
LEGAL DISCOURSE ON THE JUDICIAL SYSTEMS OF UNITED KINGDOM AND UNITED STATES OF AMERICA

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ABSTRACT

India is Sovereign Socialist Secular Democratic Republic. Most of the independent nations have been the colonies of the British empire. However, each of these independent nations like USA, Australia, etc. does have their own Constitution which provides for establishment of its own system of governance. United Kingdom has an unwritten Constitution but had the power to govern the significant geographical territory. This paper endeavours to compare the judicial systems of United Kingdom, United States of America and India in order to introduce the crude concepts which are cornerstones for the formation of any judicial system.

Keywords: Westminster model, Parliament, Independence of judiciary, Systems of Government, Federalism, Judicial Review.

INTRODUCTION:

The judicial system of United Kingdom (U.K.) is the product of evolution rather than emergence by an incident at a point of time. The written Constitution of United States of America (U.S.A.) came into force on June 21, 1788. Article III Section 1 of the Constitution of America provides that the judicial power of the United States shall be vested in one Supreme Court. The purpose of the judicial system is to secure Human Rights. When this purpose is secured, it is said to have achieved **Justice**. The set of rules formulated to provide justice is called Law.

Human Rights as defined by Sir John Locke is the Right to Life, Liberty and Property. The whole judicial system has been constituted to secure these basic human rights. Sir Thomas Hobbes said that man is by nature cruel, brutal and wants to compete each other so as to establish his monopoly.¹ But this activity may harm the human Rights of other fellow beings. Therefore the institution of State emerged to administer the fellow beings.

But a question arises- Why there is a need to secure Human Rights? We all believe that there is one entity named God who administers this whole World. No one is above it and he is the sole creator. God has made all men equal. Hobbes said that it is the nature of men to fight and suppress each others' wishes. As per the religious texts, no one has right to infringe others Human Right. So there is a need to secure human Rights for which the concept of State and the judicial system came into existence.

EMERGENCE OF BRITISH COURTS:

From fifth century, Britain was ruled by a King and a Council of members to advise the King. At that period all the disputes were decided by the king and his Council (*Magnum Concilium*). But *Magnum Concilium* met only thrice a year.² So in Norman period (1066 onwards), to help the King carry on the Government during the interval when the *Magnum Concilium* was not in session, another small body called *Curia Regis* or Little Council emerged out of the *Magnum Concilium*.³ The functions of *Curia Regis* were same as that of the Great

¹ Eddy Asirvatham and K.K. Misra, *Political Theory* 100 (13th edn. 2011, reprint 2012, S. Chand and Company Ltd., New Delhi); <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (last visited 07.04.2023); <https://bensguide.gpo.gov/u-s-constitution-1789> (last visited 07.04.2023).

² Vishnoo Bhagwan and Vidya Bhushan, *World Constitutions - A Comparative Study* 4 (9th edn. 2009, reprint 2012, Sterling, New Delhi).

³ *ibid.*

Council.⁴ Later the senior members of Great Council became the members of Parliament. From the *Curia Regis*, following bodies developed⁵-

- (a) Privy Council and the Cabinet;
- (b) The exchequer (the Treasury);
- (c) The High Court of Justice.

The constitution of United Kingdom is a result of evolution and its major part is unwritten.⁶ It is formed on Conventions.⁷ Conventions are a set of rules formulated on an incident which later takes the shape of law. The Constitution consists of Charters, e.g. Magna Carta signed by king John on June 14, 1215⁸, the Bill of Rights 1689⁹, Statutes and Judicial Decisions.

The Parliament of Britain consists of two houses- the upper house- House of Lords and the lower house- the House of Commons. The members of House of Lords were sovereign having powers of legislation, execution and judicial functions.¹⁰ But after thirty years of the Glorious Revolution the powers of Lords started declining and by the Act of 1911, supremacy of Commons in law-making and political functioning was established. The House of lords exercise judicial functions and it is the highest Appellate Court in Britain. There is no power of Judicial Review to British Courts.¹¹ Britain follows Parliamentary system of Government with Parliamentary supremacy. There is no Judicial supremacy.

COMPARISON OF FEATURES OF JUDICIAL SYSTEM IN U.K. AND U.S.A.:

1. JUDICIAL REVIEW:

The power of the Court of Law-

- (a) to ascertain the constitutionality of a law passed by Parliament and to declare it null

⁴ *ibid.*

⁵ *ibid.*

⁶ *Supra* note 2 at 13.

⁷ *Id* at 14.

⁸ <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/> (last visited 07.04.2023); <https://www.unitedforhumanrights.in/what-are-human-rights/brief-history/magna-carta.html> (last visited 07.04.2023);

⁹ https://avalon.law.yale.edu/17th_century/england.asp (last visited 07.04.2023).

¹⁰ *Supra* note 2 at 85. The House of Lords is the oldest second chamber in the World.

¹¹ *Id* at 99.

and void;

(b) to interpret the Constitution and law according to need of the time is called Judicial Review.¹²

British Courts do not possess the power of judicial Review while Supreme Court of America have the power of Judicial Review.

CAUSE OF NO JUDICIAL REVIEW IN BRITISH COURTS:

The House of Lords was both an executive body and the Highest Court of Appeal. There was no independent organ of Judiciary. The House of Lords does not have power of judicial review probably for the reason that if the same body will approve the laws made by the House of Commons and will have power to review its constitutionality then it may act arbitrarily and there will be a chance of it becoming a dictator.¹³ From 2009, the Supreme Court has been constituted as an independent organ in Britain.¹⁴

2. INDEPENDENCE OF JUDICIARY:

(A) QUALIFICATION FOR A JUDGE-

In U.K., the highest appellate Court is the House of Lords. The members of House of Lords are-

- (a) 12 Law Lords;
- (b) 26 bishops of the Church;
- (c) the hereditary peers and many other members.¹⁵

¹² It denotes the power of the higher judiciary to test the validity of any law passed by a Legislature or any executive action taken by a Government. see Dr. G.B. Reddy, *Judicial Activism in India* 15 (Millennium edn. 2001, Gogia Law Publications, Hyderabad).

¹³ "..., the Courts in England have come to exercise only a limited power of judicial review in the sense that they review the validity of subordinate legislation and the other executive acts of the government and strike them down if they are 'ultra vires' the provisions of the parent Acts under which they are made. But the English Courts, including the House of Lords, do not have the power to declare the Acts of Parliament as null and void on any ground whatsoever. The absence of a written constitution and the algal recognition of the doctrine of Parliamentary sovereignty seem to have inhibited the emergence of a full fledged doctrine of judicial review in England." see *Id* at 42.

¹⁴ <https://www.supremecourt.uk/about/history.html> (last visited 07.04.2023).

¹⁵ <https://parliament.uk/about/living-heritage/evolutionofparliament/> (last visited 07.04.2023).

Its strength is of 700 members by the year 2005.

The appointment of the bishop of a Church as a person to do 'Justice' is justified according to Natural Law. In “Quest For Justice at the Threshold”¹⁶, it is written that “ a Judge should have the qualities of a saint.” The Judges in Judiciary of America and India are appointed by qualifying the exams devised for selection. These exams have the goal to ensure - (a) Legal knowledge of the candidate; (b) Legal way of thinking and the requisite extent of following of principles of Natural Law.

The principles of Natural Law are unwritten and therefore we term it as indefinite. It may not be precise but its purview was religious and is extended in the contemporary era to determine the scientific validity of the act.

The Natural Law does not provide written guidelines but it applies everywhere in accordance with the act done. Human has devised legal system for maintaining peace in the society. This legal system is operated by human beings. The Indian and American judicial system contains written set of principles but they vary according to the circumstances, even from judge to judge. Nothing is absolute. The Honourable Judges also have faith on God and they pray to perform their duty as good as possible. But the judgments on the same issue having similar circumstances differ and either view becomes a settled judicial precedent. These fluctuations may cause harm to the parties because the act which is valid according to current law might be void according to the law of that period of time. This 'harm' is compensated and balanced by the Natural Law?¹⁷

It is the human tendency to endeavour to establish its own 'right' or ‘monopoly’ on a particular object.

The person who endeavours to establish such a monopoly justifies his act by a set of rules and proves it. On the same time for the same object, some other person may provide different rules (ideology). Positively, to resolve the conflict between varying notions to maintain peace in the

¹⁶ G.K. sharma, *Quest for Justice at the Threshold* (Millennium edn. New Delhi, India).

¹⁷ This predilection towards the the natural law is based on individual notions of the author. However, it is notable that Montesquieu, Socrates, St. Thomas Aquinas, St. Augustine, etc. emphasized on the sanctity of natural law and considered it to be of divine origin, which is omniscient, omnipresent and omnipotent to serve its subjects.

society and to restrict any harm to the fellow beings due to such contradicting opinions, the legal researchers in India and America have devised the system of law.

For example In India, Gandhi and Ambedkar have conflicting opinions regarding separate constituency for Dalits. Therefore the great Indian scholars have discussed together and drafted a set of rules for conduct in the administration. This document is known as the Constitution and is in written form.

In Britain, House of Lords is the highest Court of Appeal.¹⁸ The whole judicial system of United Kingdom is based on conventions. Conventions are a set of rules devised for administration according to the need of the time and has taken the shape of law. The conventions are unwritten and besides the Conventions, the English Constitution is composed of 'Charters, Statutes, Judicial Decision and Eminent works.'¹⁹ The eminent works and customs are called Common Law. These principles are used to do justice by the members of House of Lords. The members of House of Lords include legal researchers, bishops of the Church of England, and many other great fellows. These persons are not the legal scholars but are 'saints'. Their occupation is of a saint. The great legal and philosophical scholars have become Great because they have recognized and systematically followed the principles of Natural Law. Therefore these persons are considered fit to provide Justice.

The written system of providing Justice may be biased or having defects since it is drafted by a human being but the unwritten judicial system of United Kingdom²⁰ expressly requires reconsideration of rules on the same issue by all the 'saints'. Therefore it seems to be more practical in providing justice at least 'in theory'.

The ordinary members of the House of Lords have the right to vote on the decision of a legal question but in practice, only the 12 Law Lords hear appeals.²¹ Therefore the members of Judiciary in Britain also possess legal qualification and those who do not (bishops and peers), their right to give decision could be justified by the term 'saint' discussed in this section.

In America, the Judges of Supreme Court and of lower judiciary possess legal qualification.

¹⁸ <https://www.supremecourt.uk/about/appellate-committee.html>

¹⁹ <https://consoc.org.uk/the-constitution-explained/the-uk-constitution/>

²⁰ <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution>

²¹ *Supra* note 2 at 90 and 102.

(B) ORGANIZATION OF JUDICIAL SYSTEM

In Britain, the judicial system is associated with the function of executive. Therefore it is not an independent organ.

In America, Judiciary is completely an independent organ. This is declared by Article III Section 1 of the Constitution of United States of America.

PRINCIPLE OF CHECKS AND BALANCES

There are three organs of Government- legislature, Executive and Judiciary. Montesquieu stated the principle of separation of powers among the organs of government. Therefore, no organ of Government can be supreme. So in order to curb arbitrariness, the Government system in these countries follows the principle of checks and balances.²² It means one organ checks the validity of the act done by the other organ.²³ Some of the concepts that are used to implement the principle of checks and balances are-

- (i) collective responsibility (as between members of Parliament) - This concept provides that every member of the Parliament is responsible for the acts of commission and omission of other members of Parliament.²⁴
- (ii) Judicial Review- Judiciary has power to check the constitutionality of an act passed by the Parliament and to declare it null and void if it violates the Constitution.
- (iii) Independence of judiciary to ensure Judicial Review.²⁵
- (iv) Appointment of Judges of the Supreme Court and high Officials by the Executive

²² The conclusion of Montesquieu was that: "When the legislative and executive powers are united in the same person or body of persons there can be no liberty because of the danger that the same monarch or senate should enact tyrannical laws and execute them in a tyrannical manner". see *Supra* note 12 at 49.

²³ In America, the theory forms the basis on which the structure of the constitution is based. see Article I, II, III of the Constitution of the United States of America. There is scant respect given to the theory of separation of powers in England but judicial review has not become firmly entrenched in the constitutional practice. see *Supra* note 12 at 50-53.

²⁴ Article 75(3) of Constitution of India envisages the principle of collective responsibility among the members of Parliament towards the lower house, i.e. the House of the People. In respect of responsibility of the ministers of Parliament of Great Britain, see *id* at 41-43.

²⁵ *Supreme Court Advocates' -on-record Association v. Union of India*, (2016) 5 SCC 1.

Head of the State- in America.²⁶

In Britain, the Prime Minister (Head of Government) selects and the Queen (Head of State) appoints the members of Cabinet.

Therefore in America and Britain, no area of the public policy is the exclusive authority of just one branch. In Britain, House of Lords is an executive body and an independent Supreme Court has been constituted since 2009.²⁷

(C) APPOINTMENT OF JUDGES:

In Britain the members of House of Lords are partly hereditary and partly those appointed by Acts of Parliament. The Law Lords are responsible mainly for deciding a case in the highest Court of Appeal. There are presently 12 Law Lords . They are appointed by the Crown under the provisions of the Appellate Jurisdiction act, 1876 from among the distinguished jurists.

In America, The judges of the State Courts are elected by the citizens of the State. The Judges of the Supreme Court are appointed by the President of USA.²⁸

(D) TENURE: The tenure of the members of Law Lords in Britain and of the Judges in Judiciary of America is fixed for their lifetime unless they are removed by order of impeachment. ²⁹

(E) SALARY OF JUDGES: The salary of the judges in judiciary in America are fixed during their tenure (lifetime). Similarly in Britain the salary of the members of the Law lords are fixed during their lifetime.

(F) REMOVAL OF JUDGES: In Britain, the Judges can be removed only by the impeachment procedure initiated by either House of Parliament when the Bill regarding

²⁶ Such a mechanism for appointment of the executive head of the State could be recognised in India, for example, the Prime Minister is appointed by the President who is the Executive Head of the State, the President appoints Chief Justice of the Supreme Court of India and on the same vein the authority to administer oath of office to the President is conferred on the Chief Justice of the Supreme Court.

²⁷ Corporate Officers of the House of Lords is an executive no-departmental public body, sponsored by the public office. see <https://www.gov.uk/government/organisations/corporate-officers-of-the-house-of-lords#:~:text=The%20House%20of%20Lords%20is,sponsored%20by%20the%20Cabinet%20Office.> (last visited 06.04.2023)

²⁸ <https://www.supremecourt.gov/about/about.aspx> (last visited 06.04.2023)

²⁹ *Supra* note 2 at 99.

the same is passed by a majority of the two-thirds of the members of both House sitting and voting.³⁰

In United States of America, the Senate and House of Representatives have power to initiate impeachment procedure only against the Judges of the Federal Courts. Article I Section 2 paragraph 5 of the Constitution of America confers sole power on the House of Representatives to try the impeachments. Article I Section 3 paragraph 6 of the Constitution confers sole power to try all impeachments to the American Senate.

Article III Section 2 paragraph 3 of the Constitution of America provides that the Trial of all crimes, except in cases of Impeachment, shall be by jury. This implies exclusive authority of Parliament to try all the cases of impeachment.

To ensure the concept of division of powers in the federal structure of Government in USA, Article I Section 3 paragraph 6 of the Constitution provides that in case of impeachment procedure against the President, the Chief Justice shall preside.

In United Kingdom House of Lords is both an executive body and a Judicial body. It enjoys original powers to try peers in case they are involved in any treason or felony against national interest. But now the powers of impeachment are solely vested in the House of Commons and the Cabinet members. It is luminescent that since House of lords is performing a judicial function so the power to impeach the Judges in judiciary cannot be vested in it.

COMPARISON OF OTHER FEATURES OF THE CONSTITUTION OF USA AND UK:

1. PARLIAMENTARY / PRESIDENTIAL SYSTEM:

The form of Government is said to be parliamentary when there is closeness between legislature and executive whereas in presidential system, the legislature and executive are independent organs.

Secondly, in parliamentary form of government, the Head of State and Head of Government are different persons. In presidential form the Head of State and Head of Government is the

³⁰ *Supra* note 2 at 90.

same person.³¹

Thirdly, in parliamentary form of Government, the Head of State has nominal powers and the real power vests on the Head of Government. The Head of Government is usually the Chairman of Cabinet ministry. In presidential form of Government, the Head of State and Head of Government is the same person and it possesses real powers under the control of the Parliament.

Britain has a parliamentary form of Government with parliamentary supremacy. The cause for such a system is- The British system of Government is a result of evolution rather than emergence at a point of time through a written Constitution. From fifth century, it is by Convention ruled by a king and his advisory Council. in Angevin- Plantagenet period (year 1135 onwards), Britain was ruled by King John.³² King John was a despotic ruler who lost the confidence of many of his supporters. As a consequence he was made to sign on Magna Carta* (the Charter of Civil Liberty) by a powerful section of the country “barons”. Later in 1295, King Edward I summoned certain number of people from each territory to meet in an assembly and vote over the proposed taxes.³³ This Assembly consisted of people's representatives called as the ‘model parliament’. In coming years the representatives in Parliament re-assembled in two Houses- House of Lords and the House of Commons. But the powers of the king and of the parliament were clearly not defined anywhere. As a result there was a conflict between king and members of Parliament regarding supremacy of opinion. The Parliamentarians had executed a written declaration of Rights called ‘Bill of Rights’ in February 1689 so as to restrict the movement like Glorious Revolution of 1688³⁴. These historical movements show that the Parliament is above the monarch.

Secondly a question arises- Whether there is Parliamentary sovereignty among the organs of Government? The answer is Yes.

The Judiciary is a part of House of Lords in parliament. House of lords is essentially an executive body with limited legislative powers to merely pass the bills sent by House of Commons. There is no power of Judicial Review probably for the reason that the same body,

³¹ <https://keydifferences.com/difference-between-parliamentary-and-presidential-form-of-government.html> (last visited 07.04.2023);

<https://demo.repositorium.uni-nke.hu/xmlui/bitstream/handle/123456789/1133/11szil.pdf?sequence=2> (last visited 07.04.2023).

³² <https://www.britannica.com/place/United-Kingdom/The-early-Plantagenets>

³³ *Supra* note 3 at 6.

³⁴ <https://www.historic-uk.com/HistoryUK/HistoryofEngland/The-Glorious-Revolution-1688/>

i.e. the House of Lords approves law, executes the law passed by parliament and adjudicates the question in Court of law.

Therefore the parliament can make any law, amend any law and abolish any law. There is parliamentary sovereignty among the organs of Government.

But this Parliamentary sovereignty is limited to –

(a) moral values³⁵ and norms of society;

(b) public opinion.

United States of America have presidential system³⁶ of Government with Judicial supremacy. The Judiciary have power of Judicial Review.³⁷

2. FEDERAL/UNITARY SYSTEM:

The structure of Government where power is divided between Centre and State or their subordinate bodies is called Federal System.³⁸

The structure of Government where power is concentrated at the Centre and all the subordinate units are directly controlled by the Centre is called Unitary system.

The United Kingdom follows Unitary system of Government. The reason is – United Kingdom does not have a written Constitution. The ancient system of fifth century where a King and an advisory Council ruled the people has evolved into a system having a Monarch as Head of State, a Prime minister as Head of Government, Parliament and Cabinet ministry. There is also

³⁵ Sujata v. Manohar, Studies In Human Rights 97 (V.T. Patil and T.S.N. Sastry 1st ed. PR Books, M/s. Ponrani Publications Delhi 2000).

³⁶ <https://bluebox.creighton.edu/demo/modules/en-boundless-old/www.boundless.com/political-science/definition/presidential-system/index.html> (last visited 06.04.2023).

³⁷ The best-known power of the Supreme Court is judicial review, or the ability of the Court to declare a Legislative or Executive act in violation of the Constitution, is not found within the text of the Constitution itself. The Court established this doctrine in the case of Marbury v. Madison (1803). see [https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=The%20best%2Dknown%20power%20of,v.%20Madison%20\(1803\)](https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=The%20best%2Dknown%20power%20of,v.%20Madison%20(1803)) (last visited 07.04.2023). Durga Das Basu, *Introduction to the Constitution of India* 40 (20th edn. reprint 2012, Lexis Nexis Butterworths Wadhwa Nagpur).

³⁸ Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution. see V. Dicey, *An Introduction to the Study of the Law of the Constitution* 157 (10th edn. 1959, reprint 1967, English Language Book Society, Great Britain).

existence of Local- Self Government. This is unitary system because all the units of Government are directly controlled by the Centre.

The United States of America follows the federal structure of Government. The reason is – The American Constitution is a written document adopted in 1789 which unified all the States into a Confederation. There are separate Constitution for each of the States but the National policy matters like foreign relations, defence, currency, etc. are decided by the Constitution of United States of America.

3. INTRODUCTION OF BILLS

The Bill is a draft law. In a Democratic system of Government, when a bill is passed by both Houses of Parliament, it becomes law. But the procedure for introduction and assent to the Bill is different in different countries.

LEGISLATIVE PROCEDURE IN THE UNITED KINGDOM

There are two houses of Parliament- House of Lords (upper house) and House of Commons (lower House).

House of Lords have delegated its legislative powers to the House of Commons by evolution especially through the Act of 1911. At current date, the House of Lords have no power even to introduce an ordinary Bill. It merely acts as a revisory chamber for bills passed by the Commons. If there is disagreement, the bill is discussed in joint sessions and the vote of Speaker is the final decision.

LEGISLATIVE PROCEDURE IN UNITED STATES:

There are two houses of Parliament- Senate (upper house) and House of Representatives (lower House).

Parliament is called Congress. Article I Section 1 of the Constitution of USA states that all the legislative powers herein granted shall be vested in a Congress of the United States.

Since the Congress is created by the specific provision of a written Constitution which vests only legislative powers, so it is an independent organ. Therefore an ordinary bill can be

introduced by either House and both Houses have authority to assent on it. But a money Bill can be introduced only in House of Representatives.

ORGANISATION OF COURTS

IN UNITED KINGDOM - The organization of Courts in UK³⁹ in the decreasing order of final authority is written as under-

1. House of Lords – It is the Highest Court of Appeal whose members are basically 12 Law Lords in the House of Lords.
2. Court of Criminal Appeal- It was set up Act of 1907. It consists of three Judges and it deals matters purely of criminal appeals.
3. Court of Assizes- It is held three times in a year. It deals grave offences.
4. Court of Quarter sessions- It receives appeals from the lower courts It consists of all Justices of Peace of the Country. It meets four times in a year so it is called Quarter sessions.
5. Court of Summary Jurisdiction- It consists of the Justices of Peace.

IN UNITED STATES OF AMERICA - The organization of Courts in USA⁴⁰ in the decreasing order of final authority is written as under-

1. Supreme Court of America- It is constituted by Article III Section 1 of the Constitution. It consists of Chief Justice and such other Judges as Parliament by law prescribes. It has appellate jurisdiction on cases from State Courts and Federal Courts. It has original jurisdiction in cases involving ambassadors, public ministers and consuls.
2. State Courts
3. Federal Court of Appeals constituted in 1891.

³⁹ *Supra* note 2 at 100-101.

⁴⁰ *Supra* note 2 at 239.

4. Special Federal Courts- It consists of following courts-

- (i) Customs Court of 1890;
- (ii) Court of Customs and Patent Appeals of 1910;
- (iii) Territorial courts set up by Congress.;
- (iv) Tax Court of 1942;
- (v) Court of Military Appeals of 1950.

CONCLUSION:

The judicial system in Britain is established by Convention whereas in America it is established by the procedure established by law of the land. The purpose of judicial system is to maintain peace in the society and thereby protect Human Rights and values. The judicial system is established by way of human efforts. It cannot be said to be absolute because it is the strive of human towards a World of all possibilities. Nothing is absolute and pre-determined. It is the duty of Judiciary to do Justice to the litigants.

Human behaviour cannot be studied with accuracy but the principle of Law of Nature is to strive for better conditions of humanity so the judiciary should continue its functions by confirming to the principles of Natural Law. The principle of Natural Law provides that if a matter is not codified by law of the land then it should be decided by principle of equity, justice and good conscience. This principle thus dispenses with the technical formalities inherent in the judicial process. I hope the concept of justice imbibed in these legal systems would provoke higher levels of human values.

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