Seeking Talfīq as a Strategy for the Amendmends in the Muslim Marriage and Divorce Act of Sri Lanka a Juristic Analysis

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DOI : https://dx.doi.org/10.47772/IJRISS.2024.8120053

Received: 21 November 2024; Accepted: 26 November 2024; Published: 31 December 2024

ABSTRACT

The demand for amendments in the Muslim Marriage and Divorce Act has been a controversial issue in in Sri Lanka. Even though the Shāfiʿī madhhab is predominant in Sri Lanka, the activists propose to use the talfīq (combination of madhhabs) to accommodate their demands based on the Ḥanafī madhhab as a strategy for the amendments in the Muslim Marriage and Divorce Act. Accordingly, they demand the appointment of women Qāḍī, and the nullification of walī considering the opinions of Ḥanafī madhhab. Therefore, the demand for talfīq has become a controversial issue which urge an academic analysis on it. Hence, this study explores the possibilities of deploying the talfīq for reform in the juristic perspective drawing on the Quran, Hadith, and the opinions of the classical and modern jurists. As a result, this study found that the talfīq strategy is not encouraged by the classical jurists as well as the predominant religious leaders in Sri Lanka also oppose it vehemently. However, this study recommends the comparative analysis of the madhhab to find the best practice of the madhhabs on a particular subject.

Keywords: Amendments, MMDA, Sri Lanka, Strategy, Talfīq

INTRODUCTION

The Muslims in Sri Lanka are governed by the Muslim Marriage and Divorce Act (MMDA) in their matrimonial matters since the ancient time in different names. The Section 98 of the Act of 1951 of the MMDA emphasizes that all matters corresponding to Marriage, Divorce and matrimonial obligations of all Sri Lankan Muslims are determined as stated by the Muslim Law governing the madhhab to which the party belongs (Chulani, 1999, p.8). Accordingly, the court considered from the early times that most Sri Lankan Muslims are the adherents of Shāfiʿī madhhab. Simultaneously, the Memon community which belongs to Ḥanafī madhhab and the Borah community which belongs to Shīʿah are authorized to follow the matrimonial matters according to their juridical madhhab.

Nevertheless, the reformists criticize that the Act has numerous contradictions. Significantly, the Act does not consist of any measure to determine the madhhab of a Muslim. Likewise, there is no instruction for Qāḍī to follow a particular madhhab. For instance, the procedure of pronouncing three ṭalāq during a month is permitted in Ḥanafī madhhab while is prohibited in Shāfiʿī madhhab. However, the majority of the Qāḍī who belong to Shāfiʿī madhhab adhere to this procedure (Fowzul, 2014, p.207).

Hence, Marsoof (2018) expresses that:

> Atrocities in following the entire Shāfiʿī madhhab during the entire life of a Muslim should be scrutinized to find alternative alterations, quoting an exemplary model of Shāfiʿī. When Shāfiʿī stayed near the Shrine/mausoleum of Abū Ḥanīfah, he prayed Isha' and Subh prayers according to Ḥanafī madhhab, avoiding reciting Bismillah loudly or Qunūth at Subh, and he justified that he performed it to respect Imam Abū Ḥanīfah.

The Kandy Forum and Sri Lanka Thow heed Jama-at (SLTJ) criticize the MMDA for its rigid adherence to a particular madhhab, though it has limited space for Ḥanafī madhhab. For instance, one of the judgements of a Sri Lankan court describes the prominence of Shāfiʿī madhhab in decision-making as follows:

> Although there are Muslims in Ceylon who belong to the Ḥanafī madhhab (Abdul Cader vs Razick, 54 NLR201, and A.L.M. Hanifa vs A.A. Razack, 60NLR 287, 'it appears that the Moors in Ceylon belong to the Shāfiʿī madhhab of Sunnis per Wood Renton, J. in Vappu Marikkar vs Ummani umma NLR 225 at 226. In the absence of evidence to prove madhhab, it may be presumed that the parties belong to Shāfiʿī madhhab, and accordingly, the principles applicable under the school of law would apply (Ummul Marzoona vs Samad 79 NLR 29 on page 211 per Vaythilingam J.).

Therefore, the Kandy Forum and the Sri Lanka Tawhīd Jamāʿat suggest amending the MMDA based on pluralistic and eclectic avenue without relying rigidly on a specific madhhab and to assimilate all the eligible and eminent features of Family Laws of distinctive madhhabs to priorities the Qur'an and Sunnah rather than focusing on certain legal sects (madhhab) (Nuhman, 2017).

It has been widely commented that "grouping the Muslims as adherents of Ḥanafī, Mālik, Shāfiʿī and Ḥanbalī sects is entirely inconsistent with the fundamental principles of the Qur'an and Sunnah and breaks the alliance and brotherhood of Islam". Therefore, all the reform proponents suggest amending the MMDA based on 'Muslim Law' rather than rigidly depending on or focusing on Shāfiʿī madhhab (Marsoof, 2001, p.17).

Moreover, the reform proponents suggest interpreting the 'sect' prescribes in section 16 of MMDA as it refers to the Sunni and Shi'a sects. In that case, they envisage that the Qāḍī would be authorized and freed to compare prominent Imams' opinions consisting of Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī madhhabs. Finally, he can conclude the case concerning to Sunni sect with an eclectic decision or fatwa (Marsoof, 2001, p.18).

However, the most dominant religious leaders in Sri Lanka express their strong opposition against the demand for removing the influence of Shāfiʿī madhhab in the MMDA and for enacting the combination of madhhab.

Therefore, this study deeply delves into the possibilities of deploying the talfīq for reform in the juristic perspective drawing on the Quran, Hadith, and the opinions of the classical and modern jurists.

Objective of the Study

This study aims to find the legality and validity of Talfiq for the legal reform in the Muslim Marriage and Divorce Act of Sri Lanka.

RESEARCH METHODOLOGY

Even though this study is mostly based on the qualitative research, the interviews also were conducted to find the insights of the experts in the MMDA as a primary data which supported the secondary data immensely.

DISCUSSION AND RESULTS

The basic Islamic texts such as Quran and Hadith and the opinions of the classical and modern jurists on the possibilities of deploying the talfiq for the legal reform has been discussed extensively below.

Definitions of Talfīq

There are numerous definitions regarding talfīq, which means "combining two different things or matters for a purpose". In Sharīʿah, talfīq denotes "searching for the scholars' most accessible opinion in the contentious issues" (Al-Saffārīnī, 1998, p.135). Another definition delineates that the talfīq means "taking validity of an action from two madhhabs together after the judgement is null and void in each of them separately" (Awqaf and Islamic Affairs Ministry, 1993, p.290).

Legality and Validity of Talfīq

There are three opinions regarding the legality and validity of talfīq. The majority of the jurists stress that talfīq is impermissible while some of them approve it in absolute terms. However, some jurists allow talfīq with conditions.

Complete Ban on Talfīq

The jurists of the four Sunni schools establish that "tracing licences is prohibited. Besides, Ibn Ḥazm al-Ẓāhirī, Ibn ʿAbd al-Barr al-Mālikī, Abu al-Walīd al-Bājī al-Shāfiʿī, Ibn al-Ṣalāḥ al-Shāfiʿī and Ibn al-Najjār al-Ḥanbalī hold a consensus on forbidding the talfīq" (Al-Tuwayjirī, 2009, p.32).

Likewise, al-Dhahabī states that: "whoever seeks the licences of madhhabs and the faults of the mujtahids, he will dissolve his religion" (Al-Dhahabī, 2004, p.81). Al-Awzāʿī elaborates that "whoever takes the uncommon opinions of the scholars, he will go away from Islam" (Al-Saffārīnī, 1998, p.140).

Therefore, al-Saffārīnī establishes that: "every madhhab has its principal and definitions to decide a ruling. Thus, opening the door of talfīq would spoil the Sharīʿah and allow the practice of what is forbidden. For instance, if a man wishes to fornicate with a mature girl, he can imitate Imam Abu Ḥanīfah invalidating her contract (relationship) without walī, and then he can follow Mālik in avoiding the witnesses. Consequently, he can justify her fornication to escape from the crime" (Al-Saffārīnī, 1998, p.137).

Therefore, Ibn ʿAbd al-Barr asserts that "It is consensus that seeking licences is not permissible" and al-Shāṭibī defines that: "following the licences of the madhhabs is an abuse or evil which lead to alienate from the religion by following the contradicting opinions instead of adhering to the explicit evidence" (Al-Shāṭibī, 1997, p.102).

Unrestricted Permission of Talfīq

Al-Sarkhasī (n.d., p.258), Ibn al-Humām, and Ibn ʿAbd al-Shakūr think that "seeking licences is encouraged by Qur'an and Ḥadīth as follows: "Allah intends for you ease, and He does not want to make things difficult for you" (al-Baqarah:185), and Ḥadīth "Allah's Messenger (PBUH) said: "Allah the Highest loves that His permissions be practised, just as he dislikes that disobedience to Him be committed" (Ibn Ḥibbān, Ḥadīth No:2742).

Furthermore, ʿĀ'ishah (R.A.) narrated "never did Allah's Messenger (PBUH) choose between two things but adopting the easier one as compared to the difficult one, but his choice for the easier one was only in case it did not involve any sin, but if it involved sin, he was the one who was the farthest from it amongst the people" (Muslim, Ḥadīth No:2327).

Restricted Permission of Talfīq

The Mālikī Shihāb al-Dīn al-Qarāfī and the Ḥanbalī Ibn Taymiyyah and Ibn al-Qayyim al-Jawziyyah maintain that talfīq is permissible provided certain conditions are satisfied (Al-Tuwayjirī, 2009, p.32):

1. Talfīq is prohibited if it leads to following the forbidden privileges.
2. Talfīq is prohibited if it leads to spoiling a ruler's ruling because his judgment will remove the dispute.
3. Talfīq is not allowed if it leads to the repeal of what he has imitated.
4. Talfīq is disallowed if it leads to contradicting the consensus of the scholars.
5. Talfīq is not permitted if it leads to combining the rulings which are not approved by any of the Mujtahids.

The scholars have set limits and conditions which do not allow the trespassers to modify the legal rulings according to their desires and aspirations as Kāmil (1999, p.135) summarises:

Although there is no definitive ruling on the permissibility of talfīq, it is generally agreed that it should be used sparingly and only in cases where it does not lead to the legalization of prohibited practices such as alcohol and adultery. Similarly, some things are forbidden, not for their own sake, but because of the consequences that result from them.

Syncretism of Madhhabs

Since Islam is a way of life, every Muslim is obliged to adhere to the teachings and rules of the Qur'an and the Sunnah in every aspect of life. However, not every Muslim can learn the entire Islamic jurisprudential sources and deduce what they need from the law. Therefore, Islam commands the public who cannot deduce from the Qur'an and the Sunnah to enquire the potential scholar, "so, ask of those who know the scripture if you do not know" (al-Naḥl:43).

Nonetheless, if there are divergent views among the jurists due to their different ways of reasoning and deducing rules from jurisprudential sources, an individual who does not know the law can imitate a madhhab's jurist with the guidance of a trusted Islamic scholar. In this case, he cannot move to another madhhab without a reason or a legitimate excuse (Ibn Taymiyyah, 2004, Vol.20, p.220).

Therefore, al-Shāṭibī (1997, p.292) thinks that "if the public (imitators) are given the freedom to choose the best from various madhhabs, they will prioritise only their desires. It would contradict the objectives of the Sharīʿah. So, the freedom of choice in the law is not encouraged at any time". Moreover, al-Shāṭibī emphasises that "the juridical decisions of the jurists are the primary sources for the public as the jurists deduce their decisions from the fundamental sources of Sharīʿah. The imitator is not a jurist, so he should ask the jurists because they are legislators for him".

Nonetheless, if an ordinary Muslim or imitator knows well that a particular decision of a madhhab explicitly contradicts the Ḥadīth, then he should adhere to the Ḥadīth as Nawawi (1925, p.63) elaborates that: "if our ancestors found a Ḥadīth that contradicts to the decision of Imam Shāfiʿī, they implemented the Ḥadīth saying that madhhab of Shāfiʿī is what accords to Ḥadīth".
Moreover, if an imitator follows more than one madhhab on the same issue, it is called talfīq as al-Zuḥaylī (1986, p.1146) elaborated:

> Talfīq denotes following an opinion of a madhhab in an ablution while following another opinion of another madhhab at another time. It is permissible. Similarly, following another madhhab partially but with the condition of not contradicting his (own or first) madhhab. For instance, a man performed ablution according to Shāfiʿī madhhab and rubbed his entire head and massaged his parts of the body thoroughly, and he touched an unknown woman. In this situation, he is permitted to pray with that ablution considering the Ḥanafī madhhab, where the ablution does not spoil by touching an unknown (ajnabī) woman.

Imam Izzudīn ibn ʿAbd al-Salām (1986, p.122) elucidates that: "it is permissible to imitate every one of four prominent Imams. Every Muslim is permitted to imitate an Imam in one matter and simultaneously to imitate another Imam in another matter. It is not obligatory to imitate only one Imam in every matter. Nonetheless, it is not permissible to hunt for the licences".

Ḥanafī, Mālikī, Ḥanbalī and some Shāfiʿī jurists stress that "moving from a madhhab to another madhhab is prohibited elucidating 'it is not acceptable to believe a matter as obligatory on the contrary to the previous belief of the same matter as prohibited and vice versa only for the personal gains or desires" (Ibn Taymiyyah, 2004, Vol.25, 221).

On the other hand, some Ḥanafī, some Mālikī and several Shāfiʿī jurists opine that: "changing madhhab is not prohibited even though it is for personal gains or desires" (Al-Zuḥaylī, 1986, p.1154), drawing on the Ḥadīth, "certainly, almighty Allah loves when his privileges are enjoyed as well as he loves when his rulings are observed" (Ibn Ḥibbān, Ḥadīth No:354).

However, when ʿAlīsh was asked regarding an imitator who imitates an unpopular Imam in a matter or seeks the licences according to the Ḥadīth mentioned above and the Qur'anic verse "And strives hard in Allah's Cause as you ought to strive (with sincerity and with all your efforts that His Name should be superior). He has chosen you (to convey his Message of Islamic Monotheism to mankind by inviting them to His religion of Islam) and has not laid upon you in religion any hardship" (al-Ḥajj:78). He responded, "if an imitator finds a predominant or the most predominant evidence, he should adhere to it, sticking on it in the judgement and implementation" (ʿAlīsh, 1985, p.186-188). In a similar vein, Ibn Taymiyah (2004, Vol.20, p.203) asserts that: "it is permissible to move from a madhhab to another madhhab if it does not contradict the rulings of Sharīʿah. Mainly, it should not contradict the Qurʼan, Sunnah, Ijmāʿ, Qiyās and the basic principles of Islamic jurisprudence".

Demands To Break The Dominance Of Shāfiʿī Madhhab

Section 16 of the MMDA constitutes that: "in all matters relating to any Muslim Marriage or Divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim Law governing the sect to which the parties belong" (Ministry of Justice). Thus, it has been judicially recognized that most Sri Lankan Muslims are adherents of the Shāfiʿī madhhab which is the most influential and predominant (Marsoof, 2001, p.14).

Therefore, the reformists propose to use the talfīq strategy to break the dominance of Shāfiʿī madhhab demanding the promulgation of synthesis of a madhhab (Interviewee – 01).

Hence, the reformists feel that the restriction to only Shāfiʿī madhhab is a significant obstacle to judicial reform in Sri Lanka. To remove this barrier, the reformists endeavor to degrade the significance of the madhhab, describing that: "the madhhabs lead to the sectarian divisions among the Muslims as followers of Ḥanafī, Mālik, Shāfiʿī and Ḥanbalī as well as it contradicts with the concept of brotherhood and unity in Islam" (Marsoof, 2001, p.17).

Moreover, the reformists draw on the Qur'anic verse, "Verily, those who divide their religion and break up into sects (all kinds of religious sects), you (O Muhammad PBUH) have no concern in them in the least" (al-Anʿām:159), and elaborate that the restriction to only one madhhab deprives the freedom of choosing the privileges of other madhhabs and create a sectarian division between the adherent of different madhhabs (Marsoof, 2017, p.75).

Hence, the reformists advocate removing the influence of the Shāfiʿī madhhab from MMDA by deleting the term 'sect' or 'madhhab' in sections 16 and 98 (2) and other related sections to enable all Muslims in Sri Lanka to be governed uniformly by the principles of 'Muslim Law' as common law.

Furthermore, the reformists emphasize to enact the Ḥanafī opinion on the appointment of women Qāḍī which is prescribed by Ibn Qudāmah (1992) as:

"Abū Hanīfah allows the woman to be a Qāḍī except in the criminal matters"[1]. Accordingly, they stress that even though Malaysia and Indonesia are predominantly governed by Shāfiʿī madhhab, those two countries also have appointed female Qāḍīs, especially in Shariah courts considering the Ḥanafī opinion based on the talfīq (Nik Noriani and Yasmin Masidi, 2009, p.44).

In addition, the reformists asserts that Indonesia began to appoint female Qāḍīs in 1960 and Malaysia appointed Rafidah Abdul Razak and Suraiya Ramli as female Qāḍīs in the Shariah courts in 2010 based on the talfīq, as well as India also appointed Jahan Ara and Afroz Begam as female Qāḍīs in Rajasthan in 2016 (Nik Noriani and Yasmin Masidi, 2009, p.45).

Moreover, during the interview, a prominent woman activist revealed that most Sri Lankan Muslims do not like to adhere to any madhhab, especially, they referred to the Salafi movements (Interviewee – 02).

[1] Ibn Qudāmah, Al-Mughnī, Vol.14, 12.

In contrast, when this researcher interviewed the president of Ceylon Tawhīd Jamāʿat, he responded that:

His Jamāʿat is enthusiastic in adhering to the immediate injunction of the Qur'an and the Ḥadīth regardless of following several madhhabs. Simultaneously, though his Jamāʿat recommends removing the Shāfiʿī madhhab's influence, it is the frontier opponents of the feminist reforms in the matters of woman qāḍī, removing the legality of walī, fixing the age of marriage, and regulating the polygamy. Nevertheless, he added that the Ceylon Tawhīd Jamāʿat endeavours to choose the rulings nearer to the Qur'an and the Ḥadīth's explicit instruction (Interviewee – 03).

Nevertheless, the reformists attempt to select what is more appropriate to their demands from any madhhab, even though it is an individual or unpopular view (shādh), whether it is a Sunni school or not. For instance, they try to abolish child marriage drawing on the opinion of Muʿtazilī jurists Abū Bakr al-Aṣammu and Uthmān al-Baṭṭī (Faizun and Chulani, 2014, p.60).

Therefore, ACJU fervently refutes that: "it is hard to abide by the whole principles of the Muslim law without restricting to any particular madhhab".

Moreover, the president of ACJU expressed that:

"If the MMDA were governed by 'the common Muslim law', the thoughts of deviant movements such as Muʿtazilī and Qādiyānī would also influence the MMDA. As a result, it may cause unwanted detrimental consequences among the Muslims in Sri Lanka" (Interviewee – 04).

Furthermore, if we delve into the demands of the reformists for a 'Common Muslim Law' combining all madhhabs and individual thoughts, we can determine that 'it is the talfīq which the jurists have criticized'.

Moreover, Abū Minshār (2017, p.18) delineates that:

One of the broadest forms of talfīq in Islamic jurisprudence is tracing the concessions (rukhaṣ) between the different madhhabs and searching and exploring the privileges which are emphasized by every madhhab to act upon without commitment to the rest of the opinions and reasoning in the madhhab.

Besides, Ibn al-Najjār (1993, Vol.4, p.577) elaborates that:

Tracing privileges is forbidden for the public. Because whenever they see a privilege in a Madhhab, they follow it while they do not follow anything in that madhhab except that privilege. As a result, they would be considered as fāsiqūn". Therefore, Ibn ʿAbd al-Barr establishes that: "It is consensus that tracing the privileges is not permissible.

However, the reform proponents opine that:

"Tracing privileges is encouraged by the Qur'an and the Ḥadīth as follows: "Allah intends for you the ease, and He does not want to make things difficult for you" (al-Baqarah:185), and the Ḥadīth "Allah's Messenger (PBUH) said: Allah the Highest loves that His permissions be practiced, just as he dislikes that disobedience to Him be committed" (Ibn Ḥibbān, Ḥadīth No:2742).

Tracing concessions (rukhaṣ) does not denote the privileges legalized by the Qur'an and the Sunnah, such as shortening the prayer during the journey and not fasting in the month of Ramadan during the journey. Because the specific texts confirm these privileges (Al-Saffārīnī, 1998, p.138).

Therefore, the jurists of four Sunni schools establish that:

"Tracing the privileges is prohibited. Besides, Ibn Ḥazm al-Ẓāhirī, Ibn ʿAbd al-Barr al-Mālikī, Abū al-Walīd al-Bājī al-Shāfiʿī, Ibn al-Ṣalāḥ al-Shāfiʿī and Ibn al-Najjār al-Ḥanbalī hold a consensus on forbidding the talfīq if it consists of adhering the easy ones only (rukhas) (Al-Tuwayjirī, 2009, p.32).

Hence, if a Muslim finds that the matter is against Islamic rulings, he should protect himself from tracing the privileges that lead to committing sin and fault. It is the guidance of the Prophet (PBUH) for those who trace privileges, "never did Allah's Messenger (PBUH) choose between two things but adopting the easier one as compared to the difficult one, but his choice for the easier one was only in case it did not involve any sin, but if it involved sin, he was the one who was the farthest from it amongst the people" (Muslim, Ḥadīth No:2327).

Hence, if we delve into the Sri Lankan context, the talfīq would be impossible. A prominent preacher expressed that:

"The qāḍīs face difficulties in dispensing justice within the Shāfiʿī madhhab. Then, if the four madhhabs are combined, the law would be complicated, and the qāḍīs who have minimum Sharīʿah knowledge would be perplexed".

Overall, according to the Sri Lankan context, the talfīq strategy and the Common Muslim Law would cause more harm to the qāḍīs and the public rather than benefits. Moreover, the law will be very complicated for everyone.

Simultaneously, when the women's demands are analyzed from the juristic (fiqh) perspective, most of them are opposed by the majority of the jurists. For instance, the majority of the jurists including some Hanafi jurists opine that the appointment of women Qāḍī is contradictory to the Islamic rulings. Meanwhile, the Hanafi jurists also do not explicitly support the appointment of women Qāḍī. However, they argue regarding the validity of the judgement of a woman if she were appointed as a Qāḍī. Hence, since there is no explicit text and historical evidence regarding the appointment of woman Qāḍī, it is religiously and morally safe to avoid the appointment of women Qāḍī.

Furthermore, though there are divergent views among the jurists on defining the age of marriage, none of them refutes the marriage below the age of eighteen if the bride attained puberty in the early (teen) ages. Therefore, the demand for women to nullify marriages below 18 years old is un-Islamic.

Likewise, the activists bring numerous justifications and modern interpretations to nullify the legality of the walī. On the contrary, their justifications and interpretations are against the rulings of Islam. Though the Hanafi jurists allow marriage without walī, they also stipulate the approval of the walī to solemnize the marriage as well as authorize the walī to nullify the marriage if there is an incompatibility between the spouses. Hence, it can be assumed that the Hanafi jurists also emphasize the vitality of walī.

Moreover, the activists advocate imposing strict stipulations on polygamy expecting its gradual abolition such as obtaining the consent of the first wife for the second marriage and assurance of fair treatment among the co-wives. Nevertheless, since polygamy is legalized by the Qur'an and the Sunnah, no one can challenge it or impose additional stipulations on it. Hence, the women's demands are not appropriate.

In addition, the activists lobby for the combination of madhhabs to implement their demands. Exclusively, they prefer the talfiq of the law in MMDA. However, the jurists opine that tracing only the privileges are prohibited by the Sharīʿah. Moreover, this kind of talfiq or combination of madhhabs creates more complication among the Muslims of Sri Lanka where jurists are very scarce.

CONCLUSION

This research analyses the demand for talfiq as a strategy to amend the MMDA of Sri Lanka drawing on the Qur'an, the Ḥadīth and the opinions of the prominent jurists. Accordingly, this research found that the reform proponents demand the talfiq as a strategy to break the dominance of Shāfiʿī madhhab in the MMDA. Especially, they demand the appointment of women Qāḍī, and the nullification of walī considering the opinions of Ḥanafī madhhab. However, the ACJU refutes that their demands are contradictory to the Sharīʿah and the Sri Lankan context. Therefore, this research recommends the comparative jurisprudence (al-fiqh al-Muqaaran) with maslaha murslah and maqaasid shari'ah perspective as alternative solutions instead of talfiq.

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