

## STATE OF LAW, JUDICIAL POWERS, AND CONTROL OF JUDGE ETHICS

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**ABSTRACT :** This research deals with the discussion of rule of law, judicial power, and monitoring of judge ethics. In general, it aims to analyze the relationship between the rule of law, judicial power, and the ethical supervision of judges. The problems analyzed are First, how is the judicial power in a rule of law. Second, what is the ideal Oversight model for the Judicial Commission. The research method used a normative legal research approach, with a focus on the study of legal norms by collecting secondary data and the nature of this research was prescriptive and the data analysis was descriptive qualitative. The research result shows that the power of the judiciary in a rule of law is one of the characteristics that exist in every democratic state system. Judicial power must be manifested in an independent power. The presence of the Judicial Commission is a necessity in a rule of law as part of checks and balances on judicial power. Its presence strengthens the rule of law. The form of supervision of the Judicial Commission must be able to be integrated both in the context of the internal structure of the institution, coordination and careful planning and involving stakeholders in society.

**KEYWORDS:** *rule of law, judge ethics, judiciary, judicial commission*

### I. INTRODUCTION

Alfred Stepan divides society into 3 major arenas, namely; civil society, political society and the state (Alfred Stepan:1996;14-15). Civil Society (Civilian Society) is an arena where various social movements (such as neighborhood groups, women's groups, religious groups, or intellectual groups), as well as organizations of all classes (such as lawyers, journalists, trade unions and employers) try to identify themselves. in an association so that they can express themselves and can advance their own interests. Political society is an arena in which state society specifically regulates itself in political contestation in order to gain power from the government and state apparatus. The state is a continuous administrative, legal, bureaucratic and coercive system that seeks not only to manage the state apparatus but also to structure the relationship between civilian power and government and to formulate various fundamental relationships in civil society and political society.

To manage these 3 arenas in society, all countries in the world use the Constitution as the main reference for regulating the life of the nation and state administration. Indonesia is no exception, which later in the 1945 Constitution provides a stepping stone for building social, moral and legal ideals. Sri Soemantri quoted Antonius Alexis Hendrikus Struycken's opinion as saying that the basic law as a written constitution is a formal document that contains:

1. The results of the nation's past political struggle.
2. The highest levels of national constitutional development.
3. The views of national figures to be realized, both for the present and for the future.
4. A desire, how the development of the national constitutional life to be led (Antonius Alexis Hendrikus: <https://www.kompas.com/skola/read/2020/02/20/150000269/uud-1945-sebagai-konstitusi-negara>).

The main rules in the constitution are only used as the main guidelines, while the technical rules use statutory regulations and other regulations. To complement what is in the legislation, public ethics are also used. Public ethics is a reflection of standards or norms that determine the merits and wrongs of behavior, actions and decisions that direct public policies in carrying out public service responsibilities (<https://money.kompas.com/read/2011/06/07/03001349/etika.publik.dankonflik.kepentingan>).

One of the institutions that uses ethics in carrying out their profession is judge. Judges who are an important element in the realm of judicial power have the duty to hear, examine and decide cases. Cases that are present to him are obliged to be immediately examined and terminated. There should be no reason for a judge to reject a case on the grounds that there is no law. Apart from the tasks of solving cases, in everyday life judges are obliged to comply with ethics.

The state institution that is given the authority by the Constitution to ensure the application of ethics in carrying out the judge profession, namely the Judicial Commission. The Judicial Commission is here to support judicial power and accelerate judicial reform.

After the constitutional amendments there were at least 4 important changes in the branch of judicial power. *First*, if before the amendment of the 1945 Constitution, the guarantee of an independent judicial power is only found in the explanation, then after the amendment of the guarantee is explicitly stated in the body. *Second*, the Supreme Court and other judicial bodies are no longer the only actors of judicial power, because besides them there is a Constitutional Court which also functions as an actor of judicial power. *Third*, the existence of a new independent institution within the judicial power structure, namely the Judicial Commission which has the authority to propose the appointment of supreme judges and has other powers in order to maintain and uphold the honor, dignity and behavior of judges. *Fourth*, the judicial power in this case is exercised by the Constitutional Court to conduct judicial review of the Basic Law (UUD), decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide the dissolution of political parties, and decide disputes over the results of voting, general (election) (A. Ahsin Tohari:2011;13).

With this amendment, two institutions have emerged, namely the Constitutional Court and the Judicial Commission. These two institutions are useful for strengthening the rule of law as well as building public trust in the world of justice. Even though the Judicial Commission is not an actor of judicial power, its existence is to ensure that the rights, dignity and behavior of judges are better. Because so far the power of the judiciary is considered to be a problem of law enforcement. So in the preamble to Law No. 18 of 2011 on the Judicial Commission, it is stated that the Judicial Commission has an important role in law enforcement and justice. This shows the existence of law and justice problems in society. Thus, it takes an institution capable of being a part of solving the problem, namely the Judicial Commission.

## II. PROBLEMS

1. What is the Judicial Power in the rule of law?
2. What is the ideal Oversight model for the Judicial Commission?

## III. RESEARCH METHODS

This study uses a normative legal research method, which focuses on the study of legal norms by collecting secondary data, namely laws and regulations and literature (Soerjono Soekanto & Sri Mamudji:2011;13). The nature of this research is prescriptive, providing an assessment of something that should be done (Peter Mahmud Marzuki:2014;69-70).

Meanwhile, the qualitative descriptive data analysis is based on descriptions or portraits relating to the rule of law and the Judicial Commission in monitoring the behavior of judges.

## IV. RESEARCH RESULTS AND DISCUSSION

1. Judicial Authority in the rule of law

Socrates, Plato and Aristotle have begun to raise the idea of a rule of law. However, it was in Aristotle's hands that the ideals of the rule of law found its form. According to Aristotle, a rule of law is a state that stands on the law that guarantees justice to its citizens. Justice is a condition for achieving the happiness of life for its citizens, and as a basis for justice it is necessary to teach morality to every human being so that he becomes a good citizen and those who rule in the state are not humans who are actually just thoughts, while the rulers are only law holders and balance (Moh Kusnardi dan Harmaily Ibrahim:1988;153). The conception put forward by Aristotle shows that justice is the main thing in a rule of law. Therefore justice must be served for all citizens.

From the understanding put forward by Aristotle, it then gives rise to many characteristics of the rule of law adopted by many countries. However, at least there are characteristics of a rule of law that are most dominantly adhered to by countries in the world, namely the Rechtsstaat and the Rule of Law. Rechtsstaat's idea emerged from a struggle against absolutism so that it was revolutionary in character with administrative characteristics, on the other hand, the Rule of Law developed evolutionarily with judicial characteristics.

The rule of law has different terms in different countries. The United States uses the term Government under Law more, Germany uses the term der Rechtsstaat, and France uses the term le Principe de la Legalite or la Regie du Droit. This difference occurs because it is influenced by the historical background of a nation's life view (A. Azhary:1995;33-34). The term Rechtsstaat is often used by Continental European legal

experts in the Civil Law legal system, while the term Rule of Law is often used by Anglo Saxon jurists in the Common Law legal system (*Padmo Wahyono:1994;24*).

This difference in characteristics was due to the fact that in Roman times, the dominant power of kings was to make regulations through decrees. This power is then delegated to administrative officials so that administrative officials make written directions for judges on how to decide cases. The judiciary by the king then developed into a judicial system so that judicial judges were delegates from the king but did not carry out the will of the king, even though the difference between the two in subsequent developments was not questioned because they lead to the same goal, namely protection of human rights (*Philipus M. Hadjon:1987;73*).

There are legal experts who then provide limits on the rule of law. Julius Stahl gives the characteristics of a rule of law as follows; (i) guarantee of human rights; (ii) distribution of power; (iii) the government must be based on legal regulations; (iv) the existence of an administrative court (*Donald A. Rumkoy:2001;7*).

Paul Scholten mentioned two characteristics of the rule of law, namely; (i) the state apparatus has rights to the state, individuals have rights to society; (ii) in a rule of law there is a separation of powers (*Donald A. Rumkoy:2001;8*).

By using the concept of Rule of Law in England A.V. Dicey stated that the elements of the Rule of Law are; (i) the rule of law supremacy, the absence of arbitrary power in the sense that a person can only be punished if he breaks the law; (ii) equal standing in the face of the law, this argument applies to both ordinary people and officials; (iii) human rights are guaranteed by law and court decisions (*Miriam Budiardjo:2008;58*).

The International Commission of Jurist, which is an organization of international jurists at a conference in Bangkok in 1965, expanded the Rule of Law and emphasized what is called the dynamic aspects of the Rule of Law in the modern age. It is argued that the requirements for the implementation of a democratic government under the Rule of Law are; (i) constitutional protection, in the sense that the constitution apart from guaranteeing individual rights, must also determine the procedural means for obtaining protection of guaranteed rights; (ii) a free and impartial judiciary; (iii) Free elections; (iv) freedom of expression; (v) freedom to associate / organize and oppose; and (vi) civic education (*Miriam Budiardjo:2008;60*).

According to Sri Soemantri, there are 4 characteristics of a state based on law, namely:

1. There is recognition of guarantees of human rights (and citizens)
2. There is a distribution of power
3. In carrying out its duties and obligations, the government must always be based on applicable law, both written and unwritten
4. The existence of prudential power in carrying out its duties independently, meaning that it is independent from the influence of the government, while specifically the Supreme Court must also be independent from other influences (*Sri Soemantri:2015:312*).

One of the characteristics expressed by these jurists is the separation of powers. The separation of powers which then gave rise to one of the judicial powers exercised by judicial bodies. The judicial power characterizes it as an independent power, which is free from the influence of other powers. With this independent judicial power, it is hoped that the judges will be able to resolve any conflicts that come to them fairly. Then, at the same time it is part of protecting human rights.

As explained by the Constitutional Court, the independent judiciary is an absolute condition (*conditio sine qua non*) for the upholding of law and justice and must receive a strong constitutional guarantee from the state. independence is not a gift from the state or a provision of law. The freedom of judges is not a privilege or privilege of judges, but rather is an inherent right (indispensable right or inherent right) to the judge in order to ensure the fulfillment of the human rights of citizens to obtain a free and impartial trial (fair trial) (*Consideration of the Decision of the Constitutional Court Number 005 / PUU-IV / 2006; 172*).

The 1945 Constitution places judicial power as the third pillar of the more modern Indonesian state power system. Judicial power is an independent power, in the elucidation of Article 24 and Article 25 of the 1945 Constitution it is stated that, "Judicial power is an independent power to administer the judiciary in order to uphold law and justice. The conditions for becoming and to be dismissed as a judge are stipulated by law. ". This statement emphasizes that the position of judges must be guaranteed by law. One of the characteristics of a rule of law is that there is an independence of judges who are free, impartial and not influenced by legislative and executive powers. The freedom of a judge does not mean that a judge can take arbitrary actions against a case he is handling, but the judge is still bound by the existing legal regulations (Review Board MPR RI:2018:18). In other words, although the independence of the judicial power is so important in the concept of a rule of law, it does not mean that the independence of the judicial power can be as free as possible without any limits or absolute. Because in this world the unlimited power is only the power of God Almighty.

Judges are different from other officials, they must really master the law, not just rely on honesty and goodwill. In this regard, Wirjono Prodjodikoro is of the view that the difference between a court and other agencies is that the court in carrying out its daily tasks is always positive and actively observes and implements various legal regulations that apply in a country (Wirjono Prodjodikoro:2003:26-27).

An independent judicial power will not be meaningful without accountability for this task. Therefore, it must be realized that freedom and independence are also tied to accountability. Basically independence and accountability are two sides of a coin that stick together. There is no absolute freedom without responsibility. In other words, it can be understood that in the context of independence of judiciary, it must be balanced with its partner, namely judicial accountability (Imam Ansori Saleh:2011)

Accountability in judicial power is one of the transparency in the management of the judiciary, including when judges give decisions in case resolution. As Mauro Cappaletti said as quoted by M. FajrulFalaakh, the accountability of the judicial power has 4 (four) models, namely:

1. Political, constitutional accountability: the judiciary is accountable to political institutions, including impeachment by parliament, and is subject to the constitution;
2. Societal accountability: public control through the mass media, examination of judges' decisions, criticism of published decisions, the possibility of dissenting opinions in decisions (this is also a form of professional accountability);
3. Legal (personal) accountability: judges can be removed from office through the honorary panel of judges; the judge is responsible for the error
4. Legal (vicarious) accountability: the state is responsible (state liability) for errors or mistakes in the judge's decision; The state can ask the judge to share responsibility with the state (concurrent liability) (Mohammad Fajrul Falaakh:2010).

From the explanation above, it can be understood that judicial accountability is not only aimed at internally but also carried out externally, both among state institutions and with the general public. This accountability aims to prevent abuse of judicial power. At the same time it eases control of the people.

## 2. Judicial Commission and Supervision of Judge Behavior

### a. Judicial and Judge Problems

In the law enforcement process, the court is the last institution that has a very important task because with its verdict, a judge can take the life of a person, transfer someone's property and limit civil rights for the litigants. In short, all things can be done by a judge through his decision. The role of the court cannot be doubted anymore, because with this court institution everything related to neglected rights and responsibilities can be resolved, this institution provides a place to even help those who are deprived of their rights and forces the parties to be responsible for the actions they have committed. which is detrimental to the other party. The activity of such a court institution is basically an attempt to bring abstract legal formulations into the reality of society (Rusli Muhammad:2006;4).

The facts then show the disparity between what should be law as ideal legal facts (das sollen) and what happens as facts (das sein).

Many criticisms are given to the judiciary, not only personally but also institutionally, because there are many assumptions that have arisen over the violations that have occurred both violating the law and ethics. According to Bagir Manan there are 10 problems in the world of justice, namely:

- 1) Lack of proportionalism (lack of proportionality), this concerns the mastery of legal knowledge (in the broadest sense), legal skills, integrity, and ethics. This greatly affects the quality of the decisions.
- 2) Lack of social responsibility or awareness (lack of responsibility or social care), for example, the habit of luxury.
- 3) Lack of dignity (lack of dignity). Judges must realize that the profession they hold is a noble position.
- 4) Lack of carefulness (lack of caution). Judges are sometimes not careful, for example a judge attending a discussion or debate on television talks about a case, even though the case is currently being processed in court or has the potential to become a case handled by a judge.
- 5) Lack of future orientation (lack of future orientation). A judge who decides should have already explained what impact his decision will have in the future.
- 6) Lack of political carefulness or awareness (lack of political awareness). The problem facing the judiciary is low public trust.
- 7) Lack of scientific sense (lack of scientific awareness).
- 8) Lack of puritanism (lack of puritanism). Every judge must think that he is a human being who is legally minded. Every mind and body must be related to the law. Judges must address puritanism with impersonal thinking. The judge must have a distance from the object on trial, therefore in the world of justice the doctrine of conflict of interest is known. Puritanism must manifest simplicity.
- 9) Lack of sense of justice (lack of justice). Judges are often weak in considering the sense of justice that exists in him.
- 10) Lack of facilities (lack of facilities) (Bagir Manan; <https://www.hukumonline.com>, date June 17 th 2020).

The ten problems above that eventually form a negative opinion in society when dealing with the world of justice, namely convulsion, bureaucracy, mismanagement, costs a lot and neglects justice for society. Even though the judiciary should be a place with dignity, dignity, respect, respect and obedience to all parties.

As SatjiptoRahardjo said, in fact the judiciary is a place to resolve legal problems so that they do not develop into conflicts that endanger public security and order. However, this function will only be effective if the court has 4 conditions:

- 1) Belief (society) that in that place they will get the justice they want;
- 2) The belief (society) that the court is an institution that expresses the values of honesty, a mentality that is not corrupt and other main values;
- 3) The time and money they spend is not wasted;
- 4) Whereas the court is a place for people to truly obtain legal protection (Bambang Widjajanto:2009;113).

What SatjiptoRahardjo said about public trust is very much needed by the judiciary in any legal system because the court is not only a place for legal dispute resolution but also a place where legal sources are born, a place that determines what and how legal power is exercised. Even the judiciary can describe a portrait of a nation's civilization (Amzulian Rivai:2007;31).

In addition, public trust in judges and courts is not determined by what legal system is used, but how the attitudes, behavior and quality of judges' decisions are carried out so that they reflect substantial justice. The judge's decision reflects his capacity and integrity. Therefore, deep considerations are needed so that they can be accountable to God, the public, can reflect justice, personality and as part of the judge's contribution to the development of legal knowledge.

#### b. The Birth and Development of the Judicial Commission

Amendments to the 1945 Constitution emphasize a change in the format and system of power. If before the amendment the people's sovereignty was fully implemented by the MPR and now the sovereignty is in the hands of the people and exercised according to the Constitution. This change in the form of people's sovereignty caused the pattern of power that was originally vertical and at the MPR to change because it was horizontal, where high state institutions became equal in accordance with their rights, obligations and authorities. In such a power format, a system and mechanism for checks and balances is needed or mutual and mutual control (Satjipto Rahardjo:1986;107)..

This balance and mutual control is intended so that no institution works to abuse its power. With the existence of the 'Check and balances' principle mechanism, state power can be properly regulated, limited and even controlled, so that the abuse of power by state administrators or individuals who happen to be occupying positions in the state institutions concerned can be prevented and handled as well as possible (Jimly Ashiddiqi:2003).

One of the institutions that later underwent changes was the Judicial Authority which later gave rise to a new institution, namely the Judicial Commission. According to JimlyAshiddiqi in Ni'matul Huda, the emergence of a Judicial Commission in the Indonesian judicial power structure is so that members of the public outside the official structure of the parliamentary institution can be involved in the process of appointing and maintaining the honor, dignity and behavior of judges in order to realize the truth of justice based on Almighty God. .

With the honor and nobility of dignity, an independent and impartial judicial power is expected to be realized as well as to be balanced by the principle of accountability for judicial power, both from a legal and ethical perspective. This requires a supervisory institution that is independent of the judges themselves. The formation of the Judicial Commission is a concrete manifestation of the need for balance and control between state institutions. The formation of the Judicial Commission is an affirmation of the rule of law principle and the need for protection of human rights and justice (Ni'matul Huda:2015;210-2110).

According to AhsinTohari, there are 6 main arguments for the creation (raison d'atre) of the Judicial Commission in a constitutional state, namely:

1. The Judicial Commission was formed to be able to carry out intensive monitoring of the judicial power by involving elements of society in the broadest spectrum and not only internal monitoring.
2. The Judicial Commission acts as an intermediary (mediator) or liaison between government power (executive power) and judicial power (judicial power) whose main purpose is to ensure the independence of the judicial power from the influence of any power, especially government power,
3. With the existence of the Judicial Commission, the level of efficiency and effectiveness of the judicial power (judicial power) will be higher in many ways, both regarding the recruitment and monitoring of supreme judges as well as the financial management of the judicial power.
4. Consistency of judicial decisions is maintained, because each decision is subject to strict assessment and supervision from a special institution (Judicial Commission), and
5. With the existence of the Judicial Commission, the independence of the judicial power (judicial power) can be maintained, because the politicization of the recruitment of supreme judges can be minimized who are not political institutions, so it is assumed that they do not have political interests.

6. The Judicial Commission is then placed in Article 24 B of the 1945 Constitution, which has the authority to propose the appointment of supreme justices and has other powers in order to maintain and uphold the honor, dignity and behavior of judges (A. Ahsin Tohari; op.cit; 145-150).

The authority of the Judicial Commission was later strengthened by Law No. 22 of 2004 concerning the Judicial Commission. However, in the course of the Judicial Commission Law was submitted to the Constitutional Court and several of its articles were later declared contrary to the 1945 Constitution. The Judicial Commission is not an executor of judicial power but as a guardian it is intended to uphold honor, dignity and the behavior of judges in order to realize the truth, and justice based on the One Godhead. The existence of the Judicial Commission is also associated with the oversight function that is external to the judicial power.

For the realization of an independent judicial power, it is necessary to have judges who have integrity and personality beyond reproach, are honest, fair, professional and experienced in the field of law. This is actually a requirement contained in the code of ethics and code of conduct for judges and the assessment of the integrity of judges is carried out by an independent institution, namely the Judicial Commission.

### c. Judge Ethics Supervision

Supervision carried out by KY is based on the constitution because it aims to strengthen the rule of law so that the rule of law does not experience distortion of the actions of "naughty" judges. The number of judges with problems, including in corruption cases. This situation proves that monitoring the behavior of judges is important to maintain the honor and dignity of the judges themselves, it was noted that at least 2 (two) MK judges stumbled on a corruption scandal, and 13 judges under MA were also involved in bribery or gratification cases.

The large number of judges who have problems, both because of legal cases and ethical violations, prove that the supervision of judges is still weak, so that upholding judge ethics is a must to maintain the dignity of judges. Earl Warren, Chief Justice of the United States Supreme Court (1953-1969) once said that "law is floating in the sea of ethics". This expression means that the law floats on the ocean of ethics, the law cannot stand, if the oceanic ethics does not flow (Constitutional Magazine:2015;76).

Therefore one must not forget, after all, the judge is a human being who can "slip" in carrying out his duties. Judges who are part of the government (in a broad sense) are not angels like James Madison's assumption: "If angels rule humans, neither internal nor external control is needed" (The Federalist Paper, 1787). Supervision is absolute. Weak oversight for a broad-based institution such as the judiciary paves the way for "judicial dictatorships" (Umi Illiyana; Constitutional Journal;2011;418-421)

The meaning is very precise as contained in the preamble of Law No.18 of 2011 concerning Amendments to Law No. 22 of 2004 concerning the Judicial Commission states "that the Judicial Commission has an important role in the effort to realize independent judicial power through proposing the appointment of supreme judges and other powers in order to maintain and uphold the honor, dignity, and behavior of Judges for the sake of upholding law and justice in accordance with the Law. -The 1945 Constitution of the Republic of Indonesia".

This preamble shows that the desire to exercise supervision by the Judicial Commission is intended for the realization of an independent judge's power. Because the judicial power is very vulnerable to good influences from the judges, the community and the government, so it needs to be guarded so as not to abuse its authority.

Therefore, in the context of supervision, there are two main meanings, namely preventive action and repressive action. Therefore, in the framework of "maintaining and enforcing" can be defined not only as preventive or repressive measures, but also to increase understanding, awareness, quality, and professional commitment which lead to the level of honor, dignity and expected behavior of judges. This does not only arise from supervision, but especially from guidance and professional ethics education for judges, including education on judge ethics for the public. Because of that, the actual starting point in carrying out repressive actions began with the ongoing safeguards made by the Judicial Commission.

Supervision and guidance need to be integrated into a structured, systematic and massive action by the Judicial Commission. What is meant by structured is the integration between existing programs in bureaus that support the supervisory task. Systemic involves programs that are carefully designed and coordinated between those that are under supervision and those that are not under supervision. The massive oversight program was carried out on a large scale. If all can be integrated properly then the ideal supervision can be carried out.

On the other hand, to integrate the monitoring model requires the involvement of the community to become active in the eyes and ears. Of course, this community involvement is not done partially but is also carried out in a measured, systematic and massive manner. With a supervisory model like this, it takes a lot of effort and commitment in terms of human resource capabilities and also large financial capabilities.

## V. CONCLUSION

1. The power of the judiciary in a rule of law is one of the characteristics that exist in every democratic state system. Judicial power must be manifested in an independent power. This means that the judicial power is free from the influence of any power, both those outside the judiciary and those in the judiciary. However, this independent power would not be meaningful without existing accountability both institutionally and personally. Accountability is a form of exposure to the performance of the judiciary and judges. This accountability is intended so that the broad judicial power can be controlled by the wider community, especially justice seekers
2. The presence of the Judicial Commission is a necessity in a rule of law as part of checks and balances on judicial power. Its presence strengthens the rule of law. In this way, the supervision carried out by the Judicial Commission is a mandate of the Constitution. Therefore, the supervision carried out by the Judicial Commission must be able to produce judges with high integrity, therefore it is necessary to carry out a structured, systematic and massive supervision. This supervision must be able to be integrated both in the context of the internal structure of the institution, coordination and careful planning and involving stakeholders in the community.

## F. Suggestions

1. It is necessary to realize that freedom and independence are bound by accountability. In principle, independence and accountability are two sides of a coin that stick together. There is no absolute freedom without responsibility. In other words, it must be understood that in the context of independence of judiciary, it must be balanced with its counterpart, namely judicial accountability.
2. To strengthen the existence of a rule of law, the role of the Judicial Commission needs to be strengthened considering the widespread and increasing levels of public complaints, especially justice seekers, regarding ethical violations by judges. Therefore, public complaints must be placed as a need which gradually becomes a priority in supporting the performance of the Judicial Commission in monitoring the dignity and behavior of judges.

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