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The History and the Structure of European Court of Human Right

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Abstract

The European Court of Human Rights has been established by this convention, currently with more than 50 years of judicial experience, is also one of the most important international judicial organizations and from November 1998 onward the Protocol 11 became enforceable and along with its being imperative, the former two-steps system consisting of European Commission of Human Rights and the European court of Human Rights changed its structure into a one-step system, that is the new European Court of Human Rights, and that significant changes were made in the way an application was dealt with and in the Court procedure as well. This article will answer this question: How can this structure secure the rights guaranteed in this Convention against member states? Given that the topics related to the Court are very broad and diverse, attempts have been made to address issues about: the history and the structure of the Court, the issue of the Protocol 11 of the European Convention on Human Rights and the aforementioned Court after this Protocol, judges and the manner of their election, jurisdiction and so forth.

Keywords: *The European Court of Human Rights; The European Convention on Human Rights; Jurisdiction*

Introduction

The European Court of Human Rights (ECtHR) is a regional human rights judicial body based in Strasbourg, France, created under the auspices of the Council of Europe. The Court began operating in 1959 and has delivered more than 10,000 judgments regarding alleged violations of the European Convention on Human Rights.

In 1998, the European human rights system was reformed to eliminate the European Commission of Human Rights, which previously decided the admissibility of complaints, oversaw friendly settlements, and referred some cases to the Court – in a manner similar to the current Inter-American System. Now, individual victims may submit their complaints directly to the European Court of Human Rights. The European Court, or "Strasbourg Court" as it is often called, serves a complementary role to that of the European Committee of Social Rights, which oversees European States' respect for social and economic rights (Wildhaber, 2008).

The Court has jurisdiction to decide complaints ("applications") submitted by individuals and States concerning violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the "European Convention on Human Rights"), which principally concerns civil and political rights. It cannot take up a case on its own initiative. Notably, the person, group or non-governmental organization submitting the complaint ("the applicant") does not have to be a citizen of a State party (Trees, 2004).

However, complaints submitted to the Court must concern violations of the Convention allegedly committed by a State party to the Convention and that directly and significantly affected the applicant. As of November 2018, there are 47 State parties to the Convention; these include the Member States of the Council of Europe and of the European Union. Some of these States have also ratified one or more of the Additional Protocols to the Convention, which protect additional rights. As of August 1, 2018, the Court also has advisory jurisdiction. Under Protocol 16 to the European Convention, which entered into force on August 1, the highest domestic courts in the States that are a party to the Protocol may request European Court advisory opinions on questions of interpretation of the European Convention and its protocols. The questions must arise out of cases pending before the domestic court. [IJRC]

In order to resolve many cases simultaneously, the ECtHR is organized into five sections, or administrative entities, which each have a judicial chamber. Each section has a President, Vice President, and a number of judges. The Court's 47 judges are selected by the Parliamentary Assembly of the Council of Europe from a list of applicants proposed by the Member States. To read more about the judges and their election process, see our ECtHR Composition & Election guide.

Within the Court, the judges work in four different kinds of groups, or "judicial formations." Applications received by the Court will be allocated to one of these formations:

1. Single Judge: only rules on the admissibility of applications that are clearly inadmissible based on the material submitted by the applicant.

2. Committee: composed of 3 judges, committees rule on the admissibility of cases as well as the merits when the case concerns an issue covered by well-developed case law (the decision must be unanimous).

3. Chamber: composed of 7 judges, chambers primarily rule on admissibility and merits for cases that raise issues that have not been ruled on repeatedly (a decision may be made by a majority). Each chamber includes the Section President and the "national judge" (the judge with the nationality of the State against which the application is lodged).

4. Grand Chamber: composed of 17 judges, the Grand Chamber hears a small, select number of cases that have been either referred to it (on appeal from a Chamber decision) or relinquished by a Chamber, usually when the case involves an important or novel question. Applications never go directly to the Grand Chamber. The Grand Chamber always includes the President and Vice-President of the Court, the five Section presidents, and the national judge.

The Judges of the Court and the Manner of their Election

Due to the judicial nature of the Court, we first proceed to the issue of judges as the most important factor of the Court, who are, of course, responsible to exercise the jurisdiction of the Court (the Articles 20-24).

The Convention and the Articles 2-7 of the rules of Court hearing are allocated to the issue of the judges. The number of judges sitting in the Court is equal to the number of the contracting states. The judges are elected, from among those figures of high moral character possessing the scholar qualification required for being appointed to high judicial office or be jurisconsults of recognized competence, by the Parliamentary Assembly of the Council of Europe from among a three-candidates list nominated by each contracting state. The citizenship condition, which had been already foreseen, was eliminated in the new amendments and therefore each member state can introduce candidates other than their respective people in their list (Faigman, 2011).

Moreover, the condition of prohibition of the electing two judges with the same nationality, which had been foreseen in the Article 38 of the Convention before the amendment, has been eliminated and in this way it has been tried to use all existing human capacities in Europe by removing previous restrictions (Wildhaber, 2008).

The judges shall be elected for a period of six years. They will act according to their own personal recognized competence and not on the behalf of their respective states or the states introducing them. This important issue has been foreseen to emphasize the independence and impartiality of judges and therefore any activity which is incompatible with their independence, impartiality and full-time office is prohibited. Judges must notify the president of the Court of any activity other than judging in the Court that they intend to engage in; an appropriate decision will be made in the Plenary meeting of the Court, in any case, if there is a theoretical disagreement in this regard.

The re-election of judges is unimpeded and their dismissal will be impossible unless due to the loss of the prescribed conditions and the vote of two-thirds of the other judges in the Plenary meeting of the Court. The term of office will start from the date of their appointment. In the case of the judges who are re-elected and the judges replacing other judges whose tenure has ended or is about to end, the start of the tenure is from the expiration date of the previous tenure. If a judge replaces a judge whose term of office has not expired, the term of office of this judge will be the same as the remaining term of the previous judge (Ress, 2005).

After being elected and before taking office, judges announce by oath or official announcement that they will be honest, independent, impartial and confidential in the performance of their duties as judges. And finally, in the case of a decision to resign, the President of the Court must be notified and this is subject to the assignment of cases that in which the resigned judge has participated in the substantive hearing. The resignation will be formalized by the President of the Court after six months from the date of receipt. The retiring age of the Court judges is 70. Therefore, a judge's mission ends at this age despite the length of her/his tenure (Wildhaber, 2008).

Judge Rapporteur(s)

According to Articles 48, 49, 50 of the rules of the Court, a Judge Rapporteur has been foreseen under three titles: where an application is made under Article 33 of the Convention, the Chamber constituted to consider the case shall designate one or more of its judges as Judge Rapporteur(s), who shall submit a report on admissibility when the written observations of the Contracting Parties concerned have been received. The Judge Rapporteur(s) shall submit such reports, drafts and other documents as may assist the Chamber and its President in carrying out their functions (Wildhaber, 2008).

Where an application is made under Article 34 of the Convention, the applications filed by private persons, the President of the Section to which the case has been assigned shall designate a judge as Judge Rapporteur, who shall examine the application. In their examination of applications, Judge Rapporteurs may request the parties to submit, within a specified time, any factual information,

documents or other material which they consider to be relevant. Judge Rapporteurs shall decide whether the application is to be considered by a single-judge formation, by a Committee or by a Chamber. If the presented evidences in such applications, according to the Judge Rapporteur(s), are sufficient to indicate the inadmissibility of the applications and or accordingly, those applications should be strike out of the Court's list of cases, such applications shall be examined by a Committee. The Judge Rapporteur(s) shall submit such reports, drafts and other existing documents may be beneficial, as the case may be, to the Chamber or the Committee to carry out their functions.Finally, in line with her/his functions abased on the Article 30 relating to the relinquishment of jurisdiction from a Chamber of the Court to the Grand Chamber and the Article 43, The referral of judgements given by Chambers to the Grand Chamber for being reconsidered, the President of the Grand Chamber can elect one or more Judge Rapporteur(s) in inter-state applications or one Judge Rapporteur(s) in applications running by private persons from among her/his judges (Janneke, 2005).

Amendments Prescribed in Accordance with Protocol 14

One of the major areas in which Protocol 14 has attempted to reform existing system is the period of tenure and dismissal of judges.

In the current system, judges are elected for a term of 6 years and their re-election is unimpeded (the paragraph 1 of the Article 23 of the Convention).

According to the Article 2 of the Protocol 14, the terms of office of judges has been increased from 6 years to 9 years, and it is not possible to re-elect them. According to the Parliamentary Assembly of Europe Council, the above provisions would contribute to the greater efficiency and continuity of the Court and would consolidate its independence and impartiality of judges (the paragraph 13 of the would contribute to the greater efficiency and continuity of the Court and would consolidate its independence 1649 (2004) of the Parliamentary Assembly of Europe Council dated May 2004). The role of increasing the term of office of judges from 6 to 9 years in the continuity of the judicial Court and the coherence of its judicial procedure is quite obvious. However, regarding the effect of impossibility of re-election of judges on their independence and impartiality, it seems that the existential philosophy of this rule is that judges should be able to adjudicate regardless of their re-election considerations. Explain that the election of judges of the Court is such that each member state submits a list consisting of these people and the Parliamentary Assembly of Europe Council elects one person from the list proposed by each state for membership in the Court. The Council of Europe believes that the idea of being included in the list proposed by states for re-election could have a negative effect on the independence of the judgement and the impartiality of the judges, therefore, eliminating this possibility will be a step towards the independence of the Court (Thienel, 2001).

During the drafting of Protocol 14, a proposal was made stating that the three-person list submitted by states should include candidates of both sexes.

This proposal, which was made to increase the number of female judges in the Court, was not amended in the text of the Protocol 14 because it was thought the criteria for nominating candidates by states should be their eligibility not their gender. However, one year later in 2005 the Parliamentary Assembly of Europe Council decided in a resolution not to consider lists of candidates where the list does not include at least one candidate of each sex. This resolution adds that exceptionally the list submitted by states can be exclusively composed of the candidates of the same sex if under 40% of the total number of judges belong to the sex which is under-represented in the Court (See resolution 1426 (2005) of the Parliamentary Assembly of the Council of Europe entitled "Candidates for the European Court of Human Rights").

The purpose of this exception is that, in the event of the existence of a clear imbalance between the sexes in the membership of the Court (female and male judges), states can restore the balance and adjust this imbalance more quickly by introducing gender-specific candidates. Now that, for example, only 11 of the 44 judges currently in office are women (that is less than forty percent of total judges), states can only nominate female candidates on their proposed lists; thus, increasing the number of female judges and create more balance between the two groups (Wildhaber, 2008).

The Article 2 of the Protocol 14, like the paragraph 2 of The Article 23 of the Convention, provides that The terms of office of judges shall expire when they reach the age of 70. Determining a maximum age of 70 years for judging and that their terms of office is 9 years should not be construed as member states may not nominate candidates who are over 61 years of age at the time of election (70(maximum age) – 9(service period) = 61). Such a thing would deprive the court of experienced judges. Therefore, states are not allowed to nominate people over the age of 61 to serve on the court.

Despite this, the Council of Europe has recommended member states to nominate candidates who can complete at least half of their tenure before reaching the age of 70 (Erdal, 2001).

Explaining the Concept of jurisdiction in the European Convention on Human Rights

The Article 1 of the European Convention on Human Rights plays a key role in the system of referral and monitoring of the Convention and because, according to the Convention, the provisions of this article are considered as one of the factors limiting the scope of obligations of states, its interpretation is of great importance in the procedure of the Commission and the European Court of Human Rights.

Given that the preliminary works, which have led to the drafting and the ratification of this Article 1, may be used in its interpretation (as it has been mentioned in the rulings of the Court); it will be useful to express the brief course of the drafting and the ratification of the Article 1.

According to the Article 1of the initial draft of the Convention which was approved by the Parliamentary Assembly of the Council of Europe, member states have to guarantee the execution of the Convention for all persons residing in their territories. When discussing this article in the subcommittee, it was supposed to replace the phrase of "living in" instead of the phrase of “residing in" and the purpose of this amendment was to expand the scope of the Convention to individuals who do not have legal residence in the member states. But in the final amendments, the term "under jurisdiction" was used to expand the scope of the people under support of the Convention (Wildhaber, 2008).

The mentioned committee, in justifying these amendments, stated that the condition of "residence" was largely restrictive. Therefore, it was felt necessary to extend the scope of the support of the Convention to include all persons within the realm of the territories of states both legally and illegally; and given that residency in the domestic laws of the states has different meanings, in order to avoid possible ambiguities in the implementation of this article, "under jurisdiction" phrase was used at last.

At the time of drafting the Convention, experts and drafters did not want to limit the execution of the Convention to individuals residing in the realm of the territories of states; the flexible phrase of "under jurisdiction" was used for this reason. The Article 1 of the European Convention on Human Rights stipulates: “Contracting States must provide everyone within the realm of their jurisdiction with the freedoms and the rights contained in the part 1 of this Convention”. herefore, the responsibility of the governments is not merely limited to the measures that they take in the realms of their territories. This article does not seek to limit the Convention to citizenship or nationality as well; meaning that member states are also held liable for the human rights violations toward foreign nationals under their jurisdiction (Wildhaber, 2008).

The concept of jurisdiction in the proceedings of the European Court of Human Rights, especially in the case of IIascu, has been clearly specified. In this case, the Court has explained the concept of jurisdiction in accordance with the International Law. The European Court of Human Rights has emphasized many times that the European Convention on Human Rights is considered as a part of the Public International Law which of course has been able to have impacts over time in this area and is not merely limited to the framework of the rules of the Public International Law.

From the point of view of public international law, the term "under jurisdiction" contained in the Article 1 of the Convention in the first place oversees territorial jurisdiction and this jurisdiction often has to be exercised within the realms of the territories of states. The principle of territorial jurisdiction is one of the accepted principles in international law and this principle stems from the right of the sovereignty of states. Of course, this general assumption may be limited under exceptional circumstances including: Where a state is prohibited from exercising domination and sovereignty over a part of its territory. This may be due to the military occupation of the territory by other countries or this may be due to the support of one state for military or political facilities in the territory of another country. From the point of view of international law, the principle is that the concept of jurisdiction has a territorial horizon and is limited to the sovereignty of a state but exceptionally, under special circumstances, this jurisdiction can be extended beyond the borders of a state and it facilitates the context of assigning responsibility for the violation of human rights and freedoms in the form of extraterritorial for that state. The extraterritorial application of the Convention and the extension of the obligations of states toward the nationals of non-member states stems from the nature of human rights treaties. The concept of jurisdiction contained in the Article 1 is not necessarily limited to the national territory of a member state to the Convention. Rather, according to the principles of public international law, the responsibility of a state may also be realized as a result of legal or illegal military operations outside its territory; of course, it depends on the fact that the mentioned measures will eventually lead to the effective control over this land. The obligations of member states to all persons under jurisdiction to guarantee the rights and freedoms contained in the Convention stems from the exercise such control whether this control is exercised by the military or as a result of the local administration of that area. According to the Convention, in any case, states are held liable for the persons and the properties under their jurisdiction. States are also responsible for the actions of their agents and staff who carry out missions outside their territory. Therefore, regarding the nature and scope of the obligations of the states, according to the Article 1 of the Convention, it can be examined in three sections (Mahoney, 1998).

Types of Jurisdiction

Pursuant to the Article 32 (1) of the Convention, the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto. Also, in accordance with Article 32 (2) of the Convention, in the event of dispute as to whether the Court has jurisdiction, the Court shall decide. According to the provisions of the Convention, two types of jurisdiction can be recognized for the Court, which are advisory jurisdiction and judicial jurisdiction (Wildhaber, 2008).

Advisory Jurisdiction

The jurisdiction of the European Court of Human Rights is not limited to the judicial review of complaints. It also offers an advisory opinion as the case may be. Advisory jurisdiction has been referred to in the Protocol 11 and now it has been mentioned in the Article 47 of the Convention as well. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto. However, such opinions shall deal not with any question relating to the content or the scope of the rights or freedoms defined in Section1 of the Convention and the Protocols thereto. In other words, the Committee of Ministers cannot

ask the Court for advisory opinion on the content and the scope of the prescribed rights and freedoms. To request an advisory opinion of the Court must have been approved by a relative majority vote of the representatives entitled to sit on the Committee of Ministers (Janneke, 2005).

In a response to this request, the Grand Chamber of the Court will announce its advisory opinion by examining the question. The Grand Chamber of the Court shall decide whether a request for an advisory opinion is within its competence and if the Grand Chamber of the Court does not recognize a request within its advisory jurisdiction, it shall announce its reasons in this regard. Advisory opinions of the Grand Chamber shall be reasonably given by the majority vote of judges. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of judges, any judge shall be entitled to deliver a separate opinion or even to express her/his opposing opinion. The given opinion and or any decision made in this regard must be signed by the President of the Court and the Secretary of the Court; and the Committee of Ministers, the member states and the Secretary-General of the Council of Europe must be informed. The European Convention on Human Rights is an international treaty and is subject to the rules of the interpretation of international treaties (Mahoney, 1998).

In general, the principles used in the interpretation of this Convention are: the principle of practical and effective interpretation, the principle of knowing the text of the Convention alive, the principle of the narrow interpretation of exceptions to the principles of the Convention, the principle of integrity in the interpretation of the Convention and the principle of the priority of the Convention over international standards.

Judicial Jurisdiction

The jurisdiction of the Court relates to claims brought under the Articles 33 and 34 of the Convention. Pursuant to the Article 33, any High Contacting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contacting Party and Pursuant to the Article 34, the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be a victim of the violation of rights contained in the Convention or the Protocols by one of the High Contracting Parties of the rights. After filing a complaint and initially accepting it, the Court will first try to resolve the matter through a friendly settlement procedure; it can be said in the explanation that: "Adopting a friendly settlement procedure for resolving disputes and lawsuits in the Court is known as an important tool in reducing the volume of cases submitted to the Court". If the matter is not resolved peacefully, the Court enters the proceedings and through the proceedings the Court will ultimately issue the appropriate decision and opinion in accordance with the provisions of the Convention and the Protocols thereto. However, the Court may at any stage of the proceeding decide to strike an application out of its list of cases where the circumstances lead to the conclusion that the matter has been resolved. This point has been mentioned in the Article 37 of the Convention (ibid).

The Session of the Plenary Court

A Plenary session of the Court shall be convened at the invitation of the President of the Court or at the request of at least one-third of the judges. This Plenary Court will also have an annual meeting, the quorum required to formalize the plenary sessions of the Court is two-thirds of the elected judges The quorum of the plenary Court shall be the presence of two-thirds of the elected judges in office. According to the Article 25 of the Convention, the functions of the Plenary Court are: electing its President and one or two Vice-Presidents for a period of three years; they may be re-elected; with the possibility of re-election; setting up Chambers; electing the Presidents of the Chambers; they may be re-elected; adopting the rules of the Court; and electing the Registrar and one or more Deputy Registrar.

The Presidency of the Court

In the plenary meeting of the Court, attended by all members, the President of the Court and her/his one or two Vice-Presidents, as well as the Presidents of Chambers, are elected for a period of three years; they may be re-elected for another three years. According to the Rule 9 of the Court, the functions of the President of the Court are: directing and the administrating the Court; being responsible for its relations with the authorities of the Council of Europe; presiding at plenary meetings of the Court, meetings of the Grand Chamber and meetings of the panel of five judges. The President shall not take part in the consideration of cases being heard by Chambers except where he or she is the judge elected in respect of a Contracting Party concerned (Mahoney, 1998).

Sections

According to the Rule 25 of the Court, the Court is divided into at least four Sections. Each judge shall be a member of a Section and the composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties; members are elected for three years. On a proposal by the President, the plenary Court may constitute an additional Section. According to the Rule 25 of the Court, each Section is directed by a President who is elected at the plenary meeting of the Court. The Vice-Presidents of the Sections (elected by the Sections themselves) will assist the Presidents of the Sections and, if necessary, shall take their places. The Sections are not the judiciary pillars, and as it will be explained, in each Section a judicial Chamber consists of seven members, as well as several three-member committees of judges (Trees, 2004).

The Procedure for Filing Lawsuits in the Court

Filing a lawsuit in the European Court has a special petition form that the plaintiffs use to file complaints. In an initial stage, however, a complain can be filed in the Court with a simple letter, but after six weeks from the date of acceptance letter, the full petition form must be submitted to the Court.

Although the official languages of the Court are English and French, a preliminary letter can also be sent to any of the official languages of member states. There is no provision that a petition must be filed by a lawyer, and if the petition is to be filed primarily through a representative, the representative does not necessarily have to be a legal representative. No fees are paid to the Court at any stage. In some cases, it is possible to benefit from legal aid during the proceedings. There is no provision in the convention stating that the expenses of the defendant state must be paid by the claimant, however; the reasonable expenses of the plaintiff, whether as a cause of action or that the costs are stated in the Court order for the winning party, can be reimbursed by the defendant state (Mahoney, 1998).

Pursuant to the Article 41 of the European Convention, if the Court finds that there has been a violation of any of articles of the Convention articles or the Protocols thereto, the Court shall, if necessary, afford just satisfaction to the injured party and also rule on legal costs and financial and non-financial damages. The copies of all documents cited must be submitted to the Court along with application form. The Court conducts its activities based on the principle of openness of the Court and the course of the hearings. Therefore, not only the rulings of the Court and its decisions regarding the admissibility or inadmissibility of lawsuits are exposed to everyone but also all the documents deposited with the Registrar (Janneke, 2005).

In this way, the identity of applicants shall also be made available to the public unless in accordance with the fourth paragraph of the Rule 43 of Court, applicants who do not wish their identity to be kept disclosed to the public shall so indicate and shall submit a written statement of the reasons to the Court and if accepted by the Court, applicants are usually referred to by the signs X and Y. There are no provisions on urgent measures or security measures in the European Convention system, but if applicant's

life is in danger or there exists fear of severe or inappropriate behavior, the Court shall take interim measures under the rule 39 of Court.

The Procedure of the Court after Admitting an Application

When an application is declared admissible in the Court, the Court will begin to investigate and, if necessary, conduct an examination. Member states also have a duty to ensure the adequate freedom of movement and sufficient security for the representative of the Court and all plaintiff, witnesses and experts. The Court, at first, tries to settle the dispute friendly if possible but if it is not possible, the Court will continue to hear. The Court can reject an application if the applicant does not intend to pursue the application; or the matter has been resolved or for any other reason established by the Court, it is no longer justified to continue the examination of the application (Wildhaber, 2008).

Conclusion

The structure of the new European Court of Human Rights has been established with the aim of speeding up the handling of complaints with greater capacity and capability than the former two-steps system. This important issue is being done by giving importance to jurisdiction, the manner of election and the qualifications of judges and using all the human resources available in Europe. The manner of the handling of complaints and the Court procedure also provides people with direct access to the Court and the new European Court of Human Rights makes decisions by giving judgments, executing judgments, supervising them, the powers of the President of the Grand Chamber, having supplementary and compulsory jurisdiction especially judicial jurisdiction, and finally going through the stages of proceedings based on the provisions of the Convention and its protocols (Janneke, 2005).

The structure and procedure of the European Court of Human Rights enjoys a regular, direct and several-stages status and has appropriately played a very influential role in deepening and expanding human rights standards and consolidating and institutionalizing them at the level of European countries and it seeks to prevent any violation of the human rights of citizens of member states and also it had an influential role in the formation of Human Rights Conventions in other areas that is an undeniable issue. With the experience of the establishment of such a court, it seems necessary to establish an Islamic human rights court. The Organization of the Islamic Conference adopted the Islamic Declaration of Law (Cairo Declaration) on 5 August 1990 in Cairo and this declaration is usually considered as an Islamic reaction to the Universal Declaration of Human Rights after World War II in 9141 (Mahoney, 1998).

But thirty-nine years after the enactment and recognition of the inherent human rights in the document, an oversight body for the implementation of those rights, like the European Court of Human Rights which is established, has not been formed and this is while Islamic countries face numerous human rights issues, and this makes it necessary to address the establishment of an Islamic human rights court, and if Islamic governments will, this issue would be realized.

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