



RIGHTS investigation

Role of judiciary and lawyers in promoting rule of law and protecting rights

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It is a great honour for me to have been invited to speak to you about the links between our two countries and the role of lawyers in protecting the rule of law.

There are, of course, many links between Britain and Bangladesh. We share history which now goes back over 250 years. And I think it can be persuasively argued that these links are now broader and stronger than ever before.

This strength rests not just upon a formal relationship at national level but at an individual level - because of the ties and friendship between thousands, indeed hundreds of thousands, of people and families in our two countries. Britain is now home to around half a million people from Bangladesh who make a very valued contribution to our country in many different fields.

These personal links, as well as the many historical and cultural ties, explain why, on a whole range of issues, our two countries co-operate so well. On climate change, for example, which could have such a devastating impact on low-lying countries, the UK has recently announced £30 million of new funding to help Bangladesh adapt. And on development, the UK is Bangladesh's largest bilateral donor - contributing close to a quarter of a billion dollars annually as we support progress on the Millennium Development Goals.

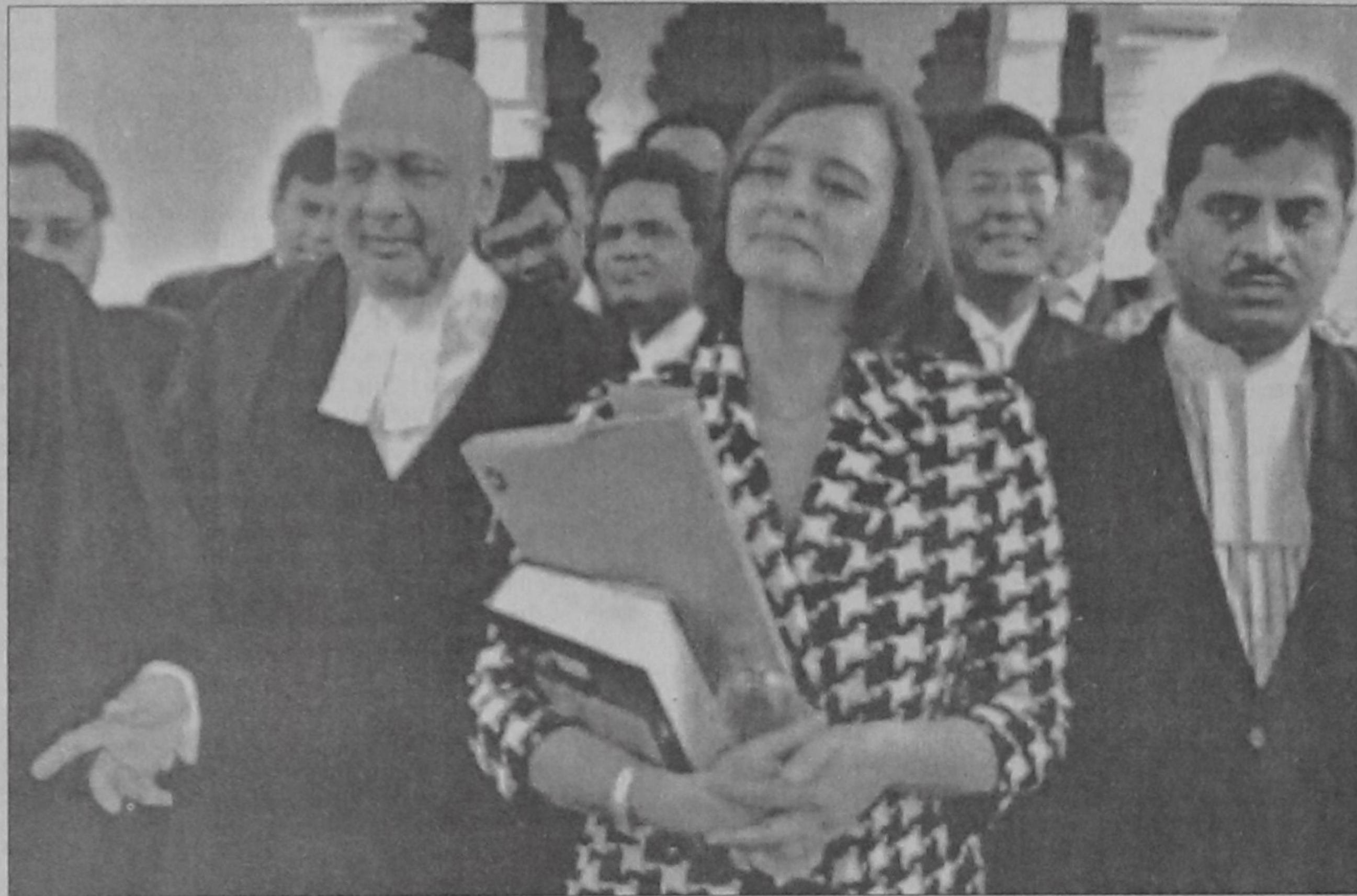
This, of course, is in our interests as much as yours. As our Foreign Secretary David Miliband has put it, 'in a globalised world, tackling the roots of poverty and inequality is in everyone's interests.'

So our relationship is close at a formal Government level and at the individual level. It's also, of course, very close at a judicial level with our two legal systems sharing many similarities. And it is one of these similarities I want to focus on today - the role of the judiciary and lawyers in the protection of human rights by promoting in every way they can the rule of law, and in ensuring, through their own efforts, that justice is not denied people just because their views are unpalatable to those in power.

The whole area of human rights is one which can be fraught with confusion. There are those, I know, who suggest that human rights are somehow a Western construct which have somehow been foisted reluctantly on the rest of the world.

This is, in my humble opinion, a serious misunderstanding of the nature of human rights, their origins and history.

That human rights are universal values is indisputable. Their basis can be found in all the World's great faiths and cultures which each protect human dignity. The ideas of equality, dignity, respect and justice, for example, are as



Cherie Blair, wife of former British prime minister Tony Blair, seen coming out of the High Court with Barrister Ajmal Hossain (on her right). Cherie was in town to work with Sheikh Hasina's legal team.

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inherent a part of Islamic belief and culture as they are of all others.

And it is important to remember that the people of Bangladesh were part of the original 48 signatories to the Universal Declaration of Human Rights in 1948 and can take pride in the role they played in helping shape such an important and remarkable document. This Declaration also put the rule of law at the centre of the battle to protect human rights.

As its preamble notes:

"... it is essential, if man is not to be compelled to have recourse... to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

For without the rule of law, human rights are meaningless. There is universal consensus that for the rule of law to exist there must be laws which are open, clear, coherent, prospective and relatively stable; the acts of the legislature and executive should be governed by laws with those characteristics; there must be a separation of powers; the Courts must be able to uphold the rule of law; and individuals must have access to those Courts so that their legal rights can be enforced.

I would like to say something then about the role and characteristics of the judiciary. I think we take for granted that judges are meant to uphold the law. But what is sometimes forgotten, or ignored, is that the role of the judge is to uphold the law even in I would say particularly in times of change or crisis. I think it is also worth acknowledging that this role requires bravery, conviction and independence on the part of

judges. That is all the more so because it is accepted internationally that in the threefold distribution of power the judiciary is conceptually the weakest and most vulnerable of the arms of government. It lacks both the power to make laws and power to tax and dispose of public funds that is enjoyed by the legislature, and the executive's power to determine and implement policy within that framework of laws with the entire machinery of the state at its disposal. Accordingly, its power is dependent on the respect of the other two arms of government and the acceptance of its decisions by all sectors of society.

It is thus important for the Government and the public to understand the place of the judiciary within a democratic state. Of course it is expected of all branches of the State that they respect the law. But where the rule of law and human rights are undermined, it becomes the judiciary's responsibility to ensure that the law is upheld. This means that the judiciary must guarantee that acts of individuals are in accordance with the law. But equally so, it is the judiciary's task to ensure that the State and its officials act in accordance with the law. The proper fulfilment of this task requires a robust independence on the part of the judiciary. It is for that reason that in all democracies the ordinarily understood role of the judiciary is to show above all else fidelity to the law. As Lord Steyn has explained, the judiciary has a duty "of reaching through reasoned debate the best attainable judgments in accordance with justice and law."

Judges then are accountable to the law. In order to properly satisfy that duty judges in mature constitutional democracies are set aside as independent arbiters of human rights and are by their oath of office expected to avoid any form of subservience to the other branches of government.

This independence of spirit is in fact a settled human rights principle that is addressed to the judiciary itself. The principle is encapsulated in Article 14 of the International Covenant on Civil and Political Rights a Covenant to which Bangladesh is a state party which requires not only that judges should be competent and independent, but also that they should be impartial in the discharge of their duties. Justice Kirby of the Australian judiciary reflects that Article 14 "helps to remind judges that they have no rights, as an elected legislator may, to pursue an agenda that they conceive to be in the interests of society. They are adjudicators. They must approach the resolution of the parties' dispute without partiality towards either side. Nor must they be obedient to external interest". Justice Kirby thus helps us to understand that judicial independence is foundational to and indispensable for the discharge of the judicial function in a democracy based on the rule of law.

I may add that the importance of judicial independence is most pronounced during times of perceived crisis or national emergency. Rashid J, in the recent decision of Iqbal Hasan Mahmood, had cause to issue that reminder. He rightly commented that in Bangladesh neither the rule of law, nor minimum international standards or human rights can be abandoned and/or sacrificed in the investigation and prosecution of corruption.

The learned Judge has highlighted the guardian role that the judicial branch of government is expected to perform in relation to executive decision-making and the risk of over-reach in times of perceived emergency. Cases from a number of jurisdictions have affirmed a vital role for the courts of scrutinising and holding accountable government institutions in times of distress and national emergency. Two of the leading cases recently decided in this regard are worthy of our attention.

In the first, Justice Sandra Day O'Connor has issued the following warning in the face of challenges brought in the US Supreme Court against the indefinite detention of detainees at Guantanamo Bay. For a plurality of the US Supreme Court in Hamdi, she wrote that:

"[s]triking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat... but it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad". [Emphasis added]

The second case emanates from the House of Lords. In 2004 the House of Lords heard a case concerned with the legality of part of the British Government's anti-terrorist legislation. Their Lordships' decision in the A case¹⁰ made it very clear that a government, even when there is an emergency and a threat to national security, must act strictly in accordance with the law. Lord Roger, in the context of the case, noted that if rights are to be meaningful then:

"... judges must be intended to do more than simply rubber-stamp the decisions taken by ministers and Parliament"

That landmark cases are being decided across the world affirming the role of the judiciary in times of perceived national crisis is a timely sign of the importance of judicial review as a bulwark against executive overreach.

One further point. To carry out their function the judiciary must be independent and impartial not only of government but of all other interests as well. Blackstone - one of the forefathers of the English legal tradition cautioned

that "[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea".

This principle of impartiality is universally accepted and can be found, for example, enshrined in the International Covenant on Civil and Political Rights and the provisions of the Universal Declaration of Human Rights. One of the reasons this principle is accepted by all is because it is essential to achieve justice in society.

That the role of the judges in each case is to provide justice to all those before them is such an entrenched idea that we actually refer to them as "Justices". Lord Bingham has suggested that the road map for judges wishing to achieve justice starts with the judicial oath, the elements of which he has explained as follows:

First, the judge must do what he... holds to be right.... Secondly... he must do right according to the laws... of the realm. He is not a free agent... who can... give vent to his own whims and predilections... Thirdly... the judge must act with complete independence... and... fourthly, so far as humanly possible, judges must decide cases with total objectivity, having no personal interest beyond that of reaching a just and legally correct solution...

The independence and impartiality of the judiciary is so important that an impression of bias and favour can disqualify a judge from hearing a case. Famously in the Pinochet case the House of Lords set aside one of its own previous decisions because it was accepted that Lord Hoffman's perceived bias would damage the judiciary's reputation. Perceptions of bias, whether justified or not, can undermine the trust that individuals have in the judiciary to hold the State accountable for violations of their rights. As a former UN Special Rapporteur on the Independence of the Judiciary has stated:

"The concepts of the impartiality and independence of the judiciary [that are the hallmarks of the legitimacy of the judicial function] postulate individual attributes as well as an institutional condition... Their absence leads to a denial of justice and makes the credibility of the judicial process dubious."

Additionally, I would stress that it is of importance to the stability and integrity of the administration of justice that judges should be free from gratuitous attacks by unsuccessful or irate litigants whose only real grievance is that they have lost their case. And judges should be free from unjustified attacks or pressure from the other Branches of Government. That is because, as Dickson CJ said for the Supreme Court of Canada "the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision."

I respectfully agree with the comments of the learned Judge. If trust in the judicial function is eroded, individuals are less likely to resort to the Courts to seek remedies against the State, thus easing the slide into arbitrary rule.

Allow me to conclude by considering two questions that may, however, legitimately be asked about the role of the judiciary in upholding the rule of law and protecting rights. First, why is a judge in a better position to shape the law and protect individual rights than anybody else? Second, what should be the limits of the judicial function?

With regard to the first question, it is certainly true that while on a personal level judges should and hopefully do have integrity, they would not claim to have moral superiority to others. As we have already seen, judges are, or at least should be, divorced from direct political pressures and be immune from lobbying by interest groups. Court procedure in the common law world relies heavily on an argument-based approach to solving disputes and precedent and the resolution of similar

problems previously. In that sense therefore, the judiciary is in the best position to resolve such disputes because there is a logical and systematic method of reasoning which should provide stability and clarity as to what the law requires. This advantaged position comes with a responsibility. While the judiciary might be best placed to resolve disputes, the resolution of that dispute in the form of a written judgment must be done publicly, persuasively, rigorously and objectively. As John Rawls, one of the 20th century's greatest legal philosophers has explained, a "court's role is... to give due and continuing effect to public reason by serving as its institutional exemplar".

While ordinary citizens and legislators are entitled to vote and debate on the strength of reasons that are not always public, the court has only public reason to rely on. Unlike citizens and legislators who may be influenced by political pulls and pushes and lobby groups, judges must "justify by public reason why they [decide] as they do" and "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."

In short, and in the famous words of Alexander Bickel in his commentary on the United States Supreme Court, "the Court is the place for principled judg-

ment, disciplined by the method of reason familiar to the discourse of moral philosophy, and in constitutional adjudication, the place only for that, or else its insulation from the political process is inexplicable."

That brings me to second question: what should be the limits of the judicial function? As important as the role of the judiciary is in upholding the rule of law and protecting rights, it is certainly the case that there are occasions on which judges should not intervene and matters must be left to the legislature. In the A case, which I mentioned earlier, Lord Bingham elaborated upon the role of judges and the limits on their powers. He noted:

"It remains the most civilised and least burdensome conception of a State yet to be devised."

1. See David Miliband, Bangladesh on higher ground, The New Nation, February 28, 2008.

2. Ibid

3. Ibid

4. Johan Steyn Democracy Through Law: Selected Speeches and Judgments (Ashgate, Aldershot 2004) 130.

5. The Honourable Justice Michael Kirby AC CMG Judicial Activism (Hartlyn Lecture) (2004) 72.

6. Ibid

7. Iqbal Hasan Mahmood v The Government of Bangladesh (Writ Petition No. 7451 of 2007- Judgment 5 December 2007) as yet unreported, at para 115.

8. Ibid

9. Hamdi v Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion).

10. A (FC) and others (FC) (Appellants) v Secretary of State of the Home Department (Respondent) [2004] UKHL 56.

11. Blackstone in Commentaries on the Laws of England III at 361.

12. The Queen in Right of Canada v Beauregard (1988) 30 DLR (4th) 481 (SCC) at 491. Emphasis added.

13. Rawls Political Liberalism (1993) 235.

14. Rawls ibid.

15. Quoted in Jack Greenberg Judicial Process and Social Change: Constitutional Litigation (1978) at 555.

16. See "Reconstructing Equality: Of Justice, Justice, and the Gender of Jurisdiction" Yale Journal of Law & Feminism 2002 vol 15 page 393-418.

The article is based on a speech delivered by Cherie Blair QC to the members of Judiciary and Bar in Dhaka and made available to The Daily Star.

The writer is lawyer and human rights advocate.



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