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# An Analysis of the Legal Framework for the Protection of Victims of Spousal Abuse in Kenya

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**Abstract**
Spousal Abuse (SA) refers to violence between intimate partners. SA is a societal problem which negatively affects the individual, family and the community. Kenya has laws which attempt to address aspects of SA and provide justice for the victims. This study seeks to analyse the legal framework for the protection of Victims of Spousal Abuse (VSA). The Study found that there are gaps in Kenya's legal framework such as the lack of a specific offence called SA, the absence of a law on mandatory reporting of SA, the lack of a law on mandatory prosecution of SA cases and the absence of a no drop policy in SA cases. These weaknesses hinder the effective protection of VSA and their access to justice. The study recommends the formulation of laws on mandatory reporting and prosecution of SA cases and the simplification of the court process in handling SA cases.
**Key words**: Access to justice, Criminal Justice System, Perpetrator, Spousal abuse, Victims of Spousal Abuse

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## I. INTRODUCTION

Spousal Abuse (SA)refers to violence between intimates living together or who have previously cohabited (Buzawa and Buzawa, 2003). SA can be perpetrated in various form such as physical, psychological, economic and verbal acts used to achieve domination and control over an intimate partner by the other (Freeman, 2008).

## II. THE LEGAL FRAMEWORK FOR THE PROTECTION OF VSA

In Kenya, the legal framework of laws which regulate SAare the Constitution of Kenya 2010, the Penal Code Cap 63 Laws of Kenya, the Sexual Offences Act of 2006, the Children Actof 2001 and more specifically the Protection from Domestic Violence Act of 2015.

The Constitution is the supreme law of the country and provides for the protection of all human beings against any form of violation including SA. The Penal Code is the main body of law that defines most crimes and provides for their punishment. It does not however provide for any offence known as SA. Cases of SA are therefore prosecuted under the general offence of assault making it difficult statistically to analyse SA matters in the CJS. The Sexual Offences Act defines several crimes of a sexual nature and provides for their punishment. This Act recognizes the sexual form of SA, however, it decriminalizes sexual abuse in the marital context. The criminalization of sexual form of abuse within a marriage such as marital rape is controversial due to the issue of when consent in a marriage is given and when it stops. Most importantly, the Protection from Domestic Violence Act aims to protect victims of domestic violence including Victims of Spousal Abuse (VSA) but does not create a specific offence called SA. It therefore becomes difficult to prosecute all forms of SA.

The Constitution of Kenya, 2010 has a special recognition for the family as the basic unit of society. It entails key provisions for the protection of the family as an institution. These provisions include:- Article 45 which recognizes the family as the basic unit of the society, Article 26 on the protection of the right to life, Article 27 on the protection from discrimination, Article 28 on the protection from inhumane and degrading treatment, Article 29 on the right to human dignity and respect, Article 31 on the right to privacy, Article 47 on the right to fair administrative action, Article 48 on the right to access to justice and Article 50 on the right to a fair hearing.

The first obligation of the State is the protection of the family institution through Article 45. It recognizes the family as the natural and fundamental unit of society and the necessary basis for social order. It further provides that the family enjoys the recognition and protection by the state. Secondly, the constitutional protection of the family obligates the State to protect the life of every family member by ensuring their safety.

The state carries out this responsibility through the institution of the Criminal Justice System (CJS) by punishing violation of rights of members of the family.

Since SA threatens the existence of the family, VSA have a constitutional right to be protected from the abuse by the state. The implication is that the state, through the Parliament, is obligated to pass enabling legislation and ensure that the criminal justice agencies, namely the police, prosecution, courts and correctional services have measures in place to protect VSA.

The third human right protection that the Constitution provides to everyone including VSA is equal treatment, benefit and protection by the law as provided under Article 27. The state is obligated to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals through discrimination. In light of this provision, the lack of a law criminalizing SA amounts to a violation of the constitution.

The fact that victims of other crimes are recognized by criminalizing acts that victimize them such as robbery, theft, assault amongst others, subjects VSA to discriminative treatment of the law. Article 50(9) of the constitution obligates Parliament to specifically enact legislation protecting the rights and welfare of victims of crime. VSA should be protected by passing an enabling legislation to protect their constitutional rights.

The fourth fundamental human right that applies to VSA is the right to security of all persons who are protected from any manner of inhuman and degrading treatment whether physical or psychological according to Article 28 of the Constitution. The Constitution recognizes psychological harm to victims of crime. However, the existing penal laws do not provide for psychological abuse. The lack of a legislation to protect VSA is therefore a violation of their right to protection from inhuman and degrading treatment.

The fifth fundamental human right protected by the constitution is the right to human dignity and respect. The sixth human right applicable to VSA is the right to privacy according to Article 31 of the Constitution and its implication to the family set up means that private affairs relating to the family should not be unnecessarily revealed.

The seventh fundamental right relevant to VSA is the right to fair administrative action which must be expeditious, efficient, lawful, reasonable and procedurally fair according to Article 47 of the Constitution. When VSA seek help from the CJS, they are entitled to fair administrative action taken by the criminal justice agencies.

The eighth fundamental right relevant to VSA is the right to access justice according to Article 48 of the Constitution. This implies that all measures and facilities should be put in place to ensure that victims get protection from the CJS.

The last fundamental right relevant to the protection of VSA is the right to a fair hearing under Article 50 of the Constitution. This provision calls for fairness to both perpetrators and victims in the process of court hearing. However, whereas the accused persons have several safeguards such as the right to remain silent and not give any incriminating evidence, the victim does not have any clearly defined rights in the trial process.

Article 26 of the constitution protects life and guarantees safety of the citizens. SA is therefore a violation of the victim's right to life. As discussed above, the State is under a constitutional obligation to protect the victims and prevent the violation from occurring. The state carries out this obligation through the use of the CJS. It is therefore important to understand how the CJS works and how it is expected to protect the lives of VSA. In the next section, the study discusses the two approaches of the justice system in Kenya namely civil and criminal approaches.

## III. THE CIVIL AND CRIMINAL JUSTICE APPROACH TO SA

Under the Constitution of Kenya 2010, there are two separate approaches to SA by the justice system in Kenya, namely civil and criminal. The first one is by making an application to the court that one's rights are about to be violated and therefore seeking protection (Article 22). With respect to SA, one can apply for protection orders, maintenance, custody for children, school fees and upkeep amongst others under the Children Act and Protection from Domestic Violence Act. The procedure is however, technical and requires the services of a lawyer as well as court fees to be paid.

The second approach, provided for by Article 167 of the Constitution is known as the CJS' Response. Under this system, a report of an abuse is reported to the police for investigation by the complainant or a member of the public. If found to have occurred, the perpetrator is prosecuted in a criminal trial. If found guilty, the perpetrator is sentenced by the court. This second approach is provided for by Article 167 of the Constitution. For prosecution to occur, the offence must be defined as a crime and punishment provided by a statute (Act of Parliament). This may be under the Penal Code which provides for different offences or different specific Acts of Parliament like the Sexual Offences Act.

In the criminal approach, there must be a law that defines action amounting to SA as a crime and a penalty provided for it. The matter must then be reported to the police, investigation carried out, the perpetrator prosecuted, witnesses who include the VSA are asked to testify. If the perpetrator is found to have committed

the crime, a fine, imprisonment or any punishment provided by the law, can be passed to punish him or her. However, if there is no proof that a crime occurred, the court sets the perpetrator free for lack of evidence in court. No remedies are available to the victim who may be left more vulnerable to the abuse than before the matter was reported to the CJS.

In the next section, the article discusses the regulation of SA cases by the CJS in Kenya.

## IV. THE REGULATION OF SA CASES BY THE CJS LEGAL FRAMEWORK IN KENYA

The CJS in Kenya is anchored on the adversarial legal system of trial in which the perpetrator and the victim of a crime are responsible for the collection of evidence and ensuring that their witnesses testify in court.

Article 50 (2) (n) of the Constitution provides that every accused person has the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law. Parliament must, therefore, pass a law that criminalizes domestic violence and provides a punishment for it so that when the abuse occurs, the report made to the police is specifically captured under a specific offence defined by an Act of Parliament. It is only under such circumstances that the wheels of justice start rolling by the arrest and prosecution of the perpetrator. In the absence of a law that specifically defines SA as a crime, it becomes very difficult to arrest, prosecute and punish the abusers. Where an accused person is prosecuted under an existing law, Kenya's Evidence Act, 2007 provides that the judicial officer must be an impartial arbiter, not taking part in the collection and presentation of evidence in court. The arbiter's role is to apply the rules of law to make a decision based on the evidence presented by the victim of crime, the perpetrator and their witnesses.

The decision arrived at determines whether the crime was committed or not. If no evidence reveals that a crime was committed, the perpetrator is set free (acquitted) and no protection orders are given to the victim. If the perpetrator is found to have committed the crime, he or she is convicted and punished. Protection orders may be issued to the victim only if the court finds that the crime was committed. This is a system where both the perpetrator and the victim are left to 'fight' their case in court and the winner takes it all as the loser gets nothing.

The parties (victim and perpetrator) are adversaries, hence the adversarial system of dispute resolution. The court decision and the punishment is predetermined by law and cannot be negotiated by the parties if a crime is found to have been committed. This is the adversarial nature of Kenya's CJS which makes it very difficult to satisfactorily handle SA cases.

## V. THE STAGES IN THE CJS

There are five stages within the CJS that any reported case including SA must go through namely; reporting of the abuse, investigation and prosecution, testimony by witnesses/ victims, testimony by perpetrator and court decision (Dobash, 1979; Lockton and Ward, 1997; Novisky and Peralta, 2014).

### i. Reporting of the Abuse

It is the cardinal rule of the working of the CJS that a report must be made to the police about the commission of a crime, so that the wheels of justice start rolling. Reporting SA is a highly personal decision left to the victims in the absence of mandatory reporting laws (Dobash, 1979; McConville and Wilson, 2002). While some victims report SA to the police, quite a number fail to report the abuse to the police and seek Alternative Dispute Resolution Mechanisms from family, friends, the clergy or other helping professionals such as counsellors (Davies et al., 2015; Jones, 2011).

Some of the determinants in reporting SA to the police include; negative attitude by the police towards the crime (Eriksson and Mazerolle, 2015; Legal Services Commission, 2009). Some police officers perceive SA as a domestic matter that should be resolved at home and not reported to them while some blame the victim for provoking the abuse, especially female victims (Dawson, Bunge and Balde, 2009; Eriksson and Mazerolle, 2015; Jasinki, 2010;Weisz, Black and Neva, 2008).

Victims' fear of retaliatory attacks by the perpetrators is yet another determinant in reporting the abuse to the police (Davies et al., 2015; Wormer and Bartollas, 2011). The social status of the victim and perpetrator in the society may also determine whether or not SA is reported to the police (Husain et al., 2015; Jasinki, 2010). Victims' concerns about their families may also determine whether or not SA is reported to the police (Dawson, Bunge and Balde, 2009; Husain et al., 2015; Jasinki, 2010;Weisz, Black and Neva, 2008).

Language barriers especially for VSA in a foreign country can also hinder reporting of the act to the police (Krist et al., 2015; Wormer and Bartollas, 2011). Failure by the police to take VSA seriously and the societal stigma faced by male victims also hinders them from reporting the abuse to the police (Haj- Yahia, 1991; Letourneau et al., 2012; Raiford et al., 2012).

**ii. Investigation and Prosecution**

This is the second stage after reporting SA to the police. The police must collect evidence from witnesses and if it is sufficient to prove that the abuse occurred then the accused person is arrested and taken to court for prosecution. Some barriers to investigation and prosecution include the private nature of the family, which implies that SA occurs within the privacy of the family protected from the "public eye". Not many people therefore witness SA. The few who have information about the vice perceive it as a private family matter and consequently opt to stay away from testifying in court (Buzawa and Buzawa, 2003; Dobash, 1979; Haj- Yahia, 1991; Krist et al., 2015; Raiford et al.,2012). Prosecution of the perpetrator involves the witness and victim's narration of the intimate details of the abuse in open court (Human Rights Watch, 1995). Many VSA shy away from revealing the embarrassing details of the abuse in court during prosecution. The gender construction of the roles of women and men, the negative attitude and ineffectual practices in the bureaucratic CJS re-victimizes VSA (Choi, 2015; Letourneau et al., 2012). The less vigour with which SA is prosecuted compared to other crimes is yet another barrier in prosecuting the crime (Human Rights Watch, 1995).

**iii. Testimony by Witnesses and Victims**

This is the third stage in the CJS where the prosecutor calls the victim and any witnesses who saw or have information regarding the incidence of SA to narrate the same in court. The CJS presumes that the perpetrator is innocent until sufficient evidence is produced in a court hearing. The threshold of proving criminal matters in court is high as any doubt sets the perpetrator free. In most cases, due to poor prosecution and the failure to meet the threshold, perpetrators of SA are not found guilty by the court. This discourages many witnesses and VSA from giving their evidence in court (Neal and Edwards, 2015; Mayordomo, 2011; Sonnis and Langer, 2008).
Another determinant is the repeated cycle of violence such that by the time the VSA and the witnesses are supposed to give evidence in court, the perpetrator may have apologized to the victim and convinced him/ her to withdraw the case (Davies, 2009). Some VSA also fail to testify because the CJS treats them as mere suppliers of information without regard to their concerns (Ptacek and Frederick, 2009).

**iv. Testimony by Perpetrator**

This is the fourth stage in the CJS. It is the opportunity for the perpetrator to narrate his/ her side of the story in court and call anybody as a witness to support his/her case. Due to the socialization process, the patriarchal nature of the society, the dominance and control of the family by husbands, the subordinate status of women and the control of family resources by men, it becomes difficult for members of the family, including the perpetrators themselves, to testify in court. The associated stigma attached to SA is therefore a barrier in accessing justice by VSA in the CJS (Dobash, 1979; Freeman, 2008; Henning et al., 2006, Khawaja et al., 2007; Kimuna and Djamba 2008; Mwale, 2002; Novisky and Peralta, 2014; Silvestri and Dowey, 2008).

Religious beliefs also have been found to serve as a barrier to accessing justice by spousal abuse victims (Aldana and Saucedo, 2008; Choi, 2015; Haj-Yahia, 1991; Wormer and Bartollas, 2011). Many religions teach tolerance and servitude in marriages, while perpetuating the subordinate position of wives and emphasises the dominant role of husbands. The religious teachings are therefore a barrier to accessing justice by VSA.

**v. Court Decision**

This is the final stage in the CJS where the court weighs the evidence produced in court by the victim and the perpetrator and their witnesses and makes a decision as to whether there is enough evidence to prove that SA occurred or not (Zedner, 2002). Where the evidence does not meet the threshold of proving that the perpetrator used violence on the victim, the perpetrator is set free (acquitted) and the case is closed (Walgrave, 2002). The danger with this position is that there may be factors that limited the attainment of the evidentiary threshold of proving that the abuse occurred and this has the potential of repeat or continued perpetration of the abuse. As a result, the VSA feels helpless and may not report subsequent abuse to the CJS when it occurs (Carmen, 2006).

Where the court finds that the evidence proves that the perpetrator used violence on the victim, then the perpetrator is found guilty (convicted) and may face punishment ranging from admonition, probation, counselling, fine and/or imprisonment (Eriksson and Mazerolle, 2015; Freeman 2008). In most cases, the punishment of the perpetrator ends the trial process and the VSA is left without any protection (Eriksson and Mazerolle, 2015; Iancu, 2010). The lack of adequate victim protection by the court, the punishment of the perpetrator who may be the head of the family and the stigma associated with being in prison, present further complications for VSA, most of whom therefore decide not to report SA to the CJS (Cerulli et al., 2011; Eriksson and Mazerolle, 2015;Human Rights Watch, 1995; Roberts and Burman, 2007).
In each of the stages discussed, there are gaps, weaknesses and challenges which hinder the proper protection of VSA and points out the ineffectiveness of the CJS in handling SA cases as discussed below.

## VI. THE GAPS AND WEAKNESSES OF THE LEGAL FRAMEWORK ADDRESSING SA IN KENYA

An analysis of the laws that regulate SA in Kenya reveals the following gaps and weaknessesof the legal framework;

i. Lack of a specific offence called SA
ii. Lack of a mandatory reporting law on SA
iii. Lack of a law on mandatory prosecution of SA
iv. Lack of a no drop policy on SA
v. Technicality of the court language
vi. Technicality of court procedure

### i. Lack of a specific offence called SA

There is no specific offence in Kenya called SA. This is the major challenge of the Legal Framework in responding to SA. Cases of SA reported to the police are prosecuted under the general offence of assault as provided for under sections 250 and 251 of the Penal Code. The two sections of the Penal Code which provide for common assault and assault causing grievous bodily harm only take care of physical abuse but leave out emotional, psychological, verbal and financial forms of spousal abuse. The Penal Code provisions are therefore inadequate in addressing complaints of SA reported to the police.

In Kenya, sexual abuse within a marriage is decriminalized thus making it difficult for the CJS to effectively protect the victims and bring the perpetrators to account for their misdeeds. Although the Sexual Offences Act addresses sexual abuse, it does not criminalize sexual abuse within a marriage. When a spouse complains of being sexually assaulted by the other spouse, the issue that arises is at what point does consent begin and stop. Is there blanket consent from the time marriage takes place or is consent to be given and withdrawn in the course of marriage? These are issues which are not addressed by any law including the Sexual Offences Act therefore making prosecution of allegations of spousal abuse by a spouse against another very difficult. The current provisions by the Penal Code and the Sexual Offences Act are therefore both inadequate in prosecuting sexual abuse within a marriage. As it is, the legal provisions do not take into account the plight and rights of the victims of sexual abuse in a marriage

Recognizing that SA occurs within the confines of the privacy of the family home, in the absence of any eye witness or circumstantial evidence, the success of the case depends entirely on the evidence of the victim.

In 2015, the Kenyan Parliament passed the Protection from Domestic Violence Act whose main goal was to protect victims of domestic violence. The Act however failed to provide for an offence known as domestic violence or spousal abuse but only provided that anybody can make a report to the police or to the court of an incident of domestic violence so as to enable the court to issue orders for protection of the victims. A closer analysis of the law reveals that the Act has only provided for anybody to report the abuse to the court on behalf of the victim by making an application for protection orders to protect the victim from the abuse. However, such an application must be heard in the presence of the abuser and evidence produced to prove that the abuse occurred or that there is a threat of the abuse occurring. This law does not take into account the perception of SA as an occurrence within a private domain (marriage) from which many people are reluctant to interfere. The law also fails to consider the vulnerability of the VSA who in most cases are dependent on the abusive spouse for financial support.

Charging perpetrators of SA with assault only recognizes physical abuse while it ignores other types of SA such as emotional and psychological abuse which are not covered by the Penal Code. Another type of SA not covered by the existing legislation is economic abuse. Therefore it is evident that the legal framework as it is now does not capture all the forms of SA.

### ii. Lack of laws on mandatory reporting

The Kenyan Legal Framework for protecting VSA does not provide for mandatory reporting of SA. There is no legal obligation on anybody who has information or witnesses of SA to report it to the authorities for the protection of the victim. Although the Protection from Domestic Violence Act provides that anybody can report SA to the police, it does not make it mandatory. In Canada and the USA, it is mandatory that anybody who has such information must report it to the authorities so that the victim can be protected. Should investigation be carried out that reveals that somebody knowingly withheld such information, the person is liable under the USA and Canadian Law to be prosecuted and punished. The absence of mandatory reporting in Kenya implies that where victims are not able to report the abuse themselves, then many cases may go unreported and as a result many victims of SA suffer the consequences and are not able to benefit from the intervention of the CJS.

The Protection from Domestic Violence Act does not make it mandatory for anybody with information that one is subjected to SA to report. This law therefore is inadequate in enabling VSA to access justice from the CJS.

**iii. Lack of laws on mandatory prosecution**

Like the absence of mandatory reporting, the Kenyan CJS has no provision for mandatory prosecution of SA. The implication is that where a case of SA has been reported to the police, even where the police find enough evidence to show that the abuse indeed occurred, there is no obligation on the prosecution to press on with the charge.

**iv. Absence of a Law on No Drop Policy**

A no drop policy means that once the prosecution process has commenced, the case is prosecuted to the end without being dropped at any stage. This works together with the mandatory prosecution requirement. Neither the prosecutor nor the victim of SA can interfere with the progress of the case that must be prosecuted to the end. The no drop policy is therefore important and protects vulnerable witnesses who are likely to be intimidated into withdrawing the charges against the perpetrator. The no drop policy ensures that once a case is reported, the victim must record a statement. If the statement reveals that SA is likely to have occurred, the victim must testify and give evidence against the perpetrator. The evidence is used to make decisions that protect the victim. An analysis of the legislative framework in Kenya reveals that there is no provision for a no drop policy with regard to cases of SA either in law or policy documentation.

**v. Formality and the Technical Language of the Court**

The CJS has specific technical words that are applied during the dispute resolution process in court. The technical language of the court is meant to ensure that the magistrate and the parties legal representatives are in consensus about the meaning of words used. The aim is to make communication in court easy.

The effect, however, is that the use of the technical language only eases communication between the legal experts in court. This therefore means that only the magistrate/judge and the lawyers or those with legal knowledge are able to communicate and understand what is going on in court. However, non-lawyers such as the victims and perpetrators who are not represented experience serious difficulty in participating in the court proceedings.

Such technical words include: plaintiff (person making a complaint), respondent (person to respond to the complaint), accused (person being charged with an offence), case to answer (at face value, a case has been established that the accused is likely to have committed the offence, taking plea (accepting or denying committing an offence which one is accused of).

Article 7(2) of the Constitution provides that the official languages of Kenya are English and Kiswahili. This therefore are the same languages that can be used in court. However, not all victims are able to effectively communicate in the two languages. This necessitates the services of a lawyer to be able to argue out one's case in court. However, the lawyer's services may be prohibitive to some victims who cannot afford to pay the legal fees (Forum on Global Violence Prevention, 2015).

**vi. Technicality of the Court Procedure**

There are different steps to be followed before a conclusion is arrived at to enable a VSA access justice. Section 145 of the Evidence Act lays down the different steps. Whereas most victims are interested in the final product of accessing justice which is their protection, the technical procedural requirements of the CJS require that even where a victim presents himself/herself with visible injuries as a result of the abuse, the court cannot issue protective orders until a complaint is formally filed, investigated, statements recorded and witnesses summoned to give evidence in court. If the victim went to a hospital, the medical record of the treatment must be produced in court.

It is after all the witnesses have testified that the court makes a decision as to whether there is a possibility that the perpetrator indeed committed a crime. At this stage, if the evidence does not reveal that an offence was committed or that the perpetrator is not the one who committed the crime, the perpetrator is set free and there are no protective orders issued to enable the victim access justice (this is what the law calls failure to establish a *prima facie* case against the perpetrator).

However, should the evidence reveal that the victim was indeed abused by the perpetrator; the perpetrator must be given an opportunity to tell the court his/her side of the story and call witnesses to support his/her case. This is followed by a decision of the court as to whether the statement and the evidence by the perpetrator absolve him/her from the accusation.

If indeed, the evidence absolves the perpetrator, then he/she is acquitted (set free) and no protective orders are issued to enable the victim access justice. It is worthy to note that it is only upon the court's finding

that the perpetrator indeed committed the offence that protective orders can be issued to protect the victim. The entire process of establishing whether or not the perpetrator abused the victim is lengthy and may take as long as three years (Judiciary, 2014). This discourages most victims of SA who in the meantime are left vulnerable to repeated abuse by the perpetrator.

## VII. CONCLUSION AND RECOMMENDATIONS

Kenya has made steps in addressing SA cases by the formulation of laws which seeks to protect VSA. However, an analysis of the legislative framework that deals with SA reveals that there are gaps and weaknesses which make it inadequate in effectively responding to SA and protecting the victims. This study therefore recommends that;

1. Parliament should amend the existing penal laws to provide for a specific offence called Spousal Abuse which is punishable under law. This offence should include the emotional, verbal, psychological, financial and sexual forms of spousal abuse.
2. Parliament should also make laws for the mandatory reporting of Spousal Abuse cases.
3. Kenya should have a law providing for the mandatory prosecution of Spousal Abuse cases.
4. Kenya should adopt a No Drop Policy in cases of Spousal Abuse.
5. The use of simple language in the Court process should be encouraged. There should be translators who interpret any technical word, phrase or language which the parties to a SA case do not understand.

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