

LIBERTY AND TURKISH CONSTITUTIONS

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I. INTRODUCTION

A. DEMOCRACY, WAVES OF DEMOCRATISATION AND CONTRARY WAVES OF DEMOCRATISATION

1. Democracy is combined of two words; demos and cratos. **Demos** means not only plurality, but also minority. A human being is citizen if he inspects (audits) his taxes. **Cratos** is power or administration (management, government). Democracy is a kýnd form of management according to which every man is the fýrst citizen.² The basis of democracy is not to grant privilege to any group or class, but liberty and equality.³ In democratic states, main power belongs to the people not monarch, dictator or any power.⁴ **Abraham Lincoln (1809-1865) defines the democracy, addressing at Gettysburg; “Democracy is government of the people, by the people, for the people”.** The meaning of this address is that government must be for people, not opprosson people. The government takes its legitimacy from people. People elect the government, not government chooses the people.

Democracy has four basic principles; (I) individualism, (ii) authority or power to represent and act for people by election, (iii) plurality, (iv) Liberty for opposition. Democracy is defined in the sense of liberal democracy in contemporary world. In democratic states, all citizens are in liberty and equality and they have the the period of political volition (mind) creative without any restriction (kýsýtlama),⁵ and the government serves to citizens, not citizens serve to the government in the relations between rulers and people.

2. The first wave of democratisation according to Samuel Huntington, began in 1820s, and ruled hundred years approximately. The roots of this fýrst wave are American and French revolutions. After this wave, general vote right and responsibility of upper administrators to the parliamentary were reached. After this affirmative process, contra--wave of democratisation came. It ruined the regimes of despots in 1920s, like Hitler and Mussolini in Germany, Italy , respectývely, Czesheslovakia, Brasil, Arjantin, Uruguay, Greece, Espanol and Japan.

The second wave of democratisation (1950-1960) started after the Second World War. At the beginning of 1950s, Turkey, Greece and Uruguay turned to democracy. This wave ended in 1960s; Military governments took the the power in Peru, Brasil, Bolivia,

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² Sartory, **The Theory of Democracy Revised**, p. 30.

³ But Old Greek’s democracy is far from these concepts; Göze, **Ayferi, Siyasal Dýpýnceler ve Yönetimler**, p. 5.

⁴ Instýtut Für Politikwissenschaften, Parteienverbot und modernes Demokratieverstandnis, p. 1-7.

⁵ Instýtut Für Politikwissenschaften, Parteienverbot und modernes Demokratieverstandnis, p. 1-7.

Argentina and Ecuador. The military of Pakistan (1958), Indonesia (1965), Marcos in Philippines (1972), Gandhi in India (1975) broke the democracy. The militarist intervention broke the Greece Democracy in 1967, also in Turkey in 1960-1961, 1971-1973, 1980-1983.

The third wave of democratisation began in 1974 with Portugal revolution. Democratic regimes took the lead approximately in thirty countries in Europe, Asia, and Latin (South) America, the place of despotic countries. At this period, a strong trend of globalisation began. Russian communist leaders in 1989, and Baltic Countries in 1990 accepted democracy; communism collapsed in Polonia, East Germany, Czechoslovakia and Romania. The third wave of democratisation is continuing, but sometimes contrary waves like intervention of armies in the government are taking place.

3. The problems of constitution do not lack on the agenda of Turkey. It may be accepted as an alienation to mention about constitution; but there are a lot of basic social problems. However, this is true. Complaints about Constitution are increasing; the unions of labour, the political and scholar quarters are concerned about the problems of Constitution. Debates as regards Constitution can not be fantasy.

It is necessary to mention The Turkey's Constitutions before 1982 Constitution.

B. TURKISH CONSTITUTIONS BEFORE 1982

1. 1876 Kanuni Esasisi (The Constitution of 1876):

After the proclamation of the Edict (Rescript) of Reorganization in 1839, Ottoman Empire had been westernised. 1876 Constitution is an advanced stage of Senedi Yttifak (1808). Tanzimat Fermanı (1839) had brought very important results to the legislative and political life. The government was made to be responsible to the law, the transition of representative regime was adopted, human rights defined, serious steps examined. Nevertheless, it can be criticized about the privilege of Halife-Sultan, and there was not enough security of parliament and also liberty was lacked.

2. The Constitution of 1909 :

This was an amendment of 1876 Constitution but also was very important and extensive. For this reason, this can be said to have been a Constitution. With this Constitution new rights were accepted, and authority of Sultan was ruled out and Parliamentary System was established which was balanced between legislative and executive powers.

3. The Constitution of 1921 (1921 Esas Teşkilat Kanunu):

The National Assembly enacted this Constitution. This was a short (it contained only 23 articles) but very important document. For the first time, it proclaimed the principle of "national sovereignty", calling itself the "only and true representative of the nation".⁶

⁶ Özbudun, "Constitutional Law", p. 25.

This was the Constitution of Independence War of Turkey and had prepared the conditions of transitive period. It did not contain anything about fundamental rights and freedoms, involving more liberality than formers.

4. The Constitution of 1924 (1924 Esas Teşkilat Kanunu):

This was impressed from individualism and natural law. National sovereignty, classical rights and freedoms had been arranged but had not ensured to the people. This Constitution ruled between 1924 and 1960. This was not a hindrance to liberalisation, freedom and democracy in Turkey.

The Constitution of 1924 was undoubtedly a democratic Constitution in spirit. However, it was a “majoritarian” or “Rousseauist” concept of democracy, rather than a “liberal” democracy based on an intricate system of checks and balances⁷.

5. The Constitution of 1961:

This was Turkey’s first Constitution which was enacted after intervention of Turkish Armed Forces. On May 27, 1960, units of the Turkish armed forces overthrew the Menderes government. The first intervention of Army in Republic Age, was not hierarchical.

Indeed, all Turkish Constitutions have been after a reaction.

This Constitution was an advanced step about separation of powers, balances of powers, democratic rules of law, independence of judiciary. In this, there was basis of liberal and plural democracy. Both the 1971 and 1973 amendments took place during the interim period of military intervention which forced the government to resign, and installed a technocratic or “above-party” government.⁸ By the amendment of 1971, military jurisdiction was enlarged against the civil jurisdiction. A new court was established under the name of “**High Military Administrative Court**”¹. Also, Council of Ministers gained the right of some limited legislation authority named “**Statutory Decrees**” (**Decrees having the effect of law**). Autonomy of some agencies like Universities, State Radio and TV were minorized.

In the Constitution of 1961, the general principle was freedom, and the limitation of freedoms was a rare possibility. But by the 1971 amendment, it was converted just opposite by the article 11.

II. BASIC SOCIAL AND POLITICAL DYNAMICS OF THE CONSTITUTION OF 1982:

A. GENERALLY:

Towards the end of the 1970s, the Turkish political system faced an increasingly serious crisis brought about by political polarization, violence and terrorism. This instability led to the military takeover of 12 September 1980, which created a “National Security Council” headed by General Kenan Evren, then the chief of the General Staff.

⁷ Özbudun, “**Constitutional Law**”, p. 26.

⁸ Özbudun, “**Constitutional Law**”, p. 30.

¹ See for “**milyetari jurisdiktion**”, Sahir Erman, “**Askeri Yargı (Military Jurisdiction)**”, in **Askeri Yargıtay’ın 80. Kuruluş Yıldönümü Sempozyumu (6-7 Nisan 1994)**, Ankara 1994, pp. 41-59.

General Evren intended the presidency of the State, and the Council undertook the functions of the **Turkish Grand National Assembly (TBMM)**.⁹

Constitution of 1982 does not depend upon the limitation concept of political power. Western liberal constitutionalism depends upon this concept. So, it is different from them. In the West, feudal monarchism had unlimited and non-responsible rules in the past. Constitutions aimed to struggle with them. In Turkey, the 1876 and 1909 Parliamentary monarchism constitutions tried to limit monarchism. But 1924 and 1961 constitutions aimed to find liberty and democracy.

Before and after the military operation of 1980, it was extensively propagated that: “the freedom in the constitution is very large, freedom has lost its attractiveness and the people wish security, not terror.”

Constitution of 1982 is the first and only Turkish Constitution that has a main purpose on strengthening the political power not the liberty or democracy. In this constitution, the given rights and freedoms were taken back by the provisions, beginning by the word “but”. So this constitution is sometimes called as “**The Constitution of But**”¹⁰. Constitution of 1982 was written under the technics of extra-ordinary administration. The exemptions of judiciary was enlarged as the second constitution. So, it is sometimes called as “**The Constitution of Exempt**”¹¹.

There has been some similarities and differences among the four military operations in Turkish political life. All have abolished the parliament (1960 and 1980) and established non-parliamentary governments (1971-1973), new constitutions were arranged (1961-1980), or importantly amended (1971).

B.THE FOUR ESSENTIALS THAT SHOULD BE INCLUDED BY A LIBERAL-DEMOCRATIC CONSTITUTION

The followings are the essentials for a liberal democratic constitution;

- (1) Liberal and pluralist basement ;
- (2) Free activism of political parties;
- (3) Representativeness;
- (4) Referandum¹².

When we observe the 1982 Constitution, it is neither similar to liberal-democratic constitutions nor the young Mediterranean Democratic Constitutions (Spain, Greece). It is similar to some Latin American Constitutions. Because;

1. The Constitution of 1982 was not arranged by an assembly which has legal representation authority. The assembly of consultation which prepared the project of the Constitution did not consist of the elected members but the appointed ones. The Council of National Security was the power over all. The real constitution-maker was that Council. A similar council had shared that authority with an assembly which has some representational quality during the preparation process of the 1961 Constitution. A representation without election is not acceptable in the democratic public law¹³. In The

⁹ See, Law no 2324, 28 October 1980, R.G. (Official Gazette) No. 17145.

¹⁰ Tanör, **Yki Anayasa**, p. 109 fn. 17.

¹¹ Çađlar, “**Anayasanın Hukuku ve Anayasanın Yargıcı Yenilenen Anayasa Kavramı Üzerine Düşünceler**”, p. 26.

¹² Tanör, **Yki Anayasa**, p. 100.

¹³ Tanör, **Yki Anayasa**, p. 101.

History of Turkish Public Law, the word “Meclis (Majlis/assembly)” was called for the meaning of an assembly which consists of partly elected members (like Meclis-i Ahkam-ı Adliye)¹⁴.

2.The Council of Consultation is not qualified to represent the people neither legally nor sociologically.

3.The Constitutive Assembly (National Security Council and the Assmebly of Consultation), did not wish to ammend the wrongful articles of the 1961 Constitution. But it preferred to constitute a new one.

4. The project of the constitution was publicly negotiated under pressure. It was allowed to be negotiated in only press in a very limited period .

5. The referandum which would provide legality for the Constitution was far from being realistic.¹⁵ Also, it was not open what would happen if the people refuse it. It means that the military administration would survive. The voters did not know if they vote the president (also the head of National Security Council or they vote about the constitution) because both of them had been joined. It was forbidden by the 71 numbered Decision of The National Security Council to comment informatively the speeches of Kenan Evren (The Head of National Security Council) on the project of The Constitution.¹⁶ So, it can not be considered as referandum but may be a plebisit.

The principal characteristics of the state have been described in articles 1 through 3 of the Constitution. Article 1 states that (**the state of Turkey is a Republic**) Article 2 describes **the characteristics of the republic as “a democratic, secular², and social state governed by the rule of law in accordance with the concepts of social peace, national solidarity, and justice; respectful of human rights committed Atatürk nationalism, and based on the fundamental principles set forth in the Preamble.”**

The Constitutýent Assembly (Kurucu Meclis) also passed a law on the submission to popular referandum of its Constitutional Project (Law No. 2707). The referandum took place on 7 November 1982, and the project was adopted by the affirmative votes over 91 percent of the voting electrorate¹⁷ . General Kenan Evren was elected the President of the Republic in the same referandum in accordance with the Transitional Article one of the Constitution.¹⁸

C.THE SOURCES OF THE CONSTITUTION OF 1982

The sources of The Constitution;

(I) The 1971 Ammendment of the 1961 Constitution,

(ii) European Human Rights Convention (It may be considered a formal source but not a real source),

¹⁴ Tanör, **Osmanlý Ýmparatorluđunda Anayasal Geliřmeler**, p. 39.

¹⁵ Tanör, **Ýki Anayasa**, p. 104-105.

¹⁶ R.G. (Offýcýal Gazette) 17845- 21. 10. 1982.

² Secularism has been one of the pillars of the reforms of Atatürk. In fact, The Constitution of 1924 was amended in 1928 to delete the provýsion declaring Islam as the State religion. The Kemalist conception of secularýsm, has allowed for some measure of State control over religion. See Özbudun, **Constitutional Law**, p. 38-39.

¹⁷ R.G. (Offýcýal Gazette) 20 Nov. 1982, No. 17874.

¹⁸ Özbudun, “**Constitutional Law**”, p. 31.

(iii)The codes and the orders which had already been promulgated by National Security Council.

The National Security Council that is the constitutive power of the 1982 Constitution, also legislated a very large number codes especially about political life and security field. Nobody can apply to the Constitutional Court about those codes (Temporary article 15 of the 1982 Constitution).

The only constitutive power between 1980-1983 was The National Security Council which consisted of the five members. The five-member Council included the commanders of the Army, Navy, Air Force and Gendarmerie.¹⁹

D. THE OPPOSITE SIDES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1982 CONSTITUTION

1. 17. article of European Human Rights Convention was used, only the abuse of person's liberties was forbidden, the word "state" which is in this article is not in the Constitution text.

2. European Human Rights Convention banned only the **actions** in the 17th article but 1982 Constitution banned the **opinions**. Restrictions in the European Convention on Human Rights is different from this Constitution. It may be said that the politics of state is preferred to the supremacy of law.

The Constitutional Court of Turkey used international treaties, general principles of law, the European Convention on Human Rights as a reference norm.

E. THE DIFFERENCES BETWEEN 1961 AND 1982 CONSTITUTIONS

1. The former Constitution prescribed "the executive" as a mission, 1982 constitution defined the executive as a mission and a power. Moreover, this power is taken from Constitution.

2. According to the 1982 Constitution, regulation and power of rule enacted in ordinary and extra-ordinary cases, "statutory decrees" or "law amending ordinances" (Decrees having the effect of law) (Kanun Hükmünde Kararname= KHK). These acts called in Anglo-American countries, "delegated legislation".

3. The powers of the President of the Republic was increased. It is unclear to dual system. Thus, it can be concluded that the 1982 Constitution created a "mixed" or "hybrid" system of government somewhat along the lines of the French Constitution of 1958.³

4. The independence of the judiciary is rather lacked in 1982 Constitution. A lot of procedures of State is given out from judiciary inspection (İyke 1982/125-4, 159/4, 125-6).²⁰

5. 1982 Constitution is a very detailed form. It is used not for freedom, banned freedom. For this reason, the Constitution remained at the back of society.²¹

¹⁹ Özbudun, "Constitutional Law", p. 30

³ Özbudun, "Constitutional Law", p. 48. The President is not responsible politically for his actions connected with his office (See art. 105).

²⁰ Tan, "1982 Anayasası Yönünden Yürütme Görevi ve Yetkisinin Niteliği (Güçlü Devlet ya da Güçlü Yürütme)", p. 46. See Özbudun, "Constitutional Law", p. 55-56.

²¹ Uygun, 1982 Anayasasında Temel Hak ve Özgürlüklerin Genel Rejimi, p. 194.

The new Constitution, political parties law, and electoral law reflect these concerns of the military and indicate the extent to which Turkey's new attempt at democracy is intended to be different from its earlier democratic experiences.⁴

6. 1982 Constitution's Consultative Assembly was not elected by people, National Security Council have given last form. There are many banned areas in this Constitution²².

With 1971 amendment, it is partly forbidden to decide as administrative act and procedure.

Decisions have taken by Supreme Military Council (YAB) and Supreme Council of Judges and Public Prosecutors (HSYK) and The President of the Republic are out of judiciary. The area of judiciary in 1982 Constitution was damaged.

In 1971, the administration of autonomy Turkish Radio and Television, Universities Autonomy was reduced also. In 1981, administrative autonomy was ended in the universities.

According to article 4 of the 1961, and article 6 of the 1982 Constitutions, "Sovereignty is vested in the nation without reservation or condition".

E. TEMPORARY 15th ARTICLE OF 1982 CONSTITUTION (IMMUNITY OF JUDICIARY ABOUT 12 SEPTEMBER 1980 ADMINISTRATORS)

It is forbidden to criticise (apply) Constitutional Court at the time between 12 September 1980 - 6 November 1983. In this term, basic laws, statutory decrees (having the effect of law) like union of labour political parties and electoral codes were enacted.²³

After military intervention, military administrators have been ensured themselves as **exit guarantees** at the democratic rule. Turkish Constitution is similar, in this aspect, to those in Portugal, and Brazil. For this reason, in these democratic countries, the chance of consolidation is difficult.

Shortly, the law of 12 Sept. benefits from judiciary immunity and shortage of judiciary. This is named as extra-ordinary constitutionalism.²⁴

F. THE POWER ACCORDING TO THE 1982 CONSTITUTION

It might be said that the military power was gradually autonomised after 27 May 1960, 12 March 1971 and 12 September 1980. **National Security Council (NSC)** established first the 111. article of 1961 Constitution. National Security Council is very important in the view of soldiers. In 1971, with 127. article, the Court of Account was reduced on soldiers.

After 1982 Constitution, the power of soldiers approximately autonomized. It changed the statue of National Security Council. With 1982 Constitution, commanders of Martial Law is dependent to the chief of General Chief, not to the prime minister.

⁴ Özbudun, "Constitutional Law", p. 32.

²² Ýnal, Turgut, "1982 Anayasasýnýn Getirdiði Sýkýntýlar Ýle Anayasa Yargýsýna Genel Bakýp", Constýtutyonal Judýcýary, Ankara 1996, p. 176-177.

²³ Özbudun, "Constitutional Law", p. 33.

²⁴ Çađlar, "Anayasasýn Hukuku ve Anayasasýn Yargýcý Yenilenen Anayasa Kavramý Üzerine Dþþünceler", p. 25.

Before this, they were dependent to the prime minister. With 118. article of 1982 Constitution, statues of National Security Council were considerably widened. It may be said that, with 1982 Constitution, soldiers are more effective on civil administration²⁵.

G. THE CONSTITUTION OF 1982 AND INDIVIDUAL (IT'S POLITICAL PHILOSOPHY)

The 1961 Constitution was respectful for human rights on democracy. Individualism was one of its basic principals .But the 1982 Constitution presents the democracy within its words (1982/ introduction): the superiority is not within the universal principles or the law but in the constitution and the codes (1982 /introduction) Instead of universal democratic principals, it gives only a nationalized democracy comprehension. "It brings a democracy and liberty, limited, under its positive text"²⁶.

The Parliamentary Assembly of the European Council declared the standard democracy phrases, instead of national democracy, by its 800 numbered decision in 1983. Followings were defined as the legal standards of democracy;

1. Democracy is a kind of administration in which people administrate people,
2. The basis of a democracy is the rule of law and the division of state powers.
3. In a democratic system, government and administration shall exercise within respect of the rule of law.
4. Democracy makes the judges authorized to inspect the administration,
5. It shall be responsibility of a democratic system to provide a good balance between the government's activities and the protection of the citizens rights and freedoms,
6. Democratic system shall provide a good balance between public interest and the protection of basic individual rights. The majority shall be in respect of the minority. The 15th article of **The European Convention on Human Rýghts** should actively be realized²⁷.

In the Constitution, the main principal is restriction but not freedoms. The Constitution declares itself as a liberalist democracy but it arranges its idea within very limited statements²⁸. In the Constitution, The State is superior than the individual and society. It is the first and the only constitution in The West that considers the state as a "Holly State". The individual and society depend upon The State. It could not have realized a good balance between freedom and authority.²⁹

The 1982 Constitution provides a great possibility on restrictions of basic rights and freedoms to the legislation. It has such a limitation system that can never seem in any Western system.³⁰

In the Constitution of 1982, the basic novation is the multi-restrictions system. The first face is the general restrictions provision (art.13) The general restrictions

²⁵ Yazýcý, **Türkiye'de Askeri Müdahalelerin Anayasal Etkileri**, p. 188.

²⁶ Uygun, **1982 Anayasasında Temel Hak ve Özgürlüklerin Genel Rejimi**, p. 91.

²⁷ Turhan, "**Anayasamız ve Demokratik Toplum Düzeninin Gerekleri**", s. 422-423. As says Turhan, The Constýtütýonal Court of Turkey, may not decýde about democracy's defýne. Also ýt ýs rýght that Atatürkýsm is to reach contemporary cývylýsatýon not the ýdea of despotýsm, he was democratýcan and republýcan; p. 424-425.

²⁸ Tanör, **Ýki Anayasa**, p. 133.

²⁹ Soysal, "**Temel Nitelikleriyle 1961 ve 1982 Anayasaları (Karþýlaþtırma)**", p. 19.

³⁰ Uygun, **1982 Anayasasında Temel Hak ve Özgürlüklerin Genel Rejimi**, p. 192.

may be realized in case of nine different reasons. All of the basic rights and freedoms can be restricted in case of each of these reasons with no exempt. This nine cases are neither clear nor concrete statements. There is not such a general restriction case in any of western countries. These are not in accordance with **The European Convention on Human Rights (ECHR)**.³¹

The second restriction phase is the special restriction cases.

The third restriction phase is the article 14, the general prohibition and sanction provision :”The defined constitutional prohibitions and the orders can directly be exercised even when there is not any provision in codes.”³²

The 1961 Constitution had a principal providing that any restrictions can only be realised with legislation and it was impossible to restrict “essence (the core) of” any right or freedom. In the field of the “essence (core)” no determination could be made. In 1982 Constitution, this principal does not exist. However “The Democratic Society Order” principal was provided that any determination shall be in accordance with this principal. This principal is of course more limited than the said provision in the 1961 Constitution. It is relative and does not provide a certain field, out of determination.

The Constitutional Court shall freely comment the article 13/2, because we shall not have a different democracy theory from that in the west. And this is Atatürk’s view of democracy.

The basis of the Western Constitutionalism depends upon equality and liberty that come from the honor of the humanity. Constitutionalism has been considering that the political order’s main function is to protect the individual’s basic rights and freedoms, since Locke and Montesquieu. Democratic process is an indivisible whole, comprising fundamental rights and freedoms.³³ The fundamental qualifications of secularity are the necessities of a democratic society’s order, too.³⁴ Freedom and equality are the necessities of the democratic society’s order.

In the 1961 Constitution personal liberty could only be determined by judicial provision. This provision was converted into a flexible situation by the 1971 amendment, but the Constitution of 1982 provide great authorities to the administration (the police) in some certain cases (if it is dangerous to be late). General and administrative judiciary has lost its importance. The extra-ordinary administration was considered like a normal administration. So, the executive power has gained superiority against the two other powers.³⁵

The Constitution has fidelity for not only the individual rights but for the collective liberties, also (art. 33-34). The collective social rights (strike, syndicate (union) etc.), political activities were determined. So, individuals, society, working people and political groups, all were fundamentally determined.

H. CONCLUSIVE

³¹ Uygun, **1982 Anayasasında Temel Hak ve Özgürlüklerin Genel Rejimi** , p. 192.

³² Tanör, **Yeni Anayasa**, p. 194.

³³ Turhan, “**Anayasamız ve Demokratik Toplum Düzeninin Gereklere**”, p. 411-412.

³⁴ See the decision of **The Constitutional Court of Turkey**, RG. (Official Gazette) 20216/5.7.1989, E. 1989/1, K. 1989/12, Date of decision 7.3.1989.

³⁵ Tanör, **Yeni Anayasa**, p. 137.

Conclusively, the 1982 Constitution protects authority, not the individual, freedom and liberal-democracy.³⁶ So, it was sometimes claimed by someone as a “anti- constitution”.³⁷

It may be said that, The Constitution of 1982 is a handicap against democracy. However to realize a new Constitution is much difficult, too. In order to constitute a strong democracy in Turkey, the large competence belonging to some authorized agencies should be minorized, but before this, it is necessary the corruption in the official field should be ended and on accountable administration be established.³⁸

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³⁶ Kili, “**Temel Hak ve Özgürlükler Yönünden 1961 ve 1982 Anayasaları**”, p. 28.

³⁷ Tanör, **Ýki Anayasa**, p. 154-155.

³⁸ Yazýcý, **Türkiye’de Askeri Müdahalelerin Anayasal Etkileri**, p. 219-220.

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Text:

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