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INTRODUCTION

Martin Loughlin's *Foundations of Public Law* represents a challenge as well as an opportunity for the discipline of public law[1]. It offers a radical and unique reworking of public law scholarship, converting it into a wide-ranging, interdisciplinary study of the political character of the state. This is challenging in its rejection of the idea that public law can meaningfully be captured through juridical doctrine alone, or by a method of positivist jurisprudence more generally. Instead, it requires an approach that is capable of incorporating political theory, political sociology and state theory. Public law is recast by *Foundations* as integral *to* these disciplines. By the same token, it provides a vital opportunity to free public law from its jurisprudential straitjacket. By bringing public law into conceptual and discursive interplay with other disciplines, *Foundations* offers to transform the discipline of public law into a vehicle for exploring the core elements and evolutionary character of the modern state.

Such a reworking demands critical interrogation. Can public law maintain its internal coherence if extended in this way? Does *Foundations* offer the normative resources to renew the discipline in the context of the many serious challenges it faces? Is *Foundations'* methodology a suitable one for understanding the concrete phenomena associated with public law, and in specific jurisdictional settings? The purpose of the articles presented here is to consider these questions, and to advance our understanding of the challenges and opportunities provided by *Foundations* for the development of the modern discipline of public law.

The Foundations of Foundations

Foundations offers a reconstruction of public law at once traditional and radical. It presents public law not simply as a discrete set of juridical doctrines and practices but as integral to our capacity to make political sense of the world. Public law is approached not as part of an autonomous legal system, or as a doctrinal offshoot of private law or common law, but as an essential feature of the modern political imaginary. Public law, in this account, is not derivative but foundational to the construction and maintenance of the modern idea of the state and its exercise of political authority.

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[1] M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010 [hereinafter *Foundations*].

If it is commonplace that in modernity this idea of the state and its authoritative apparatus of rule anchors our political being, *Foundations* argues this to be a thoroughly *juridical* phenomenon, but one that can not be grasped by focusing on the judicial branch of government or the positive law alone. It can only be grasped through an analysis of the key conceptual building blocks of state authority, along with an historical contextualization of their evolution over time.

This contextualization suggests that, although central to « seeing and thinking like a state », to constructing a scheme of political intelligibility, public law is in danger of being eclipsed, subverted or transformed in contemporary conditions – due in part to material changes in the nature and techniques of governing and in part to the pressures on the nation-state as the hegemonic locus of political power and authority[2]. But the danger also flows from the increasingly specialized and technical nature of the discipline of public law, a retreat encapsulated in the turn to systematizations of positive public law, which has its analogues in general jurisprudence (in the traditions of Kelsen and Hart).

Foundations of Public Law attempts to redefine the discipline of public law, away from a court-centric doctrinal jurisprudence concerned primarily with judicial review – whether in positivist or moralist guise – and towards a « political jurisprudence » based on the idea of political right. It a a project that aims at retrieval of neglected ideas and at re-foundation of the discourse of public law as much as a historical reconstruction of its origins and development.

In performing this radical reorientation of the enterprise of public law – radical only in the proper sense of uncovering and reclaiming its *roots* – *Foundations* draws on diverse but also traditional sets of materials, integrating legal scholarship as well as writings in political theory, social theory, moral theory, state theory (*Staatslehre*), and political science. *Foundations* analyses this in a historical rather than abstract orientation, integrating legal material from the UK, continental Europe, and the United States, much of which has evolved independently.

The manner of this synchronic retrieval adds a further disciplinary layer to the analysis as well as providing an evolutionary narrative, tracking the constitutional development of the modern state and the pressures it faces in the latter half of the twentieth century. In this process, *Foundations* develops a unique theoretical frame, incorporating work in the cannon of political and legal philosophy – Hobbes and Rousseau, Kant and Hegel, Schmitt and Foucault, amongst many others, – which has sought to uncover « the laws of the political », or the basic rules and precepts of political association. Throughout *Foundations*, these giants of political philosophy are rendered central figures in the tradition of political jurisprudence and of a reconstructed public law.

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[2] See e.g. C. MCAMHLAIGH, C. MICHELON & N. WALKER (eds.), *After Public Law*, Oxford, Oxford University Press, 2013.

For these reasons, *Foundations* stands as deserving of special attention, not only from public law scholars, but also from political theorists, constitutional theorists, constitutional historians and all those interested in the fate of the modern state and the chances of its survival, renewal or transcendence in the 21st century. Even those who contest the particular claims made in *Foundations*, or reject its overall endeavor will not doubt that it contributes centrally to this project, if only, as one major critique notes, because it now provides the starting point for any deeper inquiry into the subject of public law[3].

The purpose of this collection of essays is to begin precisely such an inquiry. And it aims to do so in a thoroughly critical manner, taking neither the methodology nor the content of *Foundations*' theoretical reconstruction for granted. To pursue this aim, we have integrated critical commentary by scholars from diverse traditions and disciplines who contest the claims – both general and particular – made in and by *Foundations*.

In the remainder of this introduction we first single out two features in *Foundations* that stand out for special attention: the integration of **law and politics** into a coherent conceptual scheme, and the historical integration of public law with the **state's evolving political form**. We then turn to consider, categorise and summarise the series of trenchant critiques made of *Foundations* in the articles that follow, in order to begin to reflect on where this criticism leaves the development of the discipline. Serious doubts remain about the viability of the project of *Foundations* as a whole as well as about its discrete claims; the doubts raised are conceptual and synthetic, methodological as well as particular. These doubts – and the critiques that generate them – will be categorized here under four headings: ***normative, materialist, methodological***, and ***comparative***, in an attempt to organize the set of critical reflections, and provide some coherence to the various complaints.

Law and Politics

Constitutional theory and public law scholarship commonly approach politics as outside the law, to be tamed or contained by law, or even as antithetical to law. Politics is presumed to follow a distinct logic of power as opposed to authority, or to inhabit the realm of fact as opposed to norm. Alternatively, politics is ignored, occluded by a formalist or positivistic approach to the constitution of the polity. In normativist traditions, particularly in a liberal constitutional imagination, public law exists to protect the individual from interference by the political organs of the state;

[3] D. DYZENHAUS, « The End of the Road to Serfdom », *University of Toronto Law Journal* 63, 2013, p. 326. Other review articles include M. WALTERS, « Is Public Law Ordinary? », *Modern Law Review*, 2012, p. 894-913; J. GRANT, *Times Literary Supplement*, 7 Oct. 2010, p. 22-23; C. THORNHILL, « Martin Loughlin, Foundations of Public Law », *Public Law*, 2011, p. 673-679; B. MAUTHE & T.E. WEBB, « Realism and Analysis Within Public Law », *Liverpool Law Review* 34, 2013, p. 27-46.

constitutional scholarship then consists in identifying, specifying or offering suggestions for improving structures to constrain and limit the powers of the state, explicating their interrelationship and their overall architecture with particular attention to the judicial branch of government.

Foundations suggests this ubiquitous vision to be misleading. Public law, understood in the broader sense of political right, does not simply constrain the organs of the state; it also creates, shapes and maintains them. It does so by establishing and sustaining the governing relationship between rulers and ruled. And since this governing relationship is not exhausted by the positive law narrowly conceived, public law as political jurisprudence captures all juridical aspects of its institutionalization and regulation, and also, significantly those occasions of abrogation or suspension of ordinary institutional forms in response to crisis or emergency.

Public law as seen through the lens of political jurisprudence thus consists in the fundamental laws and practices that structure the governing relationship as well as those prudential judgments required to maintain – or regain – stability in that relationship. The set of practices and the manner of their ordering is captured in the term *droit politique* or « political right ».

This might be usefully contrasted with what in the English-speaking world has emerged in the field often referred to as « general jurisprudence ». If the thrust of general jurisprudence (in the tradition of Kelsen and Hart) is to provide an account of the systemic coherence of positive law as such, the purpose of *Foundations* is to provide an account of the socio-epistemic coherence of the laws of politics, of what gives claims to political authority traction and of what undermines them in the world of lived experience.

To capture the phenomenon of public law therefore demands an analysis that transcends the positive law alone; it demands, in the vernacular of *Foundations*, a « political jurisprudence ». This is reconstructed by Loughlin through an analysis of the key building blocks of « state », « constitution » and « government », as they emerge and evolve in concrete public law traditions (especially but not limited to the German tradition of *Staatslehre*) and in tandem with classical works of political theory, from Hobbes through to Foucault, which seek to reveal the grounds of the authority of the modern state and explore its practices of governing.

It is from the practice and discourse of political right as a state – and polity-building exercise that the distinctive jurisprudence of public law is reconstructed. The task of this political jurisprudence is to make theoretical and practical sense out of the various relations and configurations of power and authority that emerge in practice, enabling their recognition as a set of relatively coherent phenomena. But because of the inherently conflictual nature of the human condition – conflict over material as well as symbolic resources – the ways in which relative coherence and stability are achieved will perpetually evolve.

For the governing process to convert conflict into relatively manageable contest, an overall unity of purpose and character needs to be established and maintained through representational devices. And, in Loughlin's analysis, the dominant mode this takes in the context of modern public law is the unity of the State and autonomy of the political on which its power

and authority rests. The arrangements of public law thus contribute to the maintenance of the state as a political unity, one that discharges political responsibility to its subjects.

This political unity can never be fully captured by rule-based categories, not least because conflict can never be fully or finally resolved. If « the establishment of an autonomous domain of the political is therefore a historical achievement[4] », it is also a precarious one, particularly as through late modernity the legal-political coupling is put under increasing pressure from social, economic and geo-political developments.

The significance of this reconstruction – as well as the pressure it is put under – can be appreciated by considering that outside the Anglosphere, in both continental Europe and in Asia, the formational appeal of public law continues to exist precisely in its state-creating and state-shaping functions. The same can be said of the public law of the European Union, where the polity-building function of the law, as well as its limits in performing this function, continues to offer an experimental case in re-configuring relations of political power and authority that affect the constitution of the European state and state system. *Foundations* thus facilitates the cross-fertilization of public law scholarship, representing the most promising framework to date for integrating diverse experiences of public law into a common discourse, rooted in a particular context of modern state development that is extending at the same time as it is coming under increasing pressure.

The Evolution of the Modern State

To expand on this last claim, we can consider briefly a crude version of the exercise in historical reconstruction that *Foundations* itself relies on. There are two key foundational shifts that occur with the emergence of the modern state. The first is a change in the belief system on which political authority rests: political jurisprudence thus captures the process of secularization of authority, corresponding to Weber's well known account of the process of modern « disenchantment », involving a loss of faith in divine or substantive natural law. In a constitutional vernacular associated with the period of modern revolution, but which becomes widespread over time, « We, the people » are the new foundation of political authority.

Foundations' contribution here is to offer an alternative to the Weberian narrative which equates this process of secularization with total positivisation of rules and norms, which reduces power to sheer coercive force, and which effects a complete separation of fact and value. The normative power of the factual – including the symbolic imaginary – remains in the secular age; disenchantment is far from total. This is nowhere more apparent than in the realm of public law, despite the pressures of modernization. And the point of Loughlin's political jurisprudence is to capture in a scientific manner the ways in which the normative power of the

[4] See also M. LOUGHLIN, « Political Jurisprudence », 8, this collection.

factual is retained but also transformed in comparison to the medieval mindset and the pre-modern understanding of the governing relationship.

The second foundational shift that characterises the modern state is more material in nature: the evolution in the power and authority structures necessary to produce and sustain a political community in the face of competing political and economic pressures. To respond comprehensively to military and other kinds of security threat and provide for the well-being of the people in conditions of economic scarcity requires the actual exercise of particular forms of governing power. This real power to dominate can be captured by the term, used initially by Spinoza, *potentia*, in contrast to a claim to command and rightfully assert political rule captured by *potestas*[5].

The state cannot govern by *potestas* alone; the legitimacy of its governing power must be based on more than a claim to a formal right to rule, even as its authority becomes increasingly rationalized on the basis of legal rules and formal practices. The state must generate allegiance through its actual delivery of certain public goods – not least in order for its claim to rightful rule to be credible and match a corresponding set of beliefs on the part of the ruled in its continuing legitimacy.

To put the point differently, authority requires both a claim to rightful rule and the compulsion or compliance that corresponds with actual obedience; *de jure* and *de facto* authority. But for the purpose of understanding public law in terms of political jurisprudence it makes little sense to make a formal separation of these elements. Authority is thus not a purely normative concept; it is irreducible either to moral principle or positive legalisation. Neither, however, is it a purely materialist concept that can be reduced to sheer coercion or violence or any other causal forces of nature. It must be based in political right and be able to produce political goods.

Since the modern state, in *Foundations'* reconstruction, is a creature of *potentia* as well as *potestas*, it is also an evolving beast. As political power evolves to accommodate human needs and social demands, so too does political authority. *Potestas* and *potentia* are interdependent and dialectical rather than alternatives; political authority « is a product of their relationship ». And this will change over time with the evolution of the constitutional imagination and changing constitutional circumstances.

Foundations' contribution here is to chart the nature and evolution of constitutional discourse of public law. Significantly, it insists that there will and can be no consensus on the nature of political goods or on the correct manner of their production over time. As such, « the law of the political cannot be an ethic of ultimate ends ». Political conduct « involves a trade-off between rival and often incommensurable goods in circumstances where there is no authoritative principle or standard for resolving any dispute[6] ».

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[5] B. DE SPINOZA, *Tractatus Theologico-Politicus, Tractatus Politicus*, R.H.M. Elwes trans., London, Routledge, 1951.

[6] See also M. LOUGHLIN, « Political Jurisprudence », 9, this collection.

Prudential judgment is therefore required; governing is an activity without end.

Throughout the twentieth century, this governing activity and the dialectical process on which it is based become increasingly fraught. More and more is required of the traditional state in terms of both its normative as well as its factual basis of legitimacy, just as its overall authority is increasingly called into question by processes of European integration and economic globalisation. So although the normative standards of rightful rule become increasingly demanding, as the governing arrangements of the state are increasingly called on to satisfy principles of democratic process and the rule of law, so too do the expectations of its capacity to protect and enhance the welfare of its citizens in increasingly pressing conditions. This has led to the emergence of new forms of rules and regulations, as well as increasingly prescriptive legal and informal goal-setting.

If the apparatus of rule of the modern state, both repressive and ideological, is classically grounded in traditional legal categories – constitutional law, administrative law, competition law, and various aspects of private law – much of its standards are increasingly prescribed by soft or informal law. The disciplinary and regulatory character of its governing arrangements increasingly derives from routinization, expectation and informal coercion rather than from threat of official state sanction.

As normative standards and practical expectations come into conflict with one another, particularly in times that are considered critical for the polity's identity or even survival, practices and methods of sustaining the governing relationship thus change and even transform the nature of the relationship and the practices and methods that undergird it. The challenge then is to grasp the juristic significance of these phenomena. This challenge is significantly aided by the conceptual tools offered in *Foundations*, in particular the dynamic of *potestas* and *potentia* as this evolves through the practice and discourse of political right. But it also leaves open the question of whether the phenomenon of public law as it develops into the 21st century has reached the stage where a new set of conceptual tools are required for its proper scrutiny and full understanding.

Continuity and critique

In synthesizing diverse and sometimes competing intellectual traditions into a coherent whole that tracks the dynamics of state development, *Foundations* contributes to the very discourse of public law it identifies, precipitating further syntheses with new ideas and related phenomena.

But the project, in its rather terse concluding sections, also calls into question the stability and durability of public law in contemporary social and political conditions, in particular the increasing demands placed on its governing apparatus by the « rise of the social ». This suggests that the enterprise of political jurisprudence is itself ripe for renewal. Critique is therefore necessary for continuity of the discipline, whether through refinement or abandonment of the project of « political jurisprudence ».

Critique will be categorised here along normative, material, methodological, and comparative lines. This division does do not of course reflect any tight or neat separation, it merely serves a heuristic purpose and connects general themes. It exposes the extraordinary breadth and depth of curiosity that *Foundations* has aroused across a great range of disciplinary foci and helps the reader to determine for themselves where the study of public law will or should be taken in the future.

The Normative Critique

The first critique casts doubt on whether *Foundations* does justice to the full normative force of the idea and practice of public law. In particular, it suggests that the occlusion of the ethical dimension of the state as subjective freedom leaves *Foundations* without the tools to address contemporary anti-statism , particularly as it emerges in advanced liberal or neo-liberal discourse. In privileging a top-down dialectic of *potestas* and *potentia* based on sovereignty, *Foundations* neglects the generation of power through pre-institutional acts of egalitarian solidarity (Brunkhorst) and the normative significance of public authority as the manifestation of subjective freedom in a political community of equals (Yeatman).

Hauke Brunkhorst challenges *Foundations*' basic prioritization of a top-to-bottom dynamic of state formation and political development. In its place Brunckhorst resurrects the idea of *potentia* as social or communicative power, which emerges from the « bottom-up », in the manner suggested, for example, by Hannah Arendt or Jürgen Habermas. *Foundations* thus overlooks the possibilities of a *rational* (more than prudential) grounding of public law in the communicative power of the people, a process that *precedes* the formation of concrete order and reunites *voluntas* and *ratio*. This is advanced not only in order to hold open the possibility of emancipation, but to retrieve traditions of public law that *Foundations* also alludes to in its outline of political jurisprudence (from Spinoza to Arendt), but which « go missing » as *potentia* emerges as merely technical regulatory power through the 20th and into the 21st century (a loss explained by *Foundations*' adoption of a meta-narrative of constituent power as state-sovereignty rather than egalitarian solidarity).

Anna Yeatman too argues that to successfully revive the tradition of political right requires a retrieval not only of a practical and prudential discourse – as *Foundations* attempts – but also, as it rejects, an explicitly ethical discourse based on subjective freedom. The unification in the early modern imagination of state and subjective freedom (which through Spinoza and Hegel play a significant part in the construction of political jurisprudence) is lost along the way in *Foundations*, and once it recedes, the emergence of social law and dominance of a functionalist mindset threaten to resemble « the road to serfdom[7] ». Rather than viewing the rise of the

[7] See D. DYZENHAUS, « The End of the Road to Serfdom? », *op. cit.*

social as terminating the dialectic of *potentia* and *potestas* (and lamenting the « destruction of the modern edifice of public law ») we should instead view it through the lens of an *evolution* of subjective right in an increasingly complex world, a further stage in the dialectic of *potentia* and *potestas*. Only then might contemporary neo-liberal anti-statism be properly contested, as it must be in order to conceive of the state as expressing a form of public freedom rather than merely patrimonial service. *Foundations'* equivocation on and ultimate denial of any normative standpoint thus threatens to undermine its overall promise for the discipline of public law.

The Materialist Critique

There is a different challenge to *Foundations* that emerges in a significant sense from an opposing perspective to the normative critique and which we label here as « materialist ». From this perspective, the problem with *Foundations* is that it presents conflicting claims over the common good in overly abstract terms, even naturalizing in a Hobbesian fashion the human condition of antagonism and formalizing the relationship between rulers and ruled. In other words, rather than being insufficiently normative, *Foundations* is insufficiently concrete, in a sense that is familiar to critical theory and Marxist traditions. Rationalising the art of governing requires an account – missing from *Foundations* – of how concrete social conflict, real domination, and power dynamics are translated into and in turn shape the ordering and outcome of political negotiations and of the content of political right. *Foundations*, in other words, fails to account for the material phenomena that condition political claims, in particular the interplay of concrete subjectivities from below through class struggle. From a materialist perspective, this omission betrays a residue of formalism and even ideology, privileging – or at least reifying – one particular but contingent form of rule, neglecting that the state has not only a political but also a material constitution.

Whilst complementing *Foundations'* adoption of a dialectic of power and authority, Marco Goldoni thus suggests that its analytics is overly formal. Goldoni picks as an example its metaphor of public law as grammar, which elides the element of political agency at play in the generation of different grammars or even of an overarching « Ur-grammar ». As a corrective, Goldoni proposes the integration into political jurisprudence of the political subjectivities whose actions are responsible for forging the content of the material constitution. Integrating these insights means more than merely emphasising the formal possibility of revolutionary interruption or « disruption » of the *status quo* (*à la Ranciere*); it requires analyzing in greater detail the political-economic organisation of society, including those hegemonic forces that shape it. By establishing the « conditions of visibility » of political subjects the potential dividends of a focus on the material constitution can be fully cashed out, not by a crude reductionism of politics to causal economic forces but by an integration of economic and material features into an analysis of the evolving political constitution.

The Methodological Critique

There is third an « external » critique of *Foundations* that questions its basic methodological approach and working assumptions. This casts doubt on the viability and desirability of a search for any singular, scientific account (however internally complex and differentiated) of an object that can be called « public law » when the practices that come under this label constitute a diverse set of contingent and incommensurable experiences. *Foundations*, in this view, is ultimately an incoherent exercise in conceptualisation; moreover, to the extent it claims purity it is an ideological view of, an apology even, for the modern state's particular ruling forms and governing apparatus.

Andrew Halpin's critique is a direct assault on the methodological underpinnings of *Foundations*. It questions both the possibility as well as the desirability of projecting a uniform concept of public law based on a master narrative of the modern state. Halpin thus challenges each of *Foundations*' key claims: the *autonomy* of public law, the possibility of a *science* of political right, political jurisprudence as the prudential *approximation* of this science, and public law as a *grammar* of political jurisprudence. For Halpin, the characteristics of public law are determined by particular social and political circumstances; there is no uniform conception of a state (or of its institutional branches) that undergirds public law. The attempt to impose one elides the variety of questions that public law needs to answer and of problems it is and might be called on to resolve. Since there is no single problematic that gives the modern state its *raison d'être*, public law loses any claim to autonomy. And even if there were such a problematic, there is no reason to suppose it would be restricted to public as opposed to private law in his account. On the contrary, since there are multiple concepts of public law, stained by their own ideological hues, *Foundations* succeeds only in providing an account of one more, albeit dressed in a (spurious) garb of objectivity. This not only overlooks important local differences, skewing our understanding of public law as a particular phenomenon, but also is liable to elevate its own unwarranted trust in juristic forms to « negotiate » social tensions at the expense of an authentic political hearing.

The Comparativist Critique

If the methodological critique suggested that *Foundations*' dependence upon a singular and uniform paradigm of the modern state fails to account for the actual diversity of political and public law forms as they have emerged across time and space, this suggestion only invites further specification of what these different forms are, where they might be found and why they depart from the paradigm. It invites, in other words, a critique from the perspective of comparative constitutional and public law. This section calls into question any claim to universality, to public law reflecting a unitary ordering of political right based on the edifice of the modern European state, by presenting a specific case study, namely French and UK

administrative law, based on court-centric practice and emerging sporadically and laterally. This suggests that whilst *Foundations* may have offered an account of the « foundations » of a very particular ideal type of public law (although one that remains underspecified), it is far from having offered a persuasive account of the foundations of public law *per se*.

Denis Baranger addresses two phenomena which should be central to or at least easily integrated into the vernacular of *Foundations*: British and French administrative law. Specifically he queries whether *Foundations* fully captures the emergence of the court-based jurisprudence which has generated administrative law in both contexts. This, after all, is the law commonly referred to by « public law » in contemporary scholarship, including administrative action, regulation, and judicial review. In Baranger's view, modern administrative law does not emerge out of a foundational process of « political jurisprudence »; it is rather a « lateral » development, emerging in a « sporadic and peripheral » fashion. And yet it evolves into a feature that becomes central to the discipline of public law as a whole. In other words, the French and British fields of administrative law, despite their significant differences, have both developed outside any foundational narratives of « the State » or of « the Constitution », and they remain in that suspended state. This autonomy is best explained as a process of « differentiation », the state distinguishing (or « derogating ») the exercise of its powers from private law ordering. But in that sense public law is derivative rather than foundational.

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In conclusion, these critiques suggest that while *Foundations* represents a key and in significant respects novel approach to reconstructing public law, much work remains to be done. They suggest that the attempt to grasp the foundations of public law (if such exist), is likely to require further and more complex theoretical and practical insights than are captured in *Foundations* itself. This is less a criticism of *Foundations*, than an encouragement to continue the journey it begins. *Foundations* provides a crucial first step, and will be germinal in fomenting a new wave of scholarship that considers questions so often removed from mainstream public law scholarship. The critical essays presented in this special issue identify some of what we can expect to encounter on the further stages of this journey.

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