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The Urgency of Philosophical, Sociological and Juridical Applicability in Legislation

Yohanes Hartono[1], Elisabeth Sundari[2], Anny Retnowati[3]

[1,2,3]Universitas Atma jaya Yogyakarta

ABSTRACT: Legislative regulations are drawn up and enacted to ensure that the statutory regulations are adhered to and adequate to fulfil their aims and objectives. Three applicabilities, namely philosophical, sociological, and juridical, strongly influence the effectiveness of statutory regulations. Philosophical applicability shows that laws and regulations must follow intellectual values that live in society. At the same time, sociological bearing states that the community recognizes any rule and regulation and meets the people's needs and developments. Juridical applicability indicates that an authorized institution must make the statutory regulations stipulate the content is suitable. The form of the Law does not conflict with the higher rules, and the legislator makes it through a predetermined procedure. This research is a descriptive analysis using a normative juridical approach. The study results indicate that the non-compliance of statutory regulation to the three applications will create the potential for carrying a judicial review, both formally and materially, which causes the court that has the power to review to cancel the Law.

KEYWORDS: applicability, philosophical, sociological, juridical, Legislation.

INTRODUCTION

The Republic of Indonesia is a rule-of-law country. Article 1 Paragraph (3) of the Indonesian Constitution stipulates that the State of Indonesia is a rule-of-law state. Burkens, as quoted by Attamimi (1992) said that the rule of Law is simply a state that places Law as the basis to administer the state power and its state practices in all forms. Refers to John Lock's view (Kadaryanto, 2012), the essence of the rule of Law includes, among others, (1) the existence of state administration that must base on Law as a leading position, (2) a separation of powers, and (3) the Law that guarantees human rights.

Law as the basis for state administration includes both written and unwritten laws. In the constitutional law aspect, this unwritten Law is the practice that grows and develops in unwritten constitutional practices, or what is also called a constitutional convention. In countries with a constitution as written fundamental Law, the existence of conventions complements the written Constitution. Conventions can accommodate development that the written Constitution cannot reach. Constitutional conventions are only helpful in complementing the applicable Constitution but can also be used to overcome various deficiencies in the written Constitution. The Constitution is a means to become the basis for the administration of the State. The Constitution formulated the vital interests of the community, nation and State. However, due to rapid changes, not all public interests are formulated in the Constitution. Therefore, it hopes the constitutional convention will overcome all these shortcomings (Rumokoy, 2010).

The existence of laws is a vital thing to manifest the rule of law principle. In the context of *civil law* legal tradition, the existence of written Law will provide legal certainty and the basis for state administrators to carry out their duties and authorities. Dainow, as quoted by Hadi (2016), found that the Continental European legal system generally develops codified Legislation as their primary source of Law.

Many countries have adopted the rule of Law as a concept that is considered the most ideal. European is the region that originally developed this concept. The essence of the rule of Law is related to the idea of popular sovereignty namely the concept of democracy (Asshidiqie, 1999). The principle of the rule of Law also developed broadly in other legal traditions, such as socialist, Anglo-Saxon, and religious law traditions. As stated by Bagir Manan (Handoyo, 2014), the characteristics of the continental legal tradition are:

a. prioritizing written Law, namely Legislation, as the main point of the legal system;

b. making every legal regulation as complete as possible to be compiled in a written law;

c. structuring Law in a codification;

d. positioning the government or judges as *the mouthpiece* of the Law.

Julius Stahl (Asshiddiqie, 2005) believes that the Continental European concept of the rule of Law also called *rechtsstaat* has four critical elements: protection of human rights, power sharing, and government by Law and state administrative court. Conversely, the characteristics of the Anglo-Saxon rule of the rule of Law have different, such as does not create written Law as the primary point in their legal system but jurisprudence and judge-made Law to develop legal rules and principles (Handoyo, 2014).

Dickey, as one of the rules of law founders (Asshidiqie, n.d), described three essential characteristics in every rule of Law: the supremacy of Law, equality before the Law, and due process of Law. In practice, equality before the Law manifests in inequality before the court. This third characteristic gives rise to the consequences of implementing judicial unification. Therefore, in the tradition of Anglo-Saxon Law, only one judicial environment applies equally to all citizens and does not recognize special courts for the government.The tradition of religious Law respects religious laws such as Islamic religious Law, Christian religious Law, Hindu religious law, and Jewish religious Law.

Legislation as the primary source of Law in Indonesia has a consequence in its process of drafting that has to pay attention to their applicability in practices. There are three aspect of the applicability of Law, namely philosophical, sociological, and juridical applicability. This paper discusses the urgency of this applicability aspect in the Indonesian context and the consequences of ignoring those three applicability aspects. It begins with describing the Indonesian Rule of law Tradition. The second part will explain the urgency of philosophical, sociological and juridical application of Legislation in Indonesia context.

This research uses normative juridical research (Marzuki, 2010) and the doctrinal research (Ali, 2018). The normative legal research will analys the primary legal sources relating with the urgency to consider the philosophical, sociological and juridical aspect in Indonesia context of legal drafting in the Indonesian context. It analyses the Indonesian Constitution, Law Number 24 of 2000 on The International Agreement, Law Number 24 of 2003 on The Constitutional Court, Law Number 48 of 2009 on The Judiciary Power, Law No.12 of 2011 on The Laws and Regulations Drafting, Law No. 23 of 2014 on The Regional Government, Presidential Regulation Number 87 of 2014 on the Implementing Regulation of Law No.12 of 2011. Furthermore, the doctrinal research will discuss about theories and opinion relating with the legislative power, legislation process, legislation form, three aspects of the applicability of the legislation. The research analys the data qualitatively to describe and explain the urgency to consider the philosophical, sociological, and legal aspect in drafting legislation. It will conclude using deductive way of thinking.

RESULT AND DISCUSSION

1. The Indonesian' Rules of Law Tradition.

In John Lock's view, there must be a separation of powers in a rule of Law. This separation of powers manifests in the function of the State. At the same time, Montesqueau'concept of his *Trias Politica* teaching divides the function of the State into three functions: the executive, legislative and judicial. This separation of power may prevent the centralization of power that may raise absolute authority. John Lock'1690 view inspired Montesqieu to develop 'the separation of powers' theory by developing point of view that the power to establish the rule of Law should not be held by those who apply it (Asshiddiqie,2005). Implementing the separation of power is significant since, in practice, absolute power leads to violating the citizen' fundamental rights. *Trias Politica* was initially able to prevent the emergence of centralized power.

Looking at such a trend, the development of the Indonesian state administration modifies the concept of separation of power into the distribution of the power. In *trias politica* or separation of power theory, each power has each authority separately. No collaboration or working together between each power. In the other hand, in the distribution of the power concept the authority is shared to each power with the possibility to work together between them. They, in a certain issue, may work together. For instance, as stipulated in Article 5 of the Indonesian Constitution, the President has the right to propose drafted law to the House of Representative. Article 14 Paragraph (1) of The Indonesian Constitution gives the President the right to grant clemency, and rehabilitation which originally is in judicial authority. It means the authory has been determined, each power has each primary authority, but, in a certain interest, they may share the authority.

With the concept of power-sharing, the check and balance mechanism becomes more effective. The authority to make Law by the legislative power can be cecked by the executive, as provided in Article 20 paragraph (2) of the Indonesian Constitution, by the provision that each draft law is discussed by the House of Representatives and the President for mutual approval. The concept of power sharing still places the legislative body as a law-making institution, only to realize checks and balances. In Indonesia, this legislative power exercises jointly with the executive. Legislative power generally reflects people's representatives who sit in the People's Legislative Assembly. It is the reason why is this people's representative institution often referred to as the law-making body. The legislative branch of power is the branch of power that first reflects sovereignty (Assiddiqie, 2005).

The existence of the Act as a product of Legislation is in line with the Indonesian rule of law principle adopted by the Indonesian Constitution. In the context of the regional government, following Article 18 Paragraph (6) of the Indonesian Constitution, regional governments have the right to stipulate regional Laws to implement autonomy and co-administration power. Based on Law No. 23 of 2014, this Legislation becomes the authority of the Regional House of Representatives which

together with the Regional Government, produces Regional Legislation. Regional Legislation as a law regulates regional public interest (Assiddiqie, 2005).

In line with Julius Stahl's point of view, Article 24 Paragraph (2) of the Indonesian Constitution shows that Indonesia adopted the rule of Law. The article states that the Supreme Court and its four judicial bodies exercise judicial power together with the Constitutional Court. The four judicial bodies are the general court, religious court, military court, and administrative court. Thus, the Indonesian judicial system has unique court structures, consisting of an Administrative Court, military and religious courts. It is in contrast with other *rechtstaat* countries such as France and the Netherlands, who do not have the religious court. Relating to the concept of Rules of law in global sense, it proves that Indonesia adheres not only to the Continental European tradition but also to the religious legal tradition, especially the Islamic religion.

Article 5 Paragraph (1) of the Indonesian Constitution gives the President the power to initiate Legislation and in line with Article 20 Paragraph (1) of the Indonesian Constitution, which gives the House of Representatives (DPR) to enact laws and stipulate national legislation programs at the national level. At the same time, the Regional House of Representatives prepares the regional legislation program.

2. The Urgency of Philosophical, Sociological and Juridical Application of Legislation in Indonesia Context.

As previously described, three elements of the applicability of the Law may influence the effectiveness of the Indonesian legal system. Commendation of Article 5 of law No.12 of 2011 stipulates that every Legislation must consider its effectiveness in society by considering the philosophical, sociological, and juridical aspects in drafting Legislation. A written law that does not comply with three applications will potentially be reviewed in its content or procedure by the court. Based on Asshiddiqie's view (2005), the application to examine Legislation shall base on the consideration that:

a. the tested regulation is contrary to the Constitution or a higher law;
b. the regulation in question is stipulated by an un-authorized institution,
c. the regulation is stipulated in a way that deviates from the proper procedure,
d. the regulation is being made for a purpose contrary to the Law and propriety,

For instance, the Legislation deliberately made for the abuse of authority, corruption, or personal benefit.

In the context of judicial review by the Constitution Court, Article 51 Paragraph (3) of Law Number 24 of 2003 provides two types of judicial review. First, the formation of laws does not meet the provisions based on the Indonesian Constitution. Second, the content in paragraphs, articles, and/or parts of the Law is contrary to the Indonesian Constitution. In formation review, the Constitutional Court examines and interprets laws from a procedural perspective determined by the Indonesian Constitution (Syahrizal, 2006). Any citizen who considers a particular Law breaches his constitutional rights may become a petitioner to submit a judicial review before the Constitution Court (Syahrizal, 2006).

The formation of a law's judicial review, or a formal judicial review, may be submitted on the ground that the legislative process does not meet the requirement stipulated in the Indonesian Constitution. Substantial judicial review may be applied considering that the content in paragraphs, articles, and parts of the Law breaches the Indonesian Constitution (Marzuki, 2004). Briefly, the formal judicial review relates to the procedural aspects of Legislation, while the substantial judicial review concerns the substantial aspect of Legislation. The Act's judicial review will be held by the Constitution Court, while the Supreme Court will hold the judicial review for lower Legislation than an Act.

PHILOSOPHICAL APPLICABILITY

Philosophical applicability considers the philosophy or values in the society where the Legislation applies. Kaelan (2016) defined this philosophical term as a sense of wisdom. Indonesia, with many diverse customs, has its philosophical values, which nationally crystallizes in the values of *Pancasila.*

Based on the Fourth Paragraph of the Preamble of the Indonesian Constitution, *Pancasila* has the position of the State Foundation. *Pancasila* is the highest source of all Indonesian law sources. It gives rise that all any Legislation shall consider and shall not have a conflict with *Pancasila* values, namely divinity, humanity, unity, democracy, and social justice. *Pancasila*'values embody the principles of the State, which are also in line with the rules of law principles, such as the principle of justice, legal certainty, democracy, and welfare. The fourth Paragraph of the Preamble of the Indonesian Constitution formulates *Pancasila*'s Principles. Of these rules of law principles, Manan (1992) states that there must also consider the rules of Law, the Constitution, and the people's sovereignty principles in establishing good laws. Manan's point of view support Attamimi (1992), who states that in establishing good laws and regulations, there must consider the ideals of Indonesian Law, the principles of the rules of Law, the Constitution, and other principles.

Referring to the discussion, the philosophical applicability of Legislation in the Indonesian legal system must consider the Indonesian rules of law principles that consist of the values of justice and legal certainty, the principle of a democratic state and the principle of a welfare state. Considering *Pancasila* as the indispensable nation's philosophy, any level of Legislation must consider *Pancasila*'s values. In other words, the formation of laws and regulations must give thought to the philosophy of

Pancasila, namely the value of religiosity, humanity, national unity, democracy, and social justice (Handoyo, 2014). It supports Notonagoro's view (Kaelan, 2016) that all aspects of state administration are covered and incarnated by the spiritual principle of *Pancasila* and, in this sense, the position of *Pancasila* as the spiritual principle and philosophical basis of the Indonesian State.
Based on this philosophical foundation as the basis for this philosophical application, if the content of a statutory regulation at all levels does not meet with the principles of *Pancasila* and the principles of Indonesian Rules of Law, the statutory regulations may be subject to a substantial judicial review. As provided in Article 24 C Paragraph (1) of the Indonesian Constitution, if the conflicting statutory regulation is an Act, the review is carried out by the Constitutional Court. At the same time, Article 24 A Paragraph (1) of the Indonesian Constitution states that the Supreme Court will hold the judicial review for a lower level of Law. Alignment of the content of Law with the philosophical ideology of the State, such as *Pancasila* ideology, will also make the Law apply effectively.

SOCIOLOGICAL APPLICABILITY.

The sociological basis of Legislation means that the Legislation process has to meet the community's needs. The sociological basis concerns empirical facts regarding the development of problems and community needs. Community needs continuously develop thoroughly. It causes problems and friction when the Legislation cannot accommodate the community's needs. Therefore, the Legislation shall meet the citizen' needs as a reality. The legislation maker shall catch aspirations, existing problems, demands, or public interests. The following process is finding the best solution to catch or overcome the problems that arise in the current situation (Muhtadi, 2013). All Legislation applies to that process.

Soekarno & Purbacaraka found (Manan, 1992) that there are two theories for sociological applicability in Legislation. First, the theory of power or *macht theory* states that the rule of Law will become applicable when the rule maker has the power to force it, regardless of whether it is accepted or not by the community. Second, the theory of recognition or *annerkennungs theory* states that the rule of Law will work well if the community where the Law applies accept it. However, the theory of power that contains an element of "coercion" may cause "psychological" problems for the community, which must obey these laws and regulations with a sense of unwillingness, especially if the Legislation invitation is not under the needs or aspirations of the community. *Vice versa*, in the *macht theory*, the community need should not be considered as a regulator or policy maker in the government's policy.

In order to bring both theories to sociological applicability, it must consider one interest thing, namely community participation in the legal drafting process. Regarding public participation, Law no. 12 of 2011 has provided the arrangement. Article 96 determines that:

(1) The public can provide input orally or in writing in the Legislation drafting
(2) through:
a. public hearings;
b. work visit;
c. socialization; and
d. seminars, workshops, and discussions.

JURIDICAL APPLICABILITY.

Juridical or Legal applicability means the Legislation has a legal power to bind the public from technical juridical considerations. Legally, Legislation is valid to be applied if the Legislation is (i) meets with the higher legislation forms, (ii) established per the law-making procedure, and (iii) determined as a legal norm by the institution that is authorized to do so (Yuliani, 2017). Manan (1992) has an opinion that juridical applicability is essential on the ground that:

a. there must be an authority from the legislators.
b. there must be conformity with the form of Legislation that is higher or equal.
c. the content does not conflict with the Legislation at a higher level.

If those requirements do not apply fully, the regulations may be nulled and not have a binding effect.

The institution authorized to make Legislation depends on the forms of Legislation to be formed, whether it is the Constitution, Acts, Government Regulations, or Regional Regulations. The attribution of authority can obtain the requirement for authority from the legislators. The attribution of authority in the context of the formation of Legislation is the grant to form laws and regulations by the Constitution or Law (Handoyo, 2014). Based on Article 3 Paragraph (1) of the Indonesian Constitution, in terms of attribution of authority, the authority to form the Constitution is the People's Consultative Assembly. Article 5 Paragraph (1) and Article 20 Paragraph (1) of the Indonesian Constitution state that the authorized institution to initiate Legislation is the House of Representatives and the President. By Article 5 Paragraph (2) of the Indonesian Constitution, the President has the authority to initiate another legislation form, such as Government Regulation. At the regional level, as promulgated in Article 236 Paragraph (2) of Law Number 23 of 2014, the Regional People's Representative Council, together with the Head of the Regional,

have the authority to make regional Legislation. The authoritative institution is a critical issue to be fulfilled. Otherwise, it will have the potential for a judicial review involving procedural aspects.

It is necessary to confirm the type of Legislation with the subject matter to be regulated. For instance, an Act has different content from government regulation, presidential regulation, or regional Legislation. Based on Article 10 Paragraph (1) of Law No. 12 of 2011, an Act will promulgate subject matter related to:

a. legislation to implement the Indonesian Constitution,
b. subject matter as an Act orders it in the form of an Act,
c. ratification of certain international conventions or agreements,
d. follow-up on the decision of the Constitutional Court or
e. public interest issue at the national level.

Article 10 Paragraph (1) of Law No. 12 of 2011 means that Legislation other than an Act may not regulate the same subject matter of an Act. The Indonesian Constitution has several articles that directly provide any issue regulated by an act. Such as:

a. Article 2 Paragraph (1) of the Indonesian Constitution provides that The People's Consultative Assembly consists of members of the People's Representative Council, together with delegates from the regions and groups, according to the rules stipulated by an Act.
b. Article 19 Paragraph (1) of the Indonesian Constitution stipulates that an Act determines the composition of the House of Representatives.
c. Article 28 of the Indonesian Constitution provides that freedom of association and assembly, expressing thoughts verbally, in writing, and others, is stipulated by an Act.

Article 21 Paragraph (2) of Law Number 48 of 2009 states that the provisions regarding the organization, administration, and finances of the judiciary, as referred to in Paragraph (1) for each judicial environment, are regulated in Act. It shows how an Act may order to promulgate a particular subject matter in another Act separately. At the same time, Law Number 48 of 2009 orders the establishment of an Act to regulate judicial bodies, such as the General Courts, the Religious Courts, the Military Courts, and the Administrative Courts, each in a separate Act.

Article 10 of Law Number 24 of 2000 concerning International Agreements states that an Act provides the ratification of international agreements related to:

a. political, peace, defence, and state security issues,
b. changes of the territory, determination of the boundaries of the territory of the Republic of Indonesia,
c. sovereignty or sovereign rights of the State,
d. human rights and the environment,
e., the establishment of new legal rules, and
f. foreign loans and grants.

It shows how the Act also provides the ratification of particular international conventions or agreements.

The Constitutional Court can review the Act and whether it conflicts with the Constitution. It raises a consequence that the Constitutional Court may decide to revise or amend an Act. The legislator thoroughly has to revise or amend the Act. Meanwhile, the contents of the Law as the fulfilment of legal needs in society concern the regulation of basic needs such as the Education Law, the Water Resources Law, the Electricity Law, the Health Law, the Social Security Law and other basic needs laws.

Based on Article 5 Paragraph (2) of the Indonesian Constitution, which states that "the President stipulates government regulations to carry out the law properly, " the content material in the Government Regulation is the content material ordered by Law.

Article 14 of Law No.12 of 2011 determines the content of regional regulations, namely:

a. implementing regional autonomy and co-administration,
b. elaborating furthermore on the higher laws and regulations.
c. accommodating special regional conditions.

Article 35 of Law Number 12 of 2011 promulgates that in planning a regional legislation programme, the Regional House of Representatives, together with the executive, should design a list of legislation drafts, and based on the following:

a. the order from the higher laws and regulations,
b. Regional Development Plans,
c. Regional autonomy and co-administration tasks,
d. Local community aspirations.

Based on Articles 14 and 35 of Law No.12 of 2011, the content of regional regulations is relatively more flexible. The content shall follow the regional development plans, which may change regularly, and the aspirations of the community, which can also develop from time to time.

The determination of the content and form of the Laws and regulations is an important thing. The determination will provide legal certainty and guarantee the realization of a hierarchy of laws and regulations. Therefore, if a specific lower law's

content breaches the higher Law's content, it will have consequences to be reviewed, namely a material judicial review or *materieel toetsing recht*.

The regulator must form the statutory regulation through a predetermined procedure. According to Law No. 12 of 2011 concerning the Preparation of Legislation in conjunction with Presidential Regulation Number 87 of 2014 concerning the Implementation of Law Number. 12 of 2011, a draft of statutory regulation shall follow several stages, including:

a. planning
b. composing
c. discussion
d. ratification; and
e. enactment.

The legislator carries out the stages of forming laws and regulations following the needs or conditions and the type and hierarchy of Legislation as provided in Article 7 of Law no. 12 of 2011 (Priyanto, 2021). The first essential stage in planning legislation is making an academic paper. An academic paper is a manuscript of research results, legal studies, and other research results on a particular problem and solution that can scientifically justify the portrayal of the problem and its solution, which the Legislation will describe. Both national and regional Legislation shall make an academic paper before drafting. The Legislation will be drafted based on the academic paper. The executive may initiate the draft, such as the President, Governor, the Head of City or Head of regency, and the House of Representatives, such as the National House of Representatives or Regional House of Representatives. Further discussion on the drafted Law will be conducted together between the executive and legislative to obtain mutual agreement.

For national Law, as stipulated in Article 20 Paragraph (5) of the Indonesian Constitution, every drafted Law is discussed by the House of Representatives and the President for mutual approval, which the President then ratifies for promulgation. The stages of national and regional legislation processing stages will include drafting, discussing, approving, ratifying, and enacting. A small amount of difference is only related to the term. National Law uses 'ratification' while regional Law has the term 'determination' for the same meaning.

Juridically these stages have been determined. It is urgent to be considered in drafting Legislation since it has legal consequences. If the drafted Law breaches the juridical stages, it may be cancelled (*vernietigbaar*) through a formal judicial review process. It uses 'formal' judicial review since it is related to a problem of procedure, not a problem of content.

In juridical application, a statutory regulation may not conflict with a higher level. It means that the lawmaker must pay attention to the hierarchy of Law to know whether the drafted Law has a conflict of content or procedure with the higher level of Law. Based on Article 7 Paragraph (1) of law No.12 of 2011, Indonesia follows Hans Kelsen Stufenbau's theory (Hasim, 2017) which principally states that: (i) a higher level of Legislation shall be used as the legal basis or basis for lower Legislation, (ii) lower Legislation must be sourced or have a legal basis from the higher level of Legislation, (iii) the content of lower laws and regulations must not deviate or conflict with higher-level laws and regulations, (iv) a statutory regulation can only be revoked, replaced or amended by a higher statutory regulation or at least an equivalent one. Article 7 Paragraph (1) of Law No.12 of 2011 provides a hierarchical order of laws and regulations, from the highest level to the lowest, namely:

a. the Republic of Indonesia Constitution,
b. Decree of the People's Consultative Assembly,
c. Act/Government Regulations instead of Act,
d. Government regulations,
e. The presidential decree,
f. Provincial Regulations, and
g. Regency/City Regional Regulations.

Considering the hierarchy theory implemented in Article 7 of Law No.12 of 2011, an act's content may not conflict with the Decree of the People's Consultative or the Republic of Indonesia Constitution. The content of Government Regulation may not conflict with an Act, and so forth.

In drafting laws and regulations, the lawmaker not only must pay attention to harmonization but also need to pay attention to synchronization by looking at the top-level laws and regulations under the hierarchy/order. Following the Stufenbau theory, Indonesia implements a principle: *lex superior de rogaat legi inferior*. It means that laws in a higher position defeat or override laws at a lower level.

CONCLUSION

Based on the discussion, it can be concluded that Indonesia has a unique concept of Rules of law by having the religious court of which is not found in any other Rules of Law states such as France and Netherland. As a Rules of Law or *rechstaat* Indonesia puts laws and regulations as the basis for conducting State. As provided by the law, the Indonesian lawmaker should consider three elements of the applicability of the Law, namely the philosophical, sociological and juridical applicability in drafting so that it

supports the effectiveness of the Legislation in practice. Breaching its three applicabilities in drafting the Legislation having the consequence that the Law may be reviewed on its content and procedures through the authorized court. The Legislation then may be nulled.

Therefore, in drafting the Law, whether at the national level or regional level, it is necessary to consider the Indonesian philosophical values, namely Pancasila, to involve community participation, both in the process of preparing Academic Papers/Academic Studies and discussing laws and regulations in order to accommodate people's aspirations, and to pay attention to the procedures of drafting the Law, including synchronizing and harmonizing.

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