

Sistani v. Bush: Constitutional Politics in Iraq

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These [occupation] authorities do not have the authority to appoint the members of the constitution writing council. There is no guarantee that this council will produce a constitution that responds to the paramount interests of the Iraqi people and expresses its national identity of which Islam and noble social values are basic components. The [constitution writing] proposal is fundamentally unacceptable. 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. All believers must demand the realization of this important issue and participate in completing the task in the best manner.

Ali al-Husaini al-Sistani, June 25, 2003¹

A Little Pre-history

Ever since the now-famous *fatwah* was promulgated, the Bush administration's "plan" for an Iraqi transition has been in deep trouble. It took them (and the daily press) over four months to realize that top-down constitution making in Iraq by the US and its clients has to be abandoned.² Not only the Ayatollah al-Sistani's democratic demand for a freely elected, sovereign constitutional assembly, but also informal proposals from the UNDP aiming at some kind of interim legitimacy, were initially disregarded. The latter, learning from recent efforts from South Africa to Afghanistan, suggested a genuine and pluralistic expansion of the Interim Governing Council, and gradual preparation for later free elections under international supervision, leading to a democratic constitutional assembly.³ This type of compromise proposal was apparently

attractive to the Constitutional Preparatory Committee of the Iraqi Governing Council,⁴ which reported one version as its favorite option in October, but not to the Council itself, which was split among the adherents of Sistani⁵ and US clients as well as minority representatives who have an interest in neither democratic elections nor pluralization of interim arrangements. US interest in anything other than a pure top-down proposal became evident only when, under the impact of the expanding military insurgency, the Coalition Provisional Authority came to understand that it could not *simultaneously* take on *both* the armed Sunnis its destruction of the Iraqi state forced underground *and* the immense masses that would rally to the call of the leading Shi'ite clerics of Najaf.⁶

Thus, during the night of November 15, the "Agreement on Political Process" between the Coalition Provisional Authority (CPA) and the Governing Council (GC) was born.⁷ It was imposed in a coup-like fashion, after a very few hours of discussion, on a severely divided council.⁸ Without knowing the circumstances, this agreement first look liked a Bush-Sistani pact, an idea that people close to the US government were only too happy to support.⁹ That should have been a clue that something was wrong. Nevertheless, the illusion was dispelled a few days later when on November 26 the Ayatollah al-Sistani himself denounced the November 15 Agreement and renewed his call for free elections for the constitution-making body as the only acceptable entity to which sovereignty could be transferred by the CPA.¹⁰

It is remarkable to see a senior Shi'ite cleric assume the mantle of Paine, Madison, and Sieyès. Now that he has begun to mobilize many tens of thousands of people around the slogan of free elections for a constituent assembly, it is impossible to tell whether he would be able to retreat from high democratic principle even if offered sufficiently attractive terms. If he is, it would be so only because, unlike democratic leaders elsewhere, he has ample reserves of

traditional legitimacy at his disposal; his ability to turn great demonstrations on and off according to strategic requirements is impressive. But as of this writing he has not been offered such terms. As we now know, he and/or his advisors immediately saw through the November 15 Agreement. Above all, he saw the point best articulated by Lenin: that in an authoritarian or dictatorial setting, whoever holds legitimate power at the time of the election of a constituent assembly has a good chance to control the electoral outcome, the assembly as well as its constitutional creation.¹¹ In his judgment, the November 15 scheme would enable the current GC, and behind it the military dictatorship of the Americans, to control the process and its outcome – some kind of polity favorable to both the geopolitical interests and the public relations effort of the US. Details of the agreement bear him out, and it is worth demonstrating this.

The Source of Authority

The problem of authority arises because the CPA has made the November 15 Agreement, which was to be the foundation of the whole subsequent process, only with its own creation and agent, the Governing Council – legally speaking, an entity authorized entirely by itself. In terms of international law and in particular UN Security Council Resolution 1511, which recognized the CPA (point 1: temporarily exercising sovereignty) and the GC (point 3: embodying sovereignty) as somehow jointly sovereign, this procedure could arguably be interpreted as legally valid. Its political legitimacy in Iraq is an entirely different matter. There is no question here in this externally imposed revolution, any more than in other revolutions, of legal legitimacy in Weber's sense. The legal order has been dramatically ruptured. In indigenous revolutions the instance that authorizes the drafting of Kelsen's "first constitution" can typically rely on revolutionary, democratic, or charismatic forms of authority, but these are also unavailable for the parties to the

November 15 Agreement. Finally, as a foreign occupier, the CPA's claim of authority as the liberator of Iraq was always weak, and becomes weaker every day the occupation continues without solving fundamental problems like employment, public services, and especially physical security.

Thus, the CPA-GC Agreement rests on brute force alone, on facts rather than norms. Given this state of affairs, it is striking that this Agreement assigned almost all the crucial tasks, and not only ultimate authority, to the two contracting parties themselves. The task of creating the unamendable body of rules, variously referred to as the "fundamental law" or the interim constitution or the "transitional administrative law,"¹² was given to the current GC itself, "in close consultation with the CPA" (heading 1).¹³ Agreements concerning security – i.e., the future role of US military forces – would be agreed upon by the CPA and the GC by March 2004, three months before the transfer of power (heading 2).¹⁴ After a misleading introductory statement to the contrary, the GC was given a crucial role along with the CPA in choosing an "Organizing Committee" in each "governorate," which would select the caucus of notables of that province ("Governorate Selection Caucus[es]"). The latter would pick that province's representatives to the Transitional National Assembly, to which the CPA would transfer sovereignty in June, and which would elect a transitional executive (headings 3 and 4). Finally, the very procedures for the adoption of a permanent constitution by a freely elected ("no later than March 2005") constitutional *convention* would be provided by the fundamental law produced by the CPA and the GC by February 28 (heading 1).

Those accustomed to coherent legal hierarchies will immediately notice the irksome problem with all this: instances of potentially higher political legitimacy – the supposedly representative caucuses, the transitional assembly, and the freely elected constitutional

convention – are here being authorized by an instance, or two of them jointly, that have no legitimacy in Iraq. They are even forbidden to amend or revise the instance that would hold them in thrall, the fundamental law. The issue is not just an abstract one, and may indeed have played a role in al-Sistani's reservations. When, at the intermediate stage of the process, the Transitional Legislature and later the Transitional Executive are formed, these bodies could easily consider themselves more legitimate than the process that created them as well as the original source of authorization, the will of Iraq's conqueror. They may be tempted to do what the Estates General did in France at the famous tennis courts: namely, sever themselves from their source of authorization, declare themselves the representatives of the Iraqi nation, and proceed to establish new rules for constitution-making or even give Iraq a new constitution themselves. The Transitional Legislature is especially likely to do so, since it is paradoxically enough supposed to be sovereign and yet is denied any role in the constitution-making process. The fact that it is not even allowed to amend the interim constitution under which it is supposed to operate for a year and a half could easily lead to the rejection of the document as a whole.¹⁵ But if the new legislature subverts the planned procedure in any way, that would compromise the concessions to al-Sistani, who would find it much more difficult to oppose an Iraqi legislature than the foreign CPA.¹⁶ Given the projected timetable, this would happen presumably only *after* the American elections, when Sistani's probably effective call for massive Shi'a protests would no longer be effective with occupation forces, which would be on hand to protect their clients.

Constituent Assembly or Constitutional Convention?

It is also true that the constitutional convention, if and when elected, may also not consider itself bound by the procedural rules of the interim constitution, or the constitutional decisions of the

interim legislature for that matter. But that would happen only (if elections for a constitutional convention take place at all) at a later stage of the process, when new power relations may already be frozen. Nevertheless, this danger too exists, especially if the legitimacy of previous stages of the process remains questionable.

Note that here the choice of terminology matters a great deal. Sistani and his circle seem to have in mind, at least by implication, a constitutional *assembly*. Indeed, since there would be no other legislature, in their model the body to which sovereignty would be transferred after free elections could only be a classical, European-type sovereign constituent and legislative body with the plenitude of powers. The fact that Sistani's *fatwah* calls for a referendum to ratify the constitution confirms that he is operating with the European radical democratic conception. The November 15 Agreement, however, speaks on the contrary of a constitutional *convention* (heading 5).¹⁷ In the US (and Latin American) tradition, this denotes a legislative body with the one and only function of drafting and proposing a constitution, existing side by side with a normal legislature that continues to function as such. We have no reason to assume that the drafters of the agreement are ignorant of this distinction. They thus wish to devalue the freely elected body conceded to Sistani¹⁸ and also intend the interim legislature to hold sovereign powers during the whole drafting process.¹⁹ They do say, however, that the "Fundamental Law," i.e. the interim constitution, will expire only with the elections of the new Iraqi government under a new, permanent constitution, implying that both interim legislative and executive branches will stay in power until then. If so, only two outcomes are imaginable: either the interim government can control the constitutional convention, or not. In the former case the concession to Sistani of democratic elections for the constitution-making body would turn out to be meaningless. But if the latter happens, we would have a classical situation of dual power,

where only force can decide the issue, as in Russia in 1917, in 1918, and again in 1993.²⁰ The US example of the Confederation Congress peacefully submitting to the extra-legalities of the 1787 Convention is entirely unusual. More common are the examples of Argentina under Perón and Venezuela under Chávez, where originally American-style conventions claimed and successfully asserted full sovereign powers. In Iraq it is hard to say which assembly would win this type of conflict, which could be especially intense because of the probably quite different social bases of one body chosen in carefully regulated provincial caucuses and another in democratic elections. But it is understandable that Sistani wants to avoid such a confrontation, in other words dual power with civil war as its very possible outcome, no less than outright rule by forces he suspects.

The Interim Constitution

No major player seems to doubt that forces supported by Shi'a clerics could win free elections for a constitutional assembly under just about any democratic electoral rule.²¹ Sistani's demand for such a procedure, however, is not only self-interested. He has good reasons to believe that Iraqi politics currently suffers from a dramatic legitimacy problem, and it is to his credit that he seeks the answer in democratic legitimacy.²² In his view or that of his advisers, an interim constitution such as the one proposed by the Agreement fails this democratic test. They are not taken in by the shifting name "fundamental" or "provisional administrative" law, or even "Law of Administering the Iraqi State for the Transitional Period," and know that an interim constitution is actually at issue. But when it comes to a constitution, their position is that it can gain its validity only from ratification by a freely elected assembly. Moreover, they certainly understand the high likelihood that an interim constitution would become a large part or even the

whole of the permanent one, as in Hungary or South Africa. This is confirmed by the current draft for that interim constitution.²³ In the entirely reasonable view of Sistani and his advisers, such an outcome – here too subverting the apparent concession to their side – would be intolerable, especially in the case of an *imposed* interim constitution. Nevertheless, the idea that an interim document can gain its validity from an assembly elected under it is not only circular, and therefore procedurally flawed; there are also important substantive considerations against it.

Procedurally, free elections can be held only under some framework of rules that are not exhausted by an electoral law. If democratic legitimacy means electoral legitimacy, as it does for Sistani and his followers, this framework must come before there are elections. There can be no purely electoral beginning to a democracy.²⁴ Moreover, conditions of free electoral competition require basic civil and political rights as well as rights of access to all relevant media. All these arrangements need enforcement as well. When one begins to produce interim “organic rules” that contain these, however, there is a tendency to produce something like a detailed interim constitution. Thus, what Sistani should be aiming for is not ratification by a freely elected assembly, which can emerge only under these interim arrangements, but a process generating legitimacy for an interim settlement that will have binding force (and possibly enforcement, probably international) with respect to the subsequent stages of the constitution-making process.

Thus, the CPA drafters were not wrong logically speaking to propose an interim constitution. They were also right to avoid including more topics than absolutely necessary, thus preserving considerable freedom for their constitutional convention – though this self-restraint is no longer characteristic of the draft interim document. Most important, even their choice of a non-sovereign convention bound by pre-existing interim rules has a lot to recommend it. Here I come to three *substantive* desiderata that may be compromised if free elections are held without

prior, legitimate agreements on interim arrangements: the rights of minorities, federalism, and (relatively consensual) procedures for the making of the permanent constitution. Sistani's sovereign constituent assembly could not be bound by instances of weaker or entirely missing legitimacy in these three respects. Such an assembly, functioning through majority rule, may indeed reject establishing Western-type protections for minorities, possibly strong federalism, and very likely an independent, strong, and secular constitutional judiciary needed to enforce these rights. It is easy to speculate about the disasters that would result, which in the political and military sense may not differ much from the consequences of the clash of jurisdictions implied by the CPA proposal. Whatever Sistani and his circle want today, once they have an overwhelming majority they may not be able to control their own most radical tendencies unless self-binding occurs previously, under conditions deemed legitimate.²⁵

Thus, both the choice of a non-sovereign convention and of interim minority and regional protections along with an independent judiciary, all present in the November 15 Agreement, are worth preserving. The crucial point, however, remains that neither the procedural nor substantive parts of the Agreement can stand up to the claims of a break-away transitional legislature or constitutional convention. In other words, an interim constitution cannot be preserved and adhered to if it rests on little more than American fiat.

As we know from previous negotiated transitions, the alternative to the imposition of interim arrangements is not immediate free elections, but a genuine and comprehensive historical compromise on interim arrangements. By excluding not only remnants of the Ba'ath (perhaps justified, as far as top echelons are concerned) but all Arab nationalist parties and Sunni as well as Shi'ite radicals from the GC and therefore the process leading to the agreements, Paul Bremer has deprived the outcome of even this type of *pluralistic* rather than *democratic* legitimacy.²⁶ It

is unclear, however, whether Sistani would today (as against last June) accept a formula that expands the GC by including his enemies when he has become so strong on his own with respect to the Americans.

The Interim Government

What Sistani found in the November 15 Agreement (and in the draft interim constitution) was in any case not a program of historical compromise, but a top-down model for creating a transitional legislature and executive based on co-optation and potentially clientelism. The Agreement's most obvious flaw is indeed its formula for constructing an interim legislature that would be the repository of political sovereignty for a year and a half. Here journalistic attention has focused mainly on Sistani's demand for a freely elected body, rather than the formula he opposes. It is one eminently deserving strong opposition. The caucuses the CPA and the GC have in mind evidently do not resemble the direct democratic procedures of, say, Iowa – open caucuses in which citizens (or members of each party) can participate if they wish. The Iraqi provincial caucuses are meant to be *closed* meetings of notables, rather than open ones of citizens. The last thing the Americans would permit is the voluntary participation of those most intensely concerned, perforce the most militant. What is especially problematic, however, is the ability of the current GC and CPA to control participation. The GC does receive, despite inconsistent denials, a formal role in selecting members of the caucuses, and, because of the three-stage process, its members could easily wind up being picked, as specifically permitted. In each governorate the GC is to pick five individuals to serve on an “organizing committee”; five others are to be picked by current provincial authorities, and five more by the authorities of the province's five largest cities. Note that the provincial and city authorities are clients of the CPA.

In each province the organizing committee of 15 would then pick the notables for the Governorate Selection Caucus, and the latter would elect the province's representatives in proportion to its population.²⁷ In case the method were not foolproof, the interim constitution (produced by the GC and the CPA) would regulate eligibility on these three levels, and undoubtedly exclude unstated categories from participating in any of them.²⁸

There is thus every reason to believe that if the proposed procedure were followed, the interim legislature would be composed of friends, clients, and even members of the current GC. Nothing would stop such a legislature in that case from re-appointing the current council, or its leading figures, as well as the ministers and state secretaries they already named to all important executive positions. The post-November 15 call of a few GC members to preserve their own body contrary to the Agreement arose either from an access of caution or, more likely, a transparent ploy to deflect from the expected state of affairs.²⁹ Sistani, however, could not be fooled by such maneuvering, which has stopped in any case. While the Americans (along with the part of the GC closest to them) continue to adamantly oppose either free elections in June or postponing the transfer of sovereignty, there are signs that they have now recognized the need to compromise. The problem is that they cannot easily do this around any caucus formula. Of course, they must reject open caucuses, but, given the main political organizations, nominating members for closed caucuses would lead to the same result. They cannot share the power to nominate with Sistani, whose followers would in any case control things in heavily Shi'a provinces, and cannot be given similar powers in the Sunni heartland or Kurdish territories. Any of these alternatives could lead to just as much or even more violent conflict than free elections.

So why not just accept the Sistani demand for free elections? The US administration's and CPA's stated reasons have to do with lack of time, lack of relevant laws, and lack of

adequate voter rolls. Time is mostly a function of law and voter rolls, as far as they are concerned. Admittedly, it would take time to negotiate electoral, party, and media laws, but no more time to impose them than to write the November 15 Agreement. Moreover, the UN could be asked to write laws at least for the first election, avoiding another American imposition. It has further been demonstrated in November by Iraqi Ministry of Planning officials that a census could be completed by this summer.³⁰ Other plans have been offered as well. So lately the CPA argument has been shifting toward security considerations. It is alleged that the insurgency in the Sunni heartland in particular would depress participation there, and this could lead to an unfair result (presumably favoring the Shi'a, who need no extra help with their probable 60% of the voters). But a territorially-based electoral system, with representatives assigned according to population and not participation, would not have this unfair result. If elections were by district, as in the US or UK, low turn-out in some districts would not effect their representation.

Given the territorial distribution of ethnic groups, the electoral system should be relatively secondary matter for the Shi'a clerics,³¹ at least for a constitutional convention, which would not be the basis of governmental coalitions. After Sistani's strong stand against Bush, he is likely to gain much nationalist in addition to Shi'a support for his candidates. Anyway, different preferences regarding electoral arrangements are amenable to compromise, and the "permanent" rule need not reflect the one for the constitutional convention if the production of the rule is not give to that body but to an independent commission.

Thus, it is difficult to avoid the impression that the Americans oppose free elections now because a dramatic Shi'a victory this summer would make mincemeat out of the American justification for the intervention in an election year. It would indeed be tough to sell the American electorate the idea that all our sacrifices and illegalities had the purpose of putting yet

another Islamic government in power, even if there is considerable likelihood that the Iraqi Shi'a, and in particular Sistani's followers, are not interested in theocratic alternatives. Thus, the CPA is clearly aiming at democracy with a certain outcome, excluding the possibility that one of America's many enemies come to power in Iraq, and most American commentators are not disturbed unduly by this *contradicto in adiecto*. Democracies, however, are systems where any party (here including the Americans) can lose elections.³² Postponing elections just because one's side would lose them is certainly the wrong way to begin a democracy.

It is also possible that an election would lead to violence and chaos. That too would look very bad for President Bush on the eve of US elections, and it would also be undesirable in its own right. To avoid fueling the insurgency, it would be very difficult to stop Arab nationalists and Sunni militants from participating, but if they do, the results may show overwhelming support for them at least in the Sunni heartland. That would mean at best that the US would have to throw its support behind Sistani, thereby losing any leverage to control his supporters' ambitions and constitutional plans. The result again could be continued conflict and instability among groups conscious of their strength, having just measured it in elections.

Rights Against the State and Security Arrangements

Nevertheless, even if US administration's and CPA's rationalizations and actual reasons for opposing free elections before the transfer of sovereignty are highly questionable, free elections soon may nevertheless be a bad idea.³³ This is the view of knowledgeable UN officials. If there is a serious reason to oppose elections for a constituent assembly, it has to do with time to organize public discussions and participation regarding the meaning of a constitution and the choices involved in creating one, as well as to establish fundamental rights, including minority

and regional rights, which could fall by the wayside in a majoritarian constitution-making effort.³⁴ The issue is not, in my view, primarily that of time, but mainly the fundamental difference between two- and one-stage constitution-making processes. A two-stage process would be more time consuming, of course, but it need not be as delayed as in the November 15 Agreement. It would allow for social negotiation and compromise concerning the fundamental rights of individuals, minorities, and regions before the majority gets its say. A two-stage process could moreover involve enforceable limitations on the powers of a *constitutional convention*, which would be impossible in a one-stage variant involving a sovereign *constituent assembly*. But this cannot be achieved by the current, illegitimate formula of an imposed interim constitution and co-opted interim assembly.

Interestingly, when making the case for delaying elections, the Americans do not focus on the problem of rights. This may be because the November 15 Agreement is itself particularly vulnerable on this question. Granted, the Fundamental Law is meant to incorporate a variety of equal freedoms, including political, minority, and due process rights along with an independent judiciary to enforce them. A gaping whole in the agreement, however, is its lack of rights against the power that is likely to monopolize (or dominate) the means of state violence, namely the US military authorities. The transference of sovereignty (illogically) has to do only with the end of the CPA, the civilian arm of a coalition that is fundamentally a military dictatorship. The agreement (heading 2) speaks of security arrangements to be made between the CPA and the GC that would give coalition forces “wide latitude” to provide for “safety and security” for an indefinite future. Sistani quite logically believes that such an agreement can be made only by fully legitimate representatives of the Iraqi people, and undoubtedly he and his followers would not consider arrangements made before the end of March binding. But the fact is that US troops

are likely to stay in Iraq for some time, at least for the duration of the constitution-making period; they are engaged in counter-insurgency as well as police work, and therefore rights of assembly, association, press, and speech as well as due process rights must protect private and public actors from the American forces if they are to protect them at all.³⁵ No free elections can be held unless the relevant rights are secured against all capable to repression – and that includes the coalition forces, who currently hold between 8,000 and 15,000 people, according to different estimates. None have been charged, and, given the likely presence of many non-combatants among them, astonishingly few have been released. The human rights situation in Iraq is thus dismal at present, and it is difficult to see how the Fundamental Law planned would provide any remedies. While repression is currently directed at the Sunni militants, there is understandably much suspicion concerning this state of affairs on the Shi'a side as well. The November 15 Agreement, along with its probable addendum on security, does not recover Iraqi sovereignty in a meaningful way, and Sistani's call for free elections and approval (or rejection) of all interim documents only by a freely elected assembly is thus meant to be a more effective formula for its recovery.

Sistani in the Driver's Seat

Suddenly all the papers and weeklies are full of stories about Sistani, about whom little was said before November. The new cliché is more or less true: he may now be the most powerful person in Iraq. He was not in that position at the time of his June *fatwah*; with the radical al-Sadr on his flank and the now dead Ayatollah Muhammad Bakr al-Hakim between them, it seemed to be Hakim in the middle who had the best chance to unite Shi'ite forces. With Hakim assassinated and his Supreme Council of the Islamic Revolution too involved in the unpopular GC, Sistani's

group came to occupy the now empty space. Hakim's brother, Abdulaziz al-Hakim, and all the Shi'ite members of the Governing council hastened to join. Al-Sadr's chances were meanwhile dramatically reduced by the threat of the neo-Ba'athist insurrection, which the Shi'a must hate and fear even more than the Americans. Now it became impossible to oppose the Americans with threats of violence, though it also remained impossible not to oppose them given their conduct and the strong nationalist feelings among Shi'ites. The top-down political process and the idea of democracy gave Sistani the perfect vehicle for constructive but fairly radical opposition – bound to gain him sympathy not only in most of Iraq, but also outside, including the US, where several commentators and at least one presidential candidate now support the demand for democratic elections.³⁶

The November 15 Agreement makes Sistani even stronger by revealing his opponent Bush's Achilles heel: the US presidential elections. The sarcastic remarks of al-Rubiae of the Dawa party, now close to Sistani, clearly point to the new-found opportunity: "Some Iraqis perceive the process as being too rushed to fit the American presidential elections. We don't mind helping our partners. We understand their requirements. And we will consider helping them."³⁷ Ahmed Chalabi was even more blunt, openly saying that the scenario envisaged by the Agreement was tailor-made to Bush's re-election.³⁸ What Bush accordingly needs is an interim constitution, transfer of sovereignty, and establishment of a provisional government, before but not too much before the US elections, to be able to claim all the credit. With the coming of a genuine political process along with its probable but unpredictable grave conflicts only in 2005, i.e. well after November, the inevitable blame would be politically irrelevant.

Knowing all this makes Sistani more powerful than before. By again putting waves of demonstrators in the streets of Najaf, Karbala, Basra, and even Baghdad, he can begin the real

political confrontation now. By using his votes on the GC, he can block the passing of the Fundamental Law, the security agreement, and probably gravely interfere with the selection of the caucuses. He cannot force his own option, but he can stop Bush's from being realized. And this may yet mean that under the constraints of US politics, Bush will have to accept free elections, which would still be better than a head-on clash with Sistani's forces on the street.

In fact, the US position is already eroding. Defections in the GC indicate that the selection of an interim legislature by caucuses is in big trouble. Adnan Pachachi has come out for a dramatic expansion of the GC, close to an earlier UN formula, and its Shi'ite members, including even Chalabi, are all apparently in Sistani's camp demanding free elections.³⁹ And while the American government's official position remains, nonsensically enough, that the November 15 Agreement needs only clarification not alteration,⁴⁰ the bravado is repeatedly contradicted by statements indicating willingness to compromise.

Asking the UN Secretary General to send a delegation to Iraq is the last American card in the game. I leave to the side the spectacle of the Bush administration coming to the UN for help after repudiating and marginalizing it, an apparent concession of the defeat of unilateralism. In fact the strategy is clever one, knowing Sistani's admission that he may be willing to accept the UN's considered judgment that free elections are not yet possible, and the view of top UN officials that they should be delayed as in Afghanistan. The Secretary General, however, faces a huge trap. The least of his problems is that security is now worse even than when Sergio di Mello was killed. Even more seriously, he is in effect being asked to decide a fundamental controversy between the Shi'a majority and the very substantial Arab Sunni, Kurd, and other minorities; if he decides on principle against free elections, he will appear as a proxy for American power. He moreover cannot continue to argue against elections on technical grounds

because he knows that Sistani knows that such arguments are spurious. The earlier UN position, too, for the expansion of the GC has been taken over by its pro-American elements, and the likelihood of a genuinely pluralistic expansion of the Council is very low. Thus, it is hard to return to this formula.

The answer to this conundrum seems to be choosing process rather than substance. Kofi Annan's statement on January 27 indicates that the goal of the delegation will be not to suggest a specific solution ("there is no single right way"), but rather to help find a process which will let Iraqis themselves negotiate one.⁴¹ One outcome of such a process could be a two-stage constitution-making process and free elections sometime between Sistani's date of June 2004 and the GC's date of December 2005 – probably closer to the former, given the paucity of technical reasons to the contrary. My hope is that Iraq will finally get its Round Table, under whatever name, where the current GC will be only one of several parties to genuinely pluralistic negotiations. Such a body, suitably organized, may still be able, in the face of great odds, to produce a *legitimate interim solution* combining enforceable rights and democratic constitution-making procedures.

Constitution-Making After an Imposed Revolution

Whatever happens in Iraq, the hazards and paradoxes of an externally imposed revolution will have been amply demonstrated. Regime change in and of itself should never again be accepted as a justification for invasion. Now that the war has happened, however, it is legitimate and, as the Secretary General affirms, necessary to work for the best possible outcome. It is also worth to drawing some lessons, which here have to do with the problem of democratic constitution-making after what is, legally speaking, a revolution. Once again it has become clear that we must

uphold Paine's famous dictum, now insisted upon by the Ayatollah al-Sistani, that "(T)he constitution of a country is not the act of its government, but of the people constituting a government."⁴² While enlightened monarchs, reforming dictators, and colonial powers have historically imposed constitutions on passive populations and weak political forces, the legitimacy and therefore the stability of such an enterprise are today highly doubtful. But what democratic procedures would today satisfy Paine's maxim?

As I have argued elsewhere,⁴³ the revolutionary democratic European formula, involving a sovereign constituent assembly with the plenitude of powers and, supposedly, purely democratic beginnings, has become dangerous and undesirable today, especially in deeply divided societies. Such a democratic beginning under non-democratic conditions is logically impossible because free elections themselves require a prior, quasi-constitutional political framework. The choice of the first electoral rule cannot be the result of an election that presupposes it. A sovereign constituent assembly is possible but it is undesirable. It practices exactly what Carl Schmitt called *sovereign dictatorship*:⁴⁴ nothing stops it from making itself permanent but its own good will or strong popular resistance. In addition, the decision rule of a sovereign assembly cannot be determined in advance; indeed, even the US non-sovereign convention discussed changing its voting rules based on a confederal principle. A majority in a sovereign assembly cannot be stopped from or even faulted for adopting majoritarian decision rules. Such an assembly, not dependent on the votes of or agreements with minorities, may very well choose to adopt few or no protections for them. It has little reason for not adopting its first preference among constitutional models, and that preference may not be democratic. Again, only self-restraint or external resistance could control a sovereign assembly's majoritarian tendencies, but the first factor may be absent, and the second, if present, could lead to massive repression or

civil war.⁴⁵ We are accustomed to thinking that majority rule in a constitutional democracy needs to be limited by fundamental rights. This recognition needs to be extended to the constituent process, and it speaks against the sovereign constituent assemblies of the European revolutionary tradition.

At the same time, the American formula of a non-sovereign constitutional convention has preconditions that may make this option either unpracticable or dangerous. It requires that a normal elected legislature with some legitimacy already be in place. That may not be the case in revolutions, as it is not the case in contemporary Iraq. Where there is such a legislature, as in Russia in 1993, the specter of dual democratic legitimacy and dual power may surface with explosive results. That is, as I tried to show, the danger inherent in the November 15 Agreement's formula. Even if the drafters of this agreement had been more careful and ended the tenure of the Transitional Legislative Assembly the moment the constitutional convention was convened, they would have no way of blocking either of these bodies from violating or changing rules delivered by instances less legitimate than themselves.

Parliamentary constitution-making is of course impossible in Iraq, because there is no sitting parliament. This fact alone seems to imply the irrelevance of constitution-making methods taken over from recent negotiated transitions, with their authoritarian parliaments, legal continuity, and constitutional amendment rules usable for the legal enactment of interim constitutions. In Iraq there is no legal continuity, nor is there a constitution in place with a usable amendment rule. The most important institution of transitions from Poland and Hungary to South Africa, however, were Round Table negotiations leading to legitimate interim arrangements and culminating in democratic constitutions of various types. The question is whether this institution,

which substitutes *pluralist* for *democratic* legitimacy, can be made available after a revolutionary break involving a full rupture of legal and constitutional continuity.

Since the beginning of the Iraq war, I have believed that the answer is positive. It was imaginable that the US would gather together all major political forces and convene – preferably under a UN umbrella, as in Afghanistan – intensive negotiations concerning the constitutional fate of Iraq.⁴⁶ That did not happen, and the subsequent insurrection as well as Sistani's dramatic challenge may be traceable to this omission. But now, given the likely failure of their current plans and the democratic pressure organized by Shi'ite clerics, there is the need to find another legitimate solution, and the model of negotiated transition among major Iraqi forces is still available.

Admittedly, during the early phase of the war the applicability of recent negotiated formulas was not only questionable because of the absence of legal continuity and a sitting parliament. The structural position of the Central European Communist Parties and the South African National Party at their respective Round Tables could not be occupied in Iraq with Saddam's government gone and the old Ba'ath shattered. The new forces would have been too weak and the moral prestige of the Ba'ath remnants too low to arrange negotiations between them. Now, however, that same structural position is occupied by the current Governing Council. Like the Central European Communists, it has a foreign sponsor, anxious for a settlement for its own political reasons. Like them and the National Party, it has its own reformist plans, but its legitimacy is too weak and society is too divided for it to be able to implement them. While legal continuity with Saddam's regime is gone, for the last year or so there has been some kind of legal order under a military dictatorship, promoting some forms of liberalization, like freedom of press and the formation of (some) political and non-political associations. At the same time, Iraqi

civil society exists and is capable of exerting pressure, but cannot impose its own solution from below. Thus, today the conditions for a new negotiating forum, with the GC as one participant, discussing and deciding basic constitutional issues are better than before. Unlike a fundamental law produced by the GC alone, an interim constitution under whatever name, emerging from or approved by such a forum, would be able to play the role it is supposed to: creating a provisional repository of state sovereignty, and establishing rules for the transition that include both the prerogatives of an electoral majority and fundamental constitutional principles affording rights and legal protections to minorities as well as individuals.

Of course, other scenarios are possible in Iraq. It is very unlikely that the November 15 Agreement will survive in its original form. But one cannot exclude that the Americans will be able to ram it through at the cost of whatever conflicts and instability later. It is also possible, if unlikely, that Sistani could accept a moderate expansion of the current GC plus the rest of the original scenario (the Pachachi formula) if the UN strongly recommends it. At the same time, the GC could be radically expanded as to include all major social actors and stake-holders – a formula very close to the Round Table structure advocated here, with the present GC in effect becoming one player among many. While to gain new legitimacy it would be better to break with the GC appellation in any version, it is possible that the survival of the name would allow the CPA to accept what would be a new formula in substance. It is also possible, finally, that Sistani will reject *all* proposed alternatives, including even a Round Table formula, and, because of his mass power and the pressure of the US electoral calendar, be able to achieve his preferred option: free elections for a constituent assembly.⁴⁷ He might even come to terms with the Americans (however unfortunate that would be) concerning who would be excluded from such elections.

I cannot predict the chances of the Round Table formula against the alternatives. All I can argue here is that it is normatively and structurally superior to them and, given the current impasse and recent turns of events, it is even achievable.⁴⁸ It, or something very similar, is the best hope that anything good can still emerge from this illegal war and the ill-conceived and ill-managed occupation.

(February 8, 2004)

NOTES

¹ <http://www.sistani.org/monasebat/messages/qanon-ara.htm> The translation is by my student Nida Alahmad. A different translation by Prof. Juan Cole refers to a constitutional 'convention' instead of an 'assembly,' but he tells me that this choice was made only with regard to the American reader. The Alahmad translation indicates the deliberate choice of a European-type constituent body, rather than a mere council.

² Rajiv Chandrasekaran, "How Cleric Trumped U.S. Plan for Iraq," *Washington Post Foreign Service*, November 26, 2003. The American plan for constitution-making at the time of the *fatwah* can be discerned from the article in *az Zaman*, translated by Cole: "The American ruler of Iraq, Paul Bremer, broached at the beginning of June a plan that specifies the formation of a political council of 25 to 30 members. The chief mission of this council will be to present discussions to the occupation administration in the economic and political spheres. One of its purposes, as well, is to appoint counselors in the ministries that will achieve at a later point the rank of deputy minister. Another purpose of the political council will be to prepare a referendum on the new constitution that will be fashioned by a convention of 125 members that will be formed in a month or two."

³ See Jamal Benomar, "Iraq's Constitution Making Process: A Framework Proposal," ms., September 2003. Already at that time Benomar rightly warned that in Iraq and elsewhere, the interim often becomes the final.

⁴ On September 8, this 25-member committee voted 24 to 0 in favor of Sistani's proposal, but that may have been an expression of respect, as was a similar vote by the Governing Council itself on November 30. See *New York Times* articles on September 30 and December 1.

⁵ The top spokesman for this group is the highly sophisticated Mowaffak al-Rubaie. But Sistani's group now also includes the members for the Supreme Council of the Islamic Revolution, who were the followers of the assassinated Ayatollah Muhammad Bakr al-Hakim, whom many cast for the role now played by al-Sistani (see Arato, "The Occupation of Iraq and the Difficult Transition from Dictatorship," *Constellations* 10, no. 3 (September 2003)). After Hakim's death, Sistani was forced to move toward greater militancy, most likely because he could not allow the more radical young cleric Moktada al-Sadr to establish himself as the leader of the Shi'ite masses. In April 2003, several days after the assassination of the moderate cleric Abdel Majid al-Khoei, reputedly close to Sistani, in Najaf's central shrine, a crowd surrounded al-Sistani's Najaf home demanding he leave Iraq. He undoubtedly learned a lot from this bitter experience concerning the sentiments of Shi'a masses concerning a policy seen as too pro-American. Since then his moves have been nearly perfect from a strategic point of view.

⁶ An anecdote shows how late a top-down solution was still being insisted upon. In early November, Prof. Noah Feldman, repeatedly touted earlier as the CPA's top constitution-making expert, gave a lecture the process in Iraq at NYU Law School. He was remarkably frank and pessimistic concerning the Sunni-based insurgency, but remained optimistic concerning a version of constitution making by co-optation that would involve a (coerced) referendum on a full slate of constitution makers selected by the CPA. I asked him four questions: 1. Would the Ayatollah al-Sistani not notice that his *Fatwah* is fully disregarded in this formula in favor of an imposed model? 2. Was there a plan to

include Arab or Iraqi Nationalist Parties in the drafting body or the Interim Governmental Council? 3. Was there not a danger of rigid consociationalism in any imposed solution that wished to appear somehow “representative”? 4. Had they thought of an interim constitution as the bases of compromise between an elected and a non-elected constituent assembly? Wrongly or insincerely, he answered that Sistani liked (or would like) his formula and that there were indeed plans to broaden participation along the lines I suggested. But what was more astonishing was that his other answers revealed the idea of a consociationalist trap and the role of interim constitutions had not occurred to him (or, presumably, his colleagues). The November 15 Agreement included these but lacked any plan to broaden the process, without which an interim constitution could not achieve the necessary measure of legitimacy.

⁷ For the Agreement, see: http://www.cpa-iraq.org/audio/20031115_Nov-15-GC-CPA-Final_Agreement-post.htm. Remarkably, most press treatments have failed to reproduce the full text or even accurate scheme.

⁸ According Juan Cole’s website, [Juan Cole Informed Comment.htm](http://www.juancole.com), Abdul Aziz al-Hakim, leader of the Supreme Council for Islamic Revolution in Iraq and a member of the Interim Governing Council, complained about the US plan for handing over sovereignty to an Iraqi government by June. He said the process working out this plan was rushed and largely dictated to the Iraqis. [The Associated Press](http://www.associatedpress.com) quotes him as saying, “The Americans were insisting that they wanted to end this matter quickly. There was rushing and although there were reservations by other council members ... regrettably (the Americans) did not stop or give more time for unanimous consent to be reached. The Iraqi people were pushed aside and the Iraqi people should play an important role. This contradicts the principles of democracy.” He also hinted that when the new government is elected, the issue of the presence of US troops will have to be revisited.

⁹ Some effort was made on November 21 to interest our group from the USIP/UNDP Workshop on “Constitution-Making, Peace Building, and National Reconciliation” in coming to Iraq to help promote the agreement. After questioning Samir Shakir, a member of the Interim Governing Council, however, we soon realized that the new formula, while conceding eventual free elections for a constituent assembly, also preserved the idea of co-opted constitution-making in its procedures for drafting an interim constitution and choosing a transitional assembly, that the governing bodies would not be made more inclusive or pluralist, and that the rule of law would not bind American military authorities after the dissolution of the CPA. We decided not to go to Iraq.

¹⁰ “First of all, the preparation of the Iraqi State (Basic) Law for the transitional period is being accomplished by the Interim Governing Council with the Occupation Authority. This process lacks legitimacy. Rather the [Basic Law] must be presented to the [elected] representatives of the Iraqi people for their approval. Second, the instrumentality envisaged in this plan for the election of the members of the transitional legislature does not guarantee the formation of an assembly that truly represents the Iraqi people. It must be changed to another process that would so guarantee, that is, to elections. In this way, the parliament would spring from the will of the Iraqis and would represent them in a just manner and would prevent any diminution of Islamic law.” He added, “Perhaps it would be possible to hold the elections on the basis of the ration cards and some other supplementary information.” [Juan Cole Informed Comment.htm](http://www.juancole.com)

¹¹ See “Two Tactics of Social Democracy in the Democratic Revolution,” *Collected Works I* (Moscow, 1970), 470ff; 474-75. Lenin made this same assumption in November 1917, when the Bolsheviks were in power, and he allowed the election of the Constituent Assembly with the hope of fully controlling the process. He lost the elections, however, in his later view because he did not control the countryside, i.e., most of the country. See “Theses on the Constituent Assembly,” *Collected Works I*, 506-09. Sistani is a step ahead of Lenin, of course, because he understands that he can control the votes of his immense constituency even as the Americans control the means of force. He is not similarly optimistic with respect to a new, supposedly transitional Iraqi legislature incorporating some other scheme of representation than mere numbers.

¹² For the version deemed appropriate to the conditions of mid-January: <http://www.iraqcoalition.org/government/AgreementNov15.pdf>

¹³ I refer to a January draft of this interim constitution called “Law of Administering the Iraqi State for the Transitional Period” (hereafter “January Draft”). The original was published in Arabic in the Kuwaiti daily *al-Qabas*. Translation is by Prof. Nathan J. Brown, who supplies intelligent commentary as well.

¹⁴ The “January Draft” repeats this formulation but adds: “This security agreement shall be presented to the Transitional National Assembly for approval in the month of June 2004.”

¹⁵ “January Draft,” Article 2. Along with Prof. Brown, I find this provision odd, and not only in terms of Iraqi history. It was probably motivated by the desire to avoid constitutional tinkering by the transitional legislature. But the consequence could easily be rejection of the interim set up as a whole if it ceases to function or if the transitional assembly wishes to assert its supposed sovereignty.

¹⁶ Note that in press reports the issue of who is to give Iraq its permanent constitution is continually confused. If the transitional assembly would claim a right to do so, few in America would notice the act of usurpation – unless they were ready to take Sistani’s word for it.

¹⁷ See A. Arato “Forms of Constitution Making and Democratic Theory” in *Civil Society, Constitution and Legitimacy* (Lanham, Md. 2000).

¹⁸ The January Draft or at least the literal Brown translation speaks only of a “constitutional *conference*” producing the permanent constitution (Article 42). This implies a further devaluation of the freely elected body. I keep asking: do they believe that Sistani and his advisors will not notice what they are doing?

¹⁹ “Sovereign,” that is, if we forget about the continued and non-accountable possession of the most significant means of violence by the American military forces.

²⁰ The three dates signify three periods of dual power or at least legitimacy: the Soviets and the provisional government in 1917; the constituent assembly and the Bolshevik government in 1918; parliament and presidency, each in charge of a constitution-making effort, in 1993. In each case armed force decided the issue.

²¹ Ultimately that is what counts. Thoughtful observers (Jamal Benomar, Juan Cole) do point to divisions among the clerics and the presence of many secular Shi’ites, which could make the assumptions of the electoral strength of Sistani’s faction illusory. Personally, I would bet on Shi’a unity in founding elections at least, reinforced by Sistani’s success in taking on the national mantle in opposing American imposition. The formula for unity: a fairly radical nationalist program under moderate leadership.

²² Reul Marc Gerecht, “The Sabotage of Democracy,” *New York Times* November 14, 2003.

²³ Indeed, Article 4 of the “January Draft” explicitly states (my italics): “*This draft must include the provisions and basic principles included in the first and second chapter of this Law in addition to the following:*”

1. Establishment of a democratic, pluralism federal system including a unified Iraq and organizing the relationship between the territory of Kurdistan and the central government
2. Guaranteeing basic private and public freedoms
3. Protecting basic human rights
4. Confirmation of the principle of separation among the three powers: legislative, executive, and judicial
5. Defining the decentralized competencies of the provinces not included in the federation
6. Guaranteeing the rights of women to political participation and other rights in a manner that is equivalent to the rights of men in all of society.”

There is much redundancy here, since chapters 1 and 2 include some of the enumerated principles, and it is not clear what the constitutional convention or conference could and could not change.

²⁴ See Arato, “Forms of Constitution Making and Democratic Theory.”

²⁵ A democratic outcome in a pre-democratic setting generally involves most actors opting for a solution that may only be their second-best preference. This is possible only if the negotiating framework and implied sanctions for failure make the first-best, usually a non-democratic or purely majoritarian democratic outcome, impossible. When a party attains a majority in a majoritarian assembly, it no longer has to accept the second-best. I thank Julian Arato for reminding me of this notion in the present context.

²⁶ Evidently some political parties or groupings would use their participation in any comprehensive process to try to bring it down and make an agreement impossible. The theoretical rule for admission ought to be acceptance of a pluralistic, constitutional democracy as the second-best solution. Practically, this demand is difficult to test. One way of doing so may be to insist that participating groups, hopefully coalitions if there are not to be too many members, publish their full political platforms in advance.

²⁷ The “January Draft” alters these arrangements in only one crucial respect: the cumbersome three-stage process is reduced to something closer to a two-stage one. The organizing committee in each province would still pick the province’s representatives, proportionally allocated, from notables, by a vote of 11 out of 15 (Articles 21 and 22). There is still something resembling a notable assembly, the Governorate Selection Caucus in each province, now called electoral assemblies (Article 27). But now there is no implication of the caucuses deliberating and *nominating*, as in the slightly more democratic formula of the November 15 Agreement, which spoke of “a transparent, participatory, democratic process of caucuses” (heading 3). Astonishingly, the response to Sistani’s democratic demands is to make the proposals even less democratic!

²⁸ The exclusion is more specific in the “January Draft.” Aside from being over 30 and having a degree (sic), candidates to the Transitional Assembly cannot have belonged “to the dissolved Ba’ath Party or be affiliated with the agencies of repression or have contributed to the oppression of citizens” (Article 23). Enforcement and appeals are placed squarely in the hands of each organizing committee “in cooperation with the CPA.” The procedure is clearly meant to exclude all those already excluded from the process, including members of new Arab Nationalist

Parties and the Sunni council who may have previously been in the Ba'ath. The now irrelevant idea of monitoring by courts and UN agencies, which may have been relevant for more autonomous caucuses, is added but qualified by the nonsensical phrase "if feasible."

²⁹ Article 32 of the "January Draft" explicitly postulates the end of both CPA and GC with the formation of the Transitional Executive based in the Transitional Legislature.

³⁰ See articles and census design in *New York Times*, December 3 and 4, 2003.

³¹ As far as first-past-the-post races in individual districts are concerned, it may be the case, depending on the drawing of the districts, that one or more sides will lose more minorities than another; this is certain to happen for small minorities which may never have a majority in any district. But the losses may balance one another, as is likely for the largest groupings. I don't know if the political actors have at their disposal a precise analysis of the districts used in Saddam's elections. The conversion of demographic groupings into party votes is entirely unpredictable, but today the actors (and especially the Americans) count on it and thus are likely to contribute to party-formation on such bases.

³² See Adam Przeworski, *Democracy and the Market* (Cambridge: Cambridge University Press, 1991).

³³ See remarks by Lakhdar Brahimi in Carol Giacomo, "U.N. Envoy Warns Against Premature Polls in Iraq," Reuters, January 27, 2004: "elections are a very divisive process. They create tensions. They create competition. And in a country not stable enough to take that...one has to be certain it will not do more harm than good."

³⁴ "[E]lections for constituent assemblies often legitimize the domination of the process by electoral victors. The winners consider their electoral victory a mandate for exerting decisive influence over the constitution and eschew negotiations with other actors on constitutional principles. The longevity and legitimacy of constitutions is thereby compromised, because they do not represent a societal consensus over the future of the state....premature elections for any type of representative body must be avoided." Benomar, "Iraq's Constitution Making Process."

³⁵ Delays in the implementation of the November 15 timetable inevitably meant delaying the agreement on security. Now the commander of the American forces, General Abizaid, no longer expects such an agreement by July 1 (actually, the deadline for this part of the timetable was supposed to be the end of March, 2004). According to the General, until there is an agreement, the U.S military's role would continue "as an evolution of the current track that we're on," *New York Times*, January 30, 2004.

³⁶ Howard Dean, who does nonsensically add that the US has the right to control participation in the election, and to exclude all Ba'athists. Unfortunately, Sistani may not object to this.

³⁷ SOURCE

³⁸ "The whole thing was set up so President Bush could come to the airport in October for a ceremony congratulating the new Iraqi government. When you work backwards from that, you understand the dates the Americans were insisting on." Joel Brinkley and Ian Fisher, "U.S. Plan in Iraq to Shift Control Hits Major Snag," *New York Times* (web edition), November 27, 2003.

³⁹ Edward Wong, "New Pressures Over U.S. Plan For Iraqi Rule" and "Delays and Split on Iraqi Council Imperil U.S. Plan," *New York Times*, January 24 and 26, 2004.

⁴⁰ John Cushman in the *New York Times*, January 25, quoting Paul Bremer's spokesman Dan Senior.

⁴¹ "The most sustainable way forward would be one that came from the Iraqis themselves. Consensus amongst all of Iraq's constituencies would be the best guarantee of a legitimate and credible transitional governance arrangement for Iraq.... [H]e added his hope that their (the UN delegation's) presence and efforts will help the Iraqis to come to a consensus..." "Annan: United Nations to Send Electoral Team to Iraq," in *Highlights of the Noon Briefing by Marie Okabe, Associate Spokesman for the SG of the UN* January 27, 2004.

⁴² Paine, *The Rights of Man*, "Of Constitutions."

⁴³ REFERENCE(S)

⁴⁴ *Die Diktatur* (Berlin, 1922), ch. 4; *Verfassungslehre* (Berlin, 1928), 59.

⁴⁵ Arato, "Good-bye to Dictatorships?" *Social Research* (Winter 2000).

⁴⁶ Arato, "The Occupation of Iraq and the Difficult Transition from Dictatorship."

⁴⁷ This seems to be the cautious prediction of Juan Cole; see his website entry for 2/4/04. If I thought the UN would wind up recommending some kind of election soon, I would agree with him. The question is what will happen if the UN recommends some kind of compromise, say a procedural one.

⁴⁸ Even if achieved, it would be possible to bring it down, especially if participation is either too narrow or too broad. It would take all the expertise of the UN, and good will among moderate actors on all political sides, to make it work.

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