

THE SIGNIFICANCE OF INTERNATIONAL LAW FOR THE MINIMUM AGE OF MARRIAGE IN MYANMAR

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Abstract

Child marriage or early marriage is a phenomenon that affects many countries. The causes of child marriage are various and complex. The impacts of child marriage which threaten child's health, growth, education, social development and increase the risk of exposure to violence and abuse. Child marriage is a violation of human rights and is prohibited by various international conventions such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The State parties need to take into account the best interest of the child. Then it is necessary to establish a minimum age of marriage in order to reduce the occurrence of early marriage. Domestic Laws should comply with international conventions ratified by the country. Myanmar is a member of CRC and CEDAW. This paper will explain how Myanmar's domestic laws on minimum age of marriage address Myanmar's international legal obligations in child marriage.

Keywords: Child, Child marriage, International Law and Minimum age of marriage.

Introduction

The legal framework of marriage in Myanmar is complex. According to Section 13 of the Burma Laws Act, 1898, the customary laws have the force of law. The Burma Laws Act included customary law for religious communities: Buddhists, Christians, Mahomedans and Hindus. All of these customary laws establish a marriageable age but they are not identical. The definitions of child are different under the various areas of law in Myanmar. Pursuant to the Article 1 of the Convention on the Rights of the Child (CRC), 1989, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Regarding child marriage, Art.16(2) of CEDAW states that the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage. Under the old Child Law, 1993, the definition of child is not conformity with the CRC and CEDAW. Myanmar has ratified both CRC and CEDAW. In order to specify a uniform minimum age of marriage in Myanmar, the new Child Rights Law was enacted by the Pyidaungsu Hluttaw in 2019. This research will examine Myanmar's domestic laws on minimum age of marriage and enforcement of laws relating to child marriage in practice and compare with relevant international conventions.

Materials & Methods

In drawing up this research, the domestic laws of Myanmar relevant to issues of minimum age of marriage including the Child Rights Law, 2019, the Myanmar Buddhist Women's Special Marriage Law, 2015, Myanmar Customary Law, The Christian Marriage Act, 1872, The Hindu Marriage Act, 1955 and Principles of Mahomedan Law are studied together with the relevant International Conventions such as Convention on the Elimination of All Forms of Discrimination

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against Women (CEDAW) 1979 and Convention on the Rights of the Child (CRC) 1989 which were ratified by Myanmar.

Causes and Impacts of Child Marriage

According to The United Nations Children's Fund (UNICEF)'s June 2019 report, 12 million girls are married before they turn 18 every year, and, in the developing world, one in nine girls is married before they turn 15. Around the world, 650 million girls and women alive today were married before they were 18.¹

Child marriage is a far-reaching issue that affects not only the lives of the children who are married, but also the lives of those around them. When girls marry young, before their minds and bodies are fully developed, they often become pregnant long before they are ready. Pregnancy is the number one cause of death among girls aged 15-19 worldwide. Child marriage also reinforces the gendered nature of poverty, with limited education and skills bringing down the potential of the girl, her family, her community and her country. These impacts extend throughout a girl's adult life and into the next generation.²

In all regions of the world, the causes of child, early and forced marriage (CEFM) are complex, interrelated and tightly interwoven with social and economic circumstances and the cultural context. Gender inequality, poverty and insecurity in the face of war and conflict are some of the conditions identified as drivers of CEFM.³

Changes in circumstances, such as natural disasters and other emergencies, can lead to the increasing rate of child marriage in the practice. Weak and sometimes contradictory legislation, poor enforcement of existing laws and the coexistence of multiple legal systems within countries quite often make the fight to eliminate the causes of child, early and forced marriage (CEFM) even more challenging. In some countries, including several in the Asia-Pacific region, both statutory and religious law regulates marriage, in often inconsistent or contradictory ways.⁴

Similarly, there are causes of child marriage in Myanmar. In order to prevent child marriage, there should be a full and comprehensive approach which addresses the root causes of child marriage and an effective legal system for the reduction of child marriage.

When early marriage occurs to girls, they tend to miss important aspects of their lives particularly education and development. There are various aspects that girl children are expected to attend to, that are deemed more important to them, other than schooling. For instance, girls are

¹ Katie Taylor, (2019), Child Marriage: Facts from around the World, (World Health Organization). <https://www.worldvisionadvocacy.org/2019/07/31/the-facts-on-child-marriage/> [accessed 27 July 2020]

² Ravi Verma, Tara Sinha & Tina Khanna, (2013), Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepal, P.5, (Plan Asia Regional Office). <https://www.icrw.org/publications/asia-child-marriage-initiative-summary-of-research-findings-in-bangladesh-india-and-nepal/> [accessed 10 August 2019]

³ Inter-Parliamentary Union (IPU) and World Health Organization (WHO), (2016), Child, Early and Forced Marriage Legislation in 37 Asia-Pacific Countries, P.8. <https://www.girlsnotbrides.org/resource-centre/child-early-forced-marriage-legislation-37-asia-pacific-countries/> [accessed 20 August 2018]

⁴ Pablo Diego-Rosell & Jacqueline Joudo Larsen, (October 25, 2017), Child Marriage Rates in Pakistan, Myanmar and Cambodia. <https://news.gallup.com/opinion/gallup/221000/child-marriage-rates-pakistan-myanmar-cambodia.aspx>, [accessed 10 August 2019]

expected to perform domestic chores and other responsibilities that end them to being married at a very young age.¹

In some situations, adolescent girls may be unable to refuse unwanted sex or resist coerced sex, which tends to be unprotected. Sexual violence is widespread and particularly affects adolescent girls: about 20% of girls around the world experience sexual abuse as children and adolescents. Inequitable gender norms and social norms that condone violence against women put girls at greater risk of unintended pregnancy.²

In Myanmar, early sexual experience and accidental pregnancy were also found to be drivers of early marriage. In case that an unmarried girl becomes pregnant (whether as a result of consensual sex or rape) the primary response is to arrange for her marriage.³

As mentioned above facts, early marriage has a strong physical, intellectual, psychological and emotional impact, cutting off educational opportunities and chances of personal growth for girls.

The Legal Issues on Minimum Age of Marriage in Myanmar

The definitions of child are not same under the various areas of law in Myanmar. Before the Child Rights Law, 2019, Section 2 (a) of the Child Law, 1993 defines that “child” means a person who has not attained the age of 16 years. Section 2 (b) of the Child Law states that “youth” means a person who has attained the age of 16 years but has not attained the age of 18 years. Additionally, this law guarantees a large spectrum of rights to children. In the Child Law, 1993, there was no provision for the minimum age for marriage.

According to section 3 of the Majority Act, 1875, a person shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before, and, a person for whom a guardianship is appointed by the court shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before.

However, Section (2) (a) of the Majority Act specifically excludes the issues under the family law from its purview as follows;

“Nothing herein contained shall affect the capacity of any person to act in the following matters (namely) – marriage, dower, divorce and adoption; the religion or religious rites and usages of any class of person”. So, there is no restriction on the marriageable age under this section.

In Myanmar, according to section 362 of the Constitution of the Republic of the Union of Myanmar, 2008 the Union recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union. Therefore, there are four main religious communities: Buddhists, Mahomedans, Hindus and Christians.

¹ Vhangani Richard Mafhala, (2016) Child Marriage Practice: A Cultural Gross Violation of Human Rights of Girls in a Free South Africa, P.25. <https://repository.up.ac.za/handle/2263/53428>. [accessed 1 August 2019]

² Adolescent pregnancy, WHO, (2018) <https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy> [accessed 7 May 2018]

³ Elizabeth Yarrow, (2016), The Causes & Consequences of Young People’s Sexual, Reproductive & Maternal Health Behaviors, Northern Shan, Myanmar, P.30, Coram International at Coram Children’s Legal Centre (CCLC). <https://coraminternational.org/wp-content/uploads/Myanmar-Report-Young-Parents-SRMH-behaviours.pdf>. [accessed 5 July 2019]

According to section 13(1) of the Burma Laws Act, 1898, customary and religious codes have the force of law and can be relied upon by the courts in decisions concerning succession, inheritance, marriage or caste, or any religious usage or institution.¹

Regarding the marriageable age of Myanmar Buddhist boy, the court was decided in the case of *Mg Thein Mg vs. Ma Saw*² that a Myanmar Buddhist boy of any age can enter into a valid marriage without the consent of his parents or guardians when he attains puberty i.e. physically competent to marry.

Concerning with the marriageable age of Myanmar Buddhist girl, Full Bench decision of Rangoon High Court in *Ma Aye Sein vs. Maung Hla Min*³ case, which declared that, except in the case of widows or divorcees, a girl under 20 years of age cannot contract a valid marriage without the consent, either express or implied, of her parents or guardians. These cases are still in force and there are no other leading cases regarding on these points up to now.

According to the above-mentioned facts, except in the case of widows or divorcees, a girl under 20 years of age cannot contract a valid marriage without the consent, either express or implied of her parents or guardians. A boy reaches his majority when he attains puberty and a girl child, except in the case of widow or divorcee, reaches her majority when she completes 20 years of age for the purpose of marriage under Myanmar Customary Law.

However, under section 4 of the Myanmar Buddhist Women's Special Marriage Law, 2015 a non-Buddhist man, who has attained the age of 18, and a Buddhist woman, who has attained the age of 18, may contract a valid marriage under this Law if the following facts are fulfilled:

- (a) both parties shall not be of unsound mind;
- (b) consent to marry shall be voluntary and free from seduction, inducement, coercion, undue influence, fraud or misrepresentation;
- (c) if the woman has not attained the age of twenty, the consent of parents, or if they are dead, of the guardian de facto or of the guardian de jure, if any, shall be obtained;
- (d) in the case of a woman, no valid marriage shall subsist;
- (e) in the case of a man, no valid marriage shall subsist.⁴

Therefore, under the Myanmar Buddhist Women's Special Marriage Law, 2015, non-Buddhist boy can marry when he attains the age of 18 years and girl can marry when she completes 20 years of age but girl under 20 years of age needs the consent of her parents or guardians to contract a valid marriage.

With regard to the marriageable age of Christian, section 60 of the Christian Marriage Act, 1872 provides that the age of the man intending to be married shall exceed sixteen years, and the

¹ Melissa Crouch, (2015). "Constructing Religion by Law in Myanmar," The Review of Faith & International Affairs, Taylor & Francis Journals, Vol. 13(4), pages 1-11, December.
<https://www.tandfonline.com/doi/full/10.1080/15570274.2015.1104961>[accessed 7 August 2019]

² 6 Ran (Indian Law Reports, 1928), p. 340.

³ 3 Ran (Indian Law Reports, 1925), p.455.

⁴ Section 4 of the Myanmar Buddhist Women's Special Marriage Law, 2015.

age of the woman intending to be married shall exceed fifteen years (Amendment of the Christian Marriage Act, 2017).

Provided that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section 19 (consent of guardians for marriage) has been given to the intended marriage, or unless it appears that there is no person living authorized to give such consent.

As mentioned above, marriageable age of Christian girl is over 15 years and boy is over 16 years. However, either of the parties to which is a minor, the consent of the parents or guardians is necessary to become a valid marriage.

The old Hindu Law, not by the Hindu Code, governs the Hindu women in Myanmar. Hindu Customary Law gives no limit for the age of men to marry. However, this is not the case for women: the age of sixteen is defined as mature. Hindu parents sometimes arrange marriages for their children before puberty (at the ages of 10 or 12).¹ According to section 5 of the Hindu Marriage Act, 1955, adopted in India a man must be 21 and a woman must be 18 in order to marry. However, the Hindu Marriage Act, 1955 shall not be applicable to Hindu marriage in Myanmar.

Concerning with the Muslims' marriage, every Muslim of sound mind, who has attained puberty, may enter into a contract of marriage. No particular age has been fixed for the marriage however it has been recognized that the age of maturity is the same as the age of puberty. Where there is no evidence of the date of puberty, most of the schools accept a boy or a girl who reaches fifteen years of age shall be recognized as having the capacity of marriage. The Hanafi School of law presumes that unless there is no evidence to show the date of puberty, both parties either male or female complete the age of fifteen years may enter into the marriage contract.²

Though each of personal law consists marriageable age, there is no minimum age of marriage. According to these personal laws, every boy and girl can marry with the consent of their parents or guardians even though the boy and girl have not the capacity of marriageable age. Therefore, personal laws cannot reach the uniform minimum age of marriage.

The primary legislation in Myanmar concerning crimes and violence and the punishments associated with them is the Penal Code, 1860, which defines "women" as female persons of any age.³ Section 375 of the Penal Code, which was revised in January 2016, raised the minimum age at which an individual can legally consent to sex with an adult from 14 to 16 years old (and from 13 to 15 years old if the couple are married). According to the amendment of Penal Code, it can be assumed that the minimum age of marriage is 16 years in Myanmar.

The laws relating to the marriage vary according to the personal law of the man and the woman and statutory law. A single standard age for consent by the parties would help to prevent coerced and underage marriages. In order to prevent child marriages, legislation should specify a uniform minimum age of marriage for personal laws in Myanmar.

¹ Legal Issues on Burma Journal No. 9, August 2001, Burma Lawyers' Council, Women and Law in Burma, B.K.Sen, http://www.burmalibrary.org/docs/LIOB09-women_and_law_in_burma.htm.

² Mar Lar Than, Dr., Administration of Islamic Law of Marriage in Myanmar, 2017, p.2. https://www.academia.edu/8972861/The_Administration_on_Islamic_Law_of_Marriage_in_Myanmar [accessed 29 September 2019]

³ Section 10 of the Penal Code, 1860.

New Domestic Law on Minimum Age of Marriage in Myanmar

Unfortunately, nationally representative surveys on child marriage are scarce, and measuring progress toward Sustainable Development Goals (SDG) Target 5.3 and other child marriage indicators is not easy. One major challenge is that many of the official surveys on child marriage are dated. To date, there are no official figures on the prevalence of child marriage in 74 countries, including large ones such as Argentina, China, Myanmar and Russia.¹

According to the 2014 Myanmar population and housing census, some 1.4 per cent of children aged 10-17 were reported as having ever been married in Myanmar, with this proportion being slightly higher in rural areas (1.6 per cent) than in urban areas (1.1 per cent) and generally higher for females (2.3 per cent) than for males (0.6 per cent). There was little variation across States/Regions. The proportion ever-married was highest among females in rural Shan (3.7 per cent) and lowest among males in urban Kayah and Tanintharyi (0.3 per cent).²

Therefore, early marriage is more common in rural areas than in urban areas and, of course, more common for females than males under 2014 census of Myanmar.

Myanmar is not the country with the highest rate of child marriage, but still a country with the problems of it. As mentioned above, legislation should specify a uniform minimum age of marriage that applies to all citizens of Myanmar in order to prevent child marriage. Therefore, the Child Rights Bill was submitted by the Ministry of Social Welfare, Relief and Resettlement in 2017 to amend the minimum age at which boys and girls can marry shall be defined by existing laws.

After years of discussion, Myanmar has finally enacted the Child Rights Law in 23 July 2019 with the following objectives:

- (a) To implement the rights of the child recognized in the United Nations Convention on the Rights of the Child;
- (b) To carry out measures for the best interests of the child and protect in order that children enjoy fully their rights in accordance with law;
- (c) To carry out necessary measures for the all-round development of children including primary health, adequate nutrition and right to education.
- (d) To protect and care of children who are felt neglect, abuse, atrocity and exploitation by the State or voluntary social workers or non-governmental organization;
- (e) To enable a separate trial of a juvenile offence and to carry out measures with the objective of reforming the character of the child who has committed an offence;
- (f) To enjoy the right to equality before the law and equal protection of the law without discrimination.

¹ Pablo Diego-Rosell & Jacqueline Joudo Larsen, (October 25, 2017), Child Marriage Rates in Pakistan, Myanmar and Cambodia, <https://news.gallup.com/opinion/gallup/221000/child-marriage-rates-pakistan-myanmar-cambodia.aspx>, [accessed 10 August 2019]

² Department of Population, Ministry of Labour, Immigration and Population, (2017), The 2014 Myanmar Population and Housing Census, Thematic Report on Children and Youth, Census Report Volume 4- M, Pages 117-118, <https://reliefweb.int/report/myanmar/2014-myanmar-population-and-housing-census-thematic-report-children-and-youth-census>. [accessed 7 August 2019]

Consistent with the United Nations Convention on the Rights of the Child, the new Child Rights Law defines a child as anyone younger than 18 years old.¹ This law provides that the minimum age of marriage is 18 years, regardless of gender in order to prevent early and forced marriage and protect traditional customs.² Regarding the penalty of early and forced marriage, the Child Rights Law provided as follows:

“Whoever commits early and forced marriage shall, on conviction be punished with imprisonment from a minimum term of one year to a maximum term of seven years. In addition to imprisonment, fine can be imposed from the minimum amount of 10 lakhs to the maximum amount of 20 lakhs.”³

As the Child Rights Law is a special law on children, it will have an influence on the other laws relating to marriage. Therefore, if a person allows boys and girls to marry before the legal minimum age of marriage, the injured party may sue him/her who shall be punished in accordance with the Child Rights Law, 2019.

The Role of International Law on Minimum Age of Marriage in Myanmar

Like all other countries, Myanmar has duties under international human rights law to respect, protect and fulfill the human rights of all persons in its territory or otherwise within its jurisdiction, without discrimination on any grounds, including child, early and forced marriage (CEFM).⁴

Myanmar is party to four of the principal international human rights treaties: The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW); the Convention on the Rights of the Child, 1989 (CRC); the Convention on the Rights of Persons with Disabilities, 2006 (CRPD); and the International Covenant on Economic, Social and Cultural Rights, 2008 (ICESCR). These treaties enshrine international law obligations binding on Myanmar, and the treaty bodies monitoring implementation of each of these treaties interpret and provide guidance on their provisions, including through the adopting of concluding observations and general comments. Many of the rights reflected in the Universal Declaration of Human Rights, 1948 (UDHR).⁵

The right to “free and full” consent to marriage is recognized in Article 16 of the Universal Declaration of Human Rights, which specifies that marriage shall be entered into only with the free and full consent of the intending spouses.

The other human rights law instruments which address child marriage that will be scrutinized in this section are the CEDAW and the CRC. Myanmar acceded to the Convention on

¹ Section 3(b) of the Child Rights Law, 2019.

² Section 23 of the Child Rights Law, 2019.

³ Section 105 (a) (5) of the Child Rights Law, 2019.

⁴ International Commission of Jurists (ICJ), June 2019, *Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible*, A Legal Briefing, p.5.
<https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG-pdf>. [accessed 7 September 2019]

⁵ International Commission of Jurists (ICJ), June 2019, *Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible*, A Legal Briefing, p.5.
<https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG-pdf>. [accessed 7 September 2019]

the Elimination of All Forms of Discrimination against Women (CEDAW) in 1997. The CEDAW addresses marriage in Article 16. Article 16 (1) requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure on a basis of equality of men and women the same right to enter into marriage and the same right freely to choose a spouse and to enter into marriage only with their free and full consent. The CEDAW also provides in Article 16 (2) that the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.¹

The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), paragraph 36 of CEDAW General Recommendation No.21 on Equality in Marriage and Family Relations, 1994 stated as follows:

“In the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993, States are urged to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child. Article 16 (2) and the provisions of the Convention on the Rights of the Child preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority. In the context of the Convention on the Rights of the Child, “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”. Notwithstanding this definition, and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman.”²

Myanmar ratified the CRC in 1991. Article 1 of the CRC states that for the purpose of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. Under Article 4 of CRC, parties need to undertake all appropriate legislative, administrative, and other measures, for the implementation of the rights recognized in this Convention. Therefore, setting minimum age of marriage is the obligations of state parties.

Additionally, paragraph 55 (f) of Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and general comment No. 18 of the Committee on the Rights of the Child on harmful practice recommends on the minimum age for marriage as follows:

“A minimum legal age of marriage for girls and boys, with or without parental consent, is established at 18 years. When a marriage at an earlier age is allowed in exceptional circumstances, the absolute minimum age must not be below 16 years, the grounds for obtaining permission must be legitimate and strictly defined by law and the marriage must be permitted only by a court of law upon the full, free and informed consent of the child or both children, who must appear in person

¹ Article 16 of CEDAW, 1979.

² UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, par.36, <https://www.refworld.org/docid/48abd52c0.html>. [accessed 16 August 2019]

before the court.”¹ As stated before that child is below 18 years of age and a minimum legal age of marriage for girls and boys are 18 years under CRC and CEDAW.

The enactment of the Child Rights Law demonstrates Myanmar’s commendable efforts to align national policies and regulatory frameworks with the CRC and the CEDAW. Under the newly enacted Child Rights Law, a child is defined as anyone under the age of 18 and a minimum age of marriage is 18 years.² Therefore, it can be clearly seen that the provisions of Child Rights Law, 2019 relating to minimum age of marriage comply with CRC and CEDAW.

Conclusion

The new Child Rights Law, 2019 constitutes an important step towards preventing child marriage in Myanmar. The international human rights instruments could be applied to prohibit child marriage. However, they do not exactly identify child marriage in those provisions. Additionally, they cannot implement and enforce to each individual State. The implementation and enforcement of the Child Rights Law in Myanmar is part of Myanmar’s obligation. The future practice of the new law is to be scrutinized by Government, members of Parliament, civil society and all citizens. Therefore, the Government, members of Parliament, civil society and all citizens have a duty to cooperate with each other in order to make an effective enforcement of the law for all citizens of Myanmar.

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¹ Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, 14 November 2014, par 55(f). <https://bettercarenetwork.org/library/socialwelfare-systems/child-care-and-protection-policies/joint-general-recommendationgeneral-comment-no31-of-the-cedaw-and-no-18-of-the-crc-on-harmful>. [accessed 7 October 2019]

² UNICEF, The enactment of the new Child Rights Law by the Government of Myanmar a Landmark step, 25 July 2019. <https://alliancecpha.org/en/child-protection-news/myanmar-enactment-new-child-rights-law-government-myanmar-lankmark-step-unicef> [accessed 21 September 2019]

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