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Navigating the Sexual Harassment Legislations in India: A Comparative Analysis of the Indian Penal Code, the POSH Act and the Bhartiya Nyaya Sanhita

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ABSTRACT

This paper seeks to evaluate the changes in Indian legal provisions dealing with sexual harassment at workplaces, especially in the IPC, POSH ACT, and the recently enacted BNS. The paper assesses the intent, reach, and further mechanisms of enforcement through these laws to analyze the effectiveness of each of these systems in fighting sexual harassment. Although the IPC and BNS, above all focus on criminalizing specific acts of sexual harassment, the POSH Act deals with a range of workplace harassment issues pertaining to economic and psychological dimensions, among others. This paper therefore describes the strengths and weaknesses of each of these legal frameworks, also outlining the potential overlaps and gaps in protection. This paper examines how these laws interact to shed light on how the evolving Indian legal landscape tackles the complex issue of sexual harassment and its impact on victims. Even the inadequacies of these laws have been critiqued in the paper. The POSH Act's gender-specific protection that has placed it to exclude not only men but also non-binary and transgender persons is challenged. The BNS and IPC are however seen to be too limited, as they ignore psychological elements of harassment that have been very fundamental in most cases.

The paper argues for a much-needed and dynamic legal approach toward sexual harassment in India. It also thinks of expanding provisions for all genders and inclusion of psychological harassment within the legal

framework. In the course of research, the need for legal periodic review, better awareness, and training, especially in informal sectors, has been strengthened by way of making the laws ongoingly relevant and effective in handling the complex issue of sexual harassment of contemporary India..

KEYWORDS

Sexual Harassment, POSH Act, Bhartiya Nyaya Sanhita (BNS), Indian Penal Code(IPC), Gender Equality.

ABBREVIATION

Title	Abbreviation
Bhartiya Nyaya Sanhita	BNS
Sexual Harassment of Women at Workplace Act, 2013	POSH Act
Indian Penal Code	IPC
Pre-Independence	PI
Post-Independence	PIn
Sexual Harassment as per Different Laws	SHDL

1. INTRODUCTION

Definitions, scope, punishments and enforcement mechanisms of these laws have been compared and contrasted in this paper with an intention to bring out the strengths and point out areas for improvement. Through this comparative analysis, we try to understand how these legal frameworks together help combat sexual harassment and protect the rights of individuals in India. Among them, it is the POSH Act that explains sexual harassment most elaborately, setting out the mental, physical, and emotional aspects of sexual harassment comprehensively. All these laws have a similarity in their cause: to protect citizens from sexual harassment; they are different in respect to scope, application, and mechanisms for enforcing actions. How hard would these laws be to act as shields for victims or deterrents for perpetrators?

This paper digs deeper into the complexities of these legal landscapes and what they mean for a society striving toward gender equality.

The journey of addressing sexual harassment in India has been one of significant legal and social evolution. This can be broken down into three distinct phases- each representing a step in taking a much safer environment for women, especially at their place of work. Let's talk about them:

1. The Era Before POSH: IPC's Limited Reach

Dealing with sexual harassment, in those days, was trying to fit a square peg into a round hole. The Indian Penal Code was the weapon; it was just not the right one. The Indian Penal Code was indeed the only legal tool, but at best, it was somewhat of a blunt instrument rather than any kind of accurate remedy. This is what it was then:

- **Section 354:** This section dealt with assault or criminal force against a woman intending to outrage her modesty. It was very broad, but although it could be applied to certain cases of harassment, it didn't specifically target workplace scenarios or the subtleties of harassment, such as lewd comments or inappropriate gestures.
- **Section 509:** It dealt with the words or gestures or acts intended to outrage a woman's modesty. As such, it was the direction towards which to go, but it was still limited in scope, focusing more on overt acts than power dynamics and pervasive nature at work place.

Its approach reactive and narrow or confining sexual harassment to an isolated incident rather than the systemic problem. It did not have a structured mechanism in place at the workplaces to

deal with complaints, leaving victims of harassment without much recourse. And the end result? Silence culture as many suffered in pains without a voice. .

2. THE POSH MOVEMENT: BRINGING STRUCTURE AND AWARENESS

The wake-up call to this society came with the Prevention of Sexual Harassment (POSH) Act in 2013. This was not merely a legal but social development. The POSH Act brought clarity, structure, and a much-needed framework with the Vishaka Guidelines laid down by the Supreme Court in 1997, to provide some relief against workplace harassment.

- **A Clear Definition:** The POSH Act provided an overarching definition for sexual harassment, thus finally ending what could be considered as a mishmash of some extremely wide range of behaviors that could make the workplace hostile from unwelcome physical contact to suggestive comments and requests of sexual favors.
- **Internal Complaints Committees (ICCs):** No more sweeping things under the rug. The POSH Act mandated the establishment of ICCs in every organization, a formal and accessible platform for complaints. It was a game-changer, giving victims of abuse a voice and a process for redressal.
- **Training & Awareness:** The Act mandates organizations to educate and sensitize employees about sexual harassment. Regular workshops and training sessions are now essential, fostering a culture of respect and breaking the silence around these issues.
- **Internal Redressal Mechanism:** The Act also requires organizations to establish an internal redressal mechanism

to handle complaints of sexual harassment. This includes setting up committees to investigate and address grievances, ensuring a structured and effective approach to resolving issues.

While the POSH Act provided a civil remedy in the work, the IPC continued to handle the criminal aspects. This dual approach was able to offer an overall shield of providing immediate solutions in the workplace while the deeper offenses carry a possibility of being made into criminal cases.

3. THE PRESENT AND FUTURE: POSH AND THE BHARATIYA NYAYA SANHITA (BNS)

Fast forward to today, and we're on the cusp of another transformation with the proposed Bharatiya Nyaya Sanhita (BNS). This initiative aims to modernize and replace the IPC, ensuring that our legal framework is not just a relic of colonial times but a living document that addresses current societal challenges.

- **Modernization and Contextual Relevance:** The BNS seeks to update the language and provisions of the IPC, making the laws more relevant to the present day. This includes addressing gaps in the current system and ensuring that sexual offenses, including harassment, are clearly defined and appropriately penalized.
- **Stronger Legal Framework:** With the integration of BNS, the legal response to sexual harassment could become even more robust. It aims to harmonize with existing laws like POSH, creating a more seamless experience for victims seeking justice, whether through workplace mechanisms or the criminal justice system.
- **Cultural Sensitivity and Inclusivity:** The BNS promises to reflect India's diverse cultural landscape, making laws more

sensitive to the unique contexts in which harassment occurs. This approach aims to create a more inclusive and supportive environment for reporting and addressing sexual misconduct.

4. BRINGING IT ALL TOGETHER

From the early days when the IPC was the only player in the game, offering limited and often inadequate recourse, to the transformative impact of the POSH Act with its structured approach and focus on the workplace, India has come a long way. Now, with the impending introduction of the Bharatiya Nyaya Sanhita, there's hope for an even more nuanced and effective framework that aligns with the complexities of modern society. This evolution isn't just about laws; it's about changing mindsets, creating awareness, and fostering an environment where everyone can work without fear. It's a journey from silence and stigma to voice and empowerment, and it's still unfolding as society continues to strive for a safer, more equitable world. In the case of corporate India itself, the issue of workplace sexual harassment against women is a continuing factor. While the POSH Act has largely remained unaffected because of the introduction of the BNS, changes elicit mixed reactions. Only time will tell how all this will be implemented and what impact it will have on society and the dynamics of workplaces.

5. SEXUAL HARASSMENT AS PER DIFFERENT LAWS

The term "sexual harassment" was coined in the 1970s in the United States as a result of increased awareness of the problem women were facing in their places of work. One such event standing out was in 1975, when a group of Cornell University women, led by Lin Farley, came out publicly using the term to

describe a lewd type of advances and behaviors women had been encountering. Farley's testimony before the New York City Human Rights Commission brought great attention to the issue and was really a defining moment for efforts to combat sexual harassment. Though the term had been coined in the mid-1970s, several more years would pass with laws and policies being written to deal with this form of discrimination and abuse.

Although the term "sexual harassment" was established in the West in the 1970s, its identification and treatment as a distinct legal and social issue in India date back to a considerably later time. Indeed, redress for sexual harassment commenced in India rather dramatically and with a landmark Supreme Court case. The issue was first brought to national attention through the case of *Vishaka v. State of Rajasthan* in 1997. While the IPC did contain some provisions that could be applied to certain forms of sexual harassment, the issue did not really come into significant public view until late in the 20th century. The landmark turn came in 1997 with the Vishaka Guidelines, issued by the Supreme Court of India. These guidelines were framed following a petition by social activists, one of whom was Bhanwari Devi, a Dalit woman who became a victim of gang rape after she opposed a child marriage. The Vishaka Guidelines went on to provide appropriate and complete framework for places of work in terms of avoiding and addressing sexual harassment. They served to galvanize the idea of sexual harassment as a serious issue and laid the ground for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, popularly known as the POSH Act. The evolution in the legal framework is no doubt very positive, but it does not lead to an automatic change in the social understanding and response to the question of sexual harassment, which in India remains a continuing and complex

process.

The Vishaka judgment has defined "Sexual Harassment" as: "includes such unwelcome sexually determined behavior (whether directly or by implication) as:- a. Physical contact and advances b. A demand or request for sexual favours; c. Sexually coloured remarks; d. Showing pornography; e. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature

We have at present various laws explaining or defining the term Sexual Harassment, viz. POSH Act, 2013 Bhartiya Nyaya Sanhita, Previously in Indian Penal Code which is recently replaced by Bhartiya Nyaya Sanhita, Contrastingly, what the definition of sexual harassment under the POSH Act, Bhartiya Nyaya Sanhita, and the Indian Penal Code is shall be elaborated contrastingly to the scope, language and the coverage these laws have.

1. Indian Penal Code (IPC)¹ - Section 354A

Section 354A of IPC:

(1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

¹ *Section 354 in the Indian Penal Code, 1860 INDIAN KANOON*. Available at: <https://indiankanoon.org/doc/203036/> (Accessed: 07 August 2024).

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Key Features:

- The IPC definition is focusing on explicit physical acts and sexual advances.
- Criminal Nature: IPC primarily addresses sexual harassment as a criminal offense with specific penalties.

Sexual harassment has been laid down in Section 354A of the IPC under detailed modes emphasizing on sexual harassment, including obvious physical and verbal conduct, such as unwelcome touching or advances, demands for sexual favors, and displaying pornography against a woman's will. Introduced by the Criminal Law Amendment Act, 2013, this provision has been modeled after the corresponding provisions in the *Bhartiya Nyaya Sanhita*, laying emphasis on overt acts of harassment. While both the legislations categorize such acts as criminal offenses, and the punishment in both cases includes a provision for imprisonment as well as a fine, the approach of the IPC, like that of the BNS, remains punitive in nature, thereby focusing more on criminalizing overt acts than on going into the subtle forms of harassment, as is the case with many provisions under the POSH Act. This focus on overt wrongdoing, if necessary for obvious cases, may lose sight of the great part that complex workplace

harassment, in most cases, plays in it.

2. POSH Act (Sexual Harassment of Women at Workplace Act, 2013)²

The POSH Act was specifically created to address sexual harassment in the workplace. It provides a broad and comprehensive definition of sexual harassment, encompassing both physical acts and mental or emotional harassment.

Section 3(1) and 3(2) of the POSH Act:

(1) No woman shall be subjected to sexual harassment at any workplace.

(2) The following circumstances, among other circumstances, if it occurs, or is present in relation to or connected with any act or behavior of sexual harassment may amount to sexual harassment: —

(i) implied or explicit promise of preferential treatment in her employment; or

(ii) implied or explicit threat of detrimental treatment in her employment; or

(iii) implied or explicit threat about her present or future employment status; or

(iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or

² India code: Sexual harassment of women at workplace (prevention, prohibition and Redressal) act, 2013, https://www.indiacode.nic.in/handle/123456789/2104?sam_handle=123456789/1362 (last visited Aug 7, 2024).

(v) humiliating treatment likely to affect her health or safety.

Key Features:

- **Wide enough scope:** POSH Act is full-spectrum and effectively includes all types of conduct, including threats, intimidation, and hostile work environments, while not being confined only to acts of a physical nature.
- **Impact Oriented:** The Act is impact-oriented, that is to say, it is concerned with the well-being of a victim's mind, emotions, or body.
- **Comprehensive Protection:** It encompasses both implied and explicit acts, as harassment is subtle as well as overtly physical.

It is thus the POSH Act that forms an all-embracing framework to take on this multi-dimensional problem of workplace harassment. In contrast to the narrower definition taken under the laws like *Bhartiya Nyaya Sanhita*, which remains focused on the explicit acts done by a person physically, the POSH Act extends this ambit beyond it to include within itself not only physical but also mental and emotional harassment. These can be harassment by implication—for instance, making promises to give preferential treatment or threats in relation to the status of an employee on employment, or creating a hostile and intimidating work environment. This approach looks at the impacts on the whole of the victim's condition and recognizes that fact that in most cases, harassment is done more discreetly by less obvious activities of harassment. Such nuanced and harmful behaviors might get missed in the narrower focus of the BNS on physical acts alone, making the POSH Act a better tool in safeguarding women at workplaces.

1. **Bhartiya Nyaya Sanhita³ (BNS)**

The BNS is a replacement for the IPC, aiming to modernize and Indianize the criminal laws. Its definition of sexual harassment, as per Section 75, focuses more narrowly on physical acts of harassment.

Section 75 of BNS:

(1) A man committing any of the following acts:-

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Key Features:

³ *India code: Bharatiya Nyaya Sanhita, 2023*. Available at: https://www.indiacode.nic.in/handle/123456789/20062?view_type=browse (Accessed: 10 August 2024).

The definition of BNS is more circumscribed and focused on physical acts, explicit sexual advances.

- **Criminal Sanctions:** These acts are directly linked to criminal penalties by the BNS and it also outlines some basic differences that characterize kinds of harassment.
- **Lesser degree in workplace dynamics:** The BNS does not include work environment-specific effects of harassment, such as hostile environment and implied threats.

The Bhartiya Nyaya Sanhita (BNS) revises India’s criminal laws to focus on sexual harassment, criminalizing non-consensual physical advances, demands for sexual favors, and forced pornography viewing under Section 75. While it enhances the response to overt harassment, it overlooks subtler forms like hostile environments or implied threats, suggesting a need for broader protections like those in the POSH Act.

Aspects	Indian Penal Code	POSH Act, 2013	Bhartiya Nyaya Sanhita (BNS)
Scope and Definition	-emphasizes physical acts and explicit sexual advances. - Does not address non-physical forms of harassment or workplace dynamics.	- Covers physical, mental, and emotional harassment in the workplace. - Includes implied harassment (e.g., subtle threats or promises	- Focuses on physical acts and explicit sexual advances. - Largely overlooks subtle forms like intimidation or hostile

			work environments.
Gender Orientation	-Addresses harassment by men against women	-Only Protects women and leaves out men, non-binary, and transgender persons.	Gender-oriented, only covers harassment by men against women
Coverage	-General law which has no regulations specifically set for the workplace -Relies on criminal matters, which can be too lengthy and challenging sometimes	-Specific to workplace harassment.	Generally applicable but lacks workplace-specific concerns
Penalties	-Penalties accompanied with imprisonment for 3 years or fine or both.	-Institutional recourse, for example, dismissal or reassignment. -Provides criminal cases as per the requirement	-Imposes imprisonment for up to three years and can fine and both seriously on grave offenses.
Impact on Victims	A more suitable case for overt harassment, misses psychological and non-physical intimidation.	-Alters focus from safety in a workplace that considers power play and veiled forms of harassment.	-Effective in clear-cut cases of overt harassment, tends to lose effectiveness in

			psychological harassment.
Limitations	<p>-Doesn't take into account workplace-specific issues or less overt forms of harassment.</p> <p>-Same gender-specific limitation like in BNS</p> <p>Very high burden of proof, hard to prosecute</p>	<p>-Narrowly focuses on workplace harassment rather than public space and domestic settings.</p> <p>-Protects only women; other genders are left out</p> <p>-Implied harassment is very hard to prove as it raises subjective contention</p>	<p>- Physical acts only and does not give importance to the dynamics of the workplace and mental harassment.</p> <p>- Does not cover harassment of males, non-binary, and transgender.</p> <p>- The general applicability is without specific place of work provision</p>
Appeal Process	<p>Appeals relating to any order or determination passed by a subordinate court can be transferred to a superior court under the procedure as prescribed by the CrPC.</p>	<p>Appeals against the order or determination made by the IC can be filed before courts or tribunals within the period of three months.</p>	<p>Appeals are dealt through the judicial process much like the case with the IPC but under a new legal system.</p>

CHART No. 1

6. TWO SIDES OF THE SAME COIN

The POSH Act and the BNS/IPC are two sides of the same coin. What the POSH Act does is take you through a labyrinth called workplace harassment, wherein the power play and subtle threats did more damage than the physical advance. It is for prevention, protection, and making a safe work environment. On the other hand, the BNS and IPC are the heavy artillery in the legal arsenal and designed to strike down blatant sexual harassment wherever it occurs. They will also come in handy in ensuring justice is done in clear cases of injustice, with stringent penalties appropriate for their seriousness.

These coins thus protect women, but in a complementing and intersecting way with other laws, providing double protection for them to come forward and take a stand, hence complete coverage. Whereas Posh has a limitation of safeguarding the work place for women on the other side BNS is giving a wide coverage to the women of whole state to come against Sexual harassment in any part of their life. The two Acts together provide dual protection that ensures women are safeguarded both in their professional milieus and in society at large, leaving little chinks in the armor through which harassment may slip away unattended.

7. WHAT IS BNS WITH RESPECT TO SEXUAL HARASSMENT?

The introduction of the Bhartiya Nyaya Sanhitha (BNS) can have several positive impacts on addressing sexual harassment:

- **Modernization of Laws:** BNS offers the opportunity to modernize outdated legislation, ensuring that definitions and provisions related to sexual harassment are relevant to

contemporary societal norms. This modernization can make the laws more applicable and effective in addressing current challenges.

- **Filling Gaps in Existing Legislation:** By providing more specific and detailed provisions, BNS can fill the gaps present in the existing Indian Penal Code (IPC). Stronger phraseology and more precise definitions can help address various forms of sexual harassment more effectively, ensuring that all instances are covered under the law.
- **Alignment with the POSH Act:** BNS can complement the existing frameworks of the Prevention of Sexual Harassment (POSH) Act by integrating civil and criminal redressal mechanisms. This alignment can create a seamless process for victims seeking justice, whether in the workplace or through the criminal justice system.
- **Simplified Access to Justice:** With BNS in place, victims may find it easier to navigate the legal system. By harmonizing workplace policies and criminal laws, the process for reporting and addressing sexual harassment becomes less daunting, offering a clearer pathway to justice.
- **Enhanced Legal Protections:** The introduction of BNS can lead to harsher sanctions for offenders and a more efficient legal process, acting as a stronger deterrent against sexual harassment. By establishing clear procedures for complaints and investigations, the process becomes more victim-friendly, encouraging more individuals to come forward.
- **Cultural Relevance and Inclusivity:** BNS has the potential to offer contextually applicable rules that consider the diversity and cultural nuances of Indian society. By recognizing that sexual harassment can manifest in various

forms across different scenarios, BNS can provide more inclusive protections, particularly for marginalized groups whose experiences may have been overlooked previously.

- **Public Awareness and Education:** The introduction of BNS can raise public awareness about the issue of sexual harassment, fostering a more informed and proactive approach to prevention and management. Clearer legal language and definitions can help people better understand their rights and responsibilities, contributing to a more robust societal response.
- **Stronger Deterrence:** With more stringent laws and penalties, BNS can serve as a stronger deterrent against sexual harassment, potentially reducing its occurrence. Knowing that the legal system has become more rigorous can discourage potential offenders and promote safer environments.
- **Victim-Centered Approach:** BNS can help create a more victim-centered legal process, ensuring that the rights and needs of survivors are prioritized. By streamlining procedures and making them more accessible, BNS can reduce the emotional and psychological burden on victims, encouraging more individuals to report incidents.
- **Improved Clarity and Legal Language:** By clarifying legal language and definitions, BNS can reduce ambiguity in the laws related to sexual harassment. This clarity can help individuals better understand the scope of what constitutes harassment, making it easier to identify, report, and address such behavior effectively.

Overall, the Bhartiya Nyaya Sanhitha has the potential to significantly enhance the legal framework for addressing sexual harassment in India, offering more modern, inclusive, and

effective solutions that align with contemporary societal needs.

8. CONCLUSION

India's legal structure on sexual harassment is sound but highly fragmented. The Indian Penal Code, 1860, Prevention of Sexual Harassment at Workplace, 2013 and now Bhartiya Nyaya Sanhitha, 2023 serve separate purposes but are themselves incoherent both in application and the adequacy of coverage under each of them. This was expected as addressing the harassment outside the workplace was part and parcel of the broader effort toward criminalizing under the BNS and IPC—a gap that remains to be cured, however, especially on gender neutrality and psychological harassment. India can learn from other approaches to strengthen such provisions. To be included, all-gender protection, psychological harassment, and harassment outside the workplace would make the law something more inclusive and widespread. When these measures are adopted, a country like India can ensure legal changes toward combating sexual harassment, progressively meeting international standards, and it could make it a safer and just society.

9. SUGGESTIONS

- **Gender-Neutral Legislation:** The new legislation that must evolve in India has to provide gender-neutral protections against sexual harassment as is the case in the law of the U.S. and Australia. This would extend the POSH Act to also include men, non-binary, and transgender people thus ensuring all citizens are equal before the law irrespective of any gender prejudice.
- **Confidentiality Assurance:** The most common fear among victims is the violation of confidentiality. Improving statutory provisions to make them more binding while enforcing

confidentiality with consequences for breach would instead safeguard the victim from victims and stigma. France's Labor Code also has stringent provisions for confidentiality which can be embodied in Indian laws.

- **International Standards:** Most nations have embraced international cooperation and best practices to combat the kind of sexual harassment involved here. India needs to further strengthen its collaborative efforts with other countries to know how they are going to combat it in their law system of improvement in the frame work and mechanisms of enforcement.
- **External Audits:** Here, the organization can allow the implementation of external audits by choosing external auditors to audit the workplaces for assessing culture, policies, and practice on sexual harassment. This exercise pinpoints weaknesses and gives recommendations on possible improvements.
- **Community-based Initiatives:** Establish SHPCs in the grassroots level with local leaders, activists, and ordinary residents. The committees here can educate the community, offer support for victims of sexual harassment, and can campaign for change.
- **Partnership with Government:** The SHPCs must establish partnership with the government to ensure effective running of law and policy. The SHPCs would be of immense aid to fill and identify gap while crusading for improvement.
- **Clear Guidelines for Organizations:** Provide organizations with detailed guidelines on how to align their policies with BNS, especially if there are deviations from the POSH Act. This can include training programs, templates, and resources to assist in updating their internal policies and procedures to comply with the new laws.

- **Safeguards Against Misuse:** Introduce safeguards to prevent the misuse or misapplication of the new measures. This can involve establishing oversight mechanisms, clear guidelines for interpretation, and regular reviews of how the laws are being applied to ensure they are not being exploited or leading to unintended legal complications.

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