Hate Speech
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A. Definitions

1. ‘Hate speech’ consists of verbal or non-verbal communication that involves hostility directed towards particular social groups, most often on the grounds of race and → ethnicity (racism, xenophobia, anti-Semitism, etc), gender (sexism, misogyny), sexual orientation (homophobia, transphobia), age (ageism), disability (ableism), etc. (see → discrimination; → racial discrimination; → gender discrimination; → LGBTI rights; → age discrimination).

2. The most cited book on → freedom of expression in Anglo-American constitutional doctrine, John Stuart Mill’s 1859 treatise ‘On Liberty’, advocates the fullest freedom of professing and discussing as a matter of ethical conviction despite possible conflicts with morality. Yet Mill’s own ‘harm principle’ positions freedom of expression as a non-absolute right and, therefore, sets its justifiable limitations by law.

3. While instances of hate speech are perhaps as old as humanity, active problematizing with regard to the ‘harm’ of hateful expressions in the realm of free speech can be traced back to the first half of the 20th century. In Europe, this debate was largely triggered due to the abundance of openly anti-Semitic newspapers and books flourishing in Weimer Germany and Third Republic France (Bleich). In the United States (‘US’), a solid protest was raised at the beginning of the 20th century against racist images in advertising, theatre and motion pictures targeting Irish, Jewish and Afro-American citizens (Kibler). World War II in Europe and the civil rights movement in the US have significantly catalysed the debate on harm in hate speech, exposing its potential to disrupt democracy via racist populism.

4. Yet hate speech arose as an American concept only in the 1980s. Although phrased differently in various non-US jurisdictions, the concept has increasingly influenced legal doctrine on freedom of expression, criminal and anti-discrimination law throughout much of the world since the 1990s.

5. The phenomenon addressed by hate speech has been referred to in criminal statutes after World War II mostly under the heading of ‘incitement to hatred’ (compare Czech propagace hnutí, French incitation à la haine, German Volksverhetzung, Russian возбуждение ненависти, Swedish hets mot folkgrupp, etc). Constitutional doctrine of the 2000-2010s, in contrast, tends to adopt a direct word-by-word translation of the American ‘hate speech’ (eg Croatian and Serbian govor mržnje, Dutch haatspraak, French discours de haine, Italian discorsi di odio, Polish mowa nienawiści, etc).

6. The punitive measures against incitement to hatred, largely on ethnic and racial grounds, have been incorporated into major legal systems as a part of → militant democracy. Such measures join a number of constitutional constraints on → fundamental rights to safeguard democracy against populism and hateful propaganda. It is widely believed that populism had helped Adolf Hitler to gain power in the Weimer Republic (1933).

7. While hate speech bans limit fundamental rights (particularly freedom of expression), ie rights commonly enumerated within constitutional sources, references to hate speech per se remain rare in constitutional texts. Depending on the jurisdiction, a victim of hate speech may seek redress under criminal law, civil law, or both. Some incidents of hate speech in the employment environment can also be regarded as a matter of labour law. Thus, from the end of the 1990s, the increasing number of world jurisdictions have been fighting ‘hostile working environment’ via employment and anti-discrimination laws, outlawing verbal and
non-verbal expressions through the categories of harassment, sexual harassment, victimization, mobbing, intimidation, stereotyping, etc.

8. Hate speech is commonly discussed in constitutional law through the looking glass of justifiable restrictions on freedom of speech. In this respect, the ‘US-American’ and ‘European’ models of free speech regulation are widely acknowledged as emblematic for constitutional importation elsewhere (Belavusau; Bleich; Cram; Loveland etc.). Since the 1960s, higher courts in Europe and the Supreme Court of the United States have developed divergent ways of dealing with hate speech. Therefore, the US-American and European models of free speech regulation have been analysed as central in comparative constitutional writings on hate speech.

9. Legal doctrine on hate speech includes several divergent streams of thought. From the liberal position, hate speech bans curtail individual rights to freedom of expression and freedom of assembly. They do not necessarily preserve the democracy, while serving as a major pretext for political censorship (Dworkin, Heinze, Post). Civic republican theorists, in contrast, argue that the legitimacy of viewpoint-selective bans within public discourse rest on their acceptance within a collective decision-making procedure (Cram). From the standpoint of critical legal studies (critical legal studies and comparative constitutional law) that have developed much of the vocabulary of the hate speech debates, such bans are necessary to protect the interests of vulnerable groups. Various streams within critical legal thought (critical race theory, feminist jurisprudence, queer legal discourse) condemn the universality and equality of liberal rights as abstract principles, which in practice undermine equal citizenship (Delgado and Stefancic; Matsuda et al).

B. Comparative Constitutional Framework on Hate Speech

10. Beyond national constitutional, criminal and media provisions, the advocates of hate speech restrictions worldwide often appeal to Art. 20 of the International Covenant on Civil and Political Rights (1966) (‘ICCPR’). This provision specifically prohibits ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. The US Senate ratified the ICCPR in 1992, with a reservation inter alia on its Art. 20. The reservation stipulates that Art. 20 ICCPR does not authorize or require legislation that would restrict the right of free speech and association (freedom of association) protected by the Constitution of the US. Other international-law instruments often cited by cause lawyers in the context of prohibition of racist speech are Art. 4(a) International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’) and Art. 13(5) of the American Convention on Human Rights (1969) (‘ACHR’).

1. Europe

11. Although hate speech bans have provoked constitutional debate and adjudication by constitutional and higher courts in Europe, constitutional texts per se usually do not mention hate speech. Slovenia in this respect offers a rare constitution that specifically stipulates a hate speech clause: ‘Any incitement to national, racial, religious or other discrimination and the inflaming of national, racial, religious or other hatred and intolerance are unconstitutional’ (Constitution of the Republic of Slovenia: 23 December 1991, Art. 63 (Slovn)). In monist (dualism / monism) constitutional systems (eg in the Netherlands), hate speech bans can be regarded as a matter of constitutional law by virtue of direct application of international law (application of international law in domestic legal systems).
12. These bans traditionally take the form of either a provision in criminal statutes (e.g., criminal codes) or anti-discrimination statutes. European states have largely introduced such prohibitions on racist speech in the second half of the 20th century, guided by the notorious experience of the Holocaust and other mass annihilations of people that had been agitated by Nazi propaganda.

13. The Federal Republic of Germany was the first European nation to introduce an express limitation on racist speech in a criminal code. In 1960 after several anti-Semitic incidents had been reported, Germany adopted Section 130 of the Criminal Code. The provision makes it a crime to incite hatred against population or to call for violent or arbitrary measures against them or to insult, maliciously slur or defame (→ defamation) them in a manner violating their (constitutionally protected) human dignity (→ dignity and autonomy of individuals). Likewise, the Dutch Penal Code prohibits both insulting a group (Art. 137c) and inciting hatred, discrimination or violence (Art. 137d). Similar provisions prohibiting hate speech on various grounds appear also in the criminal codes of, inter alia, Croatia, Czech Republic, Denmark, Finland, Poland, Serbia, Sweden, etc.

14. Examples of countries that have adopted special legislation on hate speech beyond their criminal code include Belgium (Law of 30 July 1981 on the Punishment of Certain Acts Inspired by Racism and Xenophobia (Belg)), France (Section 24 in the Press Law of 1881 (Fr)), Ireland (The Prohibition of Incitement to Hatred Act 1989 (Ir)), the United Kingdom (Section 18(1) of the Public Order Act of 1986 (UK)), etc.

15. Higher courts in Europe have adjudicated the conflict between constitutional protection of freedom of expression and prohibition of hate speech. For example, the jurisprudence of the Hungarian Constitutional Court most aptly displays this tension between free speech, on the one hand, and non-discrimination and dignity, on the other hand. Hungary is equally the European leader in the number of hate speech cases brought before a national constitutional court. Under initial Art. 269 (now Section 332) of the Criminal Code, ‘Anyone who, before a large public audience, incited hatred against the Hungarian nation, any other nationality, people, religion or race, or certain groups among the population commits an offence punishable by up to three years’ imprisonment’. The legislators initially attempted to extend this provision making punishable also pure offensive and denigrating expression. The Constitutional Court struck this amendment down in 1992 as incompatible with freedom of expression (Decision 30/1992 (Hung)). Likewise, in a subsequent series of judgments, the court has declined to broaden the scope of the prohibited ‘incitement’ to ‘arousal of hatred’ (Decision 12/1999 (Hung)), ‘inflaming hatred’ (Decision 18/2004 (Hung)), ‘gestures reminiscent of a totalitarian regime and denigrating a member of a given group’ (Decision 95/2008 (Hung)), as well as an attempt to prescribe hate speech ban in the Civil Code (Decision 96/2008 (Hung)).

16. Numerous cases on hate speech have been brought to the → European Court of Human Rights (ECTHR), attacking national jurisprudence and alleging the breach of Art. 10 of the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECTHR). Initially, the court found such claims unjustifiable since permitting racist utterances would contravene Art. 17 ECHR which proscribes the discriminatory treatment of people with regard to their enjoyment of other convention rights (Glimmerveen and Hagenbeek v Netherlands (1979) (ECTHR); Kühnen v Federal Republic of Germany (1988) (ECTHR)). In the 1990-2000s, the court has adopted a → proportionality test on the basis of Art. 10 ECHR, balancing free speech (para. 1 Art. 10 ECHR) against justifiable elements of restriction (para. 2 Art. 10 ECHR), such as public policy (→ ordre public (public policy)) and public security. The 2000s stream of cases justified, in particular, national restrictive measures against a book exaggerating racial tensions and stirring up anti-Muslim sentiments in France (Soulas and Others v France (2008) (ECTHR)), a journal caricature
glorifying the terrorist attacks of 11 September 2001 (Leroy v France (2008) (ECtHR)), a calendar with offensive statements about national minorities in Lithuania (Balsytė-Lideikienė v Lithuania (2008) (ECtHR)), criminal measures against anti-migrant speech by Belgian and French politicians (Féret v Belgium (2009) (ECtHR); Le Pen v France (2010) (ECtHR)). The court has sustained European constitutional views on hate speech as being incompatible with freedom of speech by leaving the matters to the margin of appreciation of the respective states. The court has also confirmed that the available approach to racist hate speech is justifiable on other grounds, as for example, in case of homophobic speech (Vejdeland v Sweden (2012) (ECtHR)).

17. Since the 1990s, a number of European countries have been targeting hateful expressions in the employment context as a part of workplace harassment (intimidatie in Dutch, harcèlement moral in French, trakasserier in Swedish, etc), reflecting the European dignity paradigm of constitutional reasoning. Sweden and France were particularly active in fostering various anti-harassment practices in labour law, linking them to worker’s dignity (Guerrero). In the 2000s, the European Union (‘EU’) adopted secondary legislation targeting, inter alia, harassment, sexual harassment and victimization in employment on the grounds of race (EU Directive 2000/43/EC), religion, sexual orientation, age, disability (EU Directive 2000/78/EC), and gender equality (EU Directive 2006/54/EC). The Court of Justice of the European Union (‘CJEU’) has established that a public statement by an employer not to hire a person because of that person’s attribution to the protected minority, constitutes direct discrimination in terms of EU anti-discrimination law (Feryn Case (2008) (CJEU); Asociaţia Accept Case (2013) (CJEU)) (→ direct and indirect discrimination).

18. In 2008, the EU adopted the Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (2008/913/JHA). Art. 1(a) of the Decision prescribes that each member state shall take the measures necessary to ensure that the following conduct is punishable: ‘[P]ublic incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin’.

2. The US

19. The initial mobilization of Irish, Jewish and African American social movements to advocate censorship of racist images in advertising, theatre and motions pictures had led to seven states passing laws forbidding discriminatory advertising and access already by 1926 (Kibler 121). Yet such a legislation has never reached the federal level, given its contradiction with the fundamental right of freedom of expression. Furthermore, a growing coalition of free speech activists won in 1952, when the Supreme Court of the US declared the censorship of motion pictures to be a violation of the First Amendment to the Constitution (Burstyn, Inc v Wilson (1952) (US)). Although the central matter of this judgment was a ‘sacriligious’ film, thus, challenging foremost blasphemy laws, the judgment paved the way to a broader liberal understanding of freedom of expression with a narrow view of harm in various categories of offensive speech.

20. Under the First Amendment to the Constitution, the Supreme Court of the US, consequently, takes a less restrictive approach to hate speech compared to European constitutional tribunals after World War II. The court has, for example, struck down penalties imposed on racist speech by a Ku Klux Klan leader (Brandenburg v Ohio (1969) (US)). The Court of Appeals in 1978 struck a ban on a Nazi march in Illinois (Collin v Smith (1978) (US)). Likewise, the US Supreme Court, while allowing other penalties to perpetrators, has reversed the ban on the community-motivated cross-burning on the front lawn of an Afro-American family (RAV v City of St Paul (1992) (US)). It has also upheld the right to public assembly of a religious sect picketing the funeral of a US marine, who died from a non-combat-related accident in Iraq, with slogans such as ‘You are going to hell’,
‘Fag troops’ and ‘Thank God for dead soldiers’ (Snyder v Phelps et al (2011) (US)). This line of cases has contributed to an assumption in comparative constitutional law of a clash between Europe and the US on hate speech regulation. The majority opinion in Snyder v. Phelps specifically declares, ‘as a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate’ (Snyder v Phelps et al (2011) Part IV (US)).

21. Several constitutional doctrines have guided the US Supreme Court in its hate speech cases. The ‘clear and present danger’ test developed by the court assumes that only the explicit and imminent danger stemming from a speech utterance justifies its restriction. The doctrine of viewpoint neutrality justifies limits on free speech only with regard to the method of expression rather than with regard to a specific community or content. Furthermore, the US Supreme Court traditionally distinguishes between facts and options. It has been granting a higher protection to the expression of—albeit emotional and provocative—opinions rather than facts. The distinction between facts and opinions has later also migrated to constitutional systems beyond the US, including those in Europe. A simplified way to understand the often-claimed US-European divide would be to suggest that the US view allows prohibitions only of incitement by hate speech to imminent lawless action, while the European view prohibits all verbal disparagement on these grounds.

22. Despite a somewhat less-restrictive approach to hate speech by the Supreme Court of the US, much of the hateful expressions in the employment context are outlawed as creating a ‘hostile work environment’, ie intimidating, hostile or offensive to a reasonable person. Employers in the US are, therefore, bound to control the workplace actions and speech of employees to avoid liability under anti-discrimination provisions or fair employment practices. Title VII of the Civil Rights Act of 1964 (US), listing adverse effects on employees with regard to individual’s race, colour, religion, sex, or national origin, has been interpreted as a tool to fight such harassment in the labour context. The Equal Employment Opportunity Commission has played a substantial role in fostering a broad understanding of harassment. In July 2015, it determined that employment discrimination based on sexual orientation was also illegal under Title VII. The US Supreme Court established that the conditions of employment are altered only if the harassment culminates in a ‘tangible employment action’ (as defined by the Court in Burlington Industries, Inc. v. Ellerth (1998), 761 or is sufficiently severe and pervasive (Oncale v Sundowner Offshore Services (1998) (US)).

3. Beyond Europe and the US

23. Most democracies have adopted the European approach. Several Latin American countries supply examples of hate speech being described in constitutional texts. In Brazil, according to the constitution, ‘the practice of racism is a non-bailable crime not subject to the statute of limitation and is punishable by imprisonment, as provided by law’ (Constitution of Brazil: 5 October 1988, Art. 5, XLII (Braz)). The Constitution of Venezuela prohibits ‘war propaganda’, ‘discriminatory messages’ and ‘messages that promote religious intolerance’ (Constitution of the Bolivarian Republic of Venezuela: 15 December 1999, Art. 57 (Venez)). The newest Constitution of Ecuador forbids ‘the dissemination of propaganda that induces to violence, discrimination, racism, sexism, religious and political intolerance and all propaganda that attempts against rights’ (Constitution of Ecuador: 20 October 2009, Art. 19 (Equador)).
24. Beyond Latin America, the Republic of South Africa specifically excludes hate speech from protection under freedom of expression in its constitution (Constitution of the Republic of South Africa: 8 May 1996 Art. 16(2) (S Afr)). Section 61 of the Human Rights Act 1993 of New Zealand describes the offence of ‘racial disharmony’ and makes it unlawful to publish or distribute ‘threatening, abusive, or insulting matters or words likely to excite hostility against or bring into contempt any group of persons on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons’.

25. The Criminal Code of Argentina, under the section on terrorist and illicit associations, imposes criminal sanctions on persons who participate in illicit organizations, which use terror having a ‘plan of action for the dissemination of ethnic, religious or political hatred’ (Art. 213(3)). The Criminal Code of Bolivia penalizes the act of inciting to violence or to the persecution of people or groups on the grounds of racist and discriminatory reasons (Art. 281). Likewise, in Canada hate propaganda is forbidden in the Criminal Code (Sections 318, 319 and 320).

26. Apart from criminal statutes, hate speech bans are often prescribed in media laws. Thus, Chile has adopted a specific provision in the Law on Freedom of Opinion and Information and the Performance of Journalism (Art. 31) that punishes with fines those who ‘through any means of social communication makes publications or transmissions intended to promote hatred or hostility towards persons or a group of persons due to their race, sex, religion, or nationality’. Jordan holds a provision in the Printing and Publications Act No. 8 of 1993 (Art. 7) that sets out the ethical rules applied to media. In accordance with this provision, it is illegal to publish material likely to stir up hatred or to make propaganda with a view to setting citizens against one another.

27. Since the 2000s, a number of states beyond the US and Europe, have been also outlawing harassment-speech in employment. For example, five Canadian provinces (Québec 2002, Saskatchewan 2007, Ontario 2009, Manitoba 2010 and British Columbia 2011) have passed workplace harassment legislation. The Protection from Harassment Act No. 17 of 2011 in South Africa sets one of the world’s widest definitions of harassment as ‘watching, pursuing or accosting of the complainant outside or near the building, where complainant works, resides, works, carries on business, studies or happens to be’, consisting in ‘verbal, electronic or any other communication … sending, delivering or causing the delivery of letters, telegrams, facsimiles, electronic mail or other objects’.

28. Various regimes often instrumentalize hate speech clauses to prosecute minorities and political opponents. Thus, Turkey is often criticized for the maintenance and execution of Art. 301 in its Penal Code that prohibits insulting Turkey, the Turkish nation or the Turkish government institutions (Kaya).

29. Along with the US, Japan is an example of a liberal constitutional democracy that chose not to introduce a specific ban on hate speech. In May 2016, the National Diet of Japan passed a law dealing with hate speech. Yet it neither explicitly forbids it nor sets a penalty. The law was adopted in a context marked by the rise of anti-Korean hate speech, and empowers municipalities to challenge hate speech mostly with education and mediation initiatives. The Japanese labour law, in contrast, acknowledges a workplace tort theory of ‘power harassment’ (pawa harassamento or pawahara), which protects employees from abuses by those in possession of greater organizational or societal power (Hsiao).

C. Equation of Genocide Denialism and Hate Speech
30. Hate speech bans have been used to prosecute not only incitement to hatred but also various forms of historical revisionism, such as Holocaust denial. In this respect, hate speech has often been conflated with genocide denial. For example, in the most cited case of the → *Supreme Court of Canada (Cour suprême du Canada)* on hate speech (*R v Keegstra* (1990) (Can)), the court has used a hate-speech provision in the Canadian criminal code to prosecute a schoolteacher denying the Holocaust.

31. In 1986, the Knesset in Israel adopted the first law to prohibit Holocaust (the *Shoah*) denial as a separate offence. In 1990, France adopted the so-called Gayssot Act that prohibits the denial of crimes against humanity as defined in the London Charter of 1945 (Charter of the International Military Tribunal). A Holocaust denier Robert Faurisson challenged the Act at the United Nations Human Rights Committee (‘UN HRC’). Yet the Committee upheld the Act as a necessary means to counter possible Anti-Semitism (UN HRC *Faurisson v France* (1996)). In 1992, Austria adopted a provision in a special constitutional law, the Prohibition Act 1947 (*Verbotsgesetz*), to ban the denial or gross minimization of the Holocaust. In 1994, Germany extended the existent criminal provision on hate speech with a special clause outlawing denial and trivialization of the crimes of National Socialism (Section 130 in Criminal Code). Similar provisions or special laws have been adopted in Belgium, Italy, Luxembourg, Portugal, Romania, etc.

32. On the EU level, the Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (2008/913/JHA) puts an obligation on the Member States to criminalize the acts of ‘publicly condoning, denying or grossly trivializing crimes of genocides, crimes against humanity and war crimes as defined in Arts 6, 7 and 8 of the Statute of the International Criminal Court’ (Art. 1 (c)).

33. Notwithstanding the Council Decision, even within the EU not all the Member States have introduced a specific clause on genocide denialism. In such states, the crime of Holocaust denial is often regarded as a matter equated with the provision on hate speech (eg Art. 137 of the Dutch Penal Code). The → *Constitutional Court of Spain (Tribunal Constitucional de España)* has struck the prohibition on the denial of Holocaust in Spain as contrary to freedom of expression (Decision 235/2007 (Spain)).

34. The legal governance of historical memory has been addressed in constitutional doctrine as ‘memory laws’ (Belavusau and Gliszczynska). Most of the genocide denial clauses target Holocaust negationism (Fronza 609). Yet a number of countries have extended such laws to incorporate other cases of historical revisionism. For example, the Czech Republic, Hungary, Lithuania, Poland and Ukraine prohibit both the denial of Nazi and communist crimes, while the Russian Federation since 2014 has outlawed the denial of Nazi crimes along with ‘spreading false information about the activity of the USSR during World War II’ (Art. 354.1 in the Criminal Code of the Russian Federation).

35. In Rwanda, genocide denial and its trivialization are punishable under the law No. 84/2013 of 11 September 2013 (Law on the Crime of Genocide Ideology and the Other Related Offences (Rwanda)). This controversial ban is used to prosecute the denialists of the genocide against Tutsi in 1994 (Jansen 192).

36. Greece, Liechtenstein, Slovenia and Switzerland prohibit the denial of both Holocaust and Armenian genocide. In France, a similar extension of the Gayssot Act, meant to prohibit the denial of Armenian genocide, was struck down by the → *Constitutional Council of France (Conseil Constitutionnel)* as contradictory to freedom of expression (Decision No.
2012-647 (2012) (Fr)). Nonetheless, the Conseil Constitutionnel has later confirmed the constitutionality of the ban on Holocaust denial (Decision No. 2015-512 (2016) (Fr)).

37. Likewise, the ECtHR did not uphold the prosecution of a politician who had denied the Armenian genocide in Switzerland (Perinçek v Switzerland (2015) (ECtHR)), finding violation of Art. 10 ECHR (freedom of expression), despite its jurisprudence that has traditionally sustained similar charges against Holocaust denial and trivialization (M’Bala v France (2015) (ECtHR)).

D. Assessment

38. Hate speech is perhaps as old as humanity, and remains a widespread phenomenon. However, regulation of hate speech has been extremely controversial from the standpoint of a proportionate balance between non-discrimination and dignity, on the one hand, and freedom of expression, on the other hand. This embedded contradiction explains the divergent approaches within liberal democracies (US, Europe, Japan, etc) and the diversity of views on hate speech in the legal doctrine (liberal, communitarian, critical legal scholarship, etc). Since the second half of the 20th century, states have fostered various mechanisms to counteract hate speech primarily via criminal law, special anti-discrimination and labour laws (in particular, anti-harassment clauses), as well as via media-law provisions. In addition, some newer constitutions (in Latin America, Slovenia, South African Republic) envisage specific clauses meant to prohibit incitement to hatred. This is uncommon in older constitutional texts. Initially prohibition of hate speech was meant exclusively on the grounds of race and ethnicity, while in recent years it has been gradually encompassing other non-discrimination grounds (sex, sexual orientation, disability, etc). A number of states have also regarded genocide denials as a form of hate speech. The recent tendency in law and constitutional doctrine, however, has been to distinguish the negation (and trivialization) of mass atrocities from hate speech. Punitive measures against historical revisionism appear even more troublesome in the light of academic freedom of expression.

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