

Interim Imposition

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[MacArthur] said that he had issued no orders or directives, and that he had limited himself merely to suggestions....He stated that it was his belief, that it was his conviction, that a constitution, no matter how good, no matter how well written, forced upon the Japanese by bayonet would last just as long as bayonets were present, and he was certain that the moment force was withdrawn and the Japanese were left to their own devices they would get rid of that constitution.

Recorded on January 29, 1946 by Nelson T. Johnson , Sec. Gen. of the Far East Commission¹

I. Part One: Interim Constitution in the Emerging Model of Regime Change

Legitimacy and Learning in Interim Constitutions

Interim constitutions have recently gained new normative and analytical significance during the wave of democratic transitions following 1989. The Iraqi interim constitution like its progenitor, the American project of regime change in Iraq, is ideologically parasitic of this wave and its achievements. Its moment of truth, common to all ideologies, is more than outweighed by its falsehood. While the interim constitutions of Hungary and South Africa expressed the logic of legal, negotiated and pluralistic change of regimes, the Iraqi Transitional Administrative Law (TAL) belongs to a program of externally imposed revolution carried out by a foreign military dictatorship. Nevertheless, and here is the moment of truth, this interim constitution, without genuine legitimacy, in its poor drafting, rigidity, and political over-reach bears the marks of the failure of constitutional imposition, from the beginning of the occupation of Iraq to what is likely to be its inglorious end.

Speaking historically, interim or transitional or provisional constitutions have been produced for a variety of reasons. Minimally they signify only the recognized need for constitutional arrangements at a time when a political community is not yet prepared

¹ Cited by Koseki Shoichi in *The Birth of Japan's Postwar Constitution* (Westview Press, 1997) 75-76. Was it already a misrepresentation the moment (January 29, 1945) this was uttered? Probably. It is proven by Koseki that two days later, on February 1, Gen. Courtney Whitney was already advising MacArthur to the contrary, and it was this advice that was followed. Yet the statement remains valid for Iraq today!

for whatever reason to produce a more permanent documentary constitution that is almost always insulated against easy alteration. The best known example is the *Grundgesetz* whose provisional status (till 1990) originally indicated that the country was occupied, divided, and that its citizenry was not yet ready (in the opinion of the framers) to fully participate in the *constituent power*. Interestingly, it was in West Germany that the term “administrative statute” was first suggested in the place of “constitution” before “basic law” was chosen.² Similarly, to some Japanese participants in the constitution making process the fact of occupation would have been itself sufficient reason for declaring the provisionality of the Japanese post-war constitution.³ As against these examples, interim constitutions have a rather bad name in the Arab world, often standing for illegitimate attempts to make supposedly temporary authoritarian and/or paper constitutions permanent or semi-permanent through subterfuge, the last glaring example being the Iraqi interim constitution of 1970 that lasted, formally speaking though without much meaning, for 34 years till the Americans overthrew Saddam!⁴

The significant role of interim constitutions in the Hungarian and South African transitions in the late 1980s and 1990s fully merits a reassessment of the potential significance of this legal instrument. Their role in creating the context for the peaceful dismantling of dictatorships has been now generally recognized. It is worth stressing nevertheless that relatively detailed publicly promulgated interim constitutional arrangements establishing viable, pluralistic, enforceable forms of political competition can allow incumbents from pre-democratic regimes to have a role in constitution making without giving them control over this process and deforming subsequent democratic elections.⁵

On a more abstract level I see the achievement of interim constitutions in two dimensions: *legitimacy* and *learning*. Facing the logical impossibility of purely democratic beginnings of democracy under dictatorships, interim constitutions made by Hungarian and South African types of round tables allow the substitution of a pluralistic form of legitimacy for an initial democratic form, as long as the major political forces of

² To my knowledge it was Social Democratic lawyers during the earliest phases of German constitution making that first offered the nomenclature of “administrative statute” (instead of constitution) to indicate not only provisionality but also the inadequacy of making a constitution-like set of rules for an occupied hence non-sovereign (and in that case divided) country. At that time the lawyers of the three military governments explicitly declared their hostility to such modest language that would of course devalue their own achievement, and demanded a constituent assembly producing a constitution as in France and Italy previously. The compromise formula was that of a “Parliamentary Council” drafting a “Basic Law”. Peter Merkl, *The Origin of the West German Republic* (Oxford University Press, 1963) 52-54

³ Koseki Shoichi op.cit. 64, 70 and 33 where the proposal for a two stage process of constitution making is mentioned.

⁴ Nathan J. Brown, *Constitutions in a Nonconstitutional World. Arab Basic Laws and the Prospects for Accountable Government* (SUNY Press, 2002) 70 (for Syria); 79 (for Egypt) and 86-87 (for Iraq). I am grateful to this careful and serious author with whom I disagree with on some theoretical and normative matters regarding paper and authoritarian constitutions that are not relevant here.

⁵ This is well argued for the Spanish transition already by Andrea Bonime-Blanc in her *Spain's Transition to Democracy. The Politics of Constitution Making* (Westview, 1987) 139ff, even if she is in my view off the mark when maintaining that in West Germany (1945-1949) these conditions were not fully satisfied.

society are well represented in the negotiating process.⁶ Pluralistic justification (that cannot *entirely* dispense with its own element of exclusion, hence imposition) can be only the first step in the genesis of democratic constitutional legitimacy. Through its very provisionality the interim constitution implies, entails, and in the best case legally requires the free election of a constitutional legislature that will produce the “permanent” constitution. Interestingly, the element of genuine legitimacy (as well as the mutual promises and commitment of major political actors) allows for the interim constitution to limit the sovereign, unlimited powers of the constitutional legislature (that will typically be only a “convention” or even an ordinary parliament, and not a--classical European--constituent assembly). At the same time, the incomplete legitimacy of the interim constitution requires that the restrictions on a freely elected body be as limited as possible under the given circumstances.⁷

An interim constitution by its nature implies a constitutional learning process involving two fundamental stages. This state of affairs mirrors the common historical experience that many constitutions (US Constitution, French Constitution of the Vth Republic, the *Grundgesetz*) emerge after the dramatic failure of a recent forerunner, whose problems can become the occasions for important learning experiences. The new interim constitutions institutionalize this kind of learning within a single process, making it less likely that revolutionary, totalizing breaks lead to replacement of earlier achievements, and that, as in the French revolution and in many Latin American countries, the second constitution is soon replaced by a third, and a fourth and so on. *Thus the new type of interim constitution allows learning to take place across two interlinked constitutions.*⁸ A technical condition of this type of learning is establishing a considerably more flexible amendment rule for the interim constitution than what would be appropriate for the permanent one in the same social-political setting. Even more important is for the interim constitutions not to interfere with the learning processes involved in making the permanent constitution beyond the provisions or principles

⁶ This pluralistic legitimacy supplements in the given cases the legal rational legitimacy implied by the continuity of a legal order, whose rules are used to usher in change. Since the participants of Round Tables, to become legitimate at all there is a high likelihood that they will seek or accept both broadly pluralistic representation, and consensual internal decision making. They cannot afford obvious exclusions, say of the Inkatha Freedom Party in South Africa that became a thorn in the side of both ANC and NP.

⁷ One restriction however enhances democratic legitimacy, the “down-stream legitimacy” of having to submit the draft of the permanent constitution to a popular referendum. Combined with referenda the emerging method of constitution making has a chance to combine all three types of legitimacy stressed by Elster: upstream, process and downstream. See: “Constitution Making in Eastern Europe: Rebuilding the Boat in Open Sea,” *Public Administration* Spring/Summer 1993

⁸ The learning advantage of an interim constitution, is that political formulas indispensable in the short term but very questionable in the long term (like consociationalism, or rigid power sharing, or great coalitions) can be included in interim constitutions, if carefully planned, without the fear of their transposition and insulation in the permanent document. While these arrangements, if they are to work, cannot be exposed to a generally flexible amendment rule, sunset provisions are able to limit the longevity of mutual guarantees that are desirable only in the initial phase of the transition. During that phase, the operation of the interim constitution, actors in a divided society can learn to politically interact and to seek guarantees (constitutionalism replacing consociationalism was the South African formula) more compatible with majority rule, and the freedom of the constitutional legislature.

consensually agreed upon by the main participants.⁹ No interim constitution could violate its own purpose more obviously than one that through its own rules both inhibited learning, and tended to make itself permanent. This is the case unfortunately of the Transitional Administrative Law in Iraq.

Interim Arrangements and Typology of transitions

There is certainly an elective affinity between types of regime change and different options of interim arrangements. The interim constitution cum round table model is most at home in a path of political change like the negotiated or coordinated transitions or regime changes of the period from 1976 to 1995 that presuppose legal continuity in the midst of the rupture of old regime legitimacy.¹⁰ Evidently, the revolutionary process in Iraq involving rupture of both legality and legitimacy, would constitute one of the unlikely cases for the adoption of the new formula.¹¹ Nevertheless, an interim constitution was produced in Iraq *but* by one sided imposition and not by round table negotiations. If we insist on path dependence to the bitter end, we may link this mixed outcome to a mixed type. When compared to indigenous revolutions carried out by an internally supported elite, Iraq's *externally imposed revolution* has weaker conditions of transitional legitimacy but is framed by obligations of an *unbroken* international legality. In all revolutions the legitimacy of the revolutionary elite feeds on a double source: its act of liberation from a hated old regime and its promise to establish a far better new one. Initially only the first claim can be tested. In the case of Iraq's externally imposed revolution however there is both a chronic lag of legitimacy that neither indigenous revolutionary agents nor external liberators from foreign occupiers have to face. The liberators appear from the outset as occupiers. Their agents are agents of an occupying power. Repeated attempts have to be made therefore to manufacture legitimacy, by inevitably awkward public relations, by pictorially representing Iraqi society in ethnically and religiously "balanced" consultative bodies, by trying to gain the

⁹ Indeed, the one great danger of interim constitutions even in non-authoritarian settings is that they work too well, and make themselves permanent not through the free choice of a democratic assembly but by dramatically interfering with that choice. *Rien ne dure que le provisoire!* it was said soon after the making of the emphatically provisional *Grundgesetz* that is still, 55 years later, Germany's valid constitution. Even when there is no interference with the freedom of a future assembly as in Hungary, the absence of any provisions (rules, incentives, disincentives) for making the permanent constitution can lead to the interim becoming permanent. (Arato *Civil Society, Constitution and Legitimacy* (Rowman and Littlefield, 2000); Arato-Miklosi "Constitution Making in Hungary" ms. 2003) Beyond its own amendment rule and sunset provisions, it is therefore extremely important for the interim constitution to regulate in plausible way the time frame and the procedures for making the permanent constitution.

¹⁰ Developing a model first introduced by Janos Kis, "Between Reform and Revolution" *Constellations* (January 1995); A. Arato, "The Occupation of Iraq and the Difficult Transition from Dictatorship" *Constellations* (September 2003) I use the dimensions of *legitimacy* and *legality* to distinguish between four pure types of change, involving rupture and/or continuity in these juridical domains. Thus the classical revolution and reform dichotomy can be reintroduced as rupture vs. continuity in both of these dimensions. But now there are two other possibilities: continuity of legality and rupture of legitimacy, and legal break carried out by a continuous, legitimate institution.

¹¹ Nevertheless I have argued for the potential relevance of this model to Iraq in several articles, most recently in "Sistani v. Bush: Constitutional Politics in Iraq," *Constellations* 2004 and "Constitution-making in Iraq," *Dissent* Spring 2004.

support of respected public figures, by activating traditional structures like tribes, and by trying to create the aura of constitutionalism in an interim constitution. In the end nothing short of free elections will do. Democratic elections however, if really free and competitive, may be won by forces most able to challenge and confront an occupation they consider illegitimate. Thus, the one source of legitimacy that may justify the occupation as liberation may lead to its final denunciation. This is why electoral legitimacy was so often eschewed even on the local level, even in the South, where there was in 2003 no security reason against holding elections.

At the same time, since the external relations of states are governed by international law, even if much weaker than its domestic counterpart, there is not a complete legal rupture in the case of externally imposed revolution. Especially since the signing of the Hague Conventions, as affirmed by the Geneva Conventions and various Security Council Resolutions (#s 1483, 1511 and 1546) in the specific case of Iraq the occupation by one state of the territory of another is today a legally regulated matter. With the interest of the United Nations, and especially the Security Council in political processes that pertain on the maintenance of international peace and security, both opportunities and limits are established for occupying powers that in a case like that of Iraq partially compensates for missing legitimacy as long as the occupying power is willing to play by the rules and make use of the institutions and offices of the world body to some not completely determined and always negotiable extent.

With respect to our topic, international law seems to be predisposed against constitutional imposition by an occupying power, and perform its domestic agents. According to Article 43 of the 1907 Hague Convention, “[T]he 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.”¹² This according to many international lawyers is still valid law in spite of the usual problems with enforcement, and the possibility that the Security Council may permit what the treaty has banned: a significant role of the occupying power in constitution making. “The objective overall is not to change constitutional arrangements but to protect them,” according to the recent (December 2001) pamphlet *The Responsibility to Protect* that seems to fudge two meanings of constitutional: regime and constitutionalism.¹³ Yet even in the case of authoritarian regimes overthrown from the outside case law seems to bear out the claim that the Hague obligation remains valid.¹⁴

¹² The Avalon Project at Yale Law School: *Laws of War : Laws and Customs of War on Land (Hague II)*; July 29, 1899

¹³ The International Commission on Intervention and State Sovereignty goes a long way toward justifying human rights interventions.

¹⁴ I focus only on case involving the United States. Already in Japan in 1945 it was recognized by the American occupiers that their self-imposed tasks could not be easily consistent with international treaties that presupposed either outright annexation or the establishment merely of a sympathetic government to be the only goals of foreign occupation. (See p. 93 of Koseki Shoichi’s excellent book. Simon Chesterman quotes Stalin to a similar effect in this issue: “This war is not as in the past; whoever occupies a territory also imposes on it his own social system. Everyone imposes his own system as far as his army can reach. It cannot be otherwise.”) Nevertheless, it has been documented that in Japan in 1946-1947 the Hague

What I am suggesting therefore is that an interim constitution, desirable on normative grounds, had some plausibility in a country of externally imposed revolution like Iraq under the combined circumstances of weaker legitimacy, and the particular constraints and opportunities offered by international law. These factors however do not mean that an interim constitution, if introduced would necessarily be a workable proposition. For it to work, the interim constitution had to be legitimately introduced, and it had to be well designed. In Iraq the interim constitution was however imposed in manner as to make its legitimate authority a highly doubtful proposition from the outset. And it was designed in such a way as to inhibit the main purpose of interim constitutions: the facilitation of constitutional learning.

II. Part Two. The Interim Constitution in Iraq

Political Imposition and its Failure

The short history of constitutional imposition by the U.S. in Iraq, real and attempted, did not begin with the interim constitution. Almost from the beginning of the occupation, a variety of American spokesmen treated it as an entirely unproblematic matter that a body authorized (and controlled) by them alone could draw up a constitution for Iraq, or authorize on their own a constitutional conference with or without a following popular referendum that would ratify the document. Even the first relevant fatwah of the Grand Ayatollah Ali al-Sistani challenging such an imagined procedure in the name of a democratic constitutional assembly had no initial effect on these plans.¹⁵ Instead, there was an attempt to further concretize them in the Governing Council handpicked by the U.S. authorities.¹⁶ It was now the GC, working through its own Constitutional Preparatory Committee that was to organize the Constitutional Conference that would produce the constitution in line with the initial American plans.¹⁷ At one point Secretary Powell gave the GC six months to produce Iraq's [permanent] constitution.¹⁸ These efforts suffered a double shipwreck: Sistani, supported by immense crowds in Najaf and

Convention played a striking role in the formal passing of the constitutional draft in spite of the fact that the document was originally produced and imposed by MacArthur's Government Section sitting "as a constitutional convention". The circle was squared by the formal passing of an entirely new constitution, establishing a completely new political regime as a mere amendment of the 1889 Meiji Constitution by the last Imperial Diet under that inherited constitution.(ibid.79, 92-93)

¹⁵ "These [occupation] authorities do not have the authority to appoint the members of the constitution writing council. There must be general elections in which each eligible Iraqi can choose his representative in a constituent assembly for writing the constitution. This is to be followed by a general referendum on the constitution approved by the constituent assembly." Ali al-Husaini al-Sistani, June 25, 2003

¹⁶ On July 13 the Coalition Provisional Authority (CPA), headed by Paul Bremer, appointed the Iraqi Governing Council (GC). While the Kurdish and some of the Shi'ite members represented real political forces and organizations, the majority represented no-one, and were picked because of their American connections.

¹⁷ For one version see op.ed. by Noah Feldman "Democracy, Closer Every Day" in *NY Times* September 24, 2004

¹⁸ Steven Weisman "Powell Gives Iraq 6 Months to Write New Constitution" *NY Times* September 26

Karbala renewed his demand for free elections for a constituent assembly, and the GC's own Committee came to oppose top-down constitution making and sought some kind of viable compromise.¹⁹

From this point on the project of imposition came in a variety of disguises. The first was the apparent Bush-Sistani compromise of November 15, the first document where the idea of an Interim Constitution appeared.²⁰ Sistani's free elections were conceded for a constitutional *convention* (the terminological shift was not insignificant) by March 15, but in the meantime a set of provincial caucuses of hand-picked notables would choose a transitional legislature and an executive based on it that would stay in power through the whole constituent process. All this would be regulated by an interim constitution, one *drafted and imposed* by the GC with the advice and consent of the CPA.²¹

When Sistani saw through the ploy of November 15 and its continued logic of imposition²², the disguise shifted to one unwittingly but unavoidably provided by the UN. A Fact Finding Commission led by the Special Representative of the Secretary General, Mr. Lakhdar Brahimi was invited by the CPA and GC to come to Iraq in February to help persuade Sistani that early elections were impossible, and to search for alternatives.²³ What the U.S. at that time cared about was only the delay in elections, and soon after Brahimi's visit and report of February 23, the interim constitution (Transitional Administrative Law, TAL) was rammed through, in a coup like fashion, despite the open resistance of five Shi'ite members of the GC.²⁴ That document, repeatedly denounced by

¹⁹ Patrick E. Tyler "Iraqi Groups Badly divided Over How to Draft a Constitution" *NY Times* September 30, 2003

²⁰ Paragraph 1 of the text of Agreement on Political Process, which speaks of a Fundamental Law in contrast to a Permanent Constitution. I accept Noah Feldman's word that it was not my suggestion to him in late October that was the source of the CPA zeroing in on the idea of interim constitution in November. I do so all the more willingly because I do not like the idea of being the founding father of a miscarriage, nor the possibility of having unwittingly participated in trying to trick the Grand Ayatollah al-Sistani who is the one great figure in the whole sorry mess of the Iraq war and occupation. For the record, as always, in my original interaction with Feldman I raised the question of a round table like expansion of the negotiating process and the interim constitution together.

²¹ Arato "Sistani v. Bush" op. cit.

²² "First of all, the preparation of the Iraqi State (Fundamental) Law for the transitional period is being accomplished by the Interim Governing Council with the Occupation Authority. This process lacks legitimacy. Rather the [Fundamental Law] must be presented to the [elected] representatives of the Iraqi people for their approval. " Translation by Juan Cole See his website archives: [Juan Cole Informed Comment.htm](#)

²³ Before the initial visit, I had a chance to informally advise one member of the Mission, Mr. Jamal Benomar, who became Mr. Brahimi's chief of staff. At the time it was clear that the UN was interested in a round table or a national conference formula that would produce a provisional government, and prepare for elections earlier than the Americans, but later than Sistani wished. These elements are still in the February 23 text "The Political Transition in Iraq: Report of the Fact Finding Mission", but with weak emphasis on the crucial element of pluralistic negotiations that were not connected to the problem of the interim constitution.

²⁴ Brahimi's irritation is evident every time he is forced to speak of the TAL. See his joint news conference with M. Barzani: "This law, first of all, we had no role in establishing...No one said it's a constitution and it is clear it is transitional". See *UN Homepage* for April 14, 2004. Certainly, Brahimi already knew how much Barzani was attached to this document.

Sistani²⁵, contained a gaping hole concerning both the origin and the structure of governmental arrangements between a projected June 30 transfer of sovereignty and free elections between December 31 and January 31, left by the elimination of the caucuses and the interim legislature. I can only speculate as to the causes of this glaring omission: either the CPA did not have the courage to challenge Sistani with its own formula, or the GC members, fighting among themselves, did not have the requisite consensus. While the U.S. was at the very least interested in a formula the Security Council could accept (and thus in attaining Brahimi's imprimatur) the majority of the GC sought throughout to fill this gap itself, or at least through its own candidates.²⁶ Through the complicated games played by various actors in this period,²⁷ only Sistani was consistent and open concerning what he wanted, namely to neutralize the imposition of the interim constitution, and this neither the UN nor the Shi'ite members of the GC could attain for him, though remarkably enough this Grand Ayatollah recognized already in March the great importance of the TAL not receiving Security Council authorization.²⁸ With Sistani tricked a second time, the Shi'ite negotiations moved to the streets in April, this time in the form of Moktadah al-Sadr's *intifadah*.²⁹ Now Brahimi's team was invited back in April to work on a short term governmental formula, and pick the suitable personnel. On

²⁵ March 9 Fatwah (Cole trans.): "any law prepared for the transitional period will not gain legitimacy except after it is endorsed by an elected national assembly. Additionally, this law places obstacles in the path of reaching a permanent constitution for the country that maintains its unity and the rights of its sons of all ethnicities and sects".

²⁶ See Brahimi's report to the Security Council on June 7

²⁷ In particular, members of the GC seeking to preserve their power as incumbents made an effort to try to divide the Grand Ayatollah from the UN that supposedly denied him his elections.

²⁸ John F. Burns "Shiite Ayatollah Is Warning U.N. Against Endorsing Charter Sponsored by U.S." *NY Times* March 23, 2004: "Iraq's most influential Shiite cleric, Grand Ayatollah Ali al-Sistani, has warned of "dangerous consequences" if the United Nations endorses the American-sponsored interim constitution for an independent Iraq that was adopted over Shiite protests two weeks ago. The warning came in a letter released by Ayatollah Sistani's office on Monday... Ayatollah Sistani warned in his letter that he would boycott a coming visit to Baghdad by Mr. Brahimi, refusing to "take part in any meetings or consultations" conducted by him or his emissaries, unless the United Nations offered guarantees that it would not endorse the interim constitution. ... The interim constitution, he said, "enjoys no support among most of the Iraqi people," and "confiscates the rights" of the national assembly that is scheduled to be elected by Jan. 31 next year to draw up a permanent constitution. Because of that, he said, the elections he has persistently demanded — for the assembly, for the constitution it will draw up, and ultimately for a permanent government — "become useless." The cleric said he feared that the United Nations Security Council resolution he had demanded as an international guarantee of elections could be expanded to endorse the interim constitution, obliging the Iraqi people to abide by it against their will."

²⁹ One may speculate endlessly about the Moktada al-Sadr and Sistani relationship, the personal, political and theological conflicts between them etc. But there are only three reasonable explanations to what happened in April and May and by now they may amount to one. After what he (rightly) took to be the betrayal through the imposition of the interim constitution 1.either Sistani simply had Sadr take the matter into the streets, and the two played a good guy – bad guy game from then on with Sistani making the final deal; or 2. Sistani was afraid to pull the trigger, and Sadr did it for him (or Bremer forced his hand), but Sistani was able to recoup and integrate Sadr; or 3. Sadr pulled the trigger and has now become the main political leader of the Shi'a, and Sistani – without direct political ambitions, and probably not impressed by the performance of the Shi'ite leaders of SCIRI and Da'wa who allowed the interim constitution to happen – will back him if he can moderate him. The meeting on June 12 between the two, before Sadr announced his political ambitions called "mainstream" by the ever optimistic American press was especially impressive. The two clerics are according to two recent surveys the most popular politicians in Iraq! See: Juan Cole's Website for June 16.

April 14 (with then GC president, the Kurd leader M. Barzani at his side) he announced his structural formula of a government based on a Prime Minister, a weak three person Presidency, and a consultative council picked by a national conference. The same formula was formally submitted to the Security Council.³⁰ But Brahimi was to all appearances, and despite President Bush's repeated assurances, quite unsuccessful in carrying out his intention to bypass the GC, and produce a new interim leadership of non-politicians who would not use incumbency to deform the coming free elections. When it came to adding an Annex to the TAL, the GC in one of its last acts gave itself a key role in organizing also the National Conference of July, and formally included all of its members not in the new executive in that deliberative body.³¹ At least to Brahimi when he temporarily abandoned his diplomatic pose the project of imposition was very much alive: in his last speech in Iraq he referred to Paul Bremer as "the dictator of Iraq."³²

The same was not true however of the imposition against which Sistani battled, or: one imposition (the short term governmental one) seems to have vitiated the other (the longer term constitutional one). In order to impose a friendly government for the crucial period of the U.S. elections that will not ask the American forces to leave, the imposition of the interim constitution could no longer be insisted on. With Shi'a cities still potentially in turmoil, Ayatollah Sistani's support for the governmental arrangement is a sine qua non of even the remotest chance for stability in Iraq through November.³³ Note how the grudging support is once again coupled with one non-negotiable demand: neutralize the effects of the interim constitution on democratic elections and constitution making.³⁴

³⁰ Statement of the Special Adviser to the Secretary-General, Lakhdar Brahimi, to the Security Council on the political transition process in Iraq, 27 April, *UN News Centre (UN Homepage)*

³¹ For the Annex to the TAL see the CPA website.

³² Terence Neilan "U.N. Envoy Urges Iraqis to Give New Leaders a Chance" *NY 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."

³³ I believe Sistani has his own reasons for not wanting the Americans to leave at this particular time. As far as security in the country is concerned the U.S. military by now probably hurts more than helps. If it left now however, nothing could stop the Kurdish *Peshmerga* (except perhaps a highly undesirable Turkish invasion) from occupying Kirkuk and the adjacent oilfields. Thus the Iraqi armed forces must be first rebuilt before the main line Shi'ites can push for the withdrawal of all foreign troops whose presence is a high irritant to them. His special expertise (and networks) in the area of military and security policy may be the reason why Allawi has been accepted as Prime Minister by the Sistani camp.

³⁴ Fatwa of Grand Ayatollah Ali Sistani on the New Government (trans. J. Cole [emphases Andrew Arato]) Many of the believers have asked about his position toward the new Iraqi government, which was constituted yesterday through the efforts of Mr. Lakhdar Brahimi, the envoy of the secretary general of the United Nations:

His excellency the Sayyid had previously and repeatedly affirmed the necessity for the Iraqi government to possess a sovereignty that derives from free and honest elections in which the children of the Iraqi people participate in a general way. ***But, the option of holding [early] elections was rejected, for many well known reasons--procrastination and delay, opposition and intimidation. The time fled, and the appointed date of 30 June approached, on which it was supposed that Iraqis would regain sovereignty over their country. Thus, the process has become one of appointment, in order to form a new government, without achieving the legitimacy of having been elected. Moreover, it does not represent all slices of Iraqi society and all political forces in an appropriate way.*** Even so, if it is to be hoped that this government will establish its worthiness and probity and its unwavering determination to shoulder the immense burdens

And in case the message concerning TAL needed further reaffirmation, Sistani addressed the following letter to the Secretary General on Monday, May 7:

It has reached us that some are attempting to insert a mention of what they call 'The Law for the Administration of the Iraqi State in the Transitional Period' [i.e. the interim constitution] into the new UN Security Council resolution on Iraq--with the goal of lending it international legitimacy. This "Law", which was legislated by an unelected council in the shadow of Occupation, and with direct influence from it, binds the national parliament, which it has been decided will be elected at the beginning of the new Christian year for the purpose of passing a permanent constitution for Iraq. This matter contravenes the laws, and most children of the Iraqi people reject it.

After a long and determined and consistent struggle Sistani had his way, for now.³⁵ SC Res. # 1546 had no reference to the TAL. If under the strongest Kurdish pressures,³⁶ Prime Minister Allawi subsequently declared his government's adherence to TAL *until* the election of the National Assembly, he has satisfied thereby only a minor part of the Kurdish demands, while potentially defusing the confrontation till past the American elections.³⁷ Sistani's central concern, the freedom of his sovereign constituent assembly was untouched! Legally speaking, the situation is therefore following: the American project of imposition is still *apparently* intact *for now*, but after free elections it will be the Shi'a majority that will be in the position to do what it wants with the interim constitution (abrogate it or amend it, legally or illegally), and impose its constitution.³⁸ While politics may alter both sides of this chronology, the fact that the legal structure has

now facing it, it must:

1. Obtain a clear resolution from the United Nations Security Council on the return of complete sovereignty over their country to the Iraqis, unconstrained in any regard, whether political, economic, military, or security-related. ***Every effort must be made to efface all signs of occupation in every way....***
4. First-rate preparation for general elections, and keeping to the appointed date, which is at the beginning of the coming new year according to the Christian calendar, ***so that a national assembly can be formed that is not bound by any of the decisions issued in the shadow of the Occupation, including what they call the Law for the Administration of the Transitional State*** [i.e. TAL or the Interim Constitution].
Sistani 14 Rabi II, 1425

³⁵ I document that struggle in two articles cited above in *Dissent* and *Constellations*.

³⁶ In a June 4 letter to President Bush, Masuod Barzani and Jalal Talabani specifically asked that "The Transitional Administrative Law (TAL) be incorporated into the new UN Security Council Resolution or otherwise recognized as law binding on the transitional government, *both before and after elections*. If the TAL is abrogated, the Kurdistan Regional Government will have no choice but to refrain from participating in the central government and its institutions, not to take part in the national elections, and to bar representatives of the central Government from Kurdistan. [my emphases]" Juan Cole Website

³⁷ Moreover it is also entirely self serving. The TAL even with its Annex contains almost no provisions for the operation of the government set up by Brahimi, nor any real regulations concerning the relations of the government, the presidency and the National Consultative Council, no regulations or limits of martial law. There is not for example is any way to remove a PM, since the relevant provisions of the TAL (ars. 40 and 41) mention institutions that do not now exist. Adherence to the TAL thus puts the Allawi government more or less in the position of a classical, uncontrollable revolutionary provisional government, though with the other two bodies with uncertain jurisdictions and powers the dangers of popularly based conflict or even dual power are very much in the cards. In such conflicts, the Allawi government, now speaking of martial law and states of emergency, would of course wish to rely on the American forces.

³⁸ They will also be ready to ask the American military forces to leave, if they are ready to defend Kirkuk themselves.

come to this is already a sign of profound failure in terms of what has become the purpose of interim constitutions: the generation of political legitimacy and the facilitation of constitutional learning.

The Interim Constitution from the Legal Point of View

Structure of Authority and Legitimacy

In spite of the storm surrounding its first appearance, since its initial signing on March 8, 2004, the cumbersomely named *Law of Administration for the State of Iraq for the Transitional Period* has been surprisingly free of criticism in the West.³⁹ The technocratic name⁴⁰ designed to neutralize (or hide) its constitutional significance may be one reason, but American officials anxious to declare victories where they can as well as journalists seeking newsworthiness have also insisted on the more accurate and revealing term “interim constitution”.⁴¹ A more likely reason for a generally positive attitude to the document is its contents: rightly or wrongly its readers may believe that the interim constitution provides for better protections for rights, including minorities and women, and more safeguards against new forms of authoritarian rule than other constitutions in Islamic countries and especially in the Arab Middle East, including Iraq’s own constitutional past. Commentators are apt to overlook the undemocratic character of the production of the document especially because they suspect that a more democratic and consensual product very possibly would have included fewer protections for rights and safeguards against dictatorship, or at least the “tyranny of the majority”.

I believe that process is as important as substance, and is likely to affect the relevance of constitutional substance to political and social reality. In the case of the Iraqi interim constitution the process has been and remains terrible, both the process that produced the document, and the procedural formulas contained in it that are to regulate the making of the permanent constitution. Between them these undemocratic, exclusionary and rigid patterns of process are likely to contribute to the deepening of an already deep crisis of political legitimacy that may in turn undermine or transform what may be otherwise desirable contents of the very same interim constitution.

The process of the making of a constitution reappears in its structure of authority. Especially in the case of a new constitution, its legal validity is contingent upon legitimate origins. Why should this rather than some other document carry the obligation

³⁹ Curiously, almost no Western commentator echoed Sistani’s very intelligent line of criticism (Spencer Ackerman of the *New Republic* website Iraq’d was the exception). Even Juan Cole in explaining Sistani’s position speaks of some kind of Rousseauian idea of popular will, when the Grand Ayatollah simply adopted the perspective common to Sieyes, Paine, Madison and Jefferson to name a few.

⁴⁰ See f.n. 2

⁴¹ Interpreters particularly anxious to declare victories sometimes even remove the term *interim* from constitution, as does Paul Berman in *Dissent* Spring 2004, p.110 On the other hand interpreters wishing to play down the significance of the document, like Lakhdar Brahimi recently insist on taking the subterfuge literally, and emphatically declare that the document is not a constitution at all. See press conference with Barzani op.cit. In my view they too are wrong, even if the objective of devaluing this document is understandable.

to be obeyed? The power to impose cannot alone decide this question. In spite of repeated attempts to impose their will, the U.S. occupiers never thought they could assert their own authority to make or their right to authorize an Iraqi constitution, permanent or even interim. Undoubtedly their lawyers, like those of General Mac Arthur's reminded them of the Hague Conventions, reaffirmed by various SC Resolutions and also by the Geneva Conventions, banning constitution making by an occupying power. In terms of this body of law, it could be argued that the CPA itself may at best give Iraq transitional regulations, but certainly not permanently change the legal order on its own authority. Thus it may be permissible to provide for what could be called interim quasi-constitutional or administrative arrangements during an occupation, but not arrangements that would heavily prejudge and prestructure long term constitutional change. All interim constitutions involve the latter possibility, and as I will argue below the Iraqi interim constitution implies this outcome through its internal contents and logic.

Three methods were pursued to secure valid authorization: Iraqization, Security Council authorization, and political agreement. Abstractly, especially when taken together, it would be such steps that would represent the right approach, but in the hands of the U.S. authorities each was just another subterfuge for imposition. We have seen already that the these authorities thought that it was entirely unproblematic to envision an Iraqi transition in which constitution making is the task of agents appointed by, responsible and accountable to them alone. The method was supposed to work, because if there was to be imposition it would be by an Iraqi authority as in countless instances in the Middle East and elsewhere. Unfortunately, this approach could not work for a moment in a world accustomed to the hierarchical world of the civil law, where each legal jurisdiction gains its authority from a higher one authorizing it. It would thus be obvious to all, that whether drafted by the Governing Council, its Constitutional Committee or a new body co-opted by these instances, the authority of the constitution would derive solely from the Coalition Provisional Authority, that appointed these bodies or the body that appointed them and established their jurisdiction and prerogatives that it could at any time revoke. The rights of the Governing Council and its offshoots are a function only of the rights of the occupying authority itself.⁴² And as we have seen the CPA did not have the right, even in its own eyes, to give Iraq a constitution.

At the same time the CPA never managed to actually stay out of the supposedly Iraqized process. Formally speaking the interim constitution was a product of the Governing Council and its Iraqi experts. The reality was however that the CPA and its leader Paul Bremer played a decisive role in the process. When the concessions to Islamic law threatened to become embarrassing for the Americans, Bremer threatened to veto the relevant provisions. Many members of the GC complained of the coup like, accelerated manner the whole draft was pushed through to meet American (presumably electorally conditioned) deadlines. All outside participation was minimized, and after the leaking of some very early drafts complete secrecy was preserved. The final draft was entirely unavailable until the actual signing, and was thus exposed to no criticism until the five Shi'ite members of the GC threatened not to sign the document. This threat was itself apparently neutralized by the CPA making clear that without immediate signing the

⁴² Here I am relying on Nehal Bhuta's excellent unpublished analysis.

transfer of sovereignty envisioned for June 30 would be in jeopardy, and the non-signers would have to take the responsibility for the continued occupation.⁴³

Thus CPA's own hierarchical and operational authority had to be shored up, and this could be done only by its internationalization (at a time when the U.S. government was not yet even dreaming of conceding the UN any real powers in Iraq). While there remains some doubt that even a Security Council Resolution could free a country from the obligations of an occupying power under Art. 43 of the Hague Conventions, there seems to be an emerging consensus among international lawyers to this effect. Thus it was not insignificant that in particular Resolution 1511, drafted by the U.S. while confirming the Hague regulations in general by "reaffirming the right of the Iraqi people to freely determine their own political future" seemed to accept, if ambiguously, an *earlier* project of constitutional imposition by the CPA through the agency of the Governing Council.⁴⁴ On the other side of the ledger, it is equally important, that the latter institution, the GC is not assumed to be sovereign by the same resolution⁴⁵, and this is confirmed by the long subsequent discussion of the restoration of sovereignty on June 30. Constitution making however is pre-eminently a sovereign function. By the time the interim constitution was passed it was considered necessary by its friends and feared by its enemies that the Security Council pass another resolution explicitly authorizing this particular constitutional framework and the process of its production. This was the battle that Sistani wound up winning, after losing so many skirmishes before.

Finally, beyond the question of weak legal authorization, i.e. legitimacy in the legal sense, lies the question of sociological legitimation. This cannot be achieved through pure imposition any more than legal authority, and indeed the American authorities sought to achieve it to some extent through agreement. But they came to agree only with their own agent, the governing council. And this agent was insufficiently representative given the political articulation of Iraqi society.

Legitimation is by its nature linked to the rule of some over others, and thus it may certainly be posited along with Max Weber that neither pure imposition nor pure agreement can be the starting points of a new legitimate political order. Any agreement,

⁴³ There are also reports that the Kurdish members – unopposed by the CPA – threatened to withdraw from the whole process. At the given stage it is very likely that both threats were bluffs, because Bush has the American electorate and the Kurds Turkey to worry about if they carried them out. But even the Shi'a members of the GC have a lot at stake personally in the continued relevance of that council, and possibly in the governmental formula they expected to emerge if the interim constitution was signed.

⁴⁴ "Welcoming the decision of the Governing Council to form a preparatory constitutional committee to prepare a constitutional conference that will draft a constitution that will embody the aspirations of the Iraqi people..." Note however that this language does not decide how the "constitutional conference" would be selected, does not exclude therefore an elected body, and in any case speaks of "drafting" only and not "promulgating" or "enacting" without for example popular ratification. As far as the preparation of the constitutional conference was concerned, the resolution called for "national dialogue and consensus building", something that did not happen during the drafting of the interim constitution, a totally secret process.

⁴⁵ Very unclearly, the Resolution states that the GC "without prejudice to its further evolution, embodies the sovereignty of the state of Iraq". This seems to mean only that the GC symbolizes a sovereignty that it cannot exercise, while what the CPA exercises is short of sovereign powers.

no matter how wide must still be imposed against members who do not agree. Nevertheless it is wrong to imagine away the difference between the two options. .

Two issues should be distinguished in this context: the degree of external imposition and the degree of internal pluralism. In analogous contexts of foreign military occupation in Japan and Germany it is now rightly customary to distinguish between the imposed character of the constitution making process in the former as against the mainly autonomous, deliberative process of the latter, ultimately based on freely elected provincial assemblies.⁴⁶ The German case shows that it is possible to have a low degree of imposition and a high level of pluralism under foreign occupation. In Iraq the (illogical, but self-serving) attitude of the CPA and its legal advisors seems to have been that since there is imposition anyway, the U.S. might as well impose its choice of both a bilateral structure of negotiation, and select entirely on its own the actors “representing” a society incapable to generate its own politics. This assumption was based on a fundamental misjudgement both of the importance of pluralism, and the emerging organization of Iraqi politics. Of course, the pluralism of a society can never be mirrored by political processes; pluralistic agreement always has a dimension of exclusion and imposition. Yet pluralist politics as long as it incorporates genuine opposition simulates and even promotes the pluralism of society. Even a less than complete pluralism in politics stimulates critique, accountability and the need to justify decisions with good arguments and valid claims. Finally, while later agreements cannot take away the fact of initial imposition, they can diminish its negative impact on the previously excluded. These arguments are especially relevant to the constitution making process when the rules of the political game are being generated. The political participation of such a process ought to be as broad as possible and in principle an expanding one. The worst case scenario is when the pluralism of society is developing much faster than that of the framework of representation. Under such circumstances societal pluralism leads to actors negotiating outside the formal framework of bargaining and compromise, with weapons in hand if necessary and possible.

One can perhaps debate the level of political pluralism of Iraqi society at the time of the formation of the Governing Council. What is in any case astonishing however is that from that time, during the last year, there was no attempt to expand participation in spite of the fact that many new political actors emerged. Neither the November 15 Agreement or the drafting of the Interim Constitution involved an extension of inclusion or participation, despite the first (February 23, 2004) Brahimi report’s recommendations to that effect. In the GC the principle of representation followed was an attempt to picture the ethnic, religious and gender divisions of society – an idea more suitable to a supreme soviet than a genuine deliberative assembly. At the same time important forces like all

⁴⁶ See e.g. Hideo Otake “Two Contrasting Constitutions in the Postwar World: the Making of the Japanese and West German Constitutions” in Yoichi Higuchi ed. *Five Decades of Constitutionalism in Japanese Society* (University of Tokyo Press, 2001) And yet, imposition worked in Japan only because McArthur started out with a fundamental concession to the Japanese ruling elite: the survival of the “symbolic emperor”, and the formal continuity of the state and the legal order. What is remarkable about the Iraqi case is that the American occupation authorities seek to impose a new arrangement without any such fundamental concession to either an electoral (Germany) or traditional (Japan) principle of legitimacy.

the Arab nationalist parties, the more radical wing of the Shi'a, and even many important Sunni religious groupings were left out from this body. Apparently, the only concession Sergio di Mello achieved in this context, with his great diplomatic skill, was the inclusion of the Iraqi Communist Party. Moreover, while the Kurdish members of the GC do represent the major political forces of the Kurd provinces, the same is much less true for the Shi'a members taken as a whole and is not at all the case for the Sunnis. All of the latter, and some of the former are exiles representing different interests and factions of the occupying authorities. The GC thus has little legitimacy in Iraq, and its scarcely disguised attempts to hold on to power after the transfer of sovereignty under an astonishing variety of formulas further decrease this already weak legitimacy.

To sum up this section, the legal authority behind the interim constitution is questionable, because neither the CPA nor the GC have the right in international law to give Iraq a supposedly interim or transitional constitution that may become permanent, through its own internal logic, and because the Security Council has not underwritten the authority of this legal framework. The legitimacy of this document in the sociological sense is even more doubtful, because of the failure of pluralistic representation, and the low support for the agency that seeks to enact it, the Governing Council as an institution. Even aside from the internal weakness of document, which I analyze below, the authority and legitimacy problems can become potentially fatal once the process envisioned by this document gets under way. Would political bodies that gain legitimacy under new procedures (e.g. UN appointment confirmed by the Security Council Res. # 1546 in the case of the executive; popular elections in the case of the National Assembly) feel bound by the fiat of an instance with lesser legitimacy especially when some provision or other becomes unworkable? Freely elected national (constitutional) assemblies regularly emancipate themselves from their conveners,⁴⁷ and such revolutionary act is much more likely when the latter are regarded as illegitimate. While a U.S. type constitutional convention is supposed to operate under pre-existing legality, from the Federal Convention to conventions under Juan Peron and Hugo Chavez such restrictions often prove unrealistic. The federal convention formula of the U.S. Article V has been studiously avoided for 215 years because of the fear of "runaway conventions" that is especially serious where it is very difficult to amend the constitution as in this country. In Iraq the problem that rules created by instances of an old regime or merely provisional authorities cannot bind the nation's will should be especially difficult to counter. By not including authorization for the TAL in SC Res. #1546, the U.S. authorities pretty much conceded Sistani's point that the elected National Assembly would not be bound by that interim constitution. The same point is now confirmed by PM Allawi's statement that at this point the government is willing to declare its adherence to TAL only till the meeting of that assembly. At that meeting, as Sistani and the Kurds both now believe, the interim constitution is not likely to survive, especially in its present form and for two reasons: its weak legal authorization and deficient political legitimacy, and its extreme rigidity with respect to both its own amendment and its replacement by a permanent constitution.

⁴⁷ Elster, "Arguing and Bargaining in Two Constituent Assemblies" in (...)

The Inhibition of Learning

The second of the main purposes of interim constitutions is to facilitate constitutional learning during an experimental period, before the permanent constitution is finally insulated against easy alteration.⁴⁸ The Iraqi interim constitution accomplishes this task remarkably badly. As things currently stand there are *four* distinct rules of change in or associated with the TAL. Of these two* (1 and 3 below) are mentioned in the document, a third (2) follows from the language and a fourth (4) is only implied by the conditions of its authorization:

1. *A good part of the TAL is amendable by a vote of $\frac{3}{4}$ of the National Assembly and the unanimous consent of the three member Presidential Council (art 3A.) There are however extensive unamendable provisions: rights covered under chapter 2, the time frame of the transition as defined by the interim constitution, the powers of regions and governorates, and regulations having to do with Islam and religions. After free elections, this self-referring rule can be used to change itself, before *any other part* of the constitution is changed through the new rule. Since the makers of the interim constitution (and their American advisers!) forgot (or deliberately omitted!) the elementary requirement to enshrine the amendment rule if they wished to make anything else unchangeable, everything in the TAL can be changed after free elections legally, using a two step procedure.⁴⁹
2. Since there is no National Assembly until free elections can be held between late December and January of 2005, the interim constitution is by implication unchangeable for the period from June 30 to sometime after the elections when the new National Assembly first meets.
3. *The permanent constitution fully replacing the interim one must be approved by 50% + 1 vote of the National Assembly⁵⁰, 50% + 1 of the population as a whole in a national referendum as long as 2/3 of the voters of three governorates do not vote against ratification. (art. 60) Having to do with governorates, this rule may

⁴⁸ Niklas Luhmann in his legal sociology spoke of normative learning how not to learn in the face the first disappointment. This dimension is especially important for constitutions if one is to have the two-track structure of constitutionalism rightly stressed by Bruce Ackerman. Nevertheless, under a new constitution there must also be the opportunity to correct obvious deficiencies unanticipated by the framers as in the case of the U.S. election of the president/vice-president on a single ballot corrected by the 12th Amendment of 1804. In this sense, an interim constitution properly constructed extends the two track structure to constitution making itself, by providing for normal rather than extra-ordinary alteration for a period of time. See Arato "Constitutional Learning" where I draw on the competing perspectives of Stephen Holmes and Ackerman.

⁴⁹ The same mistake was made by the authors of Article V. of the U.S. constitution, but then no-one knew if self-referring rules can be valid or not. See the famous article of H.L.A. Hart as well as Peter Sugar's book on this subject. Since the making of the *Grundgesetz* that has indeed enshrined its amendment rule protecting unchangeable provisions, similar in fact to many such sections of the TAL, textbook knowledge of amendment rules would require following the German example.

⁵⁰ I am inferring simple majority, since nothing else is stated. If it is interpreted as a law, the presidential council would have veto power over the draft submitted to the people, which could mean, as I will discuss below, either veto by one or only all three members.

have been meant to be unchangeable, but the restriction would be useless since the amendment rule is not enshrined.

4. What is not mentioned but is probably inevitable is that the CPA itself as the sole source of authority can change any part of the interim constitution before full enactment, that is, between March 8 and June 30. Since the CPA never acted in a constitutional capacity on its own, the latter date was probably June 1 when in fact the GC used the very last opportunity to add the short Annex.

I begin with the last “rule” (4) which is the first that is relevant chronologically, but will be obsolete by the time the article is published. Since there was no governmental formula in the document, at the very least this the “Annex” had to be added during the period before the document is fully enacted. As provisions could thus be added to it, the TAL constitution was for an initial period evidently not unchangeable. More importantly, if the CPA’s powers extended to the promulgation of an interim constitution, they had to involve the possibility of replacing one interim constitution by another as long as the first is not authorized or re-authorized by a higher instance.⁵¹ Thus, one might say tautologically, the formal rules of change envisioned by the interim constitution do not come into effect until that constitution itself does, i.e. on June 30. My thesis of extreme rigidity applies strictly speaking to the period after that date only – though I should note that during the period since its signing, the document has been treated, politically, despite significant Shi’ite voices demanding changes, as more or less unchangeable outside the unavoidable addition of a governmental formula. With the dissolution of the GC on June 1, and the adding of the Annex, it is not clear who before June 30 could change any part of the document since the CPA always preferred to act through an Iraqi body. There is no reason though why it could not act through the government formed on June 1, whose leader however already announced his adherence to the TAL as is.

As to the second “rule” (2) also unstated formally, it requires no analysis to show that unchangeability during the period June 30 and say January 31 means extreme rigidity for at least seven potentially crucial and difficult months. How bad an idea that is depends on the asymmetric conditions of legitimacy already discussed, as well as issues of content that I will touch on very briefly and selectively. If there is a lot that is wrong with the regulations themselves that were hastily drawn up under the aegis of narrow political inclusion, or if the current unregulated status of the provisional government proves extremely troublesome, or if conflictual actors like the Kurds and the Shi’ites move toward a new *modus vivendi* as they very well might⁵², the great likelihood is that the rule of no amendments would be politically challenged by forces having more and broader support than the authors of document had or will have. Strictly speaking from the legal point of view an unamendable constitution can only be replaced as a whole, though of course politically speaking partial illegality regarding its application (through creative interpretation, disregard of the amendment rule etc.) is also possible. In either case the transitional legal order that interim constitutions are meant to establish and protect would be severely endangered. Most importantly however the impossibility of amendments

⁵¹ I owe this line of analysis to a suggestion by Nehal Bhuta. A higher instance e.g. could be the Security Council in a new Resolution, or after June 30 an internationally recognized Iraqi sovereign power.

⁵² A delegation representing Sistani just left for Kurdistan *NY Times* June 17, 2004

short of full replacement means that parties like the Shi'ites and Kurds will find it much more difficult to renegotiate the interim constitution during the very period in which there is still a veil of ignorance, since the actors do not yet know their respective electoral strengths.

The situation only gets worse in the period when amendments become possible (rule 1) and when the permanent constitution is to be drafted and ratified (rule 3). These two rules together constitute extreme consociational limits on the changing of the interim constitution. Theoretically $\frac{3}{4}$ of the National Assembly with the agreement of all three members of the presidential council can actually pass amendments, to the interim document, **including its supposedly unamendable sections, in a two step procedure** during the potentially extended period that the permanent constitution is being drafted. Practically, the representatives of any of the three ethnic-religious (Shi'a Arab, Sunni Arab, Sunni Kurd) groups are likely to have over $\frac{1}{4}$ of the seats, and possibly, if that convention holds, one member of the presidential council. Thus any of them can veto any amendment twice over. It is very likely that Arab nationalist or strongly secular or Baghdad deputies or deputies from oil rich regions or whatever other combination will also have $\frac{1}{4}$ of the votes in the assembly. Thus the possibility for vetoes of amendments would be greater than what today we could imagine. Of course some amendments may still pass through bargaining and compromise. But when in the face of $\frac{3}{4}$ of the deputies and let us say all three members of the presidium or alternately of 95% of the deputies, along with the president and one vice-president an important amendment is blocked the likelihood of a "run-away convention" that refuses to be bound by the will of the illegitimate Governing Council or the foreign CPA would become great indeed.

Finally, and most seriously, the much discussed issue of a veto of a draft of a permanent constitution by three provinces or governorates would not only increase the rigidity of the over-all constitutional set-up, but could very easily lead to the transmutation of a very difficult to amend interim constitution into one of indefinite duration or even a quasi-permanent one. The vote of a simple majority passing the constitution is probably too easy a requirement, since only drafts having significant parliamentary consensus behind them should be submitted to the population. Given the possibility of provincial vetoes, one can assume that the National Assembly would internally generate a consensual rule that can be but probably will and should not be as high as the 80% hurdle in West Germany (where *nota bene* only the legislatures of 5 out of 14 Länder could have vetoed the *Grundgesetz*.) If there is an executive veto possibility, its use by one member of the presidential council or presidium would be too high a consensus requirement, but would not be unreasonable if the presidium unanimously (and perhaps a majority of two of its members) had to be against a draft. Because of poor codification, we don't know if a constitutional draft can be vetoed at all, and if so by one, two or three members of the presidency council. What of course is completely unreasonable is the possibility of three of imaginably the smallest provinces out of 19 (16.3 %), and thus $\frac{1}{9}$ or $\frac{1}{10}$ of the voters as a whole to have a veto power over a constitutional draft.

Can the rules of change themselves be changed, within this rather sketchy system of rules? Evidently in the initial period now past the CPA authority to change any and all

aspects of the interim constitution could not have been removed by a self-declaration, one that could in turn be reversed by the same agency. Only a strong Security Council authorization could have changed this state of affairs, and insulated the given text in the current period. That did not happen. Otherwise in this period the CPA could have through the GC or, after June 1 but before June 30, the Interim Government directly changed the other three rules. Under Shi's pressure to do so, and Kurdish demands to make sure that the TAL will survive free elections as well, it seems the Americans decided to do nothing, not even to produce the much needed annex. After June 30 the situation will be legally very different. The new government in this phase one has no amendment powers under the interim constitution, and this disability is confirmed by current talk by both Brahimi and the CPA of not giving any legislative powers to this "sovereign" entity. It will have however the choice, as a supposedly sovereign entity to repudiate the TAL as a product of a foreign force with no constituent powers in international or Iraqi law, or as a result of a coerced agreement between that force and its Iraqi agent. While no-one knows where the authority to do this originates (aside from well established authoritarian practice in many countries, unfortunately) the TAL could also be set aside or suspended in whole or in part, for the country as a whole or for specific territories if the government (the PM, the Presidential Council, the two together?) declare martial law or state of emergency as Mr. Allawi just declared he might.⁵³

Assuming that the TAL survives free elections, when the new National (constitutional) Assembly meets after January 2005, Iraqis would face the most interesting choices, at least theoretically. According to one view, Ayatollah Sistani's now apparently supported by Ambassador Brahimi (Report to SC, April 27)⁵⁴, the freely elected (sovereign!) assembly cannot be bound by interim arrangements, which can become law, and only to

⁵³ Dexter Filkins and Somini Sengupta "Iraq Government Considers Using Emergency Rule" *NY Times* June 21, 2004. See also: Edward Wond "41 Iraqis are Killed in Two Car Bomb Attacks" *NY Times* June 17. "Falah al-Naqib, the interior minister, said he "won't hesitate" to declare martial law if more devastating bombings take place...Asked about the possibility that the Iraqis would impose martial law after the handover, a senior administration official said that White House officials were not aware of the comments by Mr. Naqib. The official said the United States would no longer be in a position to second-guess decisions by the new Iraqi government. "There's got to be a period of stepping back," the official said. "There are going to have to be a lot of Iraqi solutions to the problems and they aren't necessarily the solutions we would have used."

⁵⁴"[Brahimi speaking] I welcome the clarification made recently by Ambassador Bremer who, among other things, stressed that "the Interim Government will not have the power to do anything which cannot be undone by the elected government which takes power early next year." "The fact is that the TAL is exactly what it says it is, i.e. a transitional administrative law for the transition period. It is not a permanent Constitution. Indeed, it is not a constitution at all. The Transitional Law (or any other law adopted in the present circumstances) cannot tie the hands of the National Assembly which will be elected in January 2005 and which will have the sovereign responsibility of freely drafting Iraq's permanent constitution." Security Council 4952nd Meeting, April 27, 2004. (*UN News Center*) I cannot tell if Brahimi deliberately or inadvertently confuses "interim government" in Bremer's formulation with "Transitional Administrative Law" in his own. The two are not the same, as to their ability to bind. An interim executive obviously cannot bind a constitutional assembly. An interim constitution, as in South Africa can, at least in principle. The fact that he refuses to call it a constitution does not change much in the case of a document that definitely tries to regulate the constitution making process under the National Assembly.

the extent, that the new assembly reenacts them. It is logical to assume that the assembly could then amend both the amendment rule and the ratification rule as it sees fit, before re-writing or entirely replacing the TAL as it sees fit. Moreover, since unbound it could do so through a simple majority rule unless it chooses to establish a different one, by majority rule. Of course such a procedure would violate not only the text but the spirit of the interim constitution, which would be entirely eviscerated if this revolutionary scenario were followed.⁵⁵ The results of so proceeding would be the most explosive imaginable.

Assuming some kind of agreement among the main social forces by this time, a very difficult assumption, a less explosive scenario is also imaginable. The TAL, its amendment and/or ratification rules could all be amended legally as the interim constitution itself allows in principle changing the two relevant rules. Through omission probably, neither the amendment rule (1) nor the ratification rule (3) are enshrined, or insulated against amendments. Thus using rule 1 (3/4 of the assembly, all three members of the Presidency council) both this rule and rule 3, the ratification rule could be changed to votes by qualified majorities, or whatever. While it is unreasonable to assume, that exactly the same minorities will vote to give up their own minority veto, and thus amend the amendment rule itself, the same is not true regarding the ratification rule. While unlikely, it is not unimaginable for example that $\frac{3}{4}$ of the assembly which need not necessarily include any Kurdish deputies, (if the presidency actually participates) with the support of a Kurdish vice-president chosen by $\frac{2}{3}$ of the assembly, thus possibly by the Shi'ite and other nationalist deputies, would abolish the rule allowing 3 Kurdish provinces to veto a constitutional draft in favor of a majoritarian referendum. That Kurdish vice president, since he would wish to stay alive, would probably want to trade his vote for a suitable agreement on federalist protections, cultural autonomy wherever Kurds live, and oil revenue distribution.

This scenario, however little points to it right now, is in fact not entirely impossible. It would be certainly easier to achieve it before free elections, before the parties have full knowledge of their strength, but the rigidity of the TAL in just this period makes that difficult. After elections much will depend on the exact distribution of forces, and the possibility of the formation of an alliance of parliamentary moderates of all factions capable of making a deal concerning the very difficult process of amending the TAL. Under imaginable conditions the desire to amend the ratification rule may indeed be favored by all who wish to actually enact a permanent constitution in face of supposedly unreasonable minority opposition.

⁵⁵ To avoid such majoritarian implications, Brahimi again quotes Bremer: "Iraqi unity requires a constitution that all of Iraq's communities can support. It is a fundamental principle of democracy that the constitution should provide for majority rule but also protect minority rights." These lines however refer to the desirable result of moving from consociationalism to constitutional protection of minority rights. But in the case of an unbound assembly this outcome can only be the result of voluntary self-limitation. With the interim constitution losing its binding power over the freely elected assembly an important opportunity would be lost – even as democratic legitimacy was regained.

Unfortunately, there is also a third possibility, well known from the history of many Arab countries. Given the possibility of veto by three governorates, the existence of the interim constitution itself becomes a significant liability for the constitution making process, and a potential rallying point for forces seeking to maintain the status quo of the transitional period whether that is defined in terms of extreme provincial autonomy or the power of political incumbents or both. So far for example the incumbents of the GC managed to survive to an important extent in the Interim Government formed on June 1, in spite of Brahimi's efforts to the contrary. They should be very strong in the National Conference I in July and the National Council that emerges from it. If after free elections they manage to carry over their power into the new National Assembly, and the executive power that is based on it, they may prefer to act under the interim constitution than under any new document that could emerge out of the National Assembly. Those who chose to subvert a popular permanent constitution would not be facing a situation in which they would have to accept, in case of failure either chaos or the open dictatorship of the constitutional assembly as for example in the case of the French Convention Nationale in 1793, that suspended its own constitution. These forces (as well as the voters of the three provinces) could instead rely on the survival of an undemocratic interim constitution that may in fact better coincide with their interests. The interim constitution in fact facilitates that possible choice (which would be logically available anyway unless a sunset clause was attached to the interim constitution as a whole) by providing for its own survival, if a permanent constitution were rejected, for once in sufficient and rather unambiguous detail. (Art 60E) While the unsuccessful national assembly would in that case be dissolved, a new one would be elected, and operating both under the interim constitution, with all dates suitably altered. There is no stated limit how often this eventuality may occur. Along with the possibility of six month extensions for the tenure of a given National Assembly (art. 60F) the interim constitution could become the framework for a system whose incumbents would be changed every 18 months. One would expect that actual government of the country in such a system would operate on the provincial or regional level, very possibly the goal of the forces that every 18 months or so would reject a new permanent constitution of a more centralized system.

Conclusion: Rights, State and Government under the Interim Constitution

Constitutional rigidity and potential learning problems are serious given the uncertainty concerning how any documentary constitution will actually function in a new political order. The risks would be acceptable if we were dealing with only a very short time period, or could rely on a comprehensive, consistent, and well-drafted document providing for the main projected eventualities. The time frame of the interim constitution is however at least a year and a half, could be easily extended to two years, and through the failure of permanent drafts could become indefinite. In the case of this short outline of a document, with 60 sketchy and often ambiguously formulated articles, there can be no question of a comprehensive basic law. In this respect, calling it an 'administrative law' expresses the right kind of modesty, though the document is nevertheless supposed to play the role of a constitution by providing for a legal-political framework for legislative, executive and judicial functions of government as well as the fundamental rights citizens would have against the state, or the government as a whole. The fact that it would be

extremely difficult not only to replace, but also to significantly amend and improve, legally, this particular document makes it completely unlikely that the TAL could compensate lack of legitimacy and flexibility through efficient and successful functioning.

What would such a functioning require? 1. From the point of view of the individual (unfortunately the least important politically, at least in the short run) it would have to mean that an adequate protection at least of the rights that are affirmed in the document. 2. From the point of view of the governmental process it would require sufficient clarity regarding jurisdictions and lines of authority, and that at least the main political eventualities are provided for. And 3. From the point of view of the structure of the state in a divided society success would have to mean that the bargains over that structure would be relatively clear, and would either be likely to hold or could be easily renegotiated under the same constitutional framework. Moreover, consistency among these arrangements, and especially those providing for 2 and 3 would be mandatory.

Without the requisite space at my disposal, I must restrict myself to what are to me its most salient problems in the three dimensions.

1. The question of rights and their enforcement. It is a good thing, at least symbolically, that the TAL has an extensive table of rights, not qualified in the usual manner referring to their possible limitation or determination by ordinary legislation. It is a good thing too that Iraq is supposed to have constitutional review, practiced by a special tribunal, the Supreme Court. It is not a good thing though that this court is put together from the weakest elements of Kelsen and Marshall types of courts. It is even worse that rights protections will not apply in any way to the holders of the bulk of coercive forces for quite some time, the U.S. military, that can (unless asked to go home) suppress any political or civil rights under the claim of self defense. It is worse still that the TAL does not consider the mode of declaring, exercising and limiting states of emergency and martial law when it is apparently assumed that the Interim Government has these instruments.
2. The question of governmental powers. It is a good thing that the TAL has opted for parliamentary government, as against the presidentialism that almost always meant dictatorship in the Arab world. It is not so good however that even its Annex comes up with very few limits on the powers of the PM during the period of the Interim Government, i.e. before free elections, and especially that it has been forgotten to add provisions for removal of the head of government and the ministers. The idea of presidential and National Council vetoes on the PM and the government are good ideas, but unanimity and 2/3 vote respectively may be tough thresholds to meet. Again emergency and martial law may fall into the hands of the government ministers by default, without any real limits. For the period of the Transitional Government the proportional electoral rule the UN experts came up with is a good idea for the constitutional role of the National Assembly. It may however lead to extreme fragmentation. It is also possible that ethnic-religious identity politics will lead to a great consolidation of parties. In that case the

National Assembly would have potentially a very strong majority, controlling all branches **including** even the presidential council that is not formally consociational. Such an assembly's majority is potentially capable (with one ally) to amend the TAL, and junk the consociational or confederal rule of ratification. All this would lead to extreme conflicts with the state structure provided for in the TAL, and its beneficiaries, the Kurds.

3. The question of the state structure. Actually, the state of the TAL is decisionless, a mixture of federal, confederal, and centralistic elements. The provincial structure is federal, Kurdistan with its regional government and nullification rights is a confederal enclave, the monocameral legislature is characteristic of central states. The Supreme Court is also centralistic, the amendment rule is closer to federal, and the ratification rule is certainly confederal or rather consociational, where the veto does not just lead to defection, but blocks decision for the whole entity. These elements are in potential conflict with one another (the decisions of the legislature can be nullified in Kurdistan, the amendment rule can abolish the ratification rule etc.) and in case of conflict violent struggles of those concerned become extremely likely.

I may be right or wrong in focusing on these particular problems of the TAL. There are certainly many others. The question is how to deal with any of them before it is too late, given the great rigidity of the document itself.

I would like to conclude with points already made, but worth repeating. In the making of the interim constitution, an excellent chance was missed to produce a document grounding constitutional legitimacy (one potentially constraining populist majorities) and learning both. The American project of imposition, and the desire of the few already included to keep the game to themselves, vitiated the first goal. The TAL remains an illegitimate imposition. Its substantive problems bear the marks of haste and poor drafting, but also the fact that ultimately the imposers had to please two incompatible constituencies that were both strongly anti-Saddam: the Shi'a majority and the Kurd minority. These had incompatible constitutional ambitions, which are both enshrined in the TAL. To protect the ambitions of the minority moreover the whole thing had to be doubly enshrined against alteration, thus interfering with constitutional learning. The whole thing is programmed to crash, with alternative means available that could bring it down: the revolt of the majority, states of emergency declared by the government that can become permanent, and, either way very likely civil war.

The only way out is still a civil bargain: neither diehard defense of the TAL or its ready violation will do. The coming National Conference is the last opportunity when the renegotiation of the interim constitutional package could occur. **For this to happen, the National Conference would probably have to first abrogate the**

TAL, whose rules do not allow for such a renegotiation in this crucial period. The grounds are available: illegitimate interim imposition.⁵⁶

⁵⁶ I am afraid however that this process is already marked by deep contradictions. Originally, only a Consultative Body of **country** notables was planned by Brahimi and his staff. The Annex to the TAL established some real powers for at least the National Council that would be picked, but the same document has already prepared the way for Governing Council incumbents to try to control that process too. If **these incumbents** succeed, the interim constitution will not be renegotiated. It will probably go down either through the usurpation of the Interim Government using states of emergency, or will be repudiated by the National Assembly whose hands it would illegitimately tie.