МІЖНАРОДНЕ ПРАВО

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LIMITATION OF THE RIGHT TO FREEDOM OF CREATIVITY IN THE PRECEDENT PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Unlimited creative freedom is one of the prerequisites for social progress, the main priority of the cultural policy of the state, a democratic society. Freedom of speech, information, communication, creativity and culture are the main elements of democratic government. The value of creativity and intellectual development presupposes the need to protect them from encroachment and interference by the state. Legitimate limitation of the right to freedom of creativity is one of the most relevant political and legal issues throughout the entire development of mankind. The right to freedom of expression is provided for by the Convention on the Protection of Human Rights and Fundamental Freedoms. The defined limitations of the right to freedom of creativity, established by international law as a legal means of regulating the limits of state intervention in the exercise of a person's subjective right, are not always interpreted unambiguously in practice. Observance of the right to freedom of expression provided for by the Convention is ensured by the controlling mechanism – the European Court of Human Rights, whose decisions are precedential for the participating states. In the European legal tradition, freedom of creativity is closely related to restrictions, the need for which must be proven with a high degree of their legitimacy (legality), proportionality (commensurability) and expediency (purposes). The analysis of the decisions of the European Court of Human Rights makes it possible to generalize the precedent practice of the ECtHR in the field of restriction of the right to freedom of creativity and to divide, depending on the grounds, state interference in freedom of creativity into the following groups: restriction of the right to freedom of creativity for the purpose of protecting the health or morals of other persons; restrictions on the right to freedom of creativity that are necessary in a democratic society in the interests of national security, territorial integrity or public safety, to prevent riots or crimes; restriction of the right to freedom of creativity in order to protect the reputation or rights of others. The main criteria for evaluating the reasonableness of intervention by the state in the precedent practice of the ECtHR: the method of quantitative risk assessment; justification of interference with freedom of creativity due to alleged harm; mass access to the results of creativity; a form of creative expression; the content of creativity.

Key words: limitation of rights, freedom of creativity, precedent practice, European Court of Human Rights.

Гриб Г. М. **ОБМЕЖЕННЯ ПРАВА НА СВОБОДУ ТВОРЧОСТІ В ПРЕЦЕДЕНТНІЙ ПРАКТИЦІ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ**

Необмежена свобода творчості є однією з передумов суспільного прогресу, основним пріоритетом культурної політики держави, демократичного суспільства. Свобода слова, інформації, комунікацій, творчості і культури є головними елементами демократичного правління. Цінність творчості, інтелектуального розвитку передбачає необхідність їх захисту від посягань та втручання з боку держави. Правомірне обмеження права на свободу творчості є одним із найактуальніших політико-правових питань протягом усього розвитку людства. Право на свободу вираження поглядів передбачено Конвенцією про захист прав людини і основоположних свобод. Визначені обмеження права на свободу творчості, встановлені міжнародним правом як правовий засіб врегулювання меж втручання держави у здійснення особою суб'єктивного права, на практиці не завжди трактуються однозначно. Дотримання права на свободу вираження поглядів, передбаченого Конвенцією, забезпечено контролюючим механізмом – Європейським Судом з прав людини, рішення якого мають прецедентний характер для держав-учасниць. У європейській правовій традиції свобода творчості тісно пов'язана з обмеженнями, потреба в яких має бути доведена з високим ступенем їх легітимності (законності), пропорційності (співрозмірності) та доцільності (мети). Аналіз рішень Європейського Суду з прав людини дає можливість узагальнити прецедентну практику ЄСПЛ у сфері обмеження права на свободу творчості та розділити залежно від підстав втручання держав у свободу творчості на такі групи: обмеження права на свободу творчості з метою охорони здоров'я чи моралі інших осіб; обмеження права на свободу творчості, які є необхідними в демократичному суспільстві в інтересах національної безпеки, територіальної цілісності або громадської безпеки, для запобігання заворушенням чи злочинам; обмеження права на свободу творчості з метою захисту репутації чи прав інших осіб. Основні критерії оцінки обґрунтованості втручання з боку держави у прецедентній практиці ЄСПЛ: метод кількісної оцінки ризиків; виправданість втручання у свободу творчості через ймовірну шкоду; масовість доступу до результатів творчості; форма вираження творчості; зміст творчості.

Ключові слова: обмеження права, свобода творчості, прецедентна практика, Європейський суд з прав людини.

Formulation of the problem. Unlimited creative freedom is one of the prerequisites for social progress, the main priority of the cultural policy of the state, a democratic society. Freedom of speech, information, communication, creativity and culture are the main elements of democratic government. The value of creativity and intellectual development presupposes the need to protect them from encroachment and interference by the state. However, despite the fact that society acquired the most intense evolutionary, innovative, and cultural development during the periods of the least restrictions on freedom of creativity, in some cases a person needs protection from the results of creative activity, their distribution and implementation. Legitimate limitation of the right to freedom of creativity is one of the most relevant political and legal issues throughout the entire development of mankind.

The aim of the article. The aim of the article is to study the features of the limitation of the right to freedom of creativity in the precedent practice of the European Court of Human Rights.

The state of research of the topic. Approaches of the ECtHR to limitations of freedom of creativity in the context of Art. 10 Conventions on the protection of rights and fundamental freedoms were considered by S. Shevchuk [4], I. Bandurka [5], V. Chirkin [6], Yu. Yurynets [7].

Presentation of the main material. The right to freedom of expression is provided for in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR or the Convention) [1], which is part of the national legislation of Ukraine in accordance with Article 9 of the Constitution of Ukraine [2], as a valid international treaty. The defined limitations of the right to freedom of creativity, established by international law as a legal means of regulating the limits of state intervention in the exercise of a person's subjective right, are not always interpreted unambiguously in practice. Observance of the right to freedom of expression provided for by the Convention is ensured by the controlling mechanism – the European Court of Human Rights, whose decisions are precedential for the participating states. According to Art. 17 of the Law of Ukraine "On the Execution of Decisions and Application of the Practice of the European Court of Human Rights", courts apply the Convention and court practice as a source of law when considering cases [3]. The jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of restrictions on the right to freedom of creativity of the Convention is mandatory. Decisions of the European Court of Human Rights (hereinafter ECtHR, or the Court) reveal principled approaches to understanding the limitation of creative freedom, interference with the right to creative freedom according to the law, which pursues a "legitimate purpose" and is necessary in a democratic society.

According to Article 10 of the Convention, everyone has the right to freedom of expression. This right includes freedom to hold opinions, receive and impart information and ideas without interference from public authorities and regardless of frontiers. P. 2 of Art. 10 provides that the exercise of these freedoms, as it is associated with duties and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions as are established by law and are necessary in a democratic society in the interests of national security, territorial integrity or public security, to prevent riots or crimes, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information or to maintain the authority and impartiality of the court [8].

When recognizing as legitimate restrictions on the right to freedom of expression imposed by state authorities, the Court uses the so-called three-step test: whether the restriction was "established by law"; whether it was "necessary in a democratic society"; whether the restriction pursued a "legitimate aim". If the restriction of freedom of creativity does not meet at least one of these criteria, it is considered to be in violation of Art. 10 of the European Convention [9]. Turning to the text of Art. 10 of the Convention, the ECtHR clarified: "This freedom is associated with exceptions that must be interpreted as restrictions, but the need for any restrictions must be established with a high degree of conviction" [10]. Therefore, the main criteria for the legality of the restriction of the right to freedom of creativity for the ECtHR are: legitimacy (legality) – the restriction of the right to freedom of creativity must be provided for by international and national legislation, the goal – the restriction of the right to freedom of creativity must be justified, commensurate with the goal, comply with the principle of proportionality and not to go beyond what is absolutely necessary; content – restrictions on freedom of creativity cannot be interpreted broadly, to correspond to the main content of freedom of creativity and its social purpose.

However, in the practice of the European Court of Human Rights, there are different legal positions regarding the limitation of the right to freedom of creativity. With the aim of orderly development of the practice of applying the Convention, because the observance of precedent not only directly meets the requirements of the Court's independence and impartiality, but also reflects the very essence of judicial policy, we will consider the most typical decisions of the ECtHR in complaints about the restriction of the right to freedom of creativity. Thus, in the case of Muller and others v. Switzerland,

the ECtHR supported the position of national courts regarding the restriction of the right to freedom of creativity [11].

In that case, the Court found that the confiscation of paintings exhibited by the artist and the imposition of fines on the artist and other plaintiffs for obscene publications were restrictions on the right to freedom of expression, which is "necessary in a democratic society." Given that the paintings in question depicted sexual relations in a crude form and that they were presented in an exhibition with unrestricted public access, the Court concluded that the applicant's conviction did not constitute a violation of Article 10 of the Convention. Analyzing the given decision, it should be noted that Article 10 of the Convention provides for freedom of artistic expression, in particular within the framework of the freedom to receive and disseminate ideas, to participate in the exchange of cultural, political and social information and ideas. The state is obliged not to encroach on the freedom of expression of artists. In the event that a person's actions in the exercise of the subjective right to creativity encroach on the "protection of public morals", the ECtHR recognizes a wide margin of discretion for states. When deciding on the limits of state intervention to protect public morality, the Court proceeds from the absence of a single, agreed-upon international concept of "public morality." For each individual state, this concept includes a national system of ethical norms, rules of behavior that have developed in this society on the basis of traditional spiritual and cultural values, historical development, which, in our opinion, makes it impossible to define a single agreed interstate concept of social morality.

However, the protection of public morality is a component of ensuring the country's national security. In the decision in the case "Müller and others v. Switzerland", the ECtHR supported the limitation of the right to freedom of creativity, since the specific weight of the damage to public morals is greater than the negative consequences that the complainant is forced to suffer in connection with the limitation of his right to freedom of creativity.

In the case of Handyside v. Great Britain, the complaint concerned the restriction of the distribution of the school textbook "The Little Red Book of the Schoolboy", which contained issues of sex education [12]. The court emphasized that due to the lack of a single concept of morality in European countries, the judicial bodies of the state are more knowledgeable than the judges of the international court to express an opinion about the exact content of such norms. Having considered the contested measures in the light of the entire case, the Court concluded that the measures taken in this case were in accordance with a legitimate purpose.

Based on this, the Court ruled that there was no violation of Article 10 of the Convention. Similar is the decision in the case of Otto Preminger v. Austria on the ban and removal from distribution of a film containing a provocative image of God, the Virgin Mary, and Jesus Christ [13]. The court justified the government's actions to ban the screening of the film within the framework of ensuring the right of citizens to protect their religious feelings. The ECtHR upheld the position of the Austrian courts, which did not consider that the merits of the film as a work of art or a contribution to the development of culture prevailed over the features that made it offensive to the general public. The given decision indicates that within the framework of the European legal tradition, the relationship between the right to freedom of creativity and the right to freedom of religion, respect for religious feelings is of particular importance.

The limits of freedom of creativity are established by states in accordance with the norms of social ethics and morality. When considering a complaint regarding the ban on showing the film within the framework of ensuring the right of citizens to protect religious feelings, the judges do not determine the religious rites and dogmas, the rights of whose representatives it violates, but refer to the determination of public ethics and morals of the country's population. That is, in cases concerning the exercise of the right to freedom of creativity, the ECtHR holds the opinion that in the event that the religious feelings of a part of the population could be exposed as a result of the exercise of freedom of artistic expression, the subjective right to freedom of creativity should be limited. The Court did not find a violation of Article 10 in the government's action to prohibit the screening of films that depicted individuals and practices of the Christian religion in a manner that disrespected them. Analyzing the given decision, we can conclude that one of the criteria in the precedent practice of the ECHR is the method of quantitative risk assessment. It is impossible to satisfy the realization of the freedom of a few people at the expense of violating the rights of millions, because democracy is still an indicator of the will of the majority. In every case considered by the ECtHR, there are reasons to rule both in favor of the complainants and in support of governments in restricting creative freedom.

The importance of the above restrictions on the right to freedom of creativity in the precedent practice of the European Court of Human Rights is that: first, they relate to topical issues regarding the limitation of freedom of creativity as a right to the right to freedom of expression, which is enshrined in Art. 10 of the Convention; secondly, in the above-mentioned cases, the ECtHR decided that the convictions in these cases were not a viola-

tion of Article 10 of the Convention and supported the positions of national courts regarding interference with the freedom of expression of artists; thirdly, the decision of the ECtHR indicates the absence of a single international concept of "social morality", from which we can conclude about the expediency of determining general trends in the development of modern morality of mankind; fourthly, the decision of the ECtHR in complaints about the restriction of the right to freedom of creativity, which encroaches on the religious feelings of a part of the population, norms of social ethics and morality, provided that the intervention of the state was carried out with a high degree of conviction in its expediency, the court sided with the national courts Appropriate restrictions on freedom of creativity are considered legitimate if they are aimed at preventing insult to the feelings of national minorities or believers, at protecting the most vulnerable categories of the audience (children), if there is a danger that they may gain access to this information. However, we are talking about balanced decisions, because censorship and other non-democratic institutions can be introduced under the same slogans, and here the opinion of the ECtHR as the guarantor of the Convention is important.

The restrictions on freedom of creativity in the practice of the ECtHR in cases related to encroachments on the democratic foundations of society are comparatively narrower. A precedent is the decision of the ECtHR in the field of freedom of creativity in the case of Seher Karatas v. Turkey, in which the Court ruled that the sentence of the applicant to deprivation of liberty constituted an interference with her exercise of freedom of expression. The applicant's work contained poems which, due to the frequent use of inspirational expressions and metaphors, called for self-sacrifice in the name of "Kurdistan", and included several particularly aggressive passages directed against the Turkish authorities. These verses can be interpreted as inciting readers to hatred, sedition and violence. The court ruled that the fact that the article contained appeals that contradicted the prescriptions of the national criminal law does not mean that they are inconsistent with generally recognized democratic principles. The mentioned appeals in their form and content were almost no different from those that take place in other states-members of the Convention. Considering the fact that the Turkish Government did not find in the text of the article words that would call for the commission of terrorist acts, incitement of enmity between citizens, commission of crimes or blood revenge, the Court concluded that interference with the applicant's freedom of expression was not necessary in democratic society. Therefore, there was a violation of Art. 10 of the Convention. It is necessary to pay attention to the fact that the medium used by the applicant was poetry – a form of artistic expression addressed to a small number of readers. In the context of Article 10 of the Convention, the Court added: “Persons who create, perform, distribute or present for review works of literature contribute to the exchange of ideas and opinions which is an integral part of a democratic society. Thus, the duty of the state is not to illegally encroach on the freedom of expression of their opinion" [14].

Analyzing the decision of the ECtHR in the field of freedom of creativity in the case of Seher Karatas v. Turkey, it is worth noting that the requirements of pluralism, tolerance and openness of opinions, without which a democratic society is impossible, must be clearly interpreted, and the need for such restrictions must be convincingly established. In the presented case, another criterion of precedent practice of the ECtHR appears when making decisions, namely: interference with freedom of creativity due to alleged harm, which does not exist. Opposition is one of the pillars of democracy, therefore, in order to protect democratic principles, the Court declared it illegal to interfere with the right to freedom of expression. Interference with freedom of expression through the use of inspirational expressions and metaphors and appeals against the authorities is a violation of Art. 10 of the Convention.

The case "Alinak v. Turkey" concerned a novel about the torture of peasants based on real events. The court noted the following: "... the book contains passages in which fictional graphic details of ill-treatment and atrocities directed at the peasants are presented, which, without a doubt, form in the mind of the reader a persistent hostility to the injustice that the peasants suffered in the story. Some passages can be understood as inciting the reader to hatred, sedition and the use of violence. However, in determining whether this actually induces action, it must be borne in mind that the medium of expression used by the applicant was the novel, a form of artistic work addressed to a relatively small number of persons compared, for example, to the mass media.' The court noted that "this controversial book is a novel that belongs to fiction, although it is allegedly based on real events." In the decision, the Court decided that a work of art has a limited impact, not aimed at a wide range of readers, compared to the mass media, and this reduces the nature of the expressions only to the expression of deep grief due to tragic events, and does not call for violence" [15].

Analyzing the said decision, it should be noted that the European Court of Human Rights disapproves of restrictions on the freedom to express creative views and assessments when it concerns politicians and political institutions. In addition, in the given decision, it is possible to single out the following criterion of the ECHR regarding the restriction

of creative freedom: mass access to the results of creativity. That is, special attention is paid to whether the work is intended for a wide audience or a narrow circle of readers. In Alinak v. Turkey, the Court held that a work of art has a limited impact, not aimed at a wide range of readers, like mass media, and this reduces the nature of the expressions to expressions of deep grief over tragic events, rather than calls for violence. From the standpoint of the priority of freedom of creativity in the case "Association Ekin v. France", the ECtHR sided with the applicant. In this case, a non-governmental organization published a book entitled "Euskadi War" [16].

It has been published in many European countries in several languages and is devoted to the historical, cultural, linguistic and sociopolitical aspects of the Basque ethno-political conflict in Spain. In France, the government banned the distribution or sale of the book due to its propaganda for separatism and its calls for violence. The ECtHR concluded that the legislation on which the ban was based did not contain a list of cases when such a ban could be applied, and the control by national judicial authorities of the imposition of administrative bans did not create sufficient guarantees against the abuse of power by the relevant officials. In addition, the content of the disputed book is not a threat to the public order of France. The ECtHR noted that the use of intervention in this case was not determined by an acute social need, nor was it proportionate to the goal pursued [17]. In the above case, the ECtHR concluded that interference with the applicant's freedom of expression was not necessary in a democratic society, and therefore there was a violation of Art. 10 of the Convention. The Court reached a similar conclusion in the case "Kutsuk v. Turkey" [18]. The publication of the book, titled "Interview in the Garden of the Kurds," reproduced an interview with Abdullah Ocalan, the leader of the Turkish Kurds, and contained separate references to the "Kurdish Cultural Autonomy Program." The applicant was accused of propagandizing separatism and sentenced to two years of imprisonment and payment of a fine. In its judgment, the Court observed that the applicant's book in the form of an interview was written in a literary metaphorical style and should be considered precisely in this context. Although in some paragraphs of the book harsh criticism of the Turkish state authorities was expressed, such criticism, according to the ECtHR, was intended to emphasize the intransigence of the position of one of the parties to the conflict, and not to call for violence.

The ECtHR concluded that, in the interests of public security and public order, the content of the book did not necessitate such a severe interference with the freedom of expression that occurred in the case of the applicant. The precedent of the said decision consists in a critical assessment of the government's actions, which were unfounded and not determined by an urgent social need, and were not proportionate to the legitimate goal that was being pursued. Interference with the freedom of expression in the form of sentencing the applicant to imprisonment, imposing a fine and confiscating the edition of the book was not necessary in a democratic society. In interfering with the right to freedom of creativity, a fair balance was not ensured between the restrictions that are necessary in a democratic society and the right to freedom of creative expression. Analyzing the decision in the case "Kutsuk v. Turkey", it is possible to single out such a criterion in the precedent practice of the ECtHR – a form of creative expression. If ideas are presented in a literary metaphorical style, they should be evaluated in this context. You can put the same thoughts into different forms of expression and they will have different effects.

At the same time, it is worth noting that in the practice of the ECtHR there are also decisions in which the Court concluded that creators are not immune to possible restrictions on creative freedom by the state, which are necessary in a democratic society. In such cases, the ECtHR pays special attention to the question of whether the complainant was forced to bear a disproportionate or excessive burden of responsibility as a result of the interference with creative freedom. In particular, in the case "Ochakovsky-Lawrence and Julie v. France", the ECtHR recognized that the French courts conducted an objective assessment of the facts when limiting the right to freedom of creativity of the author and publisher of the novel, which directly defamed the "National Front" political party. and the name of its head was also indicated. In the novel, he was compared to "the leader of a gang of murderers", "a vampire who profited from the suffering of his electorate".

The ECtHR recognized that "novelists, like other creators and persons contributing to the promotion of their works, are not immune to the possible restrictions defined in paragraph 2 of Article 10. A person who exercises the freedom of expression of his creative opinion undertakes, in accordance with obligations and responsibilities of the conditions established in the specified clause". The court noted that there is no fundamental difference between statements of fact and evaluative judgments, since in this case the work is not entirely fictional, but refers to real persons or facts. Thus, the sentence for defamation in the mentioned case could not be questioned by the ECtHR [19]. Analyzing the decision in the case "Ochakovsky-Lawrence and Julie v. France", it is possible to distinguish the following criterion in the precedent practice of the ECtHR: assessment of the coverage of factual material in the work or the use of fiction, with the aim of humiliating

the honor and dignity of real persons. When it comes to defamation, humiliation of the honor and dignity of real persons, the ECtHR supports the intervention of governments in the exercise of the right to freedom of creativity. Therefore, summarizing the practice of the ECtHR regarding restrictions on freedom of creativity, which are necessary in a democratic society, it is worth noting that the Court disapproves of restrictions on the freedom of expression of creative views and assessments, disagreement with the political opinion of the authorities, politicians, political institutions, if in the literary, artistic or reliable information of critical content is highlighted in another creative way. However, when it comes to defamation, humiliation of honor and dignity of real persons, the ECtHR supports the intervention of governments in the exercise of the right to freedom of creativity. So, in the European legal tradition, creative freedom is closely related to restrictions, the need for which must be proven with a high degree of their legitimacy (legality), proportionality (commensurability) and expediency (purpose). The analysis of the decisions of the European Court of Human Rights regarding the violation of Article 10 of the Convention makes it possible to generalize the precedent practice of the ECtHR in the field of restriction of the right to freedom of creativity and to divide it into three groups depending on the grounds of interference by states in freedom of creativity: 1. Restriction of the right to freedom of creativity for the purpose of protection health or morals of other persons; 2. Restrictions on the right to freedom of creativity that are necessary in a democratic society in the interests of national security, territorial integrity or public safety, to prevent riots or crimes; 3. Restriction of the right to freedom of creativity in order to protect the reputation or rights of other persons.

Conclusions. When restricting the right to freedom of creativity for the purpose of protecting the health or morals of others, the precedent practice of the ECtHR recognizes a wide margin of discretion for states. When deciding the limits of state intervention to protect public morals, the Court proceeds from the lack of a unified international concept of "public morals". The limits of freedom of creativity are established by states in accordance with the norms of social ethics and morality. The restrictions on freedom of creativity in the practice of the ECtHR are comparatively narrower in cases related to encroachments on the democratic foundations of society in the interests of national security, territorial integrity or public safety, to prevent riots or crimes. In decisions regarding the restriction of the right to freedom of creativity in order to protect the reputation or rights of others, the ECtHR indicates that creators are not immune to possible restrictions defined in paragraph 2 of Article 10 of the Convention, and a person who exercises the freedom of expression of his creative opinion accepts on himself, in accordance with the conditions established in the specified clause, obligations and responsibilities. Summarizing the decisions of the ECtHR in the field of limiting the right to freedom of creativity, the following evaluation criteria can be identified in the precedent practice of the ECtHR: the method of quantitative assessment of risks (it is not possible to satisfy the realization of the freedom of creativity of a few people at the expense of violating the rights of millions); interference with freedom of creativity due to alleged harm (the Court disapproves of restrictions on freedom of expression of creative views due to alleged harm, which does not exist); mass access to the results of creativity (special attention is paid to whether the work is intended for a wide audience or a narrow circle of readers); a form of creative expression (the expression of ideas in a literary metaphorical style should be evaluated in this context); the content of the work is real facts or fiction (coverage in the work of factual material or the use of fiction for the purpose of humiliating the honor and dignity of real persons).

Having analyzed the decision of the European Court of Human Rights regarding the violation of Article 10 of the Convention, it can be determined that the intervention of states in the freedom of creativity is considered justified by the Court, if it is legal, commensurate with the purpose of the restriction and has a justified purpose. For the most part, the ECtHR justifies the restriction of the right to freedom of creativity for the purpose of protecting the health or morals of other persons; restrictions on the right to freedom of creativity that are necessary in a democratic society in the interests of national security, territorial integrity or public safety, to prevent riots or crimes; restriction of the right to freedom of creativity in order to protect the reputation or rights of others. The main criteria for evaluating the reasonableness of intervention by the state in the precedent practice of the ECtHR: the method of quantitative risk assessment; justification of interference with freedom of creativity due to alleged harm; mass access to the results of creativity; a form of creative expression; the content of creativity.

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