

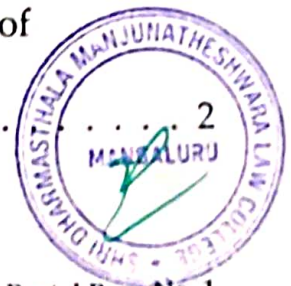
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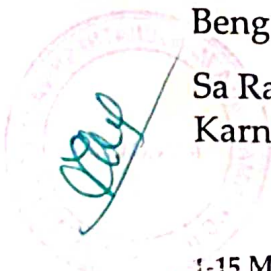
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VULNERABILITY OF TRANSGENDER MARRIAGE-LEGAL ISSUES

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SDM Law College

ABSTRACT:

Transgender persons being the marginalized community are deprived of the basic rights which are enjoyed by the common people. The legislation passed to recognize and protect the rights of Transgender Persons is prima facie a halfhearted effort on part of the government. The most crucial rights of any common person to marry and enjoy the consortium and society of the spouse has been blatantly ignored and sidelined by the legislation. It is believed marriage completes the life of a person, nevertheless marriage is a matter of choice and is a right of an individual. However, it is indeed a rude shock to the Transgender Community to find that the so-called legislation enacted for their benefit is totally silent on these matters leaving mass of grey area. The author tries to understand the intention of the legislature and the reasons and difficulties in making provision for legitimizing marriage of Transgender Person.

Key Words:

Transgender, Legal rights, Marriage, Sex reconstruction surgery, Trans-sexual, Third Gender.



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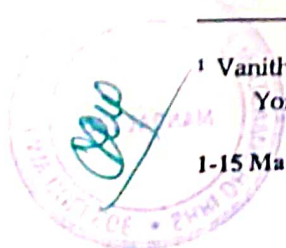
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INTRODUCTION:

Change is inevitable and is always feared. It creates a tremor in the blocks of the society. A new change that touches the family structure, shocks the very fabric of the society. To uproot a tradition and practice and adopt a new idea that challenges to change the fundamental structure of the society has always been difficult. However, history has witnessed several radical changes, which were initially vigorously resisted, but have eventually been slowly accepted and adapted by the society, forming a recognized social norm with all legal sanctions. Formerly inter caste, inter religion marriage was totally unacceptable. Divorce was hard to obtain and considered as a taboo. Perception as to marriage being an institution for procreation has also viewed differently as bearing a child has become a matter of personal choice. The Society has changed along with the laws. From the traditional Christian vow, 'Till death do us apart' to the Hindu marriage vows of seven lifetimes of togetherness, to marriage of few months to the contemporary marriage laced with awareness of possible divorce and remarriage documented in pre-nuptial agreement, the law and the society have come a long way. Each time the winds of change blew in the modern times like legalization of divorce, property rights for women, widow remarriage, inter racial marriage etc. the politicians, academicians, spiritual leaders, media etc. claimed that these changes would destroy the institution of marriage, family, and society. Now another challenge change faced by the society is the marriage rights of the Transgender persons, the acceptance of which requires a lot of understanding and adjustments in various spheres. The fear of such marriages debasing the fabric of the family structure is looming large over the society. this paper tries to explore the possibilities, impracticalities, and sustainability of such a marriage<sup>1</sup>.

Transgender Persons are the ones whose gender assigned on birth do not conform with the gender they identify themselves with. Transgender Persons do not fit into the deeply rooted gender Binary

<sup>1</sup> Vanitha Ruth, same sex marriage in India and the West,2005, Palgrave Macmillan, New York, google books.co.in, springer



<sup>2</sup> (2014)5 SEC  
<sup>3</sup> Ibid  
 1-15 March 2023

system of the society. Their identity remained obscure, and they were pushed into oblivion by the law as well as the society. In India, the decades of struggle of the Transgender persons to establish their identity and recognition of rights bore fruits only with the landmark and progressive Judgement of the Supreme Court in National Legal Services Authority v. Union of India<sup>2</sup> in the year 2014. In its Judgement the Supreme Court went into the roots of the issues faced by the Transgender Community and exhaustively explored the rights of the Transgender Persons. For the first time SC recognized the right of the Transgender Persons to identify themselves with the gender of their choice, including their right to be identified as Third Gender, among many other rights which would enable the Transgender Persons to live a life of dignity in par with the other citizens of the nation. The Supreme Court directed the Government of India to make legislations to substantiate and give effect to the long due rights of the Transgender Community.

The Transgender Persons (Protection of Rights) Acts 2019, enacted as a result of NALSA judgement<sup>3</sup>, was a great disappointment to the Transgender Community. The legislation failed in spirit and action to give effect to the intentions of the NALSA judgement. The Act has absolutely no provisions on some basic rights of the Transgender Persons like right to marriage, family, adoption, inheritance which are very crucial for any person to enjoy his rights to its true potential. Thus, in this article the author attempts to explore the rights related to marriage of the Transgender Persons and the legal issues under various laws and the practical difficulty in recognition of marriage of Transgender Persons. It is a common understanding that marriage, companionship, and family form an essential element for the complete enjoyment of individual rights. And keeping these rights out of the legislation enacted for the welfare and benefit of the Transgender person raises eyebrows. It is the neglect on part of the government, a deliberate and intentional omission or is there any specific reasons for exclusion of such rights needs to be examined in detail.

<sup>2</sup> (2014)5 SCC 438

<sup>3</sup> Ibid



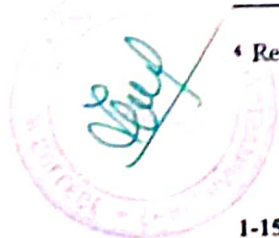
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### Historical importance of Transgender marriage

Marriage, in Hindu culture has always been given major priority. The principles and beliefs of Hindu religion requires every person to go through the four cycles of life: Artha, Kama, Dharma, and Moksha. Therefore, for attaining Moksha or salvation, one must go through the stage of marriage. Therefore, denial of marital rights deprives a person of salvation. The Hindu practices recognizes marriage as a sacred union of two individuals and performance of religious duties. Hindu marriages do not have a uniform pattern and largely depends on culture and practices of various community, caste, region, etc. The ancient Vedic scriptures speaks of eight forms of marriages like Brahma, Asura, Diva, Prajapatya, Arsha, Rakshasa, Paisacha and Gandharva. Among all these forms of marriage 'Gandharva' marriages are said to be in consonance with Transgender marriage because mutual love and attraction is the only requirement for the solemnization of this form of marriage along with some simple ritual and ceremonies like exchange of garlands and invocation before the sacred fire. Although the status of Gandharva marriage has been disputed on many occasions, it has been signified in the ancient scripture 'Kamasutra' as the best form of marriage<sup>4</sup>.

Historically speaking Hindu culture was inclusive of Transgender marriages. Several instances of Transgender marriages can be traced on perusal of ancient Vedic scriptures and texts. The instance in Mahabharatha where Princess Shikhandini marries a woman she was in love with woman, who then transforms into a man and the marriage was valid.

Another instance from Mahabharatha reveals the story of Arjuna's son Aravana who expressed his last desired to be married before he sacrificed his life. Lord Krishna adorned the form of a



<sup>4</sup> Recognizing the right of third gender to marriage and inheritance under Hindu Personal Law in India, Depayan Chowdhury Atmaja Tripathy, BRICS Law Journal, Vol III , 2016, issue 3, pp (43-50)

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beautiful maiden, Mohini to meet the last desire of Aravana and married him. The marriage was acceptable. These instances go to prove that nonbinary marriages were not new and were recognized and accepted in the ancient Hindu culture<sup>5</sup>.

The presence of effeminate men during the Hadith is very well documented. The approach of conservative Islamic traditions is that of animosity towards the Transgender Persons. Many scholars argued that Hadith refers to crossdressing men who tried to deceitfully gain access to women's private spaces by feigning to be one of them. The Transgender persons were often mistaken with these deceitful crossdressing men and thus condemned. Majority of the Muslims across the globe uphold the predominant conservative opinion that a person is forbidden to change what Allah has created, the belief is based on an interpretation of the Qur'anic Verse 4:119 which says God has created everything as it is and changes in one's body are only allowed under medical circumstances. The verse is generally given a narrow interpretation, which when applied to the Transgender Persons will not apply favorably in change of sex through whatever means<sup>6</sup>. Although in modern times many Islamic states have relaxed this rigid approach towards Transgender Persons, the meaning of the term marriage under Islamic laws creates hindrance in giving a legal status to the Transgender marriage.

**Status of Transgender marriage globally:**

New Zealand extends a very liberal approach towards the sexual minorities. The Union of same sex in New Zealand was sanctioned and legalized by the Civil Union Act 2004. This Act legalized civil union for both same sex and opposite sex couples and granted several rights including marriage. In New Zealand Trans people



<sup>5</sup> Supra note 4

<sup>6</sup> Aymanee M. Zaharin Aisya & Chiarolli Maria Pallotta (2020) Countering conservatism on being transgender: Clarifying Tantawi's and Khomeini's fatwas from the progressive Muslim standpoint, International Journal of Transgender Health, vol21, issue3, 21:3, 235-241, PP 235-241

enjoy the same rights and status as that of the general population and the marriage of Transgender people is considered legal in this country<sup>7</sup>.

In South Africa has shifted its rigid stand and formally accepted the LGBTQ relationships by bringing forth a legislation granting the rights of marriage to all without any gender barriers. The judgement of the Constitutional Court of South Africa in Minister of Home Affairs v. Fourie influenced to bring in a positive change in South Africa relating to the right of marriage of same sex people that included Transgender People.

The early 1970 British Court decision in *Corbett v. Corbett* is notable, where a petition was made to annul marriage when one of the spouses underwent change of gender by sex re assignment surgery and hormone therapy. The issue before the court was to determine the true sex of the spouse and the capacity to consummate the marriage. It was held by the court that consummating a marriage by an artificially created genitals cannot be described as natural intercourse. This ignited a huge controversy leading to several debates. However, a noteworthy development was made only in 2014 when the Gender Recognition Act was passed by the British Parliament that extended a full recognition to acquired gender. The legislation makes provision for Transgender Persons to obtain birth certificates of acquired gender and enables them to enjoy all rights at par with general population including right of marriage.

The US Supreme Court recognized the right of marriage of same sex couple in *Obergefell v. Hodges*. The court observed that need of legal recognition on par with the heterosexual union for effective enjoyment of rights.

New Zealand is a country having a very liberal approach towards the sexual minorities. The Civil Union Act, 2004 legalized



<sup>7</sup> Laws governing transgender marriages in India, July 28,2021, ipleaders, visited 5/8/2022 10.am



the civil union for same sex and opposite sex partners, where the couples are granted marriage rights along with other rights. Transgender persons in New Zealand enjoy same status and rights at par with the general population.

South Africa's earlier adopted a conservative and rigid approach towards LGBTQ relationships. It has drastically changed its approach to be liberal by enacting the legislation to formally recognize and give marriage rights to all irrespective of their gender. The Constitutional Court of South Africa in its Landmark Judgement held that the same sex couples have a constitutional right to marry. It observed that conditions of hetro sexual excludes people who are not heterosexuals insinuating that they are not normal. It gives out an impression that they are not in the same footing with the heterosexuals, therefore it is discriminatory and unconstitutional. As a consequence of this pathbreaking judgment the legislation Civil Union Act was enacted in South Africa in the year 30<sup>th</sup> Nov 2006 by the National Assemble allowing the legalisation of same sex marriages<sup>8</sup>.

**Transgender Marriages in India:**

Marriage is perceived as an association between two individuals which bestows upon certain rights. It is a sacred right where people willingly decide to share their life with their partner and the state cannot encroach upon such rights. The choice to marry is vital for upholding ones dignity and to experience a completeness in life and a recognized marriage status is also considered to be a fundamental right<sup>9</sup>.

In India law relating to marriage is not uniform and are governed by the personal laws. The marriage of Hindus is governed

<sup>8</sup> Supra note 7

<sup>9</sup> A non-recognized status of transgender marriage in India, Indian Review of Advanced Legal Research, iralr.in , Aug 12, 2020, last visited 11.35, 8-8-2022



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by Hindu Marriage Act 1955, the Muslims are governed by the Mohammadan Law and Interfaith/ Religion marriages are governed by the Special Marriage Act From the institution of Marriage flows several rights and obligations that wrap around the marriage and family. Then there are many laws that protect the domestic relationship like divorce, domestic violence, dowry prohibition. Moreover, the criminal law also contains certain provisions for offences relating to marriage. Currently all these laws are setup to suit the conventional marriages between the heterosexual couples and it may be quite a task to accommodate the Third gender persons within such legal framework. The NALSA judgement emphasized the need to amend existing marriage laws by state and the center. However, no attempt is seen by the government in this direction. The laws stand as they are and more anomalies are created. The question is whether a new law is required to be enacted for governing the marriages of Transgender Persons or whether it is practicable to amend existing laws to accommodate such marriages.

#### Status:

Since the Supreme Court in its landmark judgement in National Legal Services Authority·V. Union of India, has declared that the self-perceived identity is a fundamental right, the Transgender Persons have been granted acknowledgement of their rights to identification. However, the application of personal laws to the Transgender Persons are unclear<sup>10</sup>. For acknowledging a marriage as legitimate it is necessary to decide the character laced in marriage.

#### Hindu Marriage Act 1955:

Section 5 of the Hindu Marriage Act lays down Conditions for a Hindu marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- i. neither party has a spouse living at the time of the marriage;

<sup>10</sup> Thukral Phankhuri, Kainya Vamshika, Transgender position and identity in family law in India, ,vol 3, issue 3, april 2022, journal for law students and researchers , researchgate.net

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- ii. at the time of the marriage, neither party
  - a. is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
  - b. though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
  - c. has been subject to recurrent attacks of insanity
- iii. the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;
- iv. the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- v. the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;
  - i. A marriage between a Hindu man who converted as Christian and a Christian lady in a Hindu form is not a valid marriage
  - ii. To draw an inference merely from the fact that the spouses had no co-habitation for a short period of about a month, is neither reasonable nor permissible.

Sub section iii, iv and v of section 5 of the Hindu Marriage act lays down a requirement that the marriage must be between two Hindus and one of the spouses must be identified as bride and the other as bridegroom. Therefore, we can safely infer that a Transgender Person who has undergone sex re-assignment surgery can and have processed their documents with their respective new identity as male or female can qualify as bride or bridegroom as the case may be within the meaning of this provision<sup>11</sup>.

<sup>11</sup> Supra note 10



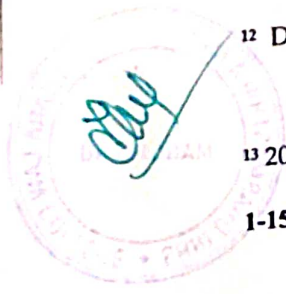
Transsexuals are people from the Transgender community, who have undergone sex change through sex re-assignment surgery to transition into their desired gender. They can officially and legally get acknowledged as the chosen gender in all their legal documents by following the necessary procedure. Therefore, under Hindu Marriage Act, 1955, where the Transgender Persons identify themselves as Male or Female, they are allowed to enter a valid marriage. However, when they do not identify themselves as male or female and choose to be identified as a third gender, it becomes difficult for their marriage to be validated under Hindu Marriage Act, 1955<sup>12</sup>.

In case of *Aruna Kumar Sreeja v, Inspector General of Registration*<sup>13</sup>, one of the spouses, the petitioner in this case was a Transgender person. Both the petitioners were professing Hindu Religion. Their marriage was solemnized as per the Hindu customs. However, the Registrar of marriage refused to register the marriage on the ground that the couple did not meet the conditions of the sec 5 of the Hindu Marriage Act. The word 'Bride' ordinarily means a woman on her wedding day. The second petitioner was a Transgender and not a woman. It was alleged that Transgender did not fit within the dictionary meaning of the term bride and bridegroom as provided in sec 5 of the Hindu Marriage Act. The court pointed out the difference between sex and gender observing that that the gender identity lies in the case of one's personal identity, gender expression and presentation. It further observed that Transgender Person fall within the expression 'Person' stated under article 14 of the Indian Constitution and therefore is entitled to legal protection. Discrimination based on gender identity and sexual orientation is violative of article 14, 19 and 21 of the Constitution.

It was held that the word Bride used under section 5 of the Hindu Marriage Act should be interpreted to include Transgender

<sup>12</sup> Daryayani Nitya, Transgender marriage and adoption in India-a socio legal analyses, [blog.knowledge.in/index.php/2022/05/12-transgender-marriage-and-adoption-in-india-a-socio-legal-analyses](http://blog.knowledge.in/index.php/2022/05/12-transgender-marriage-and-adoption-in-india-a-socio-legal-analyses), may 12,2022.

<sup>13</sup> 2019, Mad HC



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Persons who expresses and identifies themselves to be women. To validate the marriage of a of Transgender Person under Hindu Marriage Act, the self-identity as a bride or the bride groom is the only necessary factor.

The Judgement has paved the way for the Transgender marriage under the Hindu Marriage Act, however for those who do not identify with the binary genders, the doors are still closed<sup>14</sup>.

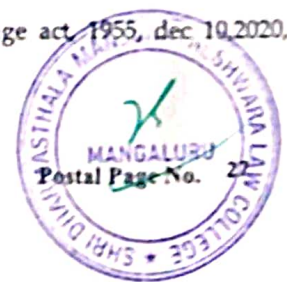
**Validity of Transgender Marriage under Mohamadden Law:**

Marriage under Mohamadan law is a contract. There is an offer and acceptance between the parties in the presence of adequate witness. It is a requirement that the contracting parties must be from the opposite gender and does not mention the words man and woman. Going by this interpretation the marriage between a Transgender Person and the person of the opposite sex can be said to be valid. So along as a Muslim Transsexual enters a heterosexual marriage, their marriage is recognized to be valid by the Muslim Law.

On the other hand, the validity of Transgender Marriage under the Moammadan Law is highly debatable. The Muslim marriage is a contract with an objective of procreation and legitimization of children. As Transgender Persons have no reproductive capacity, they fail to perform of objectives of the contract of marriage. These conditions make the validity of Transgender Marriage under Muslim Law questionable. A wider interpretation of the term 'procreation' which may include begetting of child through surrogacy also fails to validate the status of such marriage as traditional surrogacy is not acceptable and illegal under Muslim Law. Moreover, a Transexual is not capacitated to conceive through the IV process<sup>15</sup>.

<sup>14</sup> Sharma Abhishek, Can transgender marry under Hindu marriage act, 1955, dec 10, 2020, Indianlegal solution.com/visited 11am, 08/08/2022

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### Special Marriage Act:

The Special Marriage Act aims to give protection to interfaith marriages when they fail to gain recognition under the personal marriage laws<sup>16</sup>. Law relating to marriage under the Special Marriage Act are also designed on the lines of Hindu Marriage Act, 1955. The fundamental requirement for a valid marriage under the Special Marriage Act is for the parties to be male and female and attained majority<sup>17</sup>. The Special Marriage Act permits marriage between heterosexual couples only. Sec 4(b)(ii) states that neither party though capable of giving valid consent, if suffers from mental disorder of such kind or to such extent is deemed to be unfit for marriage and procreation. This leaves no room to validate marriage of Transgender Persons under this Act as the emphasis is on procreation which the Transgender Person is incapable of<sup>18</sup>.

Therefore, to summarize, Third Gender Persons who do not identify themselves with either male or female, or transsexuals who do not possess childbearing capacity, or those who do not identify themselves as bride or bridegroom under Hindu Marriage Act do not stand a chance to validate their marriage.

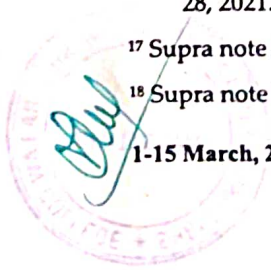
### Legal impediments:

The entire law in the legal system is rooted in the accepted gender norms. Especially the laws relating to matrimony, inheritance, welfare legislations are restricted to the binary genders man and woman depending on the gender assigned on birth. This defect in the system has created a major legal impediment for the Third Gender Persons to claim their rights effectively especially in today's world even after the Third Gender is legally recognized. The Transgender Protection of Rights Act 2019, which was passed to give and equal status to Transgender Persons is also silent on

<sup>16</sup> Sawhney Abhimanini, Grover Sara, Laws governing transgender marriages in India , July 28, 2021. ipleaders visited 5-8-2022

<sup>17</sup> Supra note 10

<sup>18</sup> Supra note 16



matters of marriage, inheritance, and adoption rights of Transgender Person. It is only the Judiciary which upholds and recognizes and pronounced the rights on the case-to-case basis, still being a task for the Transgender Persons. Perhaps the Government has its own reasons for not been proactive on matters of marriage of Transgender Persons. The government opposing same sex marriage before the Delhi High Court stated that there is a legitimate state interest in limiting the marriage to heterosexuals only. According to the Government the institution of marriage is not just a matter relating to privacy alone but has a larger domain<sup>19</sup>. The landmark judgement in *Navtej Singh Johar v. Union of India*<sup>20</sup>, though favored the decriminalization of homosexual acts, refused to recognize the same sex marriage. The reluctance on part of the judiciary and the legislation may not only be a due to reasons of morality alone, but also because of the practical difficulties arising out of such AIR acceptance. The acceptance of the marriage of Transgender Persons who do not identity with the gender binary are difficult to be accommodated in the current legal framework. The impact is not just restricted to marital law and will spill over the entire legal system. The whole structure of the family and society will undergo a massive change. It will be a great challenge to accept and adopt to the change. However, this issue cannot be skirted for long and must be addressed at the earliest.

Recommendations:

An Amendment of Special Marriage Act to embrace the Third gender Persons within the meaning of eligible parties is a fundamental requirement. Suitable amendments in the personal marriage laws must be made to bring it in tandem with the changing needs of the society regarding marriage.

Amendment of Transgender Person (Protection of Rights) Act 2019 to include rights of marriage, divorce, inheritance, and adoption and giving it an overriding effect on all provisions of other

<sup>19</sup> Agarwal Shreya, 25<sup>th</sup> Feb 2021, live law.in, 3.21pm

<sup>20</sup> 2018 SC 4321, (2018) 10 SCC



conflicting legislations. There must be a proactive initiative by the Government to disbar customs and traditions that hinder the process of bringing in change in marital validity of Transgender Persons marriage<sup>21</sup>.

### Conclusion:

The fight for Transgender Persons to marriage is gaining momentum. The society's perception of morality and equality cannot undermine the right and the laws of the class of people, because of the flimsy reason that they fail to fit into the definition of recognized gender. It is seen through the various judgements that the labor of the struggle is slowly but steadily bearing fruits. The petition for recognition of same sex marriage is pending before the Supreme Court, which has directed all the other petitions on the same matter pending before other High Courts to be transferred to it. The Supreme Court has also sought the response of the Central Government on this petition. The decision of the Supreme Court on this matter will have a significant impact on the Transgender Persons marriage rights. When the general stereotyped notion of the society on marriage changes the issue of transgender Person's marriage will find solution with acceptance. On the other hand, the society will be swept with a strong wave of changes that will alter the very structure of the family and society. It is a matter of great speculation and interest to see how the government and the society will prepare itself to embrace this challenge.

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<sup>21</sup> Supra note 16



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