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Current issues of the application of ECtHR decisions and its implementation in the field of children's rights protection

Актуальні питання застосування практики рішень ЄСПЛ та їх виконання в сфері захисту прав дитини

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Abstract

The main jurisdictional body in the field of human rights protection is the European Court of Human Rights (ECtHR). The activities of the ECtHR, among other things, are of key importance for ensuring the effective functioning and continuous improvement of the international system for the protection of children's rights. Thus, the study of the ECtHR's practice in the field of protection of children's rights is relevant in view of the importance of applying appropriate approaches to resolving disputes at the national level, as well as from the point of view of improving national and international legislation in the field of protection of children's rights. Therefore, the purpose of the work is the analysis of the practice of the ECtHR in the field of the protection of children's rights, as well as the study of the peculiarities of the implementation of relevant decisions of the ECtHR at the national level. Research methods used in writing the article include analysis, synthesis, formal-logical and comparative-legal methods. As a result of the research, the authors of the article analyzed the specific decisions of the ECtHR in the field of protection of children's rights, summarized the main approaches, standards, and principles used by the ECtHR in solving relevant cases, as well as making

Анотація

Головним юрисдикційним органом у сфері захисту прав людини є Європейський суд з прав людини (ЄСПЛ). Діяльність ЄСПЛ, серед іншого, має ключове значення для забезпечення ефективного функціонування та постійного удосконалення міжнародної системи захисту прав дітей. Таким чином дослідження практики ЄСПЛ у сфері захисту прав дітей є актуальним з огляду на важливість застосування відповідних підходів до вирішення спорів на національному рівні, а також з точки зору удосконалення національного і міжнародного законодавства у сфері захисту прав дитини. Отже, метою роботи є аналіз практики ЄСПЛ у сфері захисту прав дитини, а також дослідження особливостей виконання відповідних рішень ЄСПЛ на національному рівні. Методи дослідження, що були використані при написанні статті, включають аналіз, синтез, формально-логічний і порівняльно-правовий метод. У результаті проведеного дослідження автори статті проаналізували конкретні рішення ЄСПЛ у сфері захисту прав дітей, узагальнили головні підходи, стандарти і

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their own proposals for improving the current legislation of Ukraine aimed at protecting children's rights.

Keywords: human rights, protection of children's rights, law enforcement, court decision, international legislation.

Introduction

According to Art. 1 of the Council of Europe Strategy for the Rights of the Child 2022-2027: «Child Rights in Practice: From Sustainable Implementation to Shared Innovation» (Council of Europe Portal, 2022) child rights protection is a key element of the Council of Europe's mission to protect human rights, sustain democracy and preserve the rule of law. The Council of Europe takes care of the defense of the rights of the child in its member states with the help of multi-year strategies implemented by setting standards, monitoring compliance with regulatory requirements, and supporting implementation in the form of cooperation projects. In the member states of the Council of Europe, children have the right to enjoy all human rights protected by the European Convention on Human Rights (ECHR) (Council of Europe, 1950), the United Nations Convention on the Rights of the Child (UNCRC) (United Nations, 1989), and other international and European normative documents on human rights. Such rights include civil, political, economic, social, and cultural rights.

According to Art. 32 of the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) The European Court of Human Rights is a jurisdictional body in the field of human rights protection (Article 32 of the ECHR).

When examining the validity of interference with human rights, the European Court of Human Rights (hereinafter referred to as the ECtHR) pays special attention to the protection of children's rights. The ECtHR has repeatedly drawn attention to the fact that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their interests should be paramount.

Therefore, the proper protection of children's rights on the European continent and in the world, in general, is of key importance for the normal functioning and development of modern society. The ECtHR itself plays a leading role in

принципи, які використовує ЄСПЛ при вирішенні відповідних справ, а також зробили власні пропозиції з удосконалення чинного законодавства України, спрямованого на захист прав дітей.

Ключові слова: права людини, захист прав дітей, правозастосування, судові рішення, міжнародне законодавство.

the aspect of restoration and protection of violated children's rights. Qualified decisions of the ECtHR make it possible to resolve individual disputes arising from the protection of children's rights in countries participating in the Convention, as well as to harmonize the legislation of participating countries and other countries of the world with modern approaches to the protection of children's rights.

Based on the above, it is possible to formulate the main tasks of this study.

1. To analyze the practice of the ECtHR in the field of protection of children's rights and make generalizations about the main approaches, standards, and principles of solving relevant cases.
2. Development of general recommendations on improving the current legislation of Ukraine in the field of protection of children's rights, taking into account the practice of the ECtHR in resolving specific disputes.
3. Analysis of the peculiarities of the implementation of ECtHR decisions in the field of protection of children's rights in different countries in order to ensure the fastest and most complete restoration of violated children's rights at the national level.

Theoretical Framework or Literature Review

Liliya Radchenko (2019) in her article «Modernization of the Protection of Human Rights in the Field of family relations through the Prism of the Practice of the ECtHR» examines the category «best interests of the child». In general, her article is devoted to the consideration of the comparative legal principles of the protection of human rights in the field of family relations through the prism of researching the practice of the European Court of Human Rights (ECtHR). Among other things, the author emphasizes that the category "best interests of the child" is a basic principle in the field of

protection of the rights of the child as relevant to ECtHR decision-making. The determination of what is in the best interests of the child is fundamental and determined on a case-by-case basis. Depending on their nature and seriousness, the interests of the child may outweigh the interests of the parents.

Moreover, Taisia Tomlyak (2022) in her article "The principle of ensuring the best interests of the child in the practice of the European Court of Human Rights concludes that in the European legal tradition, the principle of ensuring the best interests of the child is widely applied in cases involving children... The European Court connects ensuring the best interests of the child with the observance by national judicial bodies of a fair balance that must be achieved between the relevant competing interests: the interests of the child, two parents, and public order, with the priority of the best interests of the child.

Besides, Louise Forde (2022) in her article "The Role of the Courts in protecting children's Rights in the Context of police questioning in Ireland and New Zealand » explores the role the courts have played in upholding children's rights in the police questioning process in Ireland and in New Zealand. The author claims that ensuring safeguards are in place from the earliest stages of criminal investigation is essential to ensure that children's rights in the youth justice system are adequately protected. The rights of children in conflict with the law are protected under the UN Convention on the Rights of the Child (UNCRC), and in situations where these rights are violated, children must have access to an effective remedy. National courts have a role to play in ensuring that children's rights are protected and in providing necessary remedies.

Additionally, Deborah Lawson, Helen Stalford, and Sarah Woodhouse (2023) made a report, which examines the nature, scope, and effects of Third-Party Interventions (TPIs) in advancing children's rights in cases that come before the European Court of Human Rights (ECtHR or 'Court'). It presents the findings of a review of existing European Convention on Human Rights (ECHR) decisions (by the Chamber and Grand Chamber) concerning children.

Also, Vibeke Blaker Strand (2019) in her article «Interpreting the ECHR in its Normative Environment: Interaction Between the ECHR, the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of the Child» offers insight into a selection of ECHR cases that

are characterized by the existence of a normative overlap between the ECHR, the CEDAW, and the CRC; and by the fact that interaction between these legal sources actually takes place in the interpretation carried out by the Court. Interaction is discussed through two topics: the issue of state obligations in relation to domestic violence, and the issue of state obligations in relation to expulsion of immigrants with children. The article demonstrates that systemic integration may result in a strengthening of the protection of human rights under the ECHR through what is termed 'interpretive widening and thickening.

The article of Mariëlle R. Bruning & Jaap E. Doek (2021) called «Characteristics of an Effective Child Protection System in the European and International Contexts» aims to explicate core elements of an effective child protection system within a child's rights framework. This aim is accomplished by highlighting and providing analysis of the principles set forth in the CRC and further elaborated in General Comment No. 13 (2011) and by the UN Children's Fund (UNICEF), the main components of policies and other relevant documents of the European Union (EU) and the Council of Europe (CoE), and caselaw from the European Court of Human Rights (ECtHR) and then presenting recommendations for an effective State-run child protection system.

Trond Helland & Ragnhild Hollekim (2023) in their article «The Convention on the Rights of the Child's Imprint on Judgments from the European Court of Human Rights: A Negligible Footprint? » aim to examine the CRC's footing in the ECtHR. Leaning on concepts of legal mobilization, lawfare, and availability heuristics, the authors argue that there has been a clear development in how the CRC is used in and by the ECtHR, indicating that the CRC has an increasingly stronger footing within the Court, especially in the past decade. Additionally, they argue that this development has strengthened children's rights and that the CRC, at least indirectly, has had and still has a vital role in developing children's rights within the ECtHR. Prof. K. Sandberg (2021) in his article «Grandparents' and grandchildren's right to contact under the European Convention on Human Rights» claims that there may be such a right, but it depends entirely on the circumstances. A family life exists between grandparents and grandchildren if there are sufficiently close ties between them. However, the relationship between grandparents and grandchildren is seen as different in nature and

degree from that of parents and children and calls for a lesser degree of protection.

Tina Gerds-Andresen & Heidi Aarum Hansen (2021) in their article «How the child's views is weighted in care order proceedings» address how the Norwegian County Social Welfare Board weights the child's view when regulating visitation rights between parents and children, when a care order is issued. Overall findings argue that the child's view is generally not given weight in the written decisions. As the care orders are presented in this study, findings suggest that the Board's practice may be in contradiction to children's conventional rights, and by this also in contradiction to the Norwegian law.

Valeska Marcela David Contreras (2017) in their research «Caring, rescuing or punishing? Rewriting *RMS v Spain* (ECtHR) from an integrated approach to the rights of women and children in poverty» analyses and rewrites the ECHR judgment in *RMS* by integrating the perspective of the rights of women and children living in poverty. First, the chapter problematizes the allocation of children's care and well-being to the 'private' realm of families, and questions the way the Court addressed the impermissibility of family separation on the ground of poverty. Second, attention is drawn to compounded stereotypes and dominant notions on valued families underlying the decisions of the Spanish authorities and which the ECHR failed to uncover. Third, the chapter revisits the ECHR scrutiny of the domestic judicial control and decision-making process over the girl's removal and placement.

Paula Távorá Vítor (2023) in her article «Banning Children's Image Online – a Portuguese Perspective» points towards a more active intervention by public entities (courts and public prosecutors offices) when the protection of children (and the promotion of their autonomy) is at stake. Fundamental rights – and (fundamental) personality rights included – were first conceived as a shield of individuals against the state. At the present, it seems that the state is using this shield to protect individuals against other individuals within one of their most private spheres – family – based on the recognition that these are especially valuable and especially vulnerable individuals. Hence, there is tension between public and private, and protection and autonomy, that must be addressed.

Therefore, as a result of the review of the works of modern researchers, it is worth concluding that

the system of protection of children's rights is quite effective, however, with the help of the practice of the ECtHR, the specified system is constantly being improved. This is explained by trends in the development of modern European civilization, based on the principles of humanism, as well as defects in the legislation and law enforcement activities of individual European countries, which must be eliminated.

Methodology

With the help of a set of methods that were used to carry out this research, the authors of the article achieved the research objectives. In particular, the methods of analysis and synthesis, as two complementary methods of knowing the objective reality, helped to analyze the practice of the ECtHR in the field of protection of children's rights and to make generalizations about the main approaches, standards, and principles of solving relevant cases. In addition, the specified methods allowed the authors of the article to investigate the peculiarities of the implementation of ECtHR decisions in the field of protection of children's rights in different countries in order to ensure the fastest and most complete restoration of violated children's rights at the national level. In turn, the comparative legal method helped to formulate general recommendations for improving the current legislation of Ukraine in the field of protection of children's rights, taking into account the practice of the ECtHR in resolving specific disputes.

Results and Discussion

The ECtHR examines all issues regarding the interpretation and application of the Convention and its protocols, as well as examines individual disputes related to human rights violations. Any person who believes that his rights have been violated and the opportunity to restore them at the national level has been exhausted can submit an individual complaint directly to the ECHR. In order to file an individual complaint about the violation of human rights and freedoms, the consent of the state is not required, and the ECtHR itself is not bound by the decisions of national courts. The ECtHR ascertains whether a person's right has been violated from the point of view of higher standards than national ones. At the same time, decisions of the ECtHR regarding individual disputes are binding for the ECtHR member state, and in case of non-compliance certain sanctions may be applied by the Committee of Ministers of the Council of Europe.

Along with solving the merits of an individual dispute, the ECHR in its decision also develops the very provisions of the Convention, which must be interpreted in the same way by all ECHR member states. It is this feature of the «obligation of uniform interpretation» that allows national courts to refer to ECtHR decisions in individual disputes that have been decided against other states.

From the analysis of the provisions of the Convention, it follows that the mention of children is contained in the following articles:

In Article 5 (the right to liberty and personal integrity), in which paragraph "d" of paragraph 1, as a basis for deprivation of liberty, provides for taking under the custody of a minor on the basis of a legal decision for the purpose of applying supervisory measures of an educational nature or legal detention of a minor for the purpose of bringing him to the competent authority; Paragraph 1 of Article 6 (the right to a fair trial) provides that the judgment shall be announced in public, but the press and the public may be excluded from the proceedings during all or part of the proceedings when the interests of minors so require, establishing the possibility of limiting the publicity of court proceedings in cases involving children;

Article 5 of Protocol No. 7 (equality of spouses) mentions that a man and a woman have equal rights and bear equal civil legal responsibility in relation to each other and with their children in relation to entering into marriage, staying in the marriage, and regarding its rupture. This article does not prevent States from requiring the adoption of such measures as are necessary for the best interests of children.

Although the Convention on the Protection of Human Rights and Fundamental Freedoms practically does not contain articles (except for Articles 5 and 6 of the Convention and Article 5 of Protocol No. 7 to it) that directly regulate or protect the rights of children, its provisions are applicable to children on an equal basis with others participants of the international legal relationship.

The European Court of Human Rights protects the rights enshrined in the Convention on the Protection of Human Rights and Fundamental Freedoms. Thus, the Convention and its Protocols determine the boundaries of the protection of rights in the ECHR. Along with this, over time, the norms enshrined in the Convention develop and expand their boundaries in the decisions of the ECHR.

A complaint to the ECHR can be filed by the state, any individual, any group of persons, or any non-governmental organization (Articles 33, 34 of the Convention). Thus, any person can apply to the court, regardless of their legal capacity (including mentally ill and minors) and citizenship. A complaint cannot be filed against a state that is not participating in the Convention and its Protocols. The European Court may establish the fact of violation of the Convention and also award the applicant appropriate compensation and reimbursement of expenses.

Taking into account the fact that a child cannot independently "exhaust intrastate means of protection", and the legal representatives of the child are sometimes recognized as violators of his rights, the issue of protecting children's rights in the practice of the European Court of Human Rights appears to be especially relevant.

Application of the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms to Children. The following articles of the European Convention appear most often in cases on the protection of children in the ECHR:

- a) Article 3. Prohibition of torture and inhumane degrading treatment or punishment (in particular, in cases of corporal punishment applied to children at school, by parents, or by court decision);
- b) Article 6. The right to a fair trial (establishes special procedural rules for the trial of minors accused of committing a crime);
- c) Article 8. The right to respect for family life (within the framework of which the court interprets the concept of family; the status of illegitimate children; defines the concept of actions in the interests of the child (choice of religion, name, etc.); transfer to the state of the right to custody of the child; cases of parental separation and children due to the deportation of their parents);
- d) Article 10 (part 2). Restriction of freedom of expression of opinion, obtaining and distributing information for the purpose of protecting health and morality;
- e) Article 14. Protection against discrimination;
- f) Article 2 of Protocol 1. The right to education (for example, education in private schools; respect for the philosophical beliefs of parents).

On the basis of these articles, the court developed certain legal standards regulating the legal position of children in international law. In

addition, when justifying the violation of a child's rights, references to other international legal acts that enshrine the rights of the child, in particular, to the UN Convention on the Rights of the Child of 1989, are permissible and even encouraged.

Based on the practice of the European Court of Human Rights, when protecting the rights of children, one of the frequently applicable provisions of the Convention is Art. 3, prohibiting torture or inhuman and degrading treatment or punishment. The European Court notes that in violation of Art. 3 is the bad treatment of a child, which has reached the minimum level of cruelty, the assessment of which, in turn, depends on a number of certain factors of a specific case (duration, gender, age, state of health of the child, impact on psychological or physical state). The cruelty of treatment distinguishes three elements: torture, inhumane treatment or punishment, and humiliating treatment or punishment.

As a precedent for the ECtHR's consideration of the case of humiliating punishment of a child, the case «Tyrer v. United Kingdom» European Court of Human Rights, 1978, can be considered. For the «illegal attack that caused bodily harm to the senior student of his school», a 15-year-old student in accordance with local law was sentenced to three strokes of the racket. It follows from the circumstances of the case that Anthony Tyrer did not suffer serious physical injuries.

Despite this, the ECtHR established that, given the child's age, he was humiliated during the execution of the punishment both in his own eyes and in the eyes of other people present there. Although the punishment was legally binding at the time of the case, the ECtHR determined that it was an attack on the honor, dignity, and physical integrity of the child. The court also noted that the execution of punishment by people completely unknown to the child could lead to negative psychological consequences. Thus, based on the totality of the circumstances, the court concluded that this punishment of the child can be considered as a punishment in which the humiliation reached the level implied by the concept of «degrading punishment», and found a violation of Art. 3 of the Convention. The ECtHR noted the responsibility of the state and the English legal system, in particular, for degrading treatment, subsequently, in accordance with the decision of the ECtHR, the legislation was changed.

As for the relationship between the Convention and other international norms in the field of child

rights protection, it should be taken into account that the Convention must be applied in accordance with the principles of international law, in particular those related to the international protection of human rights. The Court considers that Article 8 of the Convention, which concerns the Contracting States in the case of the reunification of parents with or their children, must be interpreted taking into account the Hague Convention (1980), and the Convention on the Rights of the Child.

This approach includes the combined and harmonious application of international documents, in particular in this case the Convention and the Hague Convention, taking into account its purpose and consequences for the protection of the rights of children and parents. Such consideration of international legal provisions should not lead to conflict or opposition to various international treaties, provided that the Court can fulfill its task in full, namely «to ensure compliance with the obligations assumed by the High Contracting Parties» of the Convention, by means of interpretation and application of the provisions of the Convention in a way that makes its guarantees practical and effective.

Therefore, the ECtHR examines complaints related to the violation of rights guaranteed by the Convention, which «should not be interpreted in a vacuum» and should «combine the harmonious application of international documents». The Convention must be interpreted in accordance with the general principles of international law (Parkhomenko, 2022).

The practice of the ECtHR has developed a number of principles related to the protection of children's rights:

- I. The principle of «ensuring the best interests of the child». The ECtHR in its precedent practice developed two conditions that must be taken into account when determining the main interests of the child in each specific case:
 1. First, it will be in the best interests of the child to maintain its ties with the family, except in cases where the family is particularly unsuitable or clearly dysfunctional;
 2. Secondly, it will be in the best interests of the child to ensure its development in a safe, calm, and stable environment that is not unfavorable (Mamchur v. Ukraine, 2009).

According to paragraph 1 of Article 3 of the Convention on the Rights of the Child, a child is given the right to have his or her best interests assessed and taken into account as a primary consideration when taking any actions or decisions regarding him or her in both the public and private spheres.

In General Comments No. 14 (Committee on the Rights of the Children, 2013) on the right of the child to pay primary attention to the best possible protection of his interests (paragraph 1 of Article 3), the UN Committee on the Rights of the Child formulated the following approaches:

- «Best interests of the child» is a right, principle, and rule of procedure based on the assessment of all elements reflecting the interests of the child or children in specific circumstances;
- When assessing and determining the best interests of the child in order to make a decision on the application of one or another specific measure, the following procedure should be followed:
- firstly, taking into account the specific circumstances of the case, it is necessary to determine what the relevant elements of the assessment of the best interests are, fill them with specific content, and determine the significance of each of them in relation to others;
- secondly, for this purpose, it is necessary to follow the rules that ensure legal guarantees and proper implementation of this right (paragraph 46).

When evaluating and determining the best interests of the child, the following elements must be taken into account:

Child's views;
The individuality of the child;
Preservation of the family environment and maintenance of relations;
Care, protection, and safety of the child;
Vulnerable position;
The child's right to health;
The child's right to education.

- II. The principle of «balancing the interests of the child and parents». In particular, the ECtHR has noted in its practice that there must be a fair balance between the interests of the child and the interests of the parents, and, while maintaining such a balance, special attention must be paid to the most important interests of the child, which by their nature and importance should prevail

over the interests of the parents (paragraph 54 «Hunt against Ukraine») (Resolution CM/ResDH (2008)64, 2007). X. and Y. v. the Netherlands, Application No. 6753/74 (1974), is interesting in this respect, according to the factual circumstances of which the applicant, who was only 14 years old at the time, left home, as her parents were against her boyfriend. She hid with him for several days and fearing police persecution, both young people turned themselves into the police and were taken to their parents. Being with your boyfriend for a few days can be personal. As a result of the case consideration, the ECtHR formulated the following key positions:

- Any intervention for reasons of forced return of the applicant to her parents, as provided for by the relevant legislation of the Netherlands and in accordance with the requirements of the authorities, was a manifestation of respect for the life of her family, as well as necessary to protect her health and morals within the meaning of Art. 8 of the Convention.
- The obligation of children to live with their parents, and to be otherwise subject to some control, is necessary to protect the health and morals of children, although this may, from a certain point of view of the child, constitute an interference with his own private life.

- III. The principle of «finding out the child's opinion». «Paragraph 59 of the case «Saviny v. Ukraine», European Court of Human Rights, 2008, stipulates the following:

- «Article 12 of the Convention on the Rights of the Child – States Parties shall ensure that a child who is capable of formulating his or her own views has the right to express those views freely on all matters affecting the child, and the views of the child shall be given due consideration in accordance with his or her age and maturity»;
- «In General Comments No. 12 (2009), «The right of the child to be heard», of July 20, 2009, the Committee noted that the right of all children to be heard and taken seriously is one of the fundamental principles of the Convention».

The Committee emphasizes that Article 12 does not establish any age limit on the right of the child to express his views and does not encourage States parties to introduce age limits in law or in practice that would infringe on the child's right to

be heard on all matters that concern her interests (paragraph 21).

- IV. The principle of «the child's right to be heard». In the *Saviny v. Ukraine* case the Court notes that at no stage of the proceedings in the case did the judges listen to the children (including O.S., who in December 2004, when the proceedings were ongoing the case in the court of first instance was thirteen years old), and that as a result of the execution of the decision on the removal of children from their parents, they were not only separated from their families but also placed in various institutions. Two of them are raised in another city, far from Romain, where their parents, and siblings live, and this makes it difficult to maintain a regular relationship.

Defendant states, when implementing decisions of the European Court in cases on the protection of children's rights, take a variety of individual and general measures. So, for example, in Great Britain, after the case «*Campbell and Cosens v. Great Britain*» in 1987, the Education Act came into force, abolishing corporal punishment in state schools, as well as in state-funded schools (*Campbell and Cosans v. The United Kingdom*, 1987). After the case «*Johnston and others against Ireland*» in Ireland in 1988 the Law on the Legal Status of Children entered into force, equalizing the rights of «legitimate» and illegitimate children, Application 9697/82, 1986. After the case «*Bouamar v. Belgium*» Application 9106/80, 1995, a law came into force in Belgium in 1994, prohibiting the juvenile court from detaining children more than once for one trial, which determined the maximum term of detention to be no more than 15 days. Also, the state created separate premises for teenagers in relevant institutions.

Conclusions

Thus, we can draw the following conclusions:

1. Analysis of the application of the Convention and the Protocols in the context of the protection of children's rights shows that the Convention on the Protection of Human Rights and Fundamental Freedoms, together with the relevant Protocols, does not directly contain provisions that directly regulate and protect the rights of children. However, even in the absence of special articles, children's rights can be protected on the basis of the general norms and principles of the Convention.

2. Applying the norms of the Convention, the ECtHR developed a system of principles and standards regulating the legal status of children in international law. The specified principles and standards should be taken into account when considering cases, in particular, at the national level. They are binding on states that have ratified the Convention.
3. When implementing the decisions of the European Court in cases on the protection of the rights of children, the defendant states take a variety of individual and general measures that allow to improve the system of protection of children's rights at the national level.

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