REMOVAL OF THE STATEMENT "THE STATE'S RELIGION IS ISLAM" FROM THE CONSTITUTION IN 1928

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Introduction

Historically, the concept of a Constitution first appeared in the late 1700s. In order to limit the power of the state and, at the same time, guarantee the rights and freedoms of the citizens, the need arose to enact laws which would stand above other laws and which could not be easily amended, leading to the emergence of the concept of a constitution. Before the constitutional movements started gaining a foothold, countries maintained law and order through their own legislation or edicts. But none of these laws had a privileged status in the hierarchy of laws and they were very easy to change. The first constitution known to have been written is the 1787 United States Constitution. The Constitution of the United States of America was followed by the 1791 French Constitution , the 1809 Swedish Constitution, the 1812 Spanish Constitution, the 1814 Norwegian Constitution, the 1831 Belgian Constitution, the 1848 Swiss Constitution, the 1848 Italian Constitution, the 1848 Prussian Constitution, the 1849 Danish Constitution, the 1849 Luxembourgian Constitution, the 1864 Greek Constitution, the 1866 Romanian Constitution and finally the 1876 Ottoman Constitution (Gözler, 2004; p.13-19).

Prior to the Ottoman Constitution that came into force in 1876, the legal system of the Ottoman Empire, which had a monarchical and theocratic structure and consisted of two basic elements. The first of these were the rules of Islamic law (Shariah or Ahkam-i Şer'iyye), and the second were the set of rules dictated by the Ottoman sultans (customary laws, laws, code of customary laws). In Ottoman legal documents, these two systems are referred to together as sharia and customary laws (Yetkin, 2013; p. 381). During the 19th and 20th centuries, the concept of Constitution became the subject of debate in Turkish political history and was changed many times. In particular, the reforms introduced by the Ottoman state relating to the state system, combined with efforts to keep up with the modern world, made it necessary to establish a constitution regulating the regime and the governance system as well as the rights and duties of the citizens. For this reason, Abdül Hamid II stated that he would declare the Basic Ottoman Law in consultation with the Grand Vizier Mithat Pasha if he were to be named the new ruler instead of Murad V. Dethroned pursuant to a *fatwa* issued by Hasan Hayrullah, the then Shaykh al-islam, Murad V, was replaced by Abdül Hamid II. And indeed, on 23 December 1876, Abdül Hamid II declared the Basic Ottoman Law as promised. The Basic Ottoman Law was prepared by a committee called "Cemiyeti Mahsusa" presided over by Server Pasha, consisting of 2 soldiers, 16 civil bureaucrats (3 of whom were Christians) and 10 representatives of the Muslim clergy. The Belgian, Polish and Prussian constitutions

and previous drafts were taken as the basis when preparing the draft for the Turkish constitution. The draft was approved and announced by the Sultan after its examination by the Council of Ministers headed by Mithat Pasha (Gözler, 2000; p. 19-23).

So, can the Basic Ottoman Law that came into force with the approval of the Ottoman Emperor be really referred to as a constitution? In order to answer this question, it is necessary to correctly define the concept of constitution. At its simplest, a constitution is the highest law systematically regulating the state structure governing a society, the functioning of the legislative, executive and the judicial system while at the same time protecting the rights and duties of the citizens. Kemal Gözler refers to two kinds of constitution, material and formal. A material constitution (Constitution au sens materiel) is the sum of a set of written rules that determine the basic organs and functioning of the state. Whereas a formal constitution (Constitution au sens formel) refers to a set of distinct legal rules that stand above other legislation and which are significantly harder to change. Dwelling on the issue of which definition is correct, Gözler states that if the material definition of constitution is correct, then the laws that determine the state functioning should also be regarded as part of the constitution. For example, by stating that, the statutes that define the rules and principles of election law should be considered within the framework of the Constitution, but that this is practically not possible, and he asserts that the formal definition of the Constitution is the more accurate one (Gözler, 2004; p. 13-19).

A legal text linking society and the rulers arose out of this need, such as reflected in the case of "Toy" and "Kengeş", the state assemblies in the Turkish communities before Islam, and the "Council" which convened regularly in the Turkish communities during the Islamic period, and the notion of an assembly, which has taken its most sophisticated form thanks to the present-day representative parliamentary system (Erdoğan, 2014, p.40). At this point, even though regarding the Basic Ottoman Law as a Constitution may be contentious, it represents a starting point in Turkish legal history in the context of the state regime.The Basic Ottoman Law had not been prepared by a constituent assembly and had not been publicly voted upon. It was unilaterally declared by the Sultan. Therefore, the Basic Ottoman Law is regarded as an Edict or a Royal Decree in terms of its form. According to Gözler, even though the Basic Ottoman Law was formally a royal decree, it differed from the Royal Edict of Gülhane and the Royal Edict of Reform. It was more akin to Western Constitutions consisting of a series of articles. Gözler also argues that the Basic Ottoman Law regulated the fundamental rights and freedoms of citizens as much as it laid down the relations between state organs making it a material constitution and he adds that it can be regarded as a Constitution in terms of the formal criteria that determine a document to be a Constitution. Article 115 of the Basic Ottoman Law expressly declared its superiority and its binding nature. Furthermore, according to

Article 116, a two-thirds majority vote from the members of the Chamber of Deputies and the Assembly of Elites was required for the proposal of amendments. Therefore it can be inferred, the Basic Ottoman Law was harder to change than other laws. According to Gözler, the Basic Ottoman Law was formally a Constitution fulfilling all the required criteria (Akman and Patoğlu, 2016; Gözler, 2000; p. 19-23).

The basic principles of the Basic Ottoman Law explicitly set out the monarchical nature of the State, its unitary nature, language and religion, and these principles were secured in a constitution that stood above legal norms and which could not be easily changed unlike other laws and legislation. Furthermore, a General Assembly with a two-layered legislative power was established. One section of the Assembly was called the Assembly (Committee) of Elites whose members were appointed by the Sultan. The other section was called the Chamber of Deputies appointed through a public vote every 4 years.

"The Monarchic Nature of the State - The Ottoman State is a monarchy. According to Article 3 of the Basic Ottoman Law, the state presidency is inherited.

The Unitary Nature of the State - Even though article 1 states that the Ottoman State incorporates foreign countries and other continents, it also states that it is a "single unified body" where "discrimination" does not come into question.

The Religion of the State - The Ottoman State is not laic. The state has one religion which is Islam (article 11). The Basic Ottoman Law has other sections that refer to the religion of the state. Indeed, the Emperor is also the caliphate (article 3,4) and enforces Sharia law (article 7). The Shaykh al-islam has a place in the state organization and the Government (article 27). The laws cannot violate the norms of religion (article 64). To ensure that, there are Sharia courts in the country (article 87). The name of the Emperor is to be cited in the khutbahs (article 7)[14].

The Official Language of the State -The Basic Ottoman Law states that Turkish is the one and only official language of the state (article 18). Knowing the official language is a prerequisite for employment in the public service (article 18).

Capital city of the State.- The Basic Ottoman Law states that the capital city is Istanbul. However, the capital city is granted no "concessions or exemptions" due to its status (article 2) (Gözler, 2000; p.19-23-43).

Although it caused controversy in the history of Turkish law after having emerged during the same period as its counterparts in other countries, the Basic Ottoman Law, which was primarily accepted as the first Constitution, was changed seven times during the period it was in force. In the first version of the Basic Ottoman Law, the legislative and executive powers were still under the control of the sultan. The sultan's permission had to be

obtained to make legislative proposals. The sovereign had the power to send people into exile, enforce censorship, as well as an absolute power of veto and the power to close the assembly. Finally, the Sultan closed the Parliament blaming it for defeat in the Ottoman-Russian war. The Constitution was abolished heralding a period of oppression. In 1908, the parliament was reopened and the 2nd Constitutional Monarchy was declared. The Basic Ottoman Law, which had been abolished, was considered again for adoption. With significant changes in 1909, the legislative and executive powers of the Sultan were removed from the monopoly of the sultan. The legislative power was given to the Assembly and the executive power was given to the Council of Ministers based on the trust of the legislative power (Gözler, 2000; p.19-23-43). On November 13, 1918, the Navy of the Allied Powers consisting of British, French, Italian, and Greek ships arrived in Istanbul, deploying soldiers across the city and initiating a process of invasion. On March 16, 1920, the Chamber of Deputies was shut down following the official invasion of Istanbul. Deputies were sent into exile (Saylan, 2014; p.18-34). Manastırlı Hamdi Bey conveyed the news of Istanbul's occupation to Mustafa Kemal Atatürk. Following the news, Mustafa Kemal Atatürk issued a circular to establish a parliament with extraordinary powers to implement measures to ensure the independence of the nation and to rescue the country and he then demanded elections throughout the country. (Atatürk, 2005, p.322-333).

During the period of National Struggle which took place between 1919-1923, the First Grand National Assembly was founded on April 23, 1920, under the leadership of Mustafa Kemal Atatürk and his comrades-in-arms and with the will of the Turkish nation. In 1921, the War Constitution comprising of 23 articles and one special clause was endorsed by the Assembly. This constitution is considered the only soft framework Constitution in the history of Turkish law. The Basic Ottoman Law was not abolished following the endorsement of the War Constitution heralding an era where the two constitutions stood side by side. In the Constitution of 1921, a parliamentary system of government was adopted. The constitution contained a provision calling for elections every two years as opposed to the 4 years stipulated by the Basic Ottoman Law. One of the most outstanding features of the 1921 Constitution was the proclamation *"Sovereignty Rests Unconditionally with the Nation"* enshrining the concept of national sovereignty for the first time. The Constitution of 1921 is the only Constitution which does not refer to jurisdiction and fundamental rights and freedoms. Since the priority was to liberate the nation from enemy occupation during the time this Constitution was in force, there were no regulations included concerning public institutions or other related issues. Nor does the 1921 Constitution make any references to the religion of state. But, this should not be interpreted as the first steps towards secularism since this was a period when two constitutions were in place.The provisions of the Basic Ottoman Law, which did not contradict the Constitution of 1921, were still in force during this period, meaning that

the statement concerning the religion of state in the Basic Ottoman Law was still valid (Mumcu, 1985; p.516). As a result of the divisions formed in the parliament after the Constitution of 1921, Mustafa Kemal and his like-minded friends came together and in contradistinction to their previous statements, emphasized that their priority was to liberate the nation and not to save the sultan or the caliphate. In a decree dated October 30, 1922, it had been stated that *"the Monarchy in Istanbul disappeared" and that the "Turkish government will save the legitimate Caliphate from foreign occupation*". The decision drew negative reaction from certain circles. For this reason, the General Assembly held meetings throughout the night of November 1. With a new decision taken in the aftermath of these negotiations, the sultanate was definitively removed. The reasoning behind the decision to abolish the Sultanate was that the Sultan had betrayed the nation as well as recognition of the principle that there could be no power above the national will represented by the Grand National Assembly of Turkey. Besides, with this final decision, the objective to *"save the Caliphate"* was abandoned and it was stated that *"The Turkish State is the supporting block of the Caliphate"*(Mumcu, 1986, p.57). Consequently, on 1 November 1922, the sultanate and the caliphate were separated and the sultanate was abolished. In 1923, some amendments were made to the Constitution of 1921. During this period, the Republic was declared and an article stating "The regime of the state is the Republic" was added to the constitution. The Office of Presidency and the statement "The President is elected by the Grand National Assembly", which was not included in the Constitution of 1921, were then added to the constitution. A requirement that the election of the Prime Minister be made by the President from among the deputies was also included at this time together with a stipulation that the ministers would be assigned by the president on the recommendation of the Prime Minister. The official language of the state was declared to be Turkish. The religion of the state, which was not mentioned in the Constitution of 1921, was added to the Constitution with an article stating the State's religion was Islam through an amendment made in 1923. It can be concluded that the aim in doing so was to prevent reactions due to the abolition of the Sultanate and the proclamation of the Republic (Ertan, 2007; Tangulu, karadeniz and Ateş, 2014).

After the proclamation of the republic, certain circles, including some friends of Mustafa Kemal Atatürk, began to speak out in support of the Caliph. The caliph did not comply with the warnings and recommendations of the government and gave ambitious statements and organized ceremonies. For this reason, Mustafa Kemal Pasha decided in 1924 that the caliphate should be abolished. Pursuant to Act 431, the caliphate was abolished on 3 March 1924. The abolition of the caliphate can be considered as the first major step towards a secular state. Many scholars and scientists agree that the first step towards a laic state was taken with the abolition of the Caliphate. However, Article 2 of this new Constitution still stated that the State religion is Islam (Temuçin, 2007; p. 410-413;

Soyak, 1973; p. 340). According to Soyak, Act 431 did not directly deny the Institution of the Caliphate but acknowledged it as part of the government and the Republic.

In this respect, it is even possible to say that the abolition of the caliphate did not lead directly to a transition to secularism. But the fact that there was no one to fill this office destroyed the second great foundation of the theocratic Ottoman Empire after the sultanate, so that the last vestige of the state, which had already disappeared, was also erased." (Soyak,2018,p.340).

In 1924, the Constitution was revised and with the Constitution of 1924, the Constitution of 1921 and the Basic Ottoman Law were abolished, putting an end to the era of two constitutions. To sum up a few of the main characteristics of the 1924 Constitution: The first article of the 1924 constitution stated that the Turkish state is a republic. This constitution was a rigid constitution as this article could not be changed. Moreover, since the 1924 constitution was a detailed Constitution, it was also a casuistic (Rigid) Constitution. According to the 1924 Constitution, the government model was a mixed government model and the concept of majoritarian democracy was adopted. The capital city was stated to be Ankara. Elections would be held every four years instead of two. After the adoption of the 1924 Constitution, the Assembly was divided into two groups, Conservatives and Reformists. The Constitution of 1924 allowed the transition to a multi-party regime, and therefore some important figures who broke away from the ranks of the National Struggle positioned themselves against Mustafa Kemal Pasha and founded the Progressive Republican Party on 17 November 1924. After the Sheikh Said uprising, the Progressive Republican Party was closed down due to its extremist activities. After the party was abolished, the Dervish lodges were banned, religious titles were removed and visits to shrines were prohibited (Özalper, 2014; S:119-133). On 4 October 1926, the Civil Code and the Code of Obligations came into force. A system based on freedom and equality was introduced in lieu of a system based on religious rules, which Mumcu refers to as a religious civil code, regulating aspects of civil life ranging from family, inheritance, and property to all kinds of debt and financial relationships. According to Mumcu, in this respect, the Civil Code introduced laicism to certain aspects of daily life (Mumcu, 1985; p. 513-526).

In 1928, the second article of the constitution stating that the "state religion is Islam" was removed. As in all other states, conjectural changes to the constitution, which ranked high and above other legislation in the hierarchy of legal norms until 1928, were ratified in the assembly of the Republic of Turkey on April 10, 1928, following a legislative proposal by the Malatya Deputy İsmet İnönü and 120 other deputies, in order to keep pace with the new world order and to separate religion and state affairs (İnce, 2000). According to the Grand National Assembly archives, the names of deputies who proposed the removal of the statement "The State's Religion is Islam" from the Constitution following the

declaration of the Republic are as follows:

Malatya İsmet, Giresun Hacim, Muhittin Erzincan, Saffet Sivas, Necmettin Sadık Ankara, Talât Edirne, Şakir Kayseri, Hasan Ferit Çorum, ismet Kocaeli, Ragıp Sivas, Rasim Mardin, Abdürrezzak Ordu, Recai Kütahya, Mehmet Nuri Kayseri, Zonguldak Ragıp, Bursa Ahmet Münir, Biga Ziya Gevher, Giresun Hakkı Tarik, Kara hisar îstaail, Karesi Kazım, Mardin irfan Ferit Çorum, Mustafa İzmir, Mahmut Esat İstanbul, Doctor Refik Siirt, Mahmut Malatya, Vasıf İzmir, Mustafa Necati İzmir, Saraçoğlu Şükrü Burdur, Mustafa Şeref Artvin, Mehmet Ali Gaziantep, Kılıç Ali Denizli, Necip Ali Çankırı, Talât Bolu, Şükrü Malatya, Abdülmuttalip Kastamonu, Mehmet Fuat Eskişehir, Sait Bilecik, Rasim Bolu, Cemil Samsun, Adü Balıkesir, Osiman Niyazi Çankırı, Yusuf Ziya Çorum, İsmail Kemal Kocaeli, İbrahim Süreyya Kastamonu, Cemil Muğla, Yunus Nadi Bitlis, flyas Sami Tokat, Şevki Gümüşhane, Halil Nihat İzmir, Osman Zade Hamdi, Konya Refik, Kars Halit, Manisa Mustafa Fevzi, Trabzon Şefik, İstanbul Fuat, Maraş Abdülkadir Elâziz, Nakiyettin Kütahya, NiyaZi Asım Bursa, Esat Rize, Ahlmet Fuat Alfyonkarahisar, Ruşen Eşref Yozgat, Salih Çankırı, Rıfat Konya, Tevfîk Fikret, Kütahya,İsmail Hakkı, Bursa Asaf, Tekirdağ Celâl Nuri İstanbul Nurettin, Ali Kocaeli İbrahim, Niğde Faik Konya, Hüsnü Bolu, Emin Cemal Erzurum, Aziz Rize, Ali Van, Hakkı Antalya, Rasih Bitlis, Muhittin Nam i İstanbul, Hüseyin Hüsnü Aksaray, Mustafa Erzurum, Nali Atuf Erzincan, Abdülhak Antalya, Doktor Cemal Afyinkarahisar, izzet Ulvi Tokat, Mustafa içel, Mehmet Kemal Aydın, Emin Fikri Manisa, Mehmet Sabri Mersin, Alı Kırşehir, Hazım Antalya, Ahmet Saki izmir, Mustafa Rahmi Bolu, Fallı Rifkı Kütahya, İbrahim Samsun, Ali Rıza, Manfea, Mehmet Kani Sinop, Refik ismail Sivas, Remzi Muğla, Şülkrti Kaya Trabzon, Hasan Hüsnü Manisa, Osman Aydın, Mithat Konya, Naîm Hazım Bayazlt, Halit Zonguldak, Hüsnü Mardin, Nuri Gaziantep, Ali Cenanı Erzurum, Necip Asım Sinop, Recep Zühtü Bursa, Doctor Refik Denizli, Mazhar Müfit İsparta, Mükerrem Manisa, Doctor Saim Malatya, Mahmut Nedim Manisa, Akif Mardin, Abdürrezzak Rize, Akif Burdur ,Vahit İstanbul, Ankara İhsan, Bursa Muhlis, Rize Atıf, Rize Esat, Ankara Mehmet Rıfat, Eiâzîz Trabzon Daniş" (Grand National Assembly Minute Book, 1928; p:1-3).

Another amendment was the removal from the constitution of the section stating that the Shariah code would be enforced by the Grand National Assembly. Concerning the vows taken by the deputies and the president, members of the Assembly would no longer swear to God but would rather swear on their honor (Karataş, 2008;S:290). The amendment to Article 26 of the constitution on 10 April 1928, also related to laicism. The phrase "enforcement of the sharia code" was removed pursuant to an amendment dated April 10, 1928 ending the Grand National Assembly's authority to regulate religious affairs (Ertan, 2007, p.412).

The definition of laicism in Turkey was another bone of contention. Secularization, which

means the reduction of the social power and dignity of religion over a certain period of time, and laicism, a political principle which means the separation of religion from state affairs, have become two concepts which are often confused with one another (Ertit, 2014; p.103). The word laic borrowed from French originated from Ancient Greek. In ancient Greek, "Laikus" was the name given to non-spiritual persons not belonging to the clergy. Laicism refers to a state regime and social order not governed by the clergy. After the collapse of feudalism, the long-lasting authority of the church ended. Humanism, the Renaissance and Reform movements brought enlightenment to societies in Europe. The concept of laicism was born out of such processes in Europe. Before the Republic, laicism existed to a certain degree in Turkey, though to a minimal degree, and only gained traction after the declaration of the Republic (Tayhani,2009,p.519-522). Mustafa Kemal Ataturk's opinions as to the emergence of laicism in Turkey are as follows:

"*Judging by the oldest periods of Turkish history, the Turkish nation understood early on the importance of separating issues of religion and faith from state affairs and politics. This was in itself an intellectual breakthrough...We have no precedent set by Turkish tribes migrating to Europe meddling with the religion of the populaces they conquered or mixing state affairs with religion...*"(Tayhani, 2009; p.522).

In response to a question posed by former French Prime Minister M. Heriot where he asked *"Pasha! How did you manage to introduce laicism to an Eastern society governed for hundreds of years by the laws of religion?",* Mustafa Kemal Atatürk replied:

"*This nation never fully embraced religious bigotry. It was only within the preserve of a certain group of people. And I saw that truth and led the nation towards the right course. Religion is now confined to the mosques, while politics has become the responsibility of the state. We chose to benefit from the merits of civilization guided by the light of the positive sciences."* (Tayhani,2009,p.522).

Even though laicism implies in its simplest form the separation of religion and state, the meaning of the concept of laicism in Turkey is best understood by considering the definition given by Mustafa Kemal Ataturk, the founder of the Republic of Turkey. According to Mustafa Kemal Atatürk: *"Laicism does not only mean the separation of religion and state affairs. It also means freedom of conscience, worship and religion for all citizens."* As it is understood, besides the separation of religion and state affairs, laicism comprises other aspects such as freedom of religion, worship and conscience according to Atatürk (Sarıkoyuncu, 2013; p.45-46). The complete laicisation of the state, including in the political, legal and educational fields, was carried out gradually in the course of the Turkish Revolution. All these stages were meant to eliminate obstacles standing in the way of laicism. The leader of the revolution, Mustafa Kemal Atatürk, achieved it by following a superior strategy (Tayhani, 2009; p. 522).

Legislation within the legal system must be completely in accordance with the constitution and must not contradict it. For this reason, constitutions are above the law. Many elements such as social norms, culture and traditions that shape society are important factors that come into play when constitutions are written. In addition, constitutions can be changed according to the requirements of the age, time and society, or new articles may be added to them. We see such amendments and additions made to the Basic Ottoman Law and the Constitutions of 1921,1924 and 1928 according to the requirements of the time. According to K.C Wheare, a constitution is a reflection of a social consensus in line with social requirements and ideas. In other words, reforms, political, social and economic innovations require the establishment of a constitution in line with the interests of the people. So therefore constitutions also have an economic dimension. In this context, a nation is bound to be affected by economic and political events in a constantly changing world and new constitutions can be created according to the requirements of the time. According to K.C. Wheare, the centralization of all the organs of state to ensure the welfare, security and other needs of its people necessitates the creation of a new approach, new practices and a new constitution forming a foundation for reforms besides economic interests (Wheare,1984:p.67-82).

The production of an idea and its adaptation to society require approval by that society while the harmonization of social norms with the Constitution requires a process of acknowledgement. And this makes change necessary. Political leaders place current available policies on the agenda in order to legitimize change and to measure acceptance and social reactions. Accordingly, they offer political and economic projections to the public and form a social partnership with an emphasis on social interests. In doing so, they either make laws or policies in accordance with the constitution, or eliminate the deficiencies in the Constitution, or create a legitimate basis by making a complete change to the Constitution. For this reason, political parties or governments take responsibility and follow the process of social permeability. As a matter of fact, until 1937 all the steps taken during the process of placing laicism on a Constitutional ground were gradual steps taken whilst observing the reaction of the society to the changes. In the process until the adoption of laicism, Şeriye ve Evkaf Vekaleti, namely, the Ministry of Religious Affairs and Foundations, was abolished in order to prevent its interference in the affairs of state; the law on Unification of Education was passed, the dervish lodges were closed down and religious titles were rescinded in what can be considered as a series of sweeping changes impacting social life, law and culture. In addition, the traditional structure of the state was changed through reforms to language, the alphabet, clothing, and the adoption of the Turkish civil code. With the removal of the statement "The state's religion is Islam" from the constitution in 1928, the biggest step was taken towards laicism. (Karataş, 2008; p.290). As a matter of fact, at the time of these reforms and especially with the introduction of laic innovations, anti-regime religious propaganda activities emerged

and were duly tackled (Kocaoğlu, 2007; p.1306).

Modern constitutions emerge according to the requirements of the time. In particular, constitutions written before the 20th century had an ambiguous position in the hierarchy of law since quasi-monarchies could change or abolish them at any time. Abdülhamit II's closure of the Chamber of Deputies after dismissing the Basic Ottoman Law as null and void showed that the constitution was applied not according to the will of the people but according to the wishes of the monarchy. The process of laicisation progressively gained momentum with the proclamation of the Republic and all elements of the state, including politics, as well as the legal and educational systems, became laic. Thus, Turkish legal traditions also underwent a change from the 20th century onwards, as manifested in a series of constitutions being transformed according to the requirements of the period.

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