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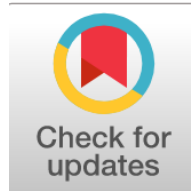
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Examining the Role of Indonesia's Constitutional Court as a Positive Legislator

Menelaah Peran Mahkamah Konstitusi Indonesia sebagai Legislator Positif

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Abstract

The judicial review process is pivotal in democratic governance, ensuring laws align with constitutional mandates. Constitutional Court Decision Number 90/PUU-XXI/2023, addressing amendments to Article 169, letter q of Law Number 7 of 2017 on Elections, has generated significant legal discourse. This study aims to analyze the legal dynamics within this judicial review, employing a descriptive-analytical methodology with a comparative approach. This involves comparing legal systems across different countries to understand the Constitutional Court's controversial role. Traditionally, the court's authority lies in acting as a negative legislator; however, in this case, it has taken on a role akin to a positive legislator, creating potential conflicts with the legislative body. The findings indicate a debate over the court's authority to add norms, revealing a fundamental tension between the judiciary and legislative functions. This decision introduces new legal implications, highlighting the necessity for further analysis to ensure the realization of substantial democracy. The study fills a knowledge gap by providing a comprehensive analysis of the court's expanded role, proposing solutive mechanisms to address the emerging legal challenges and maintain a balanced power dynamic between the judiciary and the legislature. This research underscores the importance of clear delineation of judicial and legislative responsibilities to uphold democratic principles.

Highlights:

- The court's controversial role in amending election law norms.
- Debates over the court's authority and legislative implications.
- Need for solutions to maintain democracy and balance of power.

Keywords: Judicial Review, Positive Legislator, Constitutional Court, Legal Authority, Democracy

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Introduction

In constitutional law, the dynamics of the judicial review process play a central role in determining the validity of a law or regulation that is the subject of dispute. Decisions of the CC have far-reaching implications, confined to the interpretation of the law itself and the political dynamics within a country [1]. In this context, it is necessary to delve deeper into the changes in norms within the judicial review process encompassed in CC Decision Number 90/PUU-XXI/2023. Furthermore, there will be legal and social impacts resulting from these changes. The Constitutional Court becomes one of the crucial pillars in laying a solid foundation for an inclusive and sustainable democratic system [2].

When viewed in the context of the history of the establishment of the CC, the CC was born from the third amendment to the Constitution of the Republic of Indonesia in 1945, which occurred between 1999 and 2002. The establishment of the CC resulted in significant restructuring in the governmental framework, particularly concerning the judiciary's authority in Indonesia [3]. According to Jimly Asshiddiqie, the idea of establishing the CC in Indonesia was mainly triggered by the desire to broaden the scope of judicial review of laws, which initially fell under the authority of the Supreme Court during the early stages of the state's formation. This indicates that establishing the CC is largely associated with the need for an institution specifically tasked with reviewing the constitutionality of laws.

Substantially, the role of the CC in ensuring the consistent implementation of the constitution as the guardian of the constitution and as the sole interpreter of the constitution has garnered profound attention within the legal and political context in Indonesia [4]. The CC fundamentally acts as a "negative legislator," a newly defined entity endowed with four powers outlined in Article 10, paragraph (1), letter (a) concerning the Court [5]. These powers include the authority to review laws deemed contrary to the 1945 Constitution, resolve jurisdictional disputes between state institutions, and address controversies arising from election results. These responsibilities reflect an effort to maintain the balance of power within the trias politica, ensuring that the Court's intervention in legislative matters does not exceed prescribed limits [6].

Consequently, if the CC issues decisions that are *ultra petita* (decisions exceeding the requests submitted) [7], known as acting as a positive legislator, it could be seen as a violation of the separation of powers principle among the judiciary, executive, and legislative branches. However, throughout its history, since its establishment, the Court has made several rulings that have established new regulations or can be regarded as taking on the role of a positive legislator. An example is Decision Number 11/PUU-VIII/2010, issued on March 18, 2010, by the CC, which introduced new regulations regarding the election procedure for members of the Election Supervisory Committee (Panwaslu) at the Provincial and Regency/Municipal levels [8]. In response to the ruling above, the General Election Commission (KPU) issued Circular Number 162/KPU/III/2010 to its provincial counterparts and city/regional KPUs across Indonesia.

Following the decision, on Monday, October 16, 2023, the CC announced eleven decisions on law reviews. Among these was a ruling on the constitutionality of Article 169 letter q of Law Number 7 of 2017 on General Elections. Detailed in Decision No. 90, the ruling broadened the interpretation of the Article by introducing an alternative requirement. Beyond the age limit of 40 years for presidential and vice-presidential candidates, the Court ruled that the requirement could be waived for individuals who have previously served as regional heads [9]. The decision has sparked a debate regarding the extent to which the CC should act as an independent judicial body and the extent to which its authority can influence the political process. The focus of concern is the importance of maintaining a balance between innovative legal interpretation and the fundamental principles of the constitution.

The discussion presented above leads to the following formulation: How does the authority of the CC as a positive legislator manifest in decision No. 90, and what are the legal implications of adding a norm in Article 169 section q of Law No. 7 of 2017. This research aims to delve deeply into the legal dynamics concerning the authority of the CC, particularly in the context of decision No. 90. The primary focus of this study is to provide a more comprehensive understanding of the legal implications resulting from the inclusion of a norm in Article 169 section q of Law No. 7 of 2017. The methodology employed is descriptive analysis with a comparative approach, which involves contrasting the legal structures of one country with those of other countries.

This study presents a new and significant aspect of understanding legal dynamics in judicial review, especially regarding CC Decision Number 90. Although much research has been conducted on the role and function of the CC, there needs to be a significant gap in understanding the CC's authority to make positive decisions. Apart from that, limited research also examines the comparison of the authority of the CC as a positive legislator and the age limits of the President and Vice President between countries, which are at the heart of this decision. This research aims to fill this gap and explore the proposed mechanisms and solutions.

Methods

The research employs a descriptive-analytical methodology, which is designed to thoroughly describe and analyze

the legal dynamics and implications of CC Decision Number 90/PUU-XXI/2023. This approach is the use of a comparative methodology, which entails systematically comparing the legal systems and judicial review processes of different countries [10]. By juxtaposing the Indonesian legal framework with those of other jurisdictions, the study aims to identify similarities, differences, and potential lessons that could inform and improve the Indonesian judicial review process. This comparative analysis not only highlights the unique aspects of Indonesia's legal challenges but also provides a broader context for understanding how other countries navigate similar issues, thereby enriching the overall analysis and contributing to more robust and informed conclusions.

Results and Discussion

A. The Authority of the Constitutional Court

Results The authority of the CC within Indonesia's constitutional framework is executed through the allocation of governmental functions based on the principle of the Trias Politica. This is in line with the Trias Politica doctrine proposed by Montesquieu, which asserts that power within a state should not be concentrated in the hands of a single individual or institution [11]. The principle of checks and balances embedded in the Trias Politica doctrine emphasizes that state institutions should be able to monitor and balance each other's performance per the authority established by the constitution. To gain a clearer understanding, it can be succinctly described as follows: The People's Consultative Assembly (MPR), the House of Representatives (DPR), and the Regional Representative Council (DPD) act as the legislative bodies, while the President is responsible for executing executive power. Meanwhile, the Supreme Court (MA) and the Constitutional Court (CC) operate within the judicial branch.

Lord Acton famously said, "Power tends to corrupt, but absolute power corrupts absolutely" [12], his demonstrates that the principles of checks and balances, including the separation of powers and the distribution of powers, are intended to prevent any institution from becoming overly dominant. However, implementing the trias politica principle in Indonesia is not as absolute as Montesquieu originally proposed [13]. In Indonesia, the relationship between institutions is characterized by interdependence and cooperation. Thus, the executive, legislative, and judicial branches are inherently interconnected. For instance, the president can propose bills with the House of Representatives (DPR) [14].

B. The Constitutional Court's Decision is Positive

In essence, lawmaking is the prerogative of the legislative body. However, throughout the existence of the CC from its inception to the present day, several rulings have resulted in new norms. Data indicates that from 2012 to 2022, the CC has developed new norms in cases of submitted law tests. During this period, there were 198 rulings, and 54% contained new norms [15].

This phenomenon indicates that the CC has significantly influenced the formation of laws and regulations in Indonesia through its role as a positive legislator. It is essential to underline that CC rulings have broad implications for Indonesia's legislative process and political dynamics, given that CC rulings are final and binding. One example of a positive CC ruling is regarding the testing of Law Number 42 of 2008 concerning Presidential and Vice Presidential Elections. This is CC Decision Number 102/PUU-VII/2009 [16]. The CC ruling establishes the CC as a positive legislator. This is because there is an addition of norms not regulated in the Presidential Election Law. In particular, Articles 28 and 111 previously only allowed Indonesian citizens to exercise their voting rights if registered in the Permanent Voter List (DPT). Article 28 and Article 111 explain that Indonesian citizens residing abroad but not registered in the DPT can exercise their voting rights by presenting a valid Identity Card (KTP) or a valid passport; Indonesian citizens using KTP must be accompanied by a Family Card (KK) or similar document. The CC ruling was made to ensure that the human rights of citizens to vote and participate in democracy are not diminished by technicalities. In addition to the above example, the latest CC ruling that adds new norms is Decision No. 90/PUU-XXI/2023.

C. Dynamics of the Constitutional Court's Authority in the Judicial Review Process

In Law Number 24 of 2003 concerning the CC, specific provisions regarding limitations in the process of testing laws by the CC are not explicitly regulated. This situation often results in the CC issuing rulings that exceed its basic authority as a party that nullifies norms (negative legislator). However, after the enactment of Law Number 8 of 2011, which came into effect on July 20, 2011, Article 57 paragraph (2a) of the law explicitly regulates limitations related to rulings that can be issued by the CC [17]. However, that article was removed in Law Number 7 of 2020, the third amendment to Law Number 24 of 2003 concerning the CC. Consequently, this change allows the CC to act as a Positive Legislator

D. The Authority of the CC as a Positive Legislator in Other

Countries

Not only in Indonesia, according to Christopher Wolfe, the Judiciary of the United States has implemented the authority of the CC as a positive legislator [18]. Since 1937, constitutional interpretation and judicial review have significantly differed in one crucial aspect [19]. They reflect a clear victory of modern understanding about the judicial power essentially being legislative in nature. Consequently, it is almost universally believed in the legal profession that judges, including in exercising judicial review power, ultimately act as lawmakers.

Norway also acknowledges that the CC can act as a positive legislator when protecting citizens' constitutional rights [20]. However, in practice, it still observes existing limits. Moreover, this is also the case in Germany, Italy, Spain, and France, as well as the six constitutional courts in Central-Eastern European countries: Poland, Hungary, the Czech Republic, Slovakia, Latvia, and Bulgaria [21]. These courts are no longer limited to the framework of negative law-making, as described by Hans Kelsen [22]. They do not confine themselves to reviewing the constitutionality of laws and repealing laws deemed unconstitutional. Instead, they also correct, supplement, and develop the text of laws through creative interpretation and formulation of operative rulings and their legal implications.

Implementing the CC's authority as a lawmaker highlights a paradigm shift in legal practice across various countries. This shift is evident in Indonesia and the United States, Norway, Germany, Italy, Spain, France, and several countries in Central-Eastern Europe. Despite the differences in legal and political contexts in each country, the increased role of the CC as a positive legislator reflects a response to increasingly complex social, political, and legal dynamics. Although these countries have different forms of government from Indonesia, most of them adhere to the same system of governance, namely a republic. The term "republic" originates from the phrase "res publica," which refers to the public interest [23]. In essence, a republic is a form of government in which the head of state is elected through a selection process regulated by specific rules.

Applying the CC's authority as a positive legislator has sparked both pros and cons [24]. On the one hand, it is seen as an effort to protect citizens' constitutional rights and address deficiencies or discrepancies in laws with constitutional principles. However, it raises concerns about the influence of legal decisions on the balance of power among branches of government and the principle of separation of powers. Implementing the CC's authority as a positive legislator demonstrates the importance of adapting laws to the changing times and societal demands. However, there needs to be robust oversight mechanisms and clear boundaries to ensure that CC decisions remain in line with constitutional principles and do not disrupt the balance of power within the governance system.

E. Contents of Constitutional Court Decision Number 90/PUU-XXI/2023

Almas Tsakibbirru, a student at Universitas Negeri Surakarta (UNS), filed a request for examination with Case Number 90. In his submission, Almas Tsakibbirru highlighted the economic growth of Surakarta under the leadership of Mayor Gibran Rakabuming Raka. Article 169, letter q of Law Number 7 of 2017 on General Elections constitutes the essence of the request. The CC ruled that the interpretation of Article 169, letter q in Decision Number 90 does not violate the principles of the rule of law and the right to fair legal certainty as regulated in Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution. To be eligible as a presidential and vice-presidential candidate, one must meet the following criteria: be at least 40 (forty) years old and have held or currently hold a position elected through general elections, including local elections. Additionally, the applicant also provides reasons regarding age-based discrimination, known as ageism, which is a manifestation of stereotypes and discrimination against individuals or groups based on their age. Ageism encompasses a range of beliefs, attitudes, norms, and values used to justify prejudice and discriminatory actions [25].

F. Judge's Considerations in Decision Number 90/PUU-XXI/2023

The judges make considerations in the decision. Firstly, before the amendment of the 1945 Constitution, there were no provisions setting a minimum age limit for the president. However, after the amendment, the age requirement for the president is regulated in Article 69 paragraph (3) of the 1950 Constitution, which stipulates that the president must be an Indonesian citizen who has reached the age of 30 [26]. After the amendment of the 1945 Constitution, the People's Consultative Assembly (MPR) transformed the concept of people's sovereignty. This change affected the adjustment of the qualifications for presidential and vice-presidential candidates, further regulated by the law. For example, Article 6 Letter Q of Law Number 23 of 2003 and Article 5 Letter O of Law Number 42 of 2008 stipulate that the minimum age for presidential and vice-presidential candidates is 35 years [26]. Changes in the age requirements for presidential and vice-presidential candidates, whether 30 years, 35 years, or 40 years, are regulated with various policies over time. However, despite this variation, a fixed formulation for determining the optimal age to serve as *President or Vice President has yet to be found*.

Secondly, concerning the open legal policy. In the context of legal policies related to age limits, the CC in several

rulings related to open legal policies often stated that such legal policies can be disregarded if they contradict principles of morality, rationality, and intolerable injustice [27]. The CC of the Republic of Indonesia stated that the Court cannot always do the annulment of a policy unless the policy violates principles of morality, rationality, and intolerable injustice. The CC granted the petition because the article in question resulted in injustice in this case, which is age discrimination.

However, Constitutional Judge Saldi Isra holds a different opinion. In his view, the three cases (Cases Number 29-51-55/PUU-XXI/2023) represent the first wave of various petitions challenging the age limits for presidential and vice-presidential candidates according to Article 169 letter (q) of Law Number 7 of 2017. Out of all the listed cases, only the initial wave cases underwent a plenary session to hear arguments from the parties involved, namely the President and the DPR. On September 19, 2023, Eight Constitutional Judges attended the Judges' Consultation Meeting (RPH) to consider cases number 29-51-55/PUU-32, consisting of Suhartoyo, Saldi Isra, Wahiduddin Adams, Manahan MP Sitompul, Enny Nurbaningsih, Daniel Yusmic P. Foekh, Arief Hidayat, and M. Guntur Hamzah. However, Constitutional Judge Anwar Usman did not attend the RPH. The result of the meeting, as stated in Decision Number 29-51-55/PUU-XXI/2023, shows that six Constitutional Judges decided to reject the Petitioner's petition and uphold the validity of Article 169 letter q of Law 7/2017 as an open legal policy. However, Anwar Usman attended the subsequent Judges' Consultation Meeting (RPH). Thus, the formation of nine judges became complete and focused on Case Number 90-91/PUU/XXI/2023. Although the alternative model proposed by the petitioners has essentially been recognized as an open legal policy, some Constitutional Judges who had previously affirmed Article 169 letter q of Law 7/2017 as a law-making legal policy (open legal policy) in Case Number 29-51-55/PUU/XXI/2023, suddenly showed interest in the alternative model requested in the petition for Case Number 90/PUU/XXI/2023.

Thirdly, concerning comparing countries regarding the age of Presidents and Vice Presidents. There are several examples of Presidents or Vice Presidents who served at an age below 40 years at the time of inauguration or appointment, including Gabriel Boric as the President of Chile, who was inaugurated at the age of 35, Vjosa Osmani as the President of Kosovo appointed at the age of 38, and Emmanuel Macron as the President of France appointed at the age of 39. In the context of the age of government heads in countries with a parliamentary system, there are also cases of Prime Ministers serving at an age below 40 at the time of inauguration. For example, Sanna Marin, who became the Prime Minister of Finland at age 34, and Jacinda Ardern, who served as the Prime Minister of New Zealand at age 37 [28]. Both countries also recorded significant achievements in handling the COVID-19 pandemic. These countries are primarily democracies, similar to Indonesia.

The relatively young age of government heads indicates a shift in the global political paradigm, where voters are increasingly open to younger leaders with solid vision and competence. It also reflects that democracy allows anyone, regardless of age, to lead and contribute to governance. However, it is essential to note that this comparison does not only sometimes guarantee the success or effectiveness of younger leadership. Every political context presents challenges and dynamics, and factors such as experience, expertise, and political support also play crucial roles in determining leadership success. Therefore, active evaluation and legal certainty related to age limits in presidential candidacy are necessary.

G. Controversy Over Constitutional Court Decision Number 90/PUU-XXI/2023

The CC Decision Number 90 has sparked controversy and criticism from various parties. This highlights the need for transparency, consistency, and careful consideration. As a consequence, the decision impacts the integrity of the electoral process. Firstly, regarding the legal standing. The petitioner's legal standing is considered weak because it fails to clearly explain constitutional harm. Almas' argument on harm solely stems from admiration towards Gibran Rakabuming Raka as the Mayor of Surakarta. Moreover, the explanation regarding the petitioner's constitutional harm inadequately addresses the petition regarding the alternative requirements related to the elected officials presented. In other words, the petitioner's constitutional complaints cannot be separated from the petition and the grounds of the petitioner's application.

Secondly, concerning Gibran Rakabuming Raka's relationship with Anwar Usman, who was then serving as the Chief Justice of the CC. Anwar is Gibran's uncle. This strengthens the public perception that the decision contains conflicts of interest. Especially since Anwar's speech on young leadership at the Sultan Agung Islamic University in Semarang is closely related to the essence of the case regarding the age requirements for Presidential and Vice Presidential candidates [29]. Furthermore, former Chief Justice Anwar Usman is suspected of intentionally influencing decisions regarding the minimum age limit in presidential elections. This reflects alleged political interference in the decision-making process within the judiciary, thus violating the Principle of Sapta Karsa Utama, the Principle of Independence, and the Application of numbers 1, 2, and 3. Thirdly, Anwar Usman's absence during the Plenary Session on September 19, 2023. On September 19, 2023, a Plenary Session was held to consider several cases, including Case Numbers 29/PUU-XXI/2023, 51/PUU-XXI/2023, and 55/PUU-XXI/2023. The Vice Chairman took over the leadership of the meeting due to the absence of the Chief Justice. As a result, the decisions on these three cases were to reject the applications. Although there were differing views among the judges. However, in Cases Numbers 90 and 91/PUU-XXI/2023, which also addressed the issue of the age of Presidential and Vice Presidential candidates, the Chief Justice participated in the discussions and decision-making.

Specifically, Case Number 90 was eventually partially granted by the majority of the judges. This prompted public reaction that conflicts of interest within the CC were significant. Although ultimately, the CC clarified that Usman's absence was not a matter of conflict of interest but rather due to health reasons.

Fourthly, regarding the ethical violations committed by the General Election Commission (KPU). The actions of the KPU, from the acceptance of registration to the declaration of Gibran as a vice presidential candidate, are considered inappropriate because the KPU has not revised Regulation Number 19 of 2023 concerning the Nomination of Presidential and Vice Presidential Candidates (PKPU Number 19 of 2023). The ensuing issue revolves around public perception regarding trust and the professional ability of election organizers.

H. Legal Implications of Constitutional Court Decision Number 90/PUU-XXI/2023

The court decision in the CC is final and binding. Therefore, it is challenging to determine the ideal position of a positive decision. In this context, Hamdan Zoelva elucidated the initial formulation. The court's establishment is intended to uphold constitutional cleanliness through judicial authority [30]. Consequently, the enforcement of the Court's decisions must be reflected wisely and responsibly, in line with its highest legal authority. This implies that implementing the Court's decisions must be carried out responsibly and with respect for the Court's position as the ultimate and binding legal arbiter.

The decisions of the CC have immediate and binding effect from the moment they are pronounced or read. This serves as a legal determination and immediately gains executory power [31]. In other words, these decisions serve as legal guidance to be respected and enable immediate enforcement actions to ensure effective and fair implementation. Throughout this process, justice, wisdom, and sustainability in law enforcement must always be the primary foundations. Therefore, preserving the integrity and autonomy of judicial institutions such as the Constitutional Court is a collective responsibility to achieve true justice within the legal system. From a practical standpoint, all decisions of the CC are inherently self-executing, meaning they must automatically be implemented by all components of society and the government (*erga omnes*) in the conduct of national life. One key indicator that a court decision can be executed is when it has acquired the force of law (in *Kracht van Gewijsde*) [32]. A court decision is considered to have acquired the force of law when no ordinary legal remedies are available to challenge it. Whether a court decision can be executed is determined by whether the operative clause of the decision is condemnatory [33]. If the operative clause is condemnatory, then the decision can be executed, meaning it can be implemented or enforced according to what is ordered by the court. However, if the operative clause is not condemnatory, the decision may be declaratory or merely state the legal status without ordering any specific action. In this case, the decision may not be directly executable because there is no specific order to be carried out.

Viewing the decisions of the CC, on November 3, 2023, the General Election Commission issued Regulation Number 23 of 2023 to amend Regulation Number 19 of 2023 regarding the nomination of Presidential and Vice Presidential candidates (PKPU 23/2023). In this PKPU, the candidate requirements interpreted by the CC Decision Number 90 were agreed upon in a consultation meeting with the DPR. The changes mainly concern Article 13 paragraph (1) letter q, which states that Presidential and Vice Presidential candidates must be at least 40 years old or have experience in general elections, including local elections. Thus, the requirements to become presidential and vice-presidential candidates have been adjusted by PKPU 23/2023 based on CC Decision Number 90.

Every decision of the CC has a self-executing characteristic that the entire society and government must automatically enforce. The final legal force of a court decision confirms that no ordinary legal remedies can be used to challenge it [34]. Every decision of the CC has a self-executing characteristic that the entire society and government must automatically enforce. The final legal force of a court decision confirms that no ordinary legal remedies can be used to challenge it.

Although the authority of the CC as a positive legislator is legitimate according to the Constitution and the decisions of the Court have binding force, it is essential to maintain the strength of the judicial institution not to exceed its authority. Therefore, clear regulations regarding the position of the Constitutional Court as a judicial institution, both normatively and practically, are necessary. This will ensure that the decisions of the Constitutional Court can be implemented wisely and responsibly by its highest legal authority.

The CC's decision has increased the age requirements for presidential elections to become younger and applicable to all (*erga omnes*). This indicates progressiveness in the changing paradigm of leadership age globally. However, it is crucial to note that approving these changes must be conducted through structured mechanisms and by applicable ethics. This can be achieved by establishing an open legal policy with the legislative institution. And the promulgation of the CC's decisions by the applicable provisions. Thus, although there is progress in law, the principle of the separation of powers between the judiciary, executive, and legislative can still be achieved.

Conclusion

Essentially, the Constitutional Court serves as a negative legislator. However, in practice, it has shifted towards becoming an institution with authority as a positive legislator. This is evidenced by removing Article 57 paragraph 2(a) in UUMK 8/2011 in UUMK 7/2020, the third amendment to UUMK 24/2003. The authority of the MK as a positive legislator has also been applied in several countries with a republican system of government. This is evidence of an independent judicial institution while observing its limitations. Thus, in this regard, the MK has the right to add norms regarding age requirements in presidential elections to decision number 90/PUU-XXI/2023. Moreover, leadership in government by individuals under 40 years old has been implemented in several countries, some of which have positively impacted their nations. However, it is essential to consider the processes within the MK to uphold credibility and integrity, ensuring that it does not produce controversial decisions.

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