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ASPECTS CONCERNING THE ADOPTION INSTITUTION, FROM THE PRIMITIVE SOCIETIES TO THE MIDDLE AGES

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Various forms of adoption certainly appeared before the historic written sources, probably as far back as the prehistoric times. A such assertion is supported by the indisputable authority of *the kinship* in the archaic communities studied by ethnology or kept by the historic sources of the antiquity; the kinship was a very strong tie, the adoption enlargement being near naturally made in the frame of the relationship systems and, therefore, it is easy to be made an assumption that at least formulae of the orphans' integration, similar to those later known, were as far back as the history beginning. Therefore, the kinship was a structural frame, which decided both the possibility of adoption and its forms and nature.

For the all **primitive communities**[1], the status of a person is strongly in connection with the position within the kinship lines and the family, as an essential segment of the society organization, plays to a much greater extent than in the modern societies, a decisive role: „As opposed to our societies, where the circle of the familial relations, quite limited, is completed with a network of amicable, professional relations, their interest being based on none genealogical closeness, in the traditional societies, a person is essentially defined by his / her position in a relationship system, which simultaneously conditions his / her status and role, rights and liabilities. It is coming up, as just the neighbored groups, having the different language and culture, to be sometimes identified in genealogical terms." (Géraud, Leservoisier, Pottier 2001: 197).

In these conditions, the adoption institution, as part of these communities, can be understood between the power lines enforced by the authority of the descent relationship and the rareness of the nuclear family, the monogamous family, only. If this type of family virtually exists in the all societies, in the majority of the situations ethnographically studied, the family is combined (extended) and is fundamentally based on *the consanguinity*. The organization of the families is diversely, as well as the rules for the ascertainment of the descent, maternal lines or paternal lines (for an extent discussion, see Mihu 2002: 275-320). It is made even a difference between a *real kinship* and a *fictive* one, the adoption phenomenon being closely connected to the both categories of kinship.

The blood bond - the real kinship - being very significant in the archaic communities, the adoption has here as result the integration of the adopted person within the descent line of the person who makes the adoption (woman or man), this being not so difficult, once the adoption in these communities is usually made between relatives: an orphan, for example, is automatically "adopted" by the near relations (Lowie 1969: 82). This type of adoption is defined by some authors as "tribal adoption" (Pricopi 2000: 23), among the adopted person's liabilities being the worship of the common totemic ascendant, too. In practice, the adoption was usually made within the descent lines, the tribe being a larger social unit, where more totems could coexist. It is surely that this form of adoption is very prevalent in the archaic communities. In antiquity, this was also practiced by the Indians (through the affiliation of a brother's child), or by the old Hebrews. These rearward, through the method of leviratic practice (the marriage with the deceased husband's brother), considered the children of the brother married with the widow as children of the first husband (*ibidem*: 54).

The reasons, which can underlie the adoption, however can be the others than the parents' death. For instance, the absence of any own descendants constitutes the strongest stimulus for the Eskimos Tchoukchi, that can so adopt a child, his natural father becoming the heritor of the possessions belonging to the persons making the adoption (Lowie 1969: 82). Otherwise, the legal effects of the adoption are very diverse, depending on each community and the organization system of the relations between kinship, residency and patrimony. Therefore, there was, what can appointed today as an "adoption with full rights", which ignores the artificiality of the filiation relation, but also an „adoption with limited effects", where certain relations with the natural parents are still continued. But the following aspect must be underlined, due to the absence of a properly private propriety, the problems related to the survivorship of the adopted sons were not very important: generally, the inherited patrimony belonged to the descent line, to the clan or the tribe and not to the persons, therefore, the mentioned modern categories are not very relevant.

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The affective relations between the foster-child and the new family are very closed to those characterizing the natural kinship. More, at the Indians Crow (North American tribe) - that have frequently in use to adopt their brothers' sons - even an intended exaggeration of this affection is intimated (*ibidem*). However, the anthropologist R. Lowie notes that the most special form of adoption is that met at the indigenouses from the islands Murray (the gorge Torres Oriental), where the children are adopted without an obvious reason, just prenatally and are upreared by the foster parents - often the identity of the natural parents being ignored - sometimes up to the maturity, or just to the death of those adopted (*ibidem*).

Concerning **the classic antiquity**, the understanding of the adoption - such as this practiced by **the old Greeks**, for instance - can't be made without looking for its very old origins. The former Greeks, the achacans, had a patriarchal organization, where the kinship played a very important role. The most important unit of kinship was so-called *genos*, the patriarchal clans, ensembles of families descending from a common ascendant. These venerated a single ascendant, had the proper headman - direct descendant from the respective ascendant - with absolute rights on his relatives (Glotz 1992: 10-11). These extensive families permanently prospected for the expansion of their influence, the conflicts with the similar units initially being frequent enough. The vendettas among the units of *genos* type were the first ones that allowed a special type of adoption. Thus, in the case when a member of a certain *genos* was killed, the stranger, responsible for crime - if he was not himself assassinated - either paid a damage, or was adopted, for to replace the suffered loss (*ibidem*: 13).

The units of *genos* type were themselves organized, in phratries (*phratiai*), each including more tens of clans (for instance, in Athena, 30 of *genos* units). The phratry, initially a war comradeship, appears subsequently as an association with prevalent religious character, but with important attributions of civil law. On the occasion of the annual holidays, the children born in the mean time were presented to the phratry for legitimation. Also the wives were forced to go through this scenario of legitimation and so much more the foster children, that must be necessarily recognized by the members of this association.

At the old Greeks, the adoption tried to get along with at least two necessities, a religious one and a juridical one: no family, attached to a hearth and the own domestic cult, must not die out; but then, the patrimony could be handed down to a direct descendant, only. For these reasons, even when a stranger was adopted, this became a legitimate child that perpetuated the religious tradition and continued to administer the familial patrimony. Also, he represented the family in the fortress meeting that was in fact a union of families, only.

As a person to can adopt on somebody, this must be a major man (over 18 years) and to have no children. It is highly interesting that, when the person making the adoption had yet children, this was bound to bereave these children of the quality of legitimate successors, through a real renouncement – *apokeryxis* (Rachet 1999: 124). By all these, if after adoption, the legitimate children were born, these had equal rights to inheritance with that being adopted one.

The adoption didn't represent a difficult act at Greeks: it was enough an agreement between the citizens alive, or a willed provision. The adopted person must be a citizen of fortress, or to be naturalized in that *polis*; he lost all the proper rights from the natural father, but kept those from mother that gotten back him. Not rarely, it was happened as the adopted persons being already adults when the adoption was made and in this case they were forced to be guardian for the minor children of the foster father, as well as for him legitimate daughters that must be endowed and married by them (*ibidem*). Not so common was the provision that allowed to the adopted person to contract himself a marriage with one from the daughters of the person making the adoption. This conjugal union could be just pointedly stipulated in the contract of adoption, especially if the person making the adoption had a single daughter.

Another form of adoption was that resulted from the children exposure, custom practiced both at Greeks and, how we shall see, at Romans. At least in the beginning, the custom of the children exposure wasn't very prevalent in the case of Greece. In Teba, there were even severe restrictions, the child being gone away ahead of some magistrates, the sole persons with the power to give a child to a family in order that being upreared and, possibly passed into a slave. At Ephes, the exposure practice was allowed only when the poverty of the family was well settled (*ibidem*). There where the custom was accepted, the child was exposed in the fifth day from his birth, usually, in front of a temple. He carried necklaces and amulets as possibly later on being recognized. In principle, the father kept his parental power and could subsequently vindicate his child. But in practice, this thing was unlikely if the person that took the child, didn't reveal his identity. The exposed children became either slaves, or were adopted, so getting full legitimacy in the new families.

The custom of the exposure will know a larger prevalence after the IV th century B.C., when a general degradation of the familial relations is found. The concubinages become a norm and Greeks "elude as more as possible from the paternity duties" (Glotz 1992: 361). The children are not too much wanted, just as a great connoisseur of the Greek civilization notes: „To have girls nobody want; to have a son is too much" (*ibidem*).

Otherwise, the Greek fortresses had permanently demographic problems due to the urban very reduced space and the agrarian little surfaces. For these reasons, a real collective phobia concerning the population congestion managed to very drastic proceedings for the limitation of the birthrate: the abortion, the infanticide and the abandonment became more frequent. Just great philosophers, as Plato or Aristotle, supported such starkly proceedings, although in practice the demographic efficiency was negative, the decease rate being much more than the birth rate. The gradual depopulation of the fortresses stands testimony. But, on the background of this obsession concerning the risk of the population congestion, the abandonment became more frequent and the abandoned child and taken under the care of unfeeling persons, became just a favorite personage of the Greek theatricals (*ibidem*).

In **the Roman society**, the adoption was a prevalent custom and well legally regulated. As in the case of ancient Greece, from which the Roman civilization was very much inspired, there were more forms of adoptions and all must be understood in accordance with the social and ideological conditions of the epoch. Like to Greeks, the status of the children in the Roman society - dominated by the extreme authority of the paters (*pater familias*)– was not at all similar to that hodiernal one. The Romans, specially the aristocrats, are more interested in the patrimonial side, than are emotionally attracted by the childhood qualities: „The children, moved here and there as some pawns on the table of richness and power, are not little cherished and spoiled souls..." (Veyne 1994: 29)[2].

The most prevalent form of adoption (*adoptio*) was represented by the juridical act wherewith a goodman took under his paternal power (*patria potestas*), as son or daughter, a member of the other family, being also under the paternal authority. This act was concluded in front of a magistrate (the praetor) and consisted in "the destruction" of the paternal power of the natural parent, after the model of the devolution. The procedure was quite complex, presupposing a threefold fictive sale to a third person, followed by an *in jure cessio* in favour of the person making the adoption[3]. Usually, the consent of the adopted person was not required. But in his new family, he had all the rights of the natural and recognized children[4]: had the father's name, was his heritor, venerated the domestic Gods (called *lari*) of the new family. Initially, his sole ties with the native family were the blood bonds, subsequently receiving the right of partial succession of the native family, too (Pricopi 2000: 55). It is important to be noted, as that *potestas* of the person making the adoption was not enlarged upon the descendants of the adopted person.

A specific form of adoption was represented by adrogation (*adrogatio*). In this case, the adopted person was himself a person *sui juris*, in other words, took away from *patria potestas* (Fredouille 2000: 18). Because the adrogation was practically the adoption of a *pater familias* by another *pater familias*, the consequences and the formalities, required by it, were much more important than those for the proper adoption are. In fact, a family was destroyed by the adrogation: the familial cults were lost (*detestation sacrorum*) and the patrimony, like all the rights of succession entered in the possession of the person making the adrogation. In this situation, an investigation regarding the conditions of the adrogation, made by the pontiffs, accompanied by a decision of the Curia committees[5] (the oldest people's assembly), were included in the proceeding. In front of these committees, a magistrate addressed to the person making the adrogation, the question if he wanted to become *pater* of the adrogated person and this had to confirm that he wanted to become his *filius*. Unlike the adoption, the adrogation was based therefore on the consent of the adrogated person. The people's assembly had to agree this action (*rogatio*), which so got power of law. Opening with the Dominus period, the adrogation could make ahead the group of 30 lictors, which was managed by a magistrate and with the previous and essential concurrence of the pontiffs. After some authors, this form of adrogation would be appeared as far back as the beginning of the Empire, they pleading the fall in desuetude of the people's assemblies: in other words, the pontiffs was those that authorized the adrogation at last (*cf.* Ciucă 1998: 184). A particular case of adrogation is mentioned in Roman Egypt, where a contract was concluded between the adrogated person and the person making the adrogation, wherewith this rearward compelled himself to treat the adrogated person as a son, but without getting parental power upon him (*ibidem*: 185).

The conditions of the adrogation required as the person making the adrogation had no children and no expectation related to a child in future (what according to the custom, supposed to be exceeded 60 years). The adrogated person also had to be *sui juris* and *capable* (Pricopi 2000: 55). Through the entering in the new family, this rearward became the agnate of the agnates belonging to the person making the adrogation and lost any agnatical tie with the native family. If he had children, these entered in the family of the person making the adrogation as nephews of this, the act having therefore effect, as opposed to that of adoption, upon all the descendants of the adrogated person. More, if the adrogated person was in debt, the debts were canceled, as effect of *capitis dominutio* (*ibidem*).

Beginning with the Emperor Antoninus Pius, the conditions of the adrogation related to age were changed: the adrogated person had to have over 25 years, but to be with 18 years younger than the person making the adrogation. Therefore, the age of this rearward could come down below 60 years. The Emperor

Diocletian will confer on the women, too, the right to adrogation (the adrogated person being fictitiously considered as son born from a legitimate marriage); and the plebes will receive the right to adrogation, once with the recognition of their people's assemblies, so-called *tribute – comitia tributa* (Ciucă 1998: 185).

Concerning the abandoned children, otherwise very numerous, their fate was not at all enviable. Some survived and the future for those abode alive was the slavery in the majority of the situations. Those that succeeded to demonstrate their origin from freemen, were very few, the most famous case being that of the Emperor Vespasian's wife (Veyne 1994: 21).

Conclusively, at Rome, the adoption covered more finalities: „was a way of stopping of a family disappearance; was at the same time a mean of getting the quality of paters, that was required by the law to the candidates for public honours and government of the provinces: the adoption brought all what and the marriage brought" (Veyne 1994: 27). For those without children, the adoption, in the both forms, assured a legitimate posterity, for the natural children, it brought the juridical recognition, the adoption of the Latins by the citizens of Rome, brought to Latins the citizenship and the Emperors appointed through adoption a presumptive successor. This last situation is supported by many famous examples: Caesar adrogated on Octavian Augustus, founding so the next imperial Julian - Claudine dynasties; the Emperor Galba, widower and with two sons prematurely died, adopted a noble young named Pison and the examples could be continued (*ibidem*). The adoption/the adrogation, like the marriage, were an important way for the adjustment of the patrimony fluctuations. For instance, a foster-father that appreciated the respect of his foster-son to him, could adopt him in the moment when he became an orphan one. If the foster-father, following to the submission of the son to his authorities, came into the possession of the inheritance, isn't any the less truth, that this rearward could benefit by a brilliant career in Senate, in this way, the adoption causing directly the careers.

Along with the fall of the Western Roman Empire (476 A.D.), the European world was divided in two large areas of culture and civilization: the Occidental area, where appeared the diverse barbarian Germanic states and the Byzantine area, the Eastern Christian Empire, more and more an Oriental and Greek one, but which wanted to keep the Roman patrimony, inclusively in the law field.

The barbarian states, appeared on the ruins of the Roman Empire, tried to reproduce the Roman order, which they admired, but keeping many from the laws of the traditional Germanic law. If we keep also the influence of the Christian doctrine on the mediaeval law, we have, therefore, three elements - different to a great extent - which cause the norms concerning the adoption in the centuries of the Middle Ages.

In the first centuries of the **Middle Ages**, especially in the barbarian states, the adoption was made under the Germanic patriarchal norms. The family, found under the indisputable authority of the man, was an expanded one. It got together far relatives, widows, orphans, nephews and nieces and was claimed from a *stirps*, a family of clan type or dynastic origin. Therefore, the child's protection was made in the large frame of this patriarchal family, but the polygamy practiced by Germanic peoples (Francs, Vikings) for a long time, gave the right of succession to the children of the first wife, only (Rouche 1994: 186-187).

The new structure of the society, the feudal one, as based on the personal relation between senior and liege, was itself a general form of adoption. The senior's position was comparable with that of a *pater familias*, and his authority had a well-marked familial character. For this reason, the paying homage to the seniors by lieges was equivalent *de facto* to an adoption action: „Arrived at the adult age, the warriors were given to the fortress leader through gestures that meant, some of them ... the offering of the proper person, and others ... ratified the mutual fidelity. Through these rites, a kind of pact was concluded and this placed those two partners in relations similar to the kinship ties." (Duby 1995: 41)[6] This type of tie surrounded the senior with their own „private ones", and „these were his legitimate or illegitimate sons, nephews or cousins" (Duby, Barthélemy, de la Roncière 1995: 41), brought together around the nobiliary residence, as in a large family[7]. The illegitimate sons were very numerous – especially that, for instance, the Galo-Romans were accustomed to live in concubinage with their bondwomen– and the frequent conflicts in this war society, as well as the epidemics, let countless widows and orphans. Since the young widows were always forced to marry again, the orphans entered under the new father's paternal authority. In this situation, their life was often very hard, when the foster-father had already children, sole successors.

In the rural world, the unwanted children were often abandoned, and the infanticide was not a rarity, especially in the case of the poor families, the girls being usually the main victims. By all these, the Christian morality impugned hardly the infanticide and for this reason the abandon was often the chosen solution. The unwanted children were abandoned at the entrance in churches, the priest notified their finding and usually the discoverer became the child's owner, the child being passed into a slave.

The custom of leaving the children in monasteries as to be upreared was quite frequently. The Saint Benedict's rule foresaw evidently the conditions for the receiving of the new born children in the monastic community: „If the child is very little, the parents will write the above mentioned application, will

wrap up both the application and the child's hand in the sanctuary cloth and so will be offered" (Rouche 1994: 171). These children adopted by monasteries were named „oblates" and many religious communities were transformed in real kindergartens, especially in the Galo-Roman area (e.g. France), where „the foster paternity of heathen origin got naturally a Christian value" (*ibidem*). The oblates received a religious schooling, but they could leave the monastery at the age of majority.

The Christian doctrine, through the sponsorship institution, assured another frame, very prevalent, for the adoption, when a very high mortality cut loose frequently the young parents' life, and the orphans entered in the tutelary attendance of the sacerdotal parents (*ibidem*: 238).

Beginning just with the century VIII, in some urban centers, especially in the Italian urban centers, appeared the orphanages. These will be gradually multiplied, although the funds of these institutions will be too low for the orphans' upbringing (King 2000: 246-247).

Along with the Renaissance, the child's status was improved, but the number of the abandoned children continued to be very big. In the so-called bedlams (as those from Florence), where those „trovatelli", the founded children (Duby, Barthélemy, de la Roncière 1995: 281, 310), were very numerous, the mortality remained dramatically, even in the centuries of the Renaissance (Klapisch-Zuber 1999: 278-279).

The Byzantine Empire claimed permanently from its predecessor, the Roman Empire. In practice, during of its millenary existence, the Byzantine Empire adapted to proper conditions in many areas, the Roman legislation, the family law suffering modifications, too.

Against the Roman times, the norms of adoption suffered diverse adaptations, especially through the legislative proceedings of the Emperor Justinian. On his initiative, the juridical action of adoption was much simplified –after the model already verified in the Greek provinces of the Empire–, a statement of the person making the adoption ahead of a magistrate being enough (Pricopi 2000: 54-55). In the Byzantine law, the adoption still kept some drawbacks that were inherited from the proper Roman law: if the adopted person was emancipated by the foster father, then this lost both the rights of succession in the native family and those in the family making the adoption[8]. For this reason, Justinian created two types of adoption: one with full effects (*plena*), rarely applicable, when the adopted person was cognated with the person making the adoption and therefore, even emancipated he didn't lose the rights of succession, which he had in this position; the second type of adoption (*minus plena*) had more restricted effects and kept untouched the succession rights of the adopted person in the native family, so being removed the risk as no inheritance remaining to this (*ibidem*: 55).

The objective and the form of the adrogation were to be changed, too. Since the whole legislative power belonged to the Emperor, this was not still materialized through a *rogatio* ahead the people, but through a *rescript*, initially ahead the prince, subsequently, beginning with Justinian, as private action. By the loss of the religious meaning for the familial cult, the adrogation was transformed in a goodwill action of the person making the adrogation; the indebtedness of the minimum age of 60 years disappeared definitively, being enough as this to be more aged than the adrogated person, only (*ibidem*: 56).

In the late centuries of the Byzantine Empire, „the foster filiation appeared seldom in practice and more in legislation" (Patlagean 1995: 303). The Emperor Leon VI[th] extended the right to adopt to women and eunuchs –very numerous, especially in the structures of Byzantine power–, despite the incapacity of those rearward to procreate. The Christian influence is very important for the understanding of this action, because canonical law laid the sacerdotal relation beyond the bodily relation. As concerns the Byzantine women, many of them were widowed when they were at the apogee of their renown, or their power. These rich and influential widows continued to be real householders, even when their sons were adults (Talbot 2001: 151). In these conditions, the woman's status was improved, the right to adopt naturally following to this change of status.

Owing to the importance given by the Byzantine society to the successors on the male line, a fundamental cause of adoption was the couples' agenesis. Some aristocratic women didn't hesitate to mime that were impregnated, buying instead the child of a poor woman as to assure a successor to the husband (*ibidem*: 146). In other situations, the parents could take the decision of a child's adoption for compensating the loss of the own child. So, the famous bookish man Mihail Psellos made, after his little girl, Styliana was dead (*ibidem*).

The fraternal adoption continued to be prevalent, too, especially in Balkans, despite to the explicit interdiction of this by the canonical law; this type of adoption was enough prevalent as some rogation books to include indications related to the required rite for the fulfillment of this action (Patlagean 1995: 304-305).

As a short conclusion of those previously written down, it can be noticed the oldness of the adoption institution which, in diverse forms, constituted, a lot of time, a form of coherent, social institution with the mission to assure both the protection of the minor children –especially of the orphans and the illegitimate sons– and, mainly, a way of the patrimony transmission in the case of the families without successors. Especially in the case of the Roman law, the fundamental source of inspiration for the mediaeval law, but also for the modern law, this last aspect with patrimonial meaning had precedence. The pre-eminence of the person making the

adoption interest didn't exclude absolutely the emotional charge of the adoption, or at least the interest of the adopted person, even a material one (as in the case of adrogation).

Such as we shall point out in a future study, the Romanian mediaeval law didn't make exception from the universe of the European mediaeval legislation. It continued along the centuries to include diverse elements, beginning with the practices related to the unwritten law of the village communities and ending with the princely laws, considerably inspired by the Byzantine legislation and on this succession, by the old Roman law, as well as by the doctrine of the Orthodox Christian Church.

Must be underlined that, in all the historical periods, the institutionalization, more or less an accurate one, of the adoption, represented a variable directly connected to the economic, social and ideological structure of the epoch, implicitly to the child's status, a status improved in fundamental points by the modern epoch. Only so can be understood the mutation without preceding materialized in the century XX, when, internationally, the meaning of the adoption institution is changed, it is becoming *a proceeding of the child's protection and upholder* by means with a permanent character and that is looking for the child's integration in an alternative familial medium. Consequently, the interests of patrimonial type become slightly the peripheral ones, getting pre-eminence the considerations with humanitarian and affective character.

NOTES:

[1] The situation is not valid only for the societies being in a organization study of race type, tribe type, mostly of "primitive" type, but also for the European archaic societies, ethnographically studied and which demonstrates the survival of this special importance given to the kinship, even to a fictive one and we will have the occasion to see the presence of this aspect in the Romanian unwritten law, too.

[2] The same renowned specialist, commenting the uncommon Roman paternal authority, notes: „At Rome, the blood voice was not very heared; that which was loudly heared, was that of the family name." (*ibidem*: 21).

[3] This procedure isn't evenly applied over the whole area of the Empire: in some Greek provinces, the adoption was made easier, through an act consisiting in the registration ahead the magistrate, of the triple consent – adopted person, person making the adoption and natural parent (Ciucă 1998: 187).

[4] At Romans, the son recognition by the father was compulsory. So, by taking this (*tollere*), the father used a fundamental prerogative of his authority. Without this recognition, the new born child was, like to Greeks, abandoned, in other words exposed, ussualy in front of the temples (Veyne 1994: 19-22).

[5] The people's assemblies (*Curia committees*) could be changed, at Rome (because here functionated, only), in *comitii callate*, the sole organs with the power to approve the adrogation of a family, or to fulfil some religious indebtednesses.

[6] In the Franc society, the natural or foster father was occupied with the initiation of the young man in the war activities, the status of liege, often taking the place of the juridical recognition of the filiation, during of the whole Middle Ages (Rouche 1994: 197).

[7] The historians undeline the fundamental difference between the Roman family and the Germanic family: this rearward, because didn't benefit of an effective protection from the Courts, was necessarily very numerous – condition *sine qua non* for the life and wealth conservation in the troubled centuries from the beginning of the Middle Ages; for this reason, the illegitimate sons were naturally accepted within the big household (*ibidem:* 174).

[8] In the clasical period of the Empire, truth to say, a senatus-consult was issued as a protection character and according to this in a family with three children, the foster son got compulsorily a fourth of wealth, of course, if he was abusively emancipated by this (Ciucă 1998: 188).

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