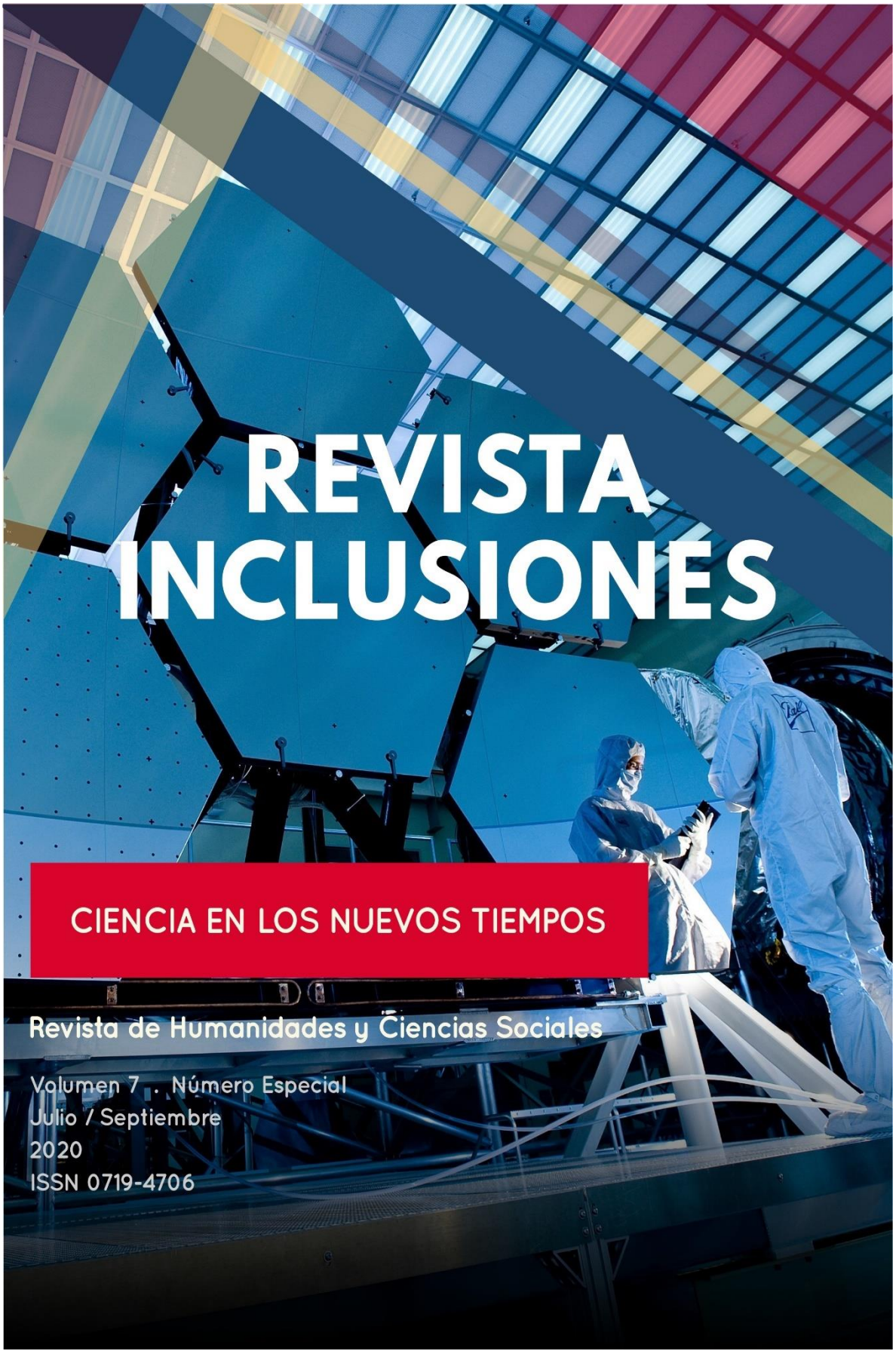

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# CONVERGENCE OF CONTEMPORARY LEGAL SYSTEMS (BASED ON THE EXAMPLE OF EUROPE, AFRICA, THE US, AND SOME MUSLIM COUNTRIES)

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## Abstract

The relevance of the study of the convergence of contemporary legal systems is due, on the one hand, to the interpenetration of the legal norms of various legal systems (legal families) in recent decades and the blurring of the boundaries of legal systems and on the other hand, to the processes of law codification that have taken place in different countries in recent years and decades. The objective of the article is to find the optimal ways of convergence of contemporary legal systems on the example of some European countries (European Union), the US, as well as some African and Muslim countries. The deductive method was the leading method in the research, which made it possible to study the legal nature of the convergence of modern legal systems. The article concludes that the legislation in the US legal system has a more specific weight and is more significant than the statutory law of England. This is mainly due to the existence of a whole system of constitutions: federal, existing for more than two hundred years, largely outdated but still playing a significant role, and state constitutions of different age. Despite the significant influence of European legal systems, Muslim law remains an independent legal family with a serious impact on millions of people in all parts of the world.

## Keywords

Legal system – Legal family – American law – Anglo-Saxon legal system

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## Introduction

The process, called "the reception of Roman law", at first had purely doctrinal forms and strictly scientific meaning. Roman law was not directly applied; its conceptual fund, very developed structure, internal logic, and legal technique were studied. The teaching of Roman law in universities has passed several stages. At first, the so-called school of glossators sought to establish the original meaning of Roman law. In the 14th century, post-glossators "purified" and "recycled" Roman law. Over time, the care about respect for the laws of Ancient Rome gave way in universities to the desire to develop the principles of law, reflecting the rational concepts of not past but present life[1].

A new school, called the doctrine of natural law, conquered university science in the 17th-18th centuries. Putting the mind in the foreground as a force creating law emphasized the importance of law and opened the way for codification. The school of natural law demanded that, along with private law based on Roman law, Europe develop the norms of public law that were absent before and that express natural human rights and guarantee the freedom of the individual.

Most countries have adopted and enforce civil (or civil and commercial), criminal, civil procedure, criminal procedure, and certain other codes. There is an extensive system of current laws regulating all major areas of social relations. Among the sources of the Romano-Germanic law, the role of by-laws is great (and is growing): regulations, administrative circulars, ministerial decrees, etc. They formulate the adopted norms to implement the laws. Besides, in case of necessity, the administrative authorities regulate relations independently; for this purpose, the legislator grants them appropriate powers (delegated legislation)[2].

## Methods

The methodological basis of this article is due to the fact that, since the Second World War, the laws governing inheritance and family relations have been adopted in almost all Arab states. These laws have quite boldly encroached upon the traditional norms of husband-wife relations in the family. In particular, they grant certain rights to wives to divorce, limit the ability of parents and guardians to marry underage children, restrict polygamy, and unilaterally determine the terms of husband and wife's divorce. Case law now allows for a clause at the time of marriage that the wife may subsequently renounce the marriage (in principle, this is the right of the husband), or she receives this right if the husband does not retain the monogamy[3].

The penetration of European law into Muslim countries is very significant and this process of international integration and economic cooperation is, in principle, irreversible. The significance, scope, and specific weight of Islamic law have decreased, and the law itself, at least in its external form, has taken much of the European codification. However,

[1] V. I. Lafitsky, Sravnitelnoe pravovedenie: natsionalnye pravovye sistemy. T. 3. Pravovye sistemy Azii (Moscú: Institut zakonodatelstva i sravnitelnogo pravovedeniya pri Pravitelstve RF; Yuridicheskaya firma «Kontrakt», 2013).

[2] R. David, Osnovnye pravovye sistemy sovremennosti (Moscow, 1988) y K. Kross, Pretsedent v angliiskom prave (Moscow, 1985).

[3] A. A. Maksimov, “Pretsedent kak odin iz istochnikov angliiskogo prava”, Gosudarstvo i pravo num 2. (1995).

this trend should not be exaggerated, especially in light of the intensification of Islam, which in recent years has characterized the political life of many states. This intensification is accompanied, among other things, by the requirements to give up Western legal models and fully restore all norms of Islamic law (for example, in Iran)[4].

## Results

The legislation in the US legal system has a more specific weight and is more significant than the statutory law of England. This is mainly due to the existence of a whole system of constitutions: federal, existing for more than two hundred years, largely outdated but still playing a significant role, and state constitutions of different age. The states also have wide legislative competence and actively use it. Each state has a significant amount of its own legislation[5].

The Constitution of India of 1950 has now repealed all rules on liability for caste-based offences. However, many Hindus, especially in rural areas, still follow the traditional rules of conduct. Marriage between members of different castes is still rare among them, especially if the woman belongs to a higher caste. Widows often do not remarry, although in 1956 the old rule of Hindu law that such a marriage was invalidated and children from it were illegitimate was abolished.

Further development of the law is related to dharmashastra — an extensive set of rules of conduct attributed to famous scientists. King Manu's dharmashastras are particularly well known (the 2nd century BC). They contain a relatively ordered system of rules, which, with a certain amount of conditionality, can be called legal.

The idea of human rights is foreign to Hindu law. It is based on a set of duties that are prescribed for all those who do not want to cover themselves with shame and think of the afterlife. The doctrine of Hinduism does not consider judicial precedents and acts established by secular rulers to be sources of law. Yet, it also requires obedience to the orders of the authorities. At the same time, even when there is a law, the judge is not obliged to always apply it accurately. At their own will, they must reconcile power and justice by all possible means[6].

Unlike Christianity, Judaism, and Islam, which justify the idea of equality of all people before God, Hinduism proceeds from the idea that people from birth are divided into social hierarchical groups (caste), each of which has its own system of rights and duties and a special moral. The members of the castes are subject to a set of rules that govern their behaviour in communication with each other and, more importantly, towards the members of other castes. Traditionally, there are four large groups: Brahmins (originally priests), Kshatriyas (warriors), Vaishyas (traders), and Shudras (servants and artisans). The transition from one caste to another is impossible, regardless of official successes, wealth, and political power. Each caste should not be tainted by contacts with certain objects and

[4] R. A. Kurbanova y R. A. Gurbanova, Sudebnye sistemy Evropy i Evrazii: nauchno-entsiklopedicheskoe izdanie: v 3 t. T. 1. Zapadnaya i Severnaya Evropa (Moscow: Prospekt, 2019).
[5] R. David, Osnovnye pravovye sistemy sovremennosti (Moscow, 1988).
[6] T. Ya. Khabrieva; V. V. Lazarev; A. V. Gabov et al.; Sudebnaya praktika v sovremennoi pravovoi sisteme Rossii: monografiya, pod red. T.Ya. Khabrievoi, V.V. Lazareva (Moscow: Institut zakonodatelstva i sravnitelnogo pravovedeniya pri Pravitelstve Rossiiskoi Federatsii: Norma: INFRA-Moscú, 2017).

communication with representatives of lower castes. Violation of these rules has entailed legal consequences that are recognized by the courts (e.g., recognition of a valid marriage between members of different castes in certain cases, determination of the legal status of children from such marriages, etc.).

## Discussion

The main source for *the Anglo-Saxon legal family* is the norm formulated by the judges and expressed in judicial precedents, i.e., in court decisions in a particular case, which are then given general binding force[7] .

When hearing a case, an English judge must find out whether a similar case has not been heard before and, if so, should be guided by an existing decision. The degree of binding precedent depends on the place in the judicial hierarchy of the court hearing the case and the court whose decision may become precedent. Thus, the decisions of the highest judicial instance — the House of Lords — are binding on all courts. The Court of Appeal, consisting of civil and criminal divisions, is obliged to follow the precedents of the House of Lords and its own and its decisions are binding on all lower courts. The High Court (all its divisions, including those on appeal) is bound by the precedents of both higher courts. Its decisions are binding on all subordinate courts and also affect the divisions of the High Court without, however, being strictly binding on them. District and Magistrates Courts are bound by the precedent of all higher courts and their own decisions are not precedents. The decisions of the Crown Court, established in 1971 to hear particularly serious criminal offences, are also not considered precedents. Thus, there are a great number of precedents in English law, which can be quite difficult to understand[8].

A court cannot reject an earlier precedent, which can only be changed by a higher authority or an act of parliament. However, since there is little overlap between the circumstances of different cases, a judge may, at their discretion, acknowledge whether they are similar and on what the application of a particular case law depends. A judge may also find that circumstances are similar even when they appear to be different. Lastly, they may not find any similarity at all and, if the case is not regulated by statutory law, they create a legal rule and become the legislator.

*Romano-Germanic legal family.* The codification completes the formation of the Romano-Germanic legal family as a holistic phenomenon. In France in 1804, in Germany in 1896, and in Switzerland in 1881-1907, civil codes were adopted. During the 19th century, other codes were adopted in most countries of the European continent. The most significant was the role of the French codification, especially of the civil code (Napoleon's Code), which had a noticeable influence on the process of adoption of the principles of law in many European countries and abroad[9]. In all countries of the Romano-Germanic legal family, there

[7] V. I. Lafitsky, Sravnitelnoe pravovedenie: natsionalnye pravovye sistemy. T. 3. Pravovye sistemy Azii (Moscow: Institut zakonodatelstva i sravnitelnogo pravovedeniya pri Pravitelstve RF; Yuridicheskaya firma «Kontrakt», 2013).

[8] V. I. Lafitsky, Sravnitelnoe pravovedenie: natsionalnye pravovye sistemy. T. 1. Pravovye sistemy Vostochnoi Evropy (Moscú: Institut zakonodatelstva i sravnitelnogo pravovedeniya pri Pravitelstve RF; Yuridicheskaya firma «Kontrakt», 2012).

[9] T. Ya. Khabrieva; V. V. Lazarev; A. V. Gabov et al.; Sudebnaya praktika v sovremennoi pravovoi sisteme Rossii: monografiya, pod red. T.Ya. Khabrievoi, V.V. Lazareva (Moscow: Institut zakonodatelstva i sravnitelnogo pravovedeniya pri Pravitelstve Rossiiskoi Federatsii: Norma: INFRA-Moscú 2017).

are written constitutions, the norms of which are recognized as the highest legal authority, manifested in the establishment by most states of judicial control over the constitutionality of ordinary laws.

*American law* emerged after the declaration of independence and as a result of the idea of breaking with its "English past". A special form of codification in the US was the creation of so-called standard state laws and codes to establish maximum unity in those branches of law where necessary. The drafting of such laws and codes is carried out by the National Commission of Representatives of all states in cooperation with the American Institute of Law and the American Bar Association. For a draft to become state law, it must be formally approved by the state[7].

The ever-increasing number of laws in the US raises the question of their systematization and adjustment for better use and application. There are a number of compilations, both official and private, covering federal or state legislation. There is, for example, the so-called US Code of Laws, which is a systematized collection of existing federal laws[10].

*Muslim law* is a unified Islamic system of social and legal regulation, which includes legal norms and religious and moral tenets and customs. Muslim law in its basis was formed in the epoch of the formation of feudal society in the Arab Caliphate in the 7th-10th centuries and is based on Islam. The law, as a set of mandatory prescriptions, was formed during the first two centuries of Islam's existence, in the Middle Ages. After all schools of law adopted the classical teaching about the roots of Muslim law, the creative activity of lawyers decreased and the Muslim legal idea gradually became purely dogmatic and archaic. The idea of development and improvement of law depending on the dynamics of social development is foreign to the system of Islamic law, and this is the main reason for its reactionary role in modern conditions[11].

Muslim court proceedings are quite simple. A single judge handles all categories of cases. There is usually no hierarchy of courts. Today in some countries (Turkey, Egypt, Tunisia, Pakistan, Algeria, Morocco, Guinea) Muslim courts have been abolished and replaced by ordinary courts. However, in many Arab States, Muslim courts continue to play a significant role in regulating public life. As a rule, judges are highly qualified in terms of their religious and legal training.

*The Hindu law system* is one of the oldest in the world. Its legal norms profess a complex system of religious, philosophical, and social views, called Hinduism. Thus, the main feature of Hindu law is its close connection with religion. It is an essential part of Hinduism, which, along with the law, also includes various religious beliefs and practices, moral and philosophical values that imply a certain way of life, social order, and social organization[12].

[10] R. A. Kurbanova, R. A. Gurbanova, Sudebnye sistemy Evropy i Evrazii: nauchno-entsiklopedicheskoe izdanie: v 3 t. T. 1. Zapadnaya i Severnaya Evropa (Moscos: Prospekt, 2019).
[11] V. I. Lafitsky, Sravnitelnoe pravovedenie: natsionalnye pravovye sistemy. T. 2. Pravovye sistemy Zapadnoi Evropy (Moscú: Institut zakonodatelstva i sravnitelnogo pravovedeniya pri Pravitelstve RF; Yuridicheskaya firma «Kontrakt», 2012).
[12] K. Kross, Pretsedent v angliiskom prave (Moscow, 1985).

*The African legal system* is based on customs. One of the characteristic features of African customary law is that legal and moral norms are inextricably linked and the parties are guided primarily by the idea of reconciliation in resolving conflicts. Another feature is that the law governs relations primarily between groups or communities rather than individuals.

After the colonization of the African continent in the 19th century, the English, French, Portuguese, and Belgian authorities mainly sought to introduce in the African countries the metropole law and their judicial system. French law was introduced in French Africa and Madagascar, Belgian law in the Congo, Portuguese law in Angola and Mozambique, and English law in English colonies. Many acts were also adopted by the metropoles specifically for the colonies. At the same time, the colonizers pursued a policy of preserving a part of customary law and African court proceedings that, in their view, were not contrary to their interests. Thus, the colonial rule created a tripartite system of colonial law, including metropole law, special colonial laws, and customary law[10].

## Conclusion

Despite the significant influence of European legal systems, Muslim law remains an independent legal family that has a serious impact on millions of people in all parts of the world.

Until the early 19th century, the socio-economic conditions of the Muslim world were changing slowly, so Sharia, despite the frozen archaic nature of its dogmata, was compatible with them. However, with the decline of the Ottoman Empire, the political influence of Western European states increased in the Middle East. The leaders of the Muslim world realized that to withstand the political and economic competition with the Western countries the modernization of the state administration and law is necessary[13].

The process of legislative reforms began in the middle of the 19th century. Regulatory sources of European origin began to interfere in the sphere of relations, which had been traditionally regulated by Muslim law. This process mainly affected areas where the conflict with traditional Islamic norms was not too acute, in particular, trade and maritime law. The authorities of the Ottoman Empire went even further.

Formed back in ancient times and following a two-thousand-year development path, Hindu law has retained, though to a limited extent, its regulatory value up to the present day. The main reason for the vitality of this law lies not in its special features but the close connection of norms with traditional, extremely stable Hindu social institutions and, above all, community and caste structures capable of adaptation in a variety of socio-economic and political conditions. In rural areas, most Hindus do not perceive the new laws and live as their ancestors did, and justice is done mainly through traditional and familiar institutions[14].

[13] V. M. Lebedev; T. Ya. Khabrieva; A. S. Avtonomov et al. Pravosudie v sovremennom mire: monografiya; pod red. Lebedeva V.M., Khabrievoi T.Ya. 2-e izd., dop. i pererab (Moscow: Norma, 2017): 784.

[14] V. M. Lebedev; T. Y. Khabrieva; A. S. Avtonomov, et al. Justice in the Modern World: monograph; ed. by Lebedev V.M., Khabrieva T.Y. 2nd ed. (Moscow: The Institute of Legislation and Comparative Law under the Government of the Russian Federation, 2019).

During the struggle for independence, ideas for the full codification of Hindu law were put forward. After the declaration of independence in 1947, the Government of India submitted a draft code to Parliament to cover family and inheritance law. However, due to opposition from conservative forces, the draft was not approved and the government proceeded with the preparation of separate bills. The first was the Marriage Act, passed in 1955, which unified marriage law and adapted it to modern family attitudes.

In accordance with traditional norms, divorce was prohibited and polygamy was permitted (although it was not widely practised among Hindus). Marriage was usually arranged on the instructions of the parents of the future spouses, and neither the consent of the marriage partners nor a certain age to marry was required. However, Hindu law created surprisingly many obstacles to the marriage: marriages between members of different castes and between even very distant relatives were forbidden. The Marriage Act eased the restrictions on marriage and removed the ban on marriages between members of different castes. Besides, it allowed divorce and prohibited polygamy, established the right to receive alimony, and set the minimum age for marriage[15].

Nowadays, the sphere of old legal customs has been sharply reduced. Even today, however, Hindu law is still actively used to regulate such matters as the legal status of children, guardianship, adoption, marriage, partition, and inheritance of property. It has also been retained in the regulation of state land ownership relations.

There were two main types of courts in Africa, sometimes operating simultaneously and in parallel. For example, in the absence of any centralized authority in the region, cases of marriage, guardianship of children, inheritance, and land ownership were resolved by arbitration, which consisted of an elder and other influential family members or a group of relatives. If a disagreement arose between neighbours within the same community, the arbitrators were the eldest family members, heads of main lines of inheritance, etc[16].

The main trends in the development of African law in the context of national independence have been characterized, on the one hand, by overcoming colonial stratifications (although colonial laws were still in force in the early stages) and, on the other hand, by limiting the regulatory value of customary law as the relationships covered by national legislation have expanded. More than one hundred codes have been adopted in the former French colonies since gaining independence. Likewise, major laws have been adopted in English-speaking countries. New constitutions operate in most independent African states[17]. The legislative activity covers, first of all, such branches of modern law as constitutional, mandatory, criminal, and judicial system. Many states have adopted several progressive norms borrowed from the legislation of Western countries. In particular, an eight-hour working day has been introduced, a minimum wage has been set, including for employees of private enterprises, paid vacations, pension provision, and free medical care. Serious legislative measures have been taken for the emancipation of women.

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