the TAL could occur indefinite number of times, because, according to him, the TAL does not allow the extension of the time limit of the interim period by amendment (art. 3A). But the indefinite number of failed ratification and preservation of the TAL requires no amendment, only following the plain text of the TAL (art. 61E) that does not limit in any way the number of times this can occur. Of course, politically, the greater likelihood is either the drafting of a final constitution that largely corresponds to the TAL, and thus can be ratified, or the majority, the first or second time around, repudiating the TAL altogether. The second of these options could occur if there are two blocks stopping ratification: a pro-TAL Kurdish and an anti-TAL Sunni block.

²⁹ He did not buy the many re-assurances, of Brahimi and Allawi among others, that a freely elected assembly could not be bound in any case, a position that I also maintained especially after SC Resolution 1546 did not underwrite the TAL. Sistani probably thought through already at that time the inter-related difficulties of government formation (according to the TAL, and having some consensual elements) and majoritarian repudiation of the TAL. See my “Interim Imposition” op.cit.

say whether it was the restrictions or the fiat to which Sistani most objected; probably in his mind they became inseparable. It is very important to note that in spite of United Nations proposals to this effect, no political force was there at any time to help accomplish the separation in theory or in practice!³⁰ In other words, the option of consensually-imposed, and therefore self-imposed, limitations on the power of the majority to make a constitution was not rejected by Sistani because no one seriously represented that option.

Evidently, the restrictions on majority rule were first and foremost demanded by the Kurds, who understandably did not, even for a moment, wish to try majoritarian democracy when they already had de facto federal and autonomous power in their provinces. Such restrictions also converged with US interests, to the extent that the denial of sole power to Iranian allies or friends remained a key desideratum, and the preservation of Kurdish influence over the process as a whole represented a potential opening for strong American influence as well. Finally, however, the same limitations were important to all those who found the table of rights in TAL and its requirement for significant political participation of women very much worth preserving in the face of a potential majority suspected of wishing to install an “illiberal democracy.” Here is where liberal democracy encountered imperial imposition and autonomous democracy and had to make a choice.

Struggles over Women's Rights in the TAL: Constitutionalism versus Democracy?

Once again, the right way of promoting the very same rights and the same binding of the constituent majority would have been in a legitimate process, supervised by a valid international

³⁰ I am thinking of Jamal Benomar's position papers (“Iraq's Constitutional Process: A Framework Proposal” ms. September 2003), and the report of the first Brahimi visit (“The Political Transition in Iraq: the Report of the Fact Finding Mission”, probably written mostly by Benomar, which stressed, at least implicitly, both the need for consensual process and constitutional limitations on constitution making.

authority, involving the free agreement and mutual binding of all major Iraqi forces. There is no reason why such a process, if initiated well before the insurrection, could not have included significant representation of many hitherto excluded groups, for example organized women's groups. Such a process was, however, not possible on the ground of an endless occupation, since many key actors, especially but not only among the Sunni, were uncompromisingly hostile to what they saw as national humiliation. Despite UN efforts in this direction, the American authorities certainly always resisted calling a genuinely representative roundtable or multi-party negotiating forum with decision-making powers. So the choice for the Kurds, liberals, and women was imposed rights (how real?) or the prospect (certainly exaggerated, but to what extent?) of having no rights at all. Many unsurprisingly chose the former. We have only some clues how this happened during the closed and secretive process of drafting the TAL, in relation to three interrelated controversies: the question of the role of the Shari'a in the interim constitution; the question of guaranteeing women's political participation; and the particular issue of the three-province veto over the final constitution.

The first question came up because the Interim Governing Council, the GC, not known for undertaking initiatives independent of the superior American authorities, nevertheless decided on its own December 29, 2003 to pass resolution 137, which (voiding a law from 1959) was to make the Shari'a the foundation of family and civil law. The new regulation was to be incorporated both in a so-called Personal Status Law and in the interim constitution that was then supposed to be completed by February 28, 2004. As far as I can reconstruct, during early and mid-January this proposal was strongly challenged in the streets of Baghdad by a series of women's demonstrations ranging from hundreds to thousands of participants. Undoubtedly, the anger of the demonstrators was fueled by the dramatic worsening of the condition of women in

many parts of the country, the return of honor killings, the enforcement of strict Islamic dress, firings from many jobs, as well as reprisals and threats against woman political activists.³¹ While up to 85 groups were said to participate,³² the leading role was played by two civil society organizations: the OWFI (the Organization of Women's Freedom in Iraq)³³ and the Women's Alliance for a Democratic Iraq (WAFDI).³⁴ There is much to admire in their statements and actions under difficult circumstances. Both belong to the "we" of this essay, and obviously represent the cause of secular, liberal rights for women to the best of their abilities.

Nevertheless, the differences are also striking. The OWFI, allied with small, left-wing groups, makes its demands to Iraqi society and to international opinion. It regards the CPA as a foreign occupier that should leave Iraq, and the Governing Council (later the Interim Government as well) as its illegitimate creature. The Women's Alliance does not contest the legitimacy of the GC, but addresses Ambassador Bremer, the real source of authority in their eyes. Their attitude to the occupation is unabashedly positive, and it is for this reason I would apply to them the label of *imperial liberalism*. They claim to represent hundreds of woman activists who advocated the (foreign) liberation of Iraq and who now, among other things, fear for the fate of "the forward strategy of freedom in the greater Middle East' that is a cornerstone of President Bush's policy." With all that said, their letter, after applauding Bremer's veto of resolution 137, culminates in important suggestions for strengthening women's representation in the interim constitution and building national as against merely local organizations capable of competing with the established parties. In contrast, many of the activists of the OWFI are very

³¹ "Iraq's Hidden War" *Newsweek* March 7, 2005

³² "The Civil Opposition In Iraq" : <http://www.ww3report.com/iraq1.html>

³³ See statement of January 14, 2004

³⁴ See letter of January 23, 2004

close to supporting at least secular insurrectionists against foreign domination.³⁵ It is not clear in their case, however, how they hope to secure the rights of women if the Americans are forced to leave, given the shifting of the political organization of Iraqi society to political parties, none of which (not even the main Kurdish groupings) are at all sensitive to women's rights.

Unfortunately, talk of a secular, worker-led revolution in Iraq does not fill the reader with much optimism. As against the *imperial liberals*, they represent the positions of *leftist sectarianism*.

Unsurprisingly, the two positions are close to one another in their uncompromising hostility to what they both call political Islam or the Islamist parties. Nevertheless, they clearly undercut each other on the strategic level. The Woman's Alliance lends legitimacy to the occupation (though less so to the Allawi government³⁶), which the OWFI radically rejects, while the latter considers the former's proposal for women's electoral quotas irrelevant, since the established parties can find women to fill these who are supposedly enemies of women's rights. The OWFI has also supported the boycott of the elections, while undoubtedly members of the Women's Alliance campaigned (and were nominated?) for Allawi's list. Neither activity obviously contributed to the success of the other.

Yet both groups have had some success. It was above all the larger and more radical demonstrations led by the OWFI that led to the Governing Council to revote and repeal resolution 137, although Bremer's veto threat also had to play a major role. That threat may have been influenced by the appeals of the Women's Alliance, and it is even likelier that the requirement that one-quarter of the National Assembly be female was written into the TAL as a

³⁵ "U.S. Troops Will Have to Leave Now and We Will take Care of Iraq" interview with Yanar Mohammed in *Democracy Now* September 13, 2004 [<http://www.democracynow.org/article.pl?sid=04/09/13/1428243>]

³⁶ See Judge Zakia Hakki's critique of the formation of the co-opted Interim National Council "Peace Needs Women, and Women Need Justice" lecture at Conference on Gender Justice in Post Conflict Situations Co-Organized by the United Nations Development Fund (UNIFEM) and the International Legal Assistance Consortium (ILAS) 15-17 September 2004.

consequence of their demand. Assuming that the figure represented a compromise between two factions of the GC,³⁷ Bremer's changing one-quarter to every third person on electoral lists was probably influenced by demands addressed directly to him.³⁸

These victories, however, do not show the rightness or viability of either the *imperial liberal* or the *leftist sectarian* strategy. Appealing to the occupier, however we are to judge it normatively, puts women's rights on the side of the occupation, in opposition not only to political Islam but to Iraqi nationalism and political self-determination as well. It implies either that the occupier would (and should!) stay, one way or another, forever, or entirely unrealistic expectations about liberal and secular development during an occupation that has itself defined representation in Iraq in terms of religious and ethnically-based political groupings. At the same time, waiting for a radical popular but secular revolution in Iraq is senseless today. The anti-occupation feminists who reject both the secular political groupings tied to the occupation and the Islamic parties have almost nowhere to go for allies. In this sense, having a more attractive normative position is paid for by an even greater remoteness from political power and influence.

Let me quickly admit, however, that in the very fluid political situation, both groups already have new political opportunities. The one-third women representatives now in parliament, or their more secular part, are potential partners in dialogue for the Women's Alliance, if much less so for the OWFI. On the other hand, recent attempts on the part of the more radical feminists to establish links with the Sunni Association of Moslem Scholars (AMS), strongly opposed to the occupation but also to the more radical wing of the insurrection, may be a promising sign on their part. Nevertheless, even here the uncompromising anti-Islamic-party stance is likely to hurt alliance building or even dialogue. The women representing Islamic

³⁷ Yochi J. Dreazen "Long Way From Indiana" *The Wall Street Journal* April 12, 2004

³⁸ CPA Order 96, 4 (3)

parties should be open to considering many women's issues, but not if they are raised by groups unwilling to recognize any of the aims of Islamic parties as legitimate. Similarly, the AMS is now involved in intense negotiations with the followers of Moktada Al-Sadr, who represent the most theocratic wing of the Shi'ite constellation. It makes little sense to be participating in discussion with the Sadrists and to totally reject more moderate Islamist politicians in parliament. Nor would it be a good idea to force the AMS to choose between feminists and Sadrists. What I am arguing for therefore is the beginning of a dialogue, in parliament and out, between "our" democracy, represented by women's movements in civil society, and "their" democracy, represented by the Shi'a parties and the AMS.

It should be frankly admitted that the interim constitution, its status (resented by the Shi'a), and its contents (supported by women's movements) represent roadblocks in the way of this dialogue that cannot be simply gotten rid of. Women's movements in civil society see themselves as having contributed to the making of the interim constitution, the TAL, which is distinguished by many strong affirmations concerning rights. Islam is said to be "the official religion of the State and is to be considered a source of legislation" – a source, but not the only source, as resolution 137 had it. While "No law that contradicts the universally agreed tenets of Islam ... may be enacted during the transitional period," the same is affirmed in the very same sentence regarding "the principles of democracy, or the rights cited in Chapter Two of this Law" (Art 7A).

The strong Chapter Two affirmations of rights concerning civil equality, non-discrimination, due process, and so on were to an important extent unenforced during the supposed restoration of Iraqi sovereignty under the Interim Government, its various states of emergency, and the activities of the almost entirely uncontrolled and unmonitored American

military forces. This lack of enforcement does not, characteristically enough, diminish the symbolic weight of the TAL to both sides. To Iraqis from Sistani to the Association of Moslem Scholars, the document remains an externally imposed constitution, a badge of oppression, one well endowed with mechanisms by which it seeks to perpetuate itself. They well remember that Ambassador Bremer threatened to hold back transferring sovereignty if the five Shi'ite members persisted in their opposition. Of course, most important Sunni groups did not agree to the document at all. And yet, at the very time when, under Sistani's pressure, five Shi'a members of the governing council were still refusing to sign the TAL because of its three-province veto, the Kurds, who controlled three provinces, already regarded the document as something like their Magna Carta. To them, other minorities, and liberal women, it represents constitutionalism against the potential tyranny of the majority, and its spirit and perhaps its very content should indeed be perpetuated.

Thus, it is the very characteristic that involves the outmaneuvering of both international law and the Shi'a movement led by Sistani that makes it so valuable to minorities and liberals of various colors. To the majority, however, the same features represent tyrannical external attempts to subvert their rights, supported at best by their own coerced agreement. It is this situation that puts constitutionalism in direct conflict with democracy. It is not in the interest of minorities and of women that the conflict continue and be even exacerbated – because in the end both constitutionalism and democracy are likely to be sacrificed.

From Substance to Procedure?

Its defenders support the TAL because of its substantive contents, which they would like to see preserved in a permanent constitution – or, secretly, in the interim made permanent. Its

opponents reject the imposed procedure that brought the interim constitution about and its potential deformation of future democratic processes. The reason for the great gap between procedure and substance lies, however, in a faulty and illegitimate procedure. It is perhaps not too late to remedy this problem, now that elections have actually taken place but without any guarantee that a functioning government and legitimate constitution making are to follow.

We have good reason to believe that comprehensive, multi-party negotiations, where actors have incomplete knowledge of the future, have the best chance to produce constitutional safeguards supported by mutual promises and commitments. Such negotiations did not take place in Iraq because the Americans did not want them. But now a different force could be in charge – if it wants to be in charge and escape American manipulation and tutelage, and it remains in its interest to move toward a large-scale, comprehensive historical compromise. There is no point in inheriting a state that is no state at all, or making a constitution that is no more than a piece of paper.

The Sunni boycott of the elections as well as the looming conflict over Kirkuk dramatize the issue. There are no major Sunni forces in the recently-elected National Assembly, and it is unthinkable that a new constitution be drafted without the participation of this central population group, to which so much of the professional and military elite belong. Thus, there is some reason to hope that a large-scale negotiating process, in or out of parliament, may still be cobbled together to produce a pre-constitutional bargain.³⁹ Similarly, the Sunni have a great interest in Kirkuk, since without a share in its oil resources, their part of the country would be permanently impoverished. If there is ever to be civil peace in Iraq, they must be brought into the negotiating process concerning the fate of this city, territory, and resources.

³⁹ For several alternatives see my three guest editorials on Juan Cole's website, *Informed Comment* (December 28, 2004, February 4 and February 21, 2005). Of course other options are conceivable and perhaps viable.

A constitution cannot be viable if it is not made for an existing state, or if a new state is not created through agreement on a basic law. In Iraq the old state was destroyed in a wholly irresponsible manner by the American occupiers, and they have put only themselves and their means of violence (hardly a legitimate monopoly) in its place. The interim constitution was not made for a coherent state, nor did it create one through either agreement or successful conquest. Thus, the document and the process based on it cannot be effective. Its successor's viability presupposes that a state is structured or restructured that is capable of enforcing law and monopolizing, more or less, the legitimate means of violence in Iraqi territory. This would mean a binding agreement among all the armed political forces about the role and subordinate status of the many militias now in existence. It would also mean ending the large-scale involvement of the Sunni community in the ongoing insurrection. That is possible only if there is a clear and timely perspective for ending the occupation. Assuming that, only comprehensive negotiations among all the major political forces, especially those linked to organized means of violence, could re-establish a viable state power in Iraq. The key to constitutional legitimacy is effective state-making, which presupposes a horizontal agreement among Iraqis, freed of the burden but also the supposed advantages of the occupation, concerning the major political rules of the game including the relationship of federal and central authorities. Only with the end of the occupation, as demanded by the AMI and the Sadrist movement but also the OWFI, can Iraqis learn that the problems of security can be solved only by their own state, and that they cannot substitute a foreign political intermediary to establish its sovereign powers.

Admittedly, in such a state bargain civil society groups that do not possess means of violence do not have a natural role. Fortunately, however, any bargain would have to be agreed to by a freely-elected parliament, where their influence can be easily brought to bear. Here any

political bargain will require the assent of women and secular deputies, many of whom are linked to civil organizations. If they manage to divest themselves of their uncompromisingly hostile attitude to the Islamic parties, it is hard to believe that parliamentary arithmetic will not favor the reassertion of many important rights. Already, the Kurds do not accept the imposition of an Islamic theocratic state in Iraq, though it is hard to know where they will draw the boundaries. Once a government is formed, however, all coalitions will be weak and probably temporary, working issue by issue. A powerful secular caucus including women, and another, a women's caucus including Islamic women, would have strong roles to play in political bargaining if they could be formed. If some kind of pre-constitutional negotiating process emerges with Sunni groupings like the AMS drawn in, anti-occupation women's groups like the OWFI can play a role through their agency as well. What is important is that it be recognized that a democratic process ties all the participants together, and that process logically entails at the very least the maintenance of the *political* rights that makes the participants able to participate.

There is little evidence that even the Islamic parties currently wish to attack political, participatory rights, which now include the electoral law with its guaranteed seats for women. I could be wrong. But, in any case, in the political bargaining process there will be room to further reaffirm these rights as well as many civil rights as well. If the imperial democracy had its performative contradiction, so does "their" democracy, Shi'a democracy in Iraq, and it is this. There is now a commitment to democratic procedure and political rights, affirmed through a series of fatwahs, but not to the civil rights and civil equality without which political participation is ultimately without value. Here too the best politics would be based on the immanent and practical critique of the performative contradiction. Sistani's method should be used against Sistani himself. But this would mean first recognizing the authenticity of *their*

struggle, which is, I believe, for the Shi'a as well as the Sunni, in spite of the different means used, directed first and foremost against the illegitimate occupation.