

# The Occupation of Iraq and the Difficult Transition from Dictatorship

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*For János Kis at 60*

## At the End of the War

In spite of the great international mobilization for peace and the subsequent failure to secure Security Council authorization or even a “moral” majority of council members, the United States launched and easily won its war against Iraq. It was an illegal aggressive war, an international crime against the peace.<sup>1</sup> Its supposed legitimacy was, however, linked to finding and destroying weapons of mass destruction and creating the framework for democratic regime change in Iraq.<sup>2</sup> As of the writing of this article (early May), the process of *post festum* justification has not been going very well. Admittedly, given the reports and suspicions of the Blix team, it is surprising that there seem to be no weapons of mass destructions to be found by the Americans, who are capable of the most aggressive forms of interrogation. It is much less unexpected, however, that the project of democratic “regime change,” so important not only for the Pentagon neoconservatives but also for the so-called reluctant hawks, remains extremely problematic. At present, a pseudo-democratic government relying on external force, a theocratic authoritarian regime, or even the fragmentation of the now stateless country seems much more likely than representative government and the rule of law for a unified Iraq.

Yet it is hard to gloat over the probable failures of the Americans. If they find no weapons, it could mean that some, most likely the biological variety, have found their way to

individuals or groups whose motivation can now only be disruption or vengeance. We can only hope (but when will we know?) that the whole WMD hysteria was nothing but disinformation and hype. But as far as the long-suffering Iraqis are concerned, it would be immoral to celebrate the probable failure of accountable government and the rule of law. This outcome is not inevitable, however, and the uncertainty puts staunch opponents of the war and remnants of the peace movement in a difficult position as to their hopes, and perhaps demands. If we see a narrow path of opportunity for democratic change in Iraq, should we point it out and even insist that it be taken seriously? Would we thereby be trying, as Habermas put it, “to redeem the irredeemable”?<sup>3</sup> Would even a minimally democratic outcome in Iraq retrospectively justify the American war, and provide ideology for the architects of empire to embark on similar ventures in the future? Should we not rather hope for the total defeat of the imperial project by whoever has the means, so that the neoconservative ideologists of the Pentagon, the “wag the dog” strategists among the president’s men, and the reluctant hawks of all stripes be taught a much needed lesson?

I admit to some ambivalence on this fundamental question. But it seems to me that it is always a good rule of thumb to avoid thinking that “the worse, the better.” In this case, “worse” could mean endless civil war and a humanitarian disaster for a country of 23 million people. Discrediting the aggressors, however satisfying, is less important than contributing in however small a way to the freedom the Iraqis that may be possible if significant political forces in the United States (including the Democratic party in an election year), the United Nations, and Europe could come to see the issues of democratization in the now occupied country more clearly.

In fact, there is a danger of trying to redeem the irredeemable. The kind of bad

compromise Habermas seems to have been thinking of when he used this phrase is one in which the United Nations would somehow rescue the Americans after the occupation of Iraq by providing some kind of international legitimating cover for a unilateral enterprise of political imposition. While the US government has already made clear that it does not desire any serious UN participation in the political transition, it does seem to want a transparent cover of this type, as long as it will not do too much to restore the prestige of the international organization. The UN's role would be largely reduced to removing sanctions and providing humanitarian assistance, and thus to participating in a humiliating side-show. The UN special coordinator for Iraq, the US is willing to concede, would have little more than unspecified informal influence on the occupation "authority" and a projected Iraqi interim government.<sup>4</sup> Thus, if genuine international rather than US supervision, monitoring, and control of political negotiations are, as I believe, required for any kind of legitimate democratic bargain in Iraq, this precondition can be achieved only by overcoming the intense resistance of American policy-makers. They will be willing to consider an international alternative only if their own unilateral efforts are defeated. Such an alternative must be clearly articulated and available as soon as possible if it is to be relevant for the only force that seems able to defeat the current US plan, the radical Shi'ite clergy. Even if the project of external imposition were defeated, it would remain a great challenge to channel the developing Shi'a movement in a direction compatible with the representation and rights of all other groups in this explosively divided society.

### **Externally Imposed Revolution?**

In order to understand the chances of democracy in radical political change, it is best to start with the transition path now in motion. The term "regime change" used by the US administration and

the press is in fact ambiguous. It may refer to any replacement of one regime by another, and thus to a variety of paths; while in Hungary and elsewhere in the late 1980s and early 1990s, the term came to mean the specific path of negotiated transition, as distinguished from both reform and revolution. In any case, it is important to note the significant differences among paths, their defining characteristics, and their likely consequences. In the most persuasive comparative analysis, that of János Kis, *reform* is defined as continuity of both legitimate authority and legality, *revolution* as rupture in both dimensions, and *regime change* or *coordinated transition* as rupture of legitimacy but legal continuity (Table 1).<sup>5</sup> Legitimacy is understood here in the sociological sense of general or at least elite acceptance of the claims of the rulers to justify their rule, while legal continuity is understood, following Hans Kelsen, as the limitation of change to a form that relies on a regime's own rule of change. The four-part scheme of Kis can be expanded to eight if we differentiate among externally induced and internally generated versions of each path. Evidently, revolutions (as all over Eastern Europe in the late 1940s), but also internal reforms – *autogolpe*, or self-coups – can be and have been promoted, induced, and even forcefully imposed by outside powers, even if the extent of the external role is often open to question. While I am not aware of even a single case of negotiated transition in the context of legal continuity having been externally produced, there seems to be no logical reason why this path too should not be possible.

[Table 1 around here]

It is not hard to demonstrate today the superiority of coordinated transition as a path to democracy. Reforms always seek to preserve an original identity, and reiterated reforms leading

to the end of a dictatorship take a very long time, as recently in Mexico. The “state-strengthening” authoritarian consequences of revolutions are almost indisputable empirically, and Hannah Arendt’s masterly analysis remains the best treatment of the elective affinity between revolution and dictatorship, even if in *On Revolution* there is an entirely exceptional case that avoids this logic: the American Revolution. In the case of a self-coup, the chances for democracy would rest with the democratic intentions of an authoritarian force – an inevitably rare commodity. As against these paths, the late twentieth-century experience of negotiated transitions, from Spain to Poland, Hungary, and South Africa, has dramatically demonstrated the possibility of relatively rapid replacement of an authoritarian legal order by a democratic one within the framework of legal continuity.

Unfortunately, however, as Linz and Stepan demonstrate, this path is available only where social forces capable of negotiation have emerged within the dictatorship. This is possible, they argue, in either authoritarian or post-totalitarian but not totalitarian regimes.<sup>6</sup> Others have rightly focused on a split within the ruling elite required for negotiated transitions, a precondition unlikely to be met under conditions of extreme and terroristic repression.<sup>7</sup> In the case of totalitarian or near-totalitarian regimes, it may very well be that only defeat in war and “occupation by a democratic regime and externally monitored democratic installation” can lead to democracy.<sup>8</sup>

If there is a path to democracy in Iraq, its beginnings at least will lie in defeat in war, occupation, and externally monitored installation. It should be noted right away that the application of the label “totalitarianism” to Saddam’s Iraq may have been more connected to justifying war, occupation, and external installation than explaining why these actions by the United States were the only path from dictatorship. Given the nature of the Shi’ite mobilization

so soon after the end of the war, there should be some room to question analyses such as that of K. Makiya's *Republic of Fear*. Very high levels of brutality and repression are possible in non-totalitarian as well as totalitarian dictatorships. I am not competent to debate the issue of the exact nature of the Iraqi dictatorship, and it is now moot to the extent that war and occupation have taken place, and the justification, right or wrong, that it was impossible to remove Saddam's dictatorship any other way can no longer be tested against other possibilities. What is not at issue is that Iraq's dictatorship has been smashed, entirely outside this regime's own rule of change (if it had one), and that all this happened through the military intervention of an outside power. Thus, legally speaking, we have a case of externally imposed revolution in Iraq.<sup>9</sup> Can it lead to some kind of democracy?

Our first impulse, that external imposition would only make a revolutionary road to democracy – already nearly impossible – more difficult, may be wrong. Linz and Stepan, with the German and Japanese cases in mind, seem to think that external imposition can accomplish a democratic transition (though not necessarily consolidation) where revolution is not likely to. While empirical evidence based on two cases (whose relevance I examine below) proves little, it could nevertheless be argued that external imposition has the advantage that an external occupier and monitor can not only remove the forces of the old regime, but also block the efforts of newly mobilized actors to impose a non-democratic solution. External occupation may force such new movements and parties to work together and accept solutions that would not be their first choice, but which they can come to accept as “the only game in town.” Accordingly, if a Shi'ite revolution, for example, had hypothetically overthrown Saddam, it would have been difficult to force victorious clerical leaders to accept any kind of power-sharing and open competition with secular or Sunni elites. With the American occupation, no force would presumably be in a

position to impose its own solutions.

At the same time, in the case of external imposition there would be problems with the legitimacy of a new, transitional order even graver than in the case of an indigenous revolution. The latter are best understood, following Arendt, as having two moments: liberation and revolutionary construction.<sup>10</sup> Between the two, when the old law is dead and the new has not been created, lies a political-legal vacuum that no revolutionary regime change can avoid. Thus, what Carl Schmitt called *sovereign dictatorship*, implying the need for a provisional government that exercises arbitrary authority without the constraints of the rule of law or the separation of powers, is inevitable even in a democratic revolution until a new constitution is drafted, ratified, and enacted. Sovereign dictatorship has a very high need for self-legitimation; in modern, democratic times it can be exercised only in the name of the people. But who are the Iraqi people? Although Bush, Blair, and Rumsfeld habitually refer to such an entity, strictly speaking the Iraqi people cannot be legally defined before the institutionalization of a democratic process. For now there are only Kurds, Shi'ites, Sunni, and others, both secular and religious, especially since the state that held them together in some kind of Iraqi nationality has been smashed.

In indigenous revolutions, the part of the people that plays a heroic and self-sacrificing role in the work of liberation has at least a claim to represent the people and their interests before the latter can express themselves through democratic channels. The reason why new elites in control of provisional governments, inevitable components of revolutionary transformations, can be accepted as legitimate for a relatively short period is that they have worked to liberate the country from a (generally) hated old regime. In the case of an external imposition, however, it is almost impossible to distinguish liberation from occupation. After defeat in war, unless a country is freed from an external occupier or its obvious puppets, the liberators will be occupiers to some

and probably to most if they stay long enough to do any good, to really help stabilize and frame the political competition. Any interim government they sponsor, with no political credit of its own, will suffer from this legitimacy problem, and the inevitable role of such governments in shaping more permanent arrangements will be the object of hypercritical scrutiny and suspicion. The occupying power – the Americans – can claim that they will let the Iraqi people gain control over their process of democratization, but they must first identify the people and its plausible representatives. If any important group is excluded, it can claim to represent large parts of the population against the occupiers and their appointees. Thus, they may find it easier to speak in the name of the people than those who represent the occupiers. This place may be taken in Iraq by the most radical Shi'ite clerics as well as some segments of the old state administration. Even a highly pluralistic provisional government cannot solve the problem, since those who participate, if they have a mass base like the Shi'a clerics, may not be able to manage their relationship with their base as well as with more radical elite rivals.

The issue of the Ba'ath administrative elite is quite different, but equally serious. As Linz and Stepan note, destroying the party in a one-party state, where it is fused with the administration, incapacitates the state, opening it up to opportunistic, clientilistic, but amateur groups who cannot solve problems of coordination and efficiency.<sup>11</sup> This has already happened in Iraq, probably along with the alienation of the Sunni middle and professional strata also tied up with the Ba'ath and the state bureaucracy. The alternative, however, restricting de-Ba'athification to the top only, which the Americans have also tried, however selectively, is incompatible with the revolutionary ideology of both the returning exiles and the radical Shi'ite clergy, whom the Pentagon ideologists were unwise enough to strongly encourage.<sup>12</sup> Radically pursuing this purging strategy would mean not only the continued disorganization of the state,



but also the exclusion of the relatively secular Sunni statist and professional middle strata from politics. It may be that this road will help legitimate the imposed revolution in the eyes of the previously excluded, inevitably the majority. But it may have two disastrous consequences: a dramatic drop in the efficiency of administration and services, and the long-term exacerbation of Sunni-Shi'ite conflicts.

### **German and Japanese Comparisons**

If the legitimation problems of an externally imposed revolution do not seem entirely insoluble, this may be because of the historical precedents of Germany and Japan, where they were handled in significantly different ways. External imposition can indeed be seen as two very different things: imposing a fully democratic solution from the outside, or merely removing the impediments to genuinely internal solutions. According to Carl J. Friedrich, the process of democratization of Germany should be understood as the second of these types: the restoration of democracy.<sup>13</sup> In the words of the best American historian of this process:

German political life reached “point zero” in May 1945. But there were still latent political traditions of pre-Hitler Germany on which a reconstruction of the body politic could fall back. There were also scores of political and intellectual leaders and thousands of faithful followers who had somehow weathered the totalitarian storm and were rallying now to rebuild society and state.<sup>14</sup>

It may therefore be more fitting to choose the Japanese example as a lesson for Iraq, because here the work of imposition was much more drastic and democracy was more obviously created than merely restored.<sup>15</sup> Note, however, that in Japan radical rupture was avoided to a far greater extent than in Germany. The Americans made a determined attempt not to smash the internal capacity of the Japanese state. The Japanese cabinet and Diet were not removed, but

instead had to follow the directives of the American military rather than dominant military groups, as in the years 1930-45.<sup>16</sup> Most importantly, General MacArthur was strongly sympathetic to the Japanese government's desire to allow the emperor, representing the unity of the state, to remain in place. The retention of the emperor was key to maintaining the coherence and loyalty of the police and the bureaucracy. Finally, even in the midst of imposition, the important *fiction* of legal continuity was maintained: the new constitution of 1947 was formally passed as a mere amendment of the 1889 Meiji constitution.<sup>17</sup>

Thus, the problem of legitimation in Germany was handled through the restoration of democracy through largely indigenous processes, whereas in Japan, where democratization was imposed, the solution relied on the preservation of the inherited state along with a species of traditional legitimacy. This difference should not hide the fact that the initial conditions of political transformation in Japan and Germany in 1945 were far more similar than either was to contemporary Iraq:

1. Germany and Japan were under the externally overthrown dictatorship for 12 and 15 years, respectively, Iraq for 40 years or more.
2. Germany and Japan were constitutional regimes before the 1930s; what occurred after 1945 was first and foremost a restoration of constitutional regimes. Iraq has never known constitutional, rule-of-law government. The skills, traditions, memories, institutions, and most of all the professionals to build a constitutional state were available in both Germany and Japan, but not in Iraq.
3. Germany and Japan are ethnically homogeneous. Japan is also religiously homogenous, while violent Catholic and Protestant conflicts were over in Germany in the seventeenth century. The ethnic and religious situation in Iraq is obviously different, to say the very least.

Here the ascriptive cleavage structure is three-dimensional and highly antagonistic (Arab-Kurd; Shi'ite-Sunni; secular-religious – with six of the eight possible groupings realized!)

4. German and Japanese elites and the Western, mainly American agents of democratization had a common enemy, whose support was relatively weak within their countries: the Soviet Union. Iraqi elites, in common with other Arab/Muslim leaders and opinion makers, have a major enemy that is a friend of the United States: Israel.
5. The external boundaries of Japan were relatively secure; those of Germany could be threatened only by a new world war. The boundaries of Iraq, on the other hand, are porous, and threatened by a plurality of states that have important allies within Iraq. Iraqi democracy is a threat to all of these states, some of them allies of the US and therefore difficult to restrain by threats of force.

### **Partition or Historic Compromise?**

Evidently, democratization in Iraq has a much less favorable “zero point” [*Stunde Null*] than did revolutionary imposition in Germany *or* Japan. It will also be much more difficult to imitate the work of the generals Lucius Clay and Douglas MacArthur, who in any case relied on whole staffs of leftist experts interested in what is now rejected by the Bush team as “nation-building”: the establishment of a new, state-based framework of social solidarity and identification. Not interested in nation- or state-building, they nevertheless gave themselves a great deal to do in this area. Unlike their forerunners in Japan, the Americans in Iraq entirely smashed not only the Ba'ath government but the existing state as well, putting its whole administration under severe threat. They did not or could not seek out any institution like the Japanese emperor, government, Diet, police, or administration that would contribute to the cohesion or the work of the state,

keeping order and maintaining the established framework of everyday life within the territory. To be sure, in Germany, too, there was little or no institutional continuity of the central state, but here both the Americans and the British very early restored or created viable provincial (*Länder*) governments. Bavaria, for example, already had a prime minister in late May 1945, a few weeks after the surrender.<sup>18</sup> When the time came to rebuild central institutions, that effort could rest on established provincial governments, administrations, and, after the election of constituent assemblies, constitutions. None of this could have happened without long-standing patterns and practices as well as surviving staffs and leaders of effective local governments.

While Iraq is in no way comparable to Germany with respect to such givens, there are nevertheless three places where the Americans could look for at least some analogous resources: the Kurds, with their experience of a quasi-independent region; the lower and provincial levels of the Ba'ath state administration; and the Shi'ite clerics, who are now showing a surprising capacity to administer cities and villages – more, in fact, than the occupiers. Unlike in Germany, however, these forces of potential bottom-up organization represent three separate and mutually antagonistic ethnic-religious groups. Two ways can be imagined of forcing them to cooperate: quasi-partitioning the Iraqi state among them, or enabling them to enter into a difficult but not impossible historical compromise. The project of full autonomization may in fact resemble the German pattern, with three military powers – the Americans, the British, and the Poles (!) – playing the central role. Right now there is loose talk in Washington of the UK holding Basra and the South, the Americans continuing to occupy Baghdad and the center, and a Polish-led international force presumably “occupying” or “protecting” the North, including the Kurdish territories. Good luck to the latter when the Turkish army crosses the border, as it certainly will if the project of partitioning Iraq is adopted.<sup>19</sup> More seriously, it may be impossible to find an

autonomy formula that will simultaneously satisfy the needs of the Kurds if the Iraqi state proves unviable, and the Turkish government and military command will insist on having an important say in the matter.

While more difficult internally, enabling the three forces to negotiate the formation of a broad-based provisional government, along with forms of reduced but still real local autonomy and a constituent process based on consensus and compromise, should have appeared more promising. Such a path would graft a negotiated or coordinated transition onto the externally imposed revolutionary model, doing only without a legal continuity that in any case would not be much missed in a society unused to the rule of law. This option would have four preconditions:

1. The first is negative: the US would have to get out of the process of refereeing the negotiations after initiating them. There are several reasons for this. The occupation is unpopular with several major groups that would have to participate in a broad-based process. The presence of US negotiators or even referees would be seen as a strong intervention on behalf of unpopular outcomes – some kind of continuation of the occupation, special access to Iraqi oil, outcomes favorable to Israel, etc. Moreover, the US has already shown too great a preference for external exiles, in particular the INC of Chalabi and Makiya, and thus could not count as a mere referee in an Iraqi process. In fact, it has been made clear by very knowledgeable analysts like Brent Scowcroft<sup>20</sup> that the US did not fight the war for democracy to hand over power to its enemies, whose victory would be quite imaginable in an open competitive election. Thus, the democratic intentions of the US would remain in doubt. The posture of the Bush government recently at the Security Council, where mere legitimation was sought for a predetermined outcome, has certainly not escaped the attention of Iraqi actors. Thus, for a genuine negotiated transition to democracy, supervision by the

UN, its Secretariat, or another plausible international agency would be mandatory.

2. Since legal continuity is already broken, the establishment of the rule of law is even more important.<sup>21</sup> This means first of all the avoidance of arbitrary acts (arrests, open-ended interrogation, shootings, public humiliation, trials without due process, etc.) by the occupation authorities themselves. This is a difficult task for an occupation regime that is formally a military dictatorship, especially while fighting continues, but important steps can be taken by establishing military and/or international courts with due process and forms of oversight, as well as by disciplining those responsible for obviously arbitrary acts. Given the problem of the Ba'ath Party, a general amnesty would have to be declared for those who have no obvious criminal responsibility under international law. (This could be linked to a truth and reconciliation process.) For political actors to be able to participate in an uncertain, open-ended political trial of democracy, their personal fates would have to be secured. Elections leading to democratic stability can only be held if party workers, publicists, and voters do not fear repression and retaliation. Granted, given the general availability of arms, a non-violent political process is hard to imagine, but at least participants should not have to fear arrests, interrogations, and kangaroo trials at the hands of the occupying authority or a transitional government.
3. The political participation in the negotiations of all groups with sufficient followings and which accept democracy as a second best would have to be guaranteed. Their attitudes toward the US, the Iraqi exiles it sponsors, or even the past need not be decisive as long as the parties publicly and convincingly indicate their strong willingness to desist from trying to impose a non-democratic outcome, and to accept the rules of the game that come out of negotiations.

4. Finally, there is a need to involve representatives of the key neighboring states (Turkey, Iran, Syria, Jordan, and Saudi Arabia) either in negotiations concerning the structure of the Iraqi state, or in a separate conference on this question. Eventually, the UN Security Council would have to produce a binding agreement, with sanctions concerning the boundaries of Iraq and its component parts.

Different formulas could have – or perhaps still could, if such initiatives are revived – actualized or combined these four desiderata. But it is the principles themselves that are all-important: internationalization, self-determination, legality, and consensus. Moreover, it is pretty obvious that the US could only have benefited from stepping aside and sponsoring a process of internationally monitored negotiated transition. The principal goal of the invasion, now that there are apparently no WMDs, is already being redefined as a united but democratic Iraq. The chances of failure in both these areas could be minimized as long as the consensus requirements for an agreement are not set too high. Equally important, all charges of imperial interests could have been refuted by adopting this model, and the UN could have been used to retroactively justify the military enterprise.<sup>22</sup> Granted, the Russians and the French would exact a price for this act of cooptation, but it would have to be paid ‘only’ by the interested US companies that may lose contracts and profit opportunities. Thus, it is difficult even to explain why the US is so against this type of model.

Evidently, part of the US government has directed its strategic plans as much against the UN as Iraq itself. Otherwise it is hard to see why a compromise proposal, variously offered by Chile, Mexico, and Canada, was not adopted by the Americans (Blair’s government seemed tempted) during the last weeks of the prewar Security Council debate. Not only a “moral majority” (i.e., nine or more votes) of the 15-member Council could thereby have been attained,

but perhaps a French or Russian veto could have been avoided after all. It seems clear in retrospect that Security Council support would have meant, as in Afghanistan, UN participation in the political transition, which the Pentagon wing of the US government (which never wanted to go the UN in the first place) was already seeking to avoid. So the idea of UN supervision or even serious participation in the political transition cannot be permitted now, and even Tony Blair had to be set right when he entertained some undetermined version of the idea.

But then why not forget my first precondition and sponsor a fully inclusive, autonomous, negotiated process under American supervision, one that could still perhaps work if they could get the radical Shi'ite clergy as well as the Kurds to sit down with elements of the old state administration? The answer seems to be that they oppose such a process precisely because of its virtues. The US government must fear just as much as Scowcroft that democracy could mean the election of forces hostile to the United States. But they cannot follow his suggestion that democracy be postponed indefinitely now that the democratization of Iraq has become the only justification for the war, the violation of international law, and the diplomatic break with important allies. What they therefore want is a democracy that turns out right – a contradiction in theory because democracy by definition implies uncertainty of outcomes,<sup>23</sup> but empirically possible to the extent that the entire process, as well as the resulting constitutional-electoral regime, can be managed.

This still leaves the question of the rule of law, but the answer seems pretty obvious. The de-Ba'athification that the exile groups continually speak about, which can only create legal uncertainty and turmoil for some time, has not only become part of the ideology of the American planners, who thereby confirm to themselves the analogy of the Iraqi regime change to previous and successful transitions to democracy (de-Nazification in Germany, demilitarization in Japan,



and, supposedly but wrongly, de-Communization in East Central Europe<sup>24</sup>). It is also a carrot uniting the Shi'ite movement, with its hatred of the Ba'ath and its bevy of office-seekers, and the ideologically oriented exiles around Chalabi. To the extent that the Shi'ite clerics cannot be allowed to rule Iraq, it may be thus possible to compensate them on lower levels of power and influence, or at least so the Americans and the exile groups must hope.

### **Confusion Reigns: Provisional Government and Constitution-Making**

Thus, revolutionary imposition will not be combined with, or its problems mitigated by, a consensual, rule-of-law-framed process of broad-based negotiations. The problem, however, remains that of devising a process that appears pluralistic without being excessively so, one that leads to sufficiently democratic elections without producing an outcome deemed unfavorable by US policy-makers. At present, all we are seeing is confusion and changing signals, which likely expresses serious conflicts between the US and its closest Iraqi partners, between the State Department and the Pentagon, and among the Iraqi groups whose participation seems necessary in one or another formula for transitional arrangements.

First there is the issue of the type of state. The Kurds, of course, cannot rule over Iraq as a whole and want as much as possible to escape rule by any central: if independence is not possible, their aim is a confederation of three "states" or "regions." They are opposed not only by Turkey, but probably also Chalabi, whose secular Shi'ite associates could not gain control over any of three possible territorial entities, except perhaps the central Sunni-Arab region, where they would have to forever rule by force of arms. The Americans oscillate between the two sides, depending on the day and on whoever happens to be speaking for the government.

Second, there is a question of who appoints the provisional or interim government. The

initial confusion of American proposals in this area seems to express a basic tension: they are loath to leave outcomes to chance even if the cost would be illegitimacy (i.e., imperfection), while whoever within the Iraqi who cares more about legitimacy would like the outcome to be produced by some kind of process that can be represented as democratic (hence the preference for a “conference” or a “national assembly”).

This tension will reappear in the process of creating a constitution. Secretary Rumsfeld, who referred to this theme very early, seemed to imply that it would be entirely unproblematic for an interim government to produce a draft that would be perhaps ratified in referendum. It is likely that the American government – or the State Department and the Pentagon separately – already has plans it wishes to introduce or impose. To any Iraqi aspiring to significant support, however, the constituent process must preserve the appearance of independence and genuine participation. Thus, Chalabi very quickly countered with a more traditional constituent assembly formula. What remained unclear was whether such an assembly would be elected, and if so how, or a method of delegation by hand-picked instances would be used. Perhaps the national assembly that would pick the provisional government would also double as a constituent assembly – the classical revolutionary-democratic formula, except that the members would not be democratically elected. Even if there were elections, everything would depend on the electoral rules, the legal conditions of the campaign, and access to the media – all of which could be arranged in such a way as to either exclude important actors or to minimize their chances. It may thus be possible to elect a bare pro-American majority that could, with suitable majoritarian decision rules, shape the constitution. But again, competitive elections or even large assemblies involve risks that a small handpicked committee or single leader would not prevail. The challenge is to minimize the risk, and yet maintain democratic appearances.

We can expect further confusion, ultimately a function of trying to square the circle: to have a democracy sufficiently democratic to justify the war, and to have that democracy produce a desirable outcome, however understood by the American officials in charge. If they could overcome their own internal disagreements, the project would not be impossible, unless another actor emerges that is capable of challenging and convincingly denouncing it as undemocratic. It is too early to tell whether that has already happened with the appearance of Shi'ite mobilization. But by failing to construct a viable process before that mobilization, the Americans may not be able to contain it whatever choices they now make.

### **Civil Society vs. Empire?**

The absence of a democratic or even rule-of-law tradition may not be fatal for democratic transition if civil society organizations can prepare a society for participation and self-government during the dictatorship. Such organizations can make it possible for a constituent power to be based on organized society and not the quicksand of isolated individuals.<sup>25</sup> It is a commonplace, however, that under totalitarian domination, forms of local autonomy, civil associations, publics, or even networks cannot develop. Accordingly, the revolutions that abolish such a dictatorship themselves have a propensity to turn dictatorial. In light of the recent Shi'ite mobilization – under which I understand not only demonstrations and cultic events but also the impressive grass-roots religious organization of communities like Najaf and Karbala and their infrastructure – one must come to one of two conclusions. Either the Saddam regime was only incompletely totalitarian or under conditions of a perceived neocolonial occupation a tradition like that of the Shi'a can be very quickly revived and reorganized even after extreme suppression. Probably both statements have some truth in them.

This idea was anticipated only by leaders of the Supreme Council of the Islamic Revolution, who maintained before, during, and after the American invasion that Iraqis could free themselves from Saddam if they received the right kind of significant but non-intrusive international support. That assessment may have been too optimistic as far as Saddam's regime was concerned, but may turn to be true for the occupation regime. In theory, the Americans have much greater resources to crush an independent movement than even Saddam, but the latter was far freer to repress independent social movements. Having fought a war for "Iraqi Freedom," the occupiers are in poor position to suppress manifestations of that freedom. At the same time, it is difficult for them to continue portraying the mere existence of an anti-American movement as proof of American success, justifying the occupation. They must be conscious of the fact that when there is no serious repression, the dynamic of mobilization will bring an increasing number of increasingly politicized people into the process. The longer the occupation lasts, moreover, and the longer the projected timetables for withdrawal, the more anti-American the movement is likely to become.

Aside from extensive repression, which seems implausible, two strategies seem to be available for the US with respect to the Shi'ite movement: cooptation and fragmentation. The first would mean making a deal with a moderate clerical leadership, notably the leaders of the Supreme Council – nominally members of Ahmad Chalabi's Iraqi National Congress, although they boycotted and demonstrated against some of the assemblies organized to promote that organization's leading role. For men like Ayatollah Muhammad Bakr al-Hakim, that prospect is dangerous now that mobilization is taking place, since if their cooperation comes too readily or cheaply, they could be challenged and replaced by more radical and more anti-American leaders. It is hard to believe that in a seven- to nine-person interim government, for example, the

‘moderates’ could accept anything less than leadership – or a decision-making structure that would allow them to veto any decision. Unlike the exiles, they appear to be organized and armed. Unlike the Kurds, they could win a majority. Thus, coopting this particular Shi’a leadership may not be possible unless the Americans are prepared to cede power to it.

But even if moderate Shi’ite leaders can be lured into a provisional government without veto rights and survive the political fallout, it would be in their interest to have an *elected* constituent assembly as early as possible. Weaker American-supported elements, like the exile groups, would be interested in a *prearranged* constituent assembly and subsequent elections, as late as possible. But provisional governments can be justified only if they are really provisional, and that means relatively short-term. With the UN in charge, as in Afghanistan, it would have been easier to justify the longer period probably needed to prepare the conditions for genuinely free elections. Now that option seems to be gone. With the US in command, and especially if American-supported elements with little following in Iraq dominate, the tenure of any provisional government would have to be especially short. Whether in or out of such a government, unless he himself leads it, Hakim and the moderate Shi’a will be in an especially strong position to denounce all delays of a free election as well as the imposition of a constitution by an unelected body. And if he does not, the more radical al-Sadr may be ready to play the part of Lenin. Chalabi should recall Kerensky’s fate (and Hakim those of the more radical social revolutionaries) before embarking upon any such path.

Fragmenting the Shi’ites may in fact be a better strategy from the American point of view, since this is already happening spontaneously. There seem to be divisions concerning the relationship of religion and politics, the model of a future Islamic republic, as well as the related question of Iran – whether an alliance should be pursued, and, if so, with which Iranian faction.

There may be also disagreement over whether the goal is to fully control part of Iraq or somehow share in control over the whole. In an ideal world from the American point of view – one that the right electoral law could promote – the Shi'a could produce four or five competing parties. In a first-past-the-post, one-round presidential election, these could all lose to an American- and Kurd-supported Arab presidential candidate, whose power could be suitably enhanced by the right constitution. It is some such solution the Americans must dream of if they are to have internationally monitored democratic elections at all. But the Shi'a would have to be asleep at several, indeed almost all stages of the process for this divide-and-conquer strategy to work. By uniting against the occupation and its hand-picked interim government before, during, or even after a projected free election, they would guarantee that the Americans could not attain both of their goals: having free elections and guaranteeing a particular outcome. With the right strategy, in other words, the Shi'ite clergy simply has too many potential voters to lose. Does that mean they can win? It depends on what they want to accomplish.

The Shi'ite civil society in formation is by its nature anti-occupation. Assuming that the Americans were really only what they claim, selfless liberators who wish for no advantages for themselves in Iraq, they nevertheless represent by their very presence the humiliation of a society that could not free itself from an oppressive, minority-based dictatorship. But of course they are not perceived as selfless, disinterested, or even particularly competent in the business of running an Islamic country. The anti-occupation movement is thus for self-determination, but not necessarily or primarily for democracy. People seem to be mobilized on behalf of their various understandings of the Islamic faith and/or the Iraqi nation, and democracy may represent a distant third goal, relevant at best to a minority. Had they been drawn into a legitimate democratic process under international supervision, many of the leaders could have become

interested in democratization as a second best to their own domination. Now it is hard to imagine a scenario in which the this could happen. Before the American occupation comes to an end, there may be mass confrontations and possibly civil war between a provisional government and popular forces. None of that is a good school for democracy. If the American proxies win an inevitably temporary victory, there may be an ongoing low intensity, asymmetric struggle against them with the danger of drawing in other countries, above all Iran. It is hard to see how a new dictatorship could be avoided in such a Vietnamization of Iraq. But if the Americans are forced to withdraw and the Shi'ites win, they themselves may fall under the illusion of being able to control the whole country – since, after all, Saddam could do this with a narrower base of support. That would also be a road to dictatorship, albeit of a different type.

The historical compromise the Americans could have sponsored but did not thus remains the only plausible road away from dictatorship. Its parameters would still be the same even if it is the anti-colonial movement in the driver's seat: international supervision, consensus, and legal security. It will be possible only if the occupying power is forced to abandon the project of imposed revolution. But whether the occupation ends in new dictatorships, coups, and civil wars or historical understanding and at least partial democratization and rule of law now depends on the internal development of the anti-occupation movement, as well as its external advice and support. We on the outside should not set the bar too high. Given its external connections, the Shi'ite movement is not likely to identify with a social model too different from that of at least one of the important factions of the Islamic Republic of Iran. An Islamic republic based on popular sovereignty, legal equality, and local autonomy, rather than religious guardianship and the suppression of women and minorities, may be the best that can come out of the Saddam dictatorship, its violent end in an illegal war, and an occupation regime that chose the option of

imposed revolution.

<i>Legitimacy</i>			
		Continuous	Rupture
<i>Legality</i>	Continuous	<b>Reform</b>	<b>Coordinated Transition</b>
	Rupture	<b>Autogolpe</b>	<b>Revolution</b>

**Table 1. Transition Paths** (Andrew Arato, after János Kis)

#### NOTES

<sup>1</sup> See Nehal Bhuta in this issue.

<sup>2</sup> Anne-Marie Slaughter, "Good Reasons for Going Around the UN," *New York Times*, 18 March 2003. Her argument is in my view normative-theoretically fallacious, since even given the open and processual nature of international law, the outright illegal cannot be simply dubbed legitimate, unless a deontological principle of legitimacy like international public opinion or the moral majority (the nine members of the Security Council) supported an action that was stopped by a veto or veto threat alone, as in the Kosovo case she cites. Moreover, the illegal but legitimate should be able to become a principle of a new and better legality, and it is hard to see how the actions of the US vis-à-vis the Security Council and the UN Charter could yield that. According to Slaughter, if weapons of mass destruction were found, and/or the Iraqi people welcomed the Americans and their allies, and if the US turns "immediately back to the UN" for after the fact approval and to help rebuild Iraq, and the UN agreed, the invasion would become legitimate. It is hard to think that she is speaking as a lawyer, and not as a sociologist to whom legitimacy is only belief in a claim of validation or justification. Even then her first two conditions have not been satisfied: WMDs have not been found, the Iraqis on the whole did not welcome the invaders. As far as the most "important" point is concerned, the US has now indeed gone back to the UN for approval, and for help in rebuilding Iraq, though the concessions in the political area (appointing a special UN coordinator with no specified powers) are more symbolic than real. For legitimacy in the sociological sense it is hard to believe that a Security Council resolution giving the Americans free hand in the political sphere which they in any case have will make much difference. On the other hand, it would be hard to deny that success in building a democratic Iraq, which is now central to the self-justification effort of the American government, would help to justify the invasion and occupation for a great many who are otherwise skeptical.

<sup>3</sup> See Jürgen Habermas in this issue.

<sup>4</sup> See *New York Times*, 9 May 2003 on the draft resolution introduced by the US, the UK, and Spain. It is to be very much hoped that this resolution, quite humiliating to the countries (France, Germany and Russia) that sought significant UN participation in the political transition, is defeated or vetoed, but the *Times* report suggests that it will pass.

<sup>5</sup> J. Kis, "Between Reform and Revolution: Three Hypotheses about the Nature of Regime Change," *Constellations* 1, no. 3 (January 1995) and "Between Reform and Revolution," *East European Politics and Society* (Spring 1998). I expanded the scheme by identifying continuity of legitimacy cum legal rupture as *autogolpe*, i.e., coup or revolution carried out by a legitimate authority in place.



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- <sup>6</sup> J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996), 55ff.
- <sup>7</sup> A. Przeworski, *Democracy and the Market* (Cambridge & New York: Cambridge University Press, 1991), 56ff.
- <sup>8</sup> Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 57 and 73. The Romanian case, however, shows that revolutionary change under some circumstances can lead to a polyarchy.
- <sup>9</sup> A similar category, artificial revolution, was introduced by some analysts dealing with post-war Germany and Japan. See: J.D. Montgomery, *Forced to Be Free: The Artificial Revolution in Germany and Japan* (Chicago: University of Chicago Press, 1957), esp. intro.
- <sup>10</sup> H. Arendt, *On Revolution* (New York: Viking, 1965).
- <sup>11</sup> Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 63.
- <sup>12</sup> In fact, de-Ba'athification seems to be more strongly represented at the Pentagon and in Washington than at the State Department and among American officials in Baghdad faced with the immediate consequences of state disintegration. The result is, however, confusion and conflict. A clear and openly stated policy would have helped, but now mixed signals have been given to Iraqi actors who have already begun to battle over important positions.
- <sup>13</sup> "Military Government and Democratization" in C.J. Friedrich et al., *American Experiences in Military Government in World War II* (New York: Rinehart, 1948), 11-15.
- <sup>14</sup> P. Merkl, *The Origin of the West German Republic* (New York: Oxford University Press, 1963), 20.
- <sup>15</sup> See especially K. Takayanagi, "Some Reminiscences of Japan's Commission of the Constitution" in D.F. Henderson, ed., *The Constitution of Japan, Its First Twenty Years, 1947-1967* (Seattle: University of Washington Press, 1968). Dr. Takayanagi, an important participant with a "collaborative theory," nevertheless writes: "All legislation for the democratization of Japan during the occupation was guided and supervised by the SCAP [Supreme Commander for the Allied Powers]. No legislation was enacted by the "free will of the Japanese" in the sense that the enactment was accomplished "without any outside interference" (77). Other interpreters believe the level of compulsion used was much more drastic, and few apparently share Takayanagi's judgement that the new constitution was "a rather moderate revision of the Meiji constitution on democratic lines." Even a cursory reading of the two texts as well Takayanagi's own comparison refutes this claim.
- <sup>16</sup> On this see W.G. Beasley, *The Rise of Modern Japan* (New York, 1990), 177ff.; Karel van Wolferen, *The Enigma of Japanese Power* (New York: St. Martin's, 1989), 39-41.
- <sup>17</sup> J. Maki, "The Japanese Constitutional Style" in Henderson, ed., *The Constitution of Japan: Its First Twenty Years*, 8-10; Takayanagi "Some Reminiscences of Japan's Commission of the Constitution," 79; as well as A. Bouterse et al., "American Military Government Experience in Japan" in Friedrich et al., *American Experiences of Military Government*, 350-51. On such fictions, see A. Arato, *Civil Society, Constitution and Legitimacy* (Lanham, MD: Rowman & Littlefield, 2000), 143-45, 174-75.
- <sup>18</sup> Friedrich, "Organizational Evolution in Germany, 1945-1947" in *American Experiences*, 205-9; Merkl, *Origin of the West German Republic*, 8-14 and passim.
- <sup>19</sup> These men of the new Europe will need Jan Sobieski or his ghost to protect them! But, as against the siege of Vienna, at least there are no Hungarians among them, because after allowing the training of Chalabi's *Freikorps* at Tazsár, that country had had enough of direct involvement in Iraqi regime change.
- <sup>20</sup> W. Gibbs, "Scowcroft Urges Wider Role for the U.N. in Postwar Iraq," *New York Times*, 9 April 2003.
- <sup>21</sup> Friedrich, "Military Government and Democratization," 8-11; United State Institute of Peace Special Report 104, "Establishing the Rule of Law in Iraq" (April 2003).
- <sup>22</sup> It may be that such paper-thin justification will be now provided anyway by passing a new Security Council resolution sponsored by the US and its allies. This type of resolution is certainly what Habermas feared, but it is hard to believe that it is the "legitimacy" Anne-Marie Slaughter hoped for.
- <sup>23</sup> Przeworski, *Democracy and the Market*, 10ff.
- <sup>24</sup> The failure of de-Communization (which I opposed) is indicated by the fact that the Polish government of the high former apparatus members President Kwasniewski and Prime Minister Miller may be asked to play a major role in policing post-war Iraq.
- <sup>25</sup> Arendt, *On Revolution*.