Separation of Judiciary and Judicial Independence in Bangladesh
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Abstract

Independent judiciary is the sin qua non of a democratic government. And separation of judiciary is the precondition of the sound and independent judiciary. Since the beginning of the British colonial rule, the question of separation of judiciary from the executive has been a continuing debate, though Bangladesh has been past thirty four years of its independence, she has failed to separate the judiciary from the executive. Today it is a burning question of our country. This paper attempts to explore to what extent initiatives, have been taken to separate the judiciary from the executive and what are the obstacles available to implement the initiatives in this path. I have also discussed in briefly the conceptual side and lastly concluded with some recommendations, so that policy of separation of judiciary from the executive would be effective and helpful for the policy makers and implementators. The paper is based on secondary sources of information, like books, journals, newspapers and research reports. Relevant literature has also been collected through Internet browsing.

Keywords: Executives, Judiciary, Independence and Separation.

Introduction: In a democratic state, the power rests on three separate organs, namely the executive, the legislature and the judiciary. The constitution of Bangladesh vests the executive power in the executive and the legislative power in parliament. Though there is no specific vesting of judicial power, it is vested in the judiciary, the judiciary comprises all courts and tribunals, which performs the delicate task of ensuring rule of law in the society. A social structure remains coherent and cohesive with the aid of a sound judicial system. Judiciary redresses the grievances of the people and resolves disputes. The dysfunction of judiciary impacts more severely than that of any other institution as it removes from the mind of people the sense of attachment with the society. In Bangladesh the Judicial norms and practice have been derogating for years. Recently a number of allegations have mounted surrounding judiciary.

Conceptual Analysis

Independence of Judiciary

Independence of judiciary means a fair and neutral judicial system of a country, which can afford to take its decisions without any interference of executive or legislative branch of government. Taking into consideration some of the recent discussions made in the Beijing Statement of Independence of the Judiciary (a statement resulting from the cumulated views of thirty-two Asian and Pacific Chief Justices) Judicial independence is defined, in this report as a Judiciary uninhibited by outside influences which may jeopardize

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the neutrality of jurisdiction, which may include, but is not limited to, influence from another organ of the government (functional and collective independence), from the media (personal independence), or from the superior officers (internal independence) (Rahman, 2000; Hadley, 2004).

Independence of judiciary truly means that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from executive or legislative or from the parties themselves or from the superiors and colleagues (Halim, 1998; 299). The concept of judicial independence as recent international efforts to this field suggests, comprises following four meaning of judicial independence (Bari, 1993, 2; Rahman, 2000):

(i) Substantive Independence of the Judges: It referred to as functional or decisional independence meaning the independence of judges to arrive at their decisions without submitting to any inside or outside pressure;

(ii) Personal independence: That means the judges are not dependent on government in any way in which might influence them in reaching at decisions in particular cases;

(iii) Collective Independence: That means institutional administrative and financial independence of the judiciary as a whole vis-à-vis other branches of the government namely the executive and the legislative; and

(iv) Internal Independence: That means independence of judges from their judicial superiors and colleagues. It refers to, in other words, independence of a judges or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding cases.

Independence of judiciary depends on some certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it (Rahman, 2000, 147). “Independence of the judiciary”, it is maintained, “lends prestige to the office of a judge and inspires confidence in the general public” (Robson, 1951).

Separation of the Judiciary

Separation of the judiciary has been argued both as a cause and a guardian of formal judicial independence (Hadley, 2004). The concept of separation of the judiciary from the executive refers to a situation in which the judicial branch of government acts as its own body free of intervention and influences from the other branches of government particularly the executive. Influence may originate in the structure of the government system where parts or all of the judiciary are integrated into another body (in the case of Bangladesh: the executive). For example, in Bangladesh the president in
consultation with the Supreme Court according to the constitution, appoints judicial officers other circumstances include functional aspects of the judicial system when the administration of justice is in some way, affected by executive orders or actions –. Executive abuse of this constitutional order result in biased appointment of judges, and other officers of the judicial cadre, favoring individuals who support the governing political party. Dr. Kamal Hossain, a respected advocate of the Supreme Court, explains the concept of separation of the judiciary through the idea of double standards. An executive officer follows plans, which are of a vertical nature, with the higher offices guiding the decisions of the lower officers, who look for the best possible ways to further the plans established by those higher in the pecking order. Executive decisions are made in lines of policy; law is not a policy. Judges or magistrates performing judicial functions must examine what evidence is given and find a way to best apply it to the law; there is less room for an individual’s perceptions in judicial decisions (Dr. Kamal, 2004; 5 March).

Complete separation is relatively unheard or outside of theory, meaning no judiciary is completely severed from the administrative and legislative bodies because this reduces the potency of checks and balances and creates inefficient communication between organs of the state (Hadley; 2004). A high degree of separation, however, can be a strong guardian of judicial independence, as this paper will attempt to prove.

The constitution of Bangladesh is the first defense of judicial independence, presiding over all the “Republic’s affairs and framing the organization and administration of the government. While constitutional flows exist, regarding separation of the judiciary, there are adequate provisions for formal judicial independence.

Judicial Independence in the Constitution

Part VI of the constitution deals with the judiciary. Art. 7 provide that all powers in the Republic shall be effective only under and by authority of the constitution. The responsibility of seeing that no functionary of the state oversteps the limit of his power is, a necessity, on the judiciary. Art. 35(3) of the constitution provide “Every person accused of a criminal offence shall have right to a speedy and public trial by an independent and impartial court or tribunal established by he law. Article 116A provides for independence in the subordinate judiciary while Article 94(4) demands independence of the Supreme Court Judges. Article 116A, while requiring judicial independence, was part of the detrimental changes to the constitution made in 1974 and 1975 discussed later in the paper: Subject to the provisions of the constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.

Separation of the Judiciary in the Constitution

The judicial independence of all judicial officers is unconditional according to the constitution of Bangladesh. This ideal is protected primarily through the concept of separation of the judiciary from the other organs of government. Article 22 state directly and unquestionably: The state shall ensure the separation of the judiciary from the executive organs of state. Article 95(1) addressed the method of appointment for the Supreme Court: the president shall appoint The Chief Justice and other Judges. The
appointment and control of judges in the subordinate judiciary (judicial service) are described in Articles 115 and 116 stating respectively: Appointment of persons to offices in the judicial service or as magistrates exercising judicial be made by the President with the rules made by him in that behalf. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.

It is principally through the above articles that the executive branch has been able to gradually intrude upon and influence the judiciary in Bangladesh, creating enormous problems regarding the quality of jurisdiction and the extent of judicial independence. Recently, separation of the judiciary from the executive has been argued as a necessity based on the unconstitutionality of the present organization and while this may well be true, it appears to be he consequential improved functional independence of the judiciary that is the fundamental reason for separation with unconstitutionality being only an argument to ensure its enactment (Dr. Kamal Hossain, 5th March, 2004).

Independence Judiciary in Bangladesh: How Far the Dream!

Separation of judiciary from the executive and judicial independence appears to have become an endless process. The debate started in the late 18th century and continues even now (Ali, 2004). However now it is important to understand the present structure of the judiciary to be able to understand where executive intrusions into the judiciary originate and how these affect the independence of individual judges.

Structure of the Judiciary

Bangladesh’s Constitution came into force on December 16, 1972, the first anniversary of the country’s independence. It contains fairly stringent safeguards for the independence of the judiciary in Article 95 (Appointment of Judges), Article 96 (Removal of Judges), and Article 99 (Prohibition on Further Employment of Judges), although the formal separation of powers is not emphatically articulated. Over the years, its safeguards for judicial independence, rather than being strengthened and consolidated, have been diluted through a number of constitutional amendments.

At a glance the judiciary of Bangladesh consists of two divisions, the Supreme Court and the subordinate courts. The highest court in Bangladesh, the Supreme Court, is actually composed of two divisions; the Appellate Divisions and the High Court Division. The functions of the two are distinct, and separate appointments of judges are made to each. The Chief Justice of the Supreme Court sits in the Appellate Division and is the Chief Justice of Bangladesh; there is no separate Chief Justice of the High Court Division. The president, sometimes-in consultation with the Chief Justice appoints the judges of the Supreme Court. While some Chief Justice in the past have insisted on being consulted on these appointments, others were not so exacting, leading to “Political” appointments by the party in power (ADB, 2003).

The lower judiciary in Bangladesh also consists of two parts: first, their are District courts and Sessions courts, with 10-30 judges sitting in each of the country’s 61
districts. Then there are also the courts of Magistrates, the Judges of the District Courts are under the jurisdiction of the Supreme Court and belong to the Bangladesh civil service, while judges in the courts of Magistrates are members of the country’s, administrative cadre, which is responsible for the general administration of its territories. Magistrates are controlled not by the judicial branch, but by the Ministry of Establishment and by the government. Magistrate judges are typically transferred to their magisterial posts for 3-10 years during the course of their employment with the government, thereafter are reverted back to their old administrative positions (ADB, 2003). There are four different types of magistrates: magistrate of the first class, second-class third class and honorary magistrates (Hoque, 2003). Responsible for 80 percent of criminal cases, it is the magistrates who usually decide if the accused is to be granted bail or prosecuted and typically have the power jail and individual for up to seven years. The most notable executive interference’s in the lower judiciary come through the appointment of judges and more importantly executive control over the magistrates, these bonds between the executive and the judiciary are an important constitutional discrepancy that results in the deterioration of the concepts of judicial independence and rule of law.

Steps for Separation of Judiciary

The first attempt was taken after the division of the sub-continent in 1947, Pakistan government enacted East Pakistan (then Bangladesh was under Pakistan government) Act No. XXIII of 1957, which provided for separation of judiciary from the executive. The law was still hanging for a simple gazette notification. As regards independence and separation of judiciary, our constitution of 1972 is fairly developed. But the framers of Supreme Law of the land made an unfortunate insertion in article 115 and 116 as ‘Magistrates exercising judicial functions’, which still remain unattended. Art 22 in unequivocal term states that ‘the state shall ensure the separation of the judiciary from the executive organs of the state’ as one of the fundamental principles of state policy. It is not readily judicially enforceable. Nevertheless the state cannot ignore it for long. There was under current of demand of implementation of constitutional obligation from the very inception of Bangladesh. But the Fourth Amendment undermined the constitutionalism itself, which obviously destroyed the independence of judiciary. The subsequent upheavals of politics rather by passed it. In 1976 law commission recommended that subordinate judiciary on the criminal side should be separated from the executive (Hussain, 2003).

In the mean time, we witnessed two extra-constitutional processes. In 1987, initiatives were taken to separate the magistracy by amending code of Criminal Procedure, 1898. For unknown reason the Bill could not placed before the Parliament. After the fall of autocratic rule in 1990, exception was high to ensure separation of judiciary. But the next two governments of 1991 & 1996 did nothing in this regard except spoiling its tenure. In 1999, the Supreme Court issued 12-point directives in famous Mazdar Hossain case to ensure separation of judiciary from the executive. The successive governments have taken time again and again to delay the process. It may be recalled that the caretaker government (2001) has all measures to ensure separation but stop at the request of AL and BNP two major parties of the country. The BNP leaded coalition government is working very slowly towards separation of judiciary. It is a pleasure that
Judicial Service Commission and Judicial Pay Commission have been created various rules and amendment in the relevant sections of code of Criminal Procedures 1898 are under consideration of parliament of late the law. Just and Parliamentary Affairs Minister announced that it would take additional six years (!) to ensure separation of judiciary the Daily Star 20.6.2004 this statement is reflective of how indifferent the Government is about separation of judiciary. The demand separation of the judiciary from the executive is universal to ensure the independence of judiciary and safeguard the rights of the people. It is quite unfortunate that the Government is moving towards at shail’s pace (Bari, 2004).

It may be noted that Pakistan and India have taken necessary steps for free the judiciary from the executive at all levels in 1973 and 1974 (in West Bengal in 1970) respectively. Ensuring justice and independence of judiciary will remain a far very until lower judiciary is separated from the executive. It is mandatory and constitutional obligation of the Government to ensure separation of the judiciary from the executive. Five years have been clasped since the Supreme Court gives it directives in Masdar Hossain case. Law Minister is seeking for additional six years in this regard we can fairly questions how long will it take to ensure separation of judiciary from the executive?

We may mention here some draft procedure to separation of judiciary by the government at a glance:


(ii) Bangladesh judicial service (ascertainment of field of service, giving promotion, system of control and discipline including grant of vacation and the term of service) procedures, 2001.


But these drafts have some flaws, which are mentioned below:

**Constitutional Amendment:** First of all constitutional amendment is essential if the judiciary is to be separated from the executive. In the proposed process, the judges are supposed to be indirect control of the president. But in the Article No. 48 of the constitution President is bound to take suggestion for appointing chief justice and Prime Minister. Moreover in the Article No. 55, it is clearly mentioned that the executive power of the republic will be vested upon the Prime Minister. So the article 48, and 55 must be amended.

**Future of Working Magistrate:** How the promotion and other facilities will be given to the magistrates, it is not clear in the draft. If the working magistrates do not go under judiciary, there will be great problem because of shortage of judges.

**Mobile Court:** In order to sustain the law and order of the country, mobile court plays a
vital role. Executive controls it though it is the work of judiciary. According to the Criminal Procedure, Clause-190 magistrate can not direct the mobile court. So it is a confusing matter that who will control mobile court.

**Pay Commission and Finance:** Who will provide money/salary to the Judges or Magistrate, if Judiciary is separated, it is not mentioned in the draft. So before separation, pay commission and finance must be fixed.

**The Problems and Obstruction of Separation of Judiciary from the Executive in Bangladesh**

The question of separation of the judiciary from the executive organ of the state is not new for our judicial system. So far many erudite articles written by highly intellectual persons of the relevant fields were published in the leading newspapers of our country. But those intellectual exercises have gone unheeded so far. There were of course commitments of the political parties every time before the elections were held (Rahman, 2004). We must seek the reasons why this very important organ of the state has so far not been given the shape as enunciated in the sacred constitution where the nation has solemnly affirmed for an independent judicial system. I have point out here some common problems.

1. **Lack of Consciousness:** Of the total people constituting the electorate of our country, I am sure more than 10% voters do not know what actually is mean by the separation of the judiciary and for that matter what is the bright side of the proposed separated judicial system. To address these questions we should have at least an average knowledge of our present judicial system. Lack of consciousness people’s have no strong movement for this reasonable and demandful wants.

2. **Lack of Political Will:** Any kind of meaningful changed, political will is mandatory because our democratic polity deals by various political parties. And Government formed by citizen’s mandate with their representatives. So, if the political parties (both government and opposition) have no interest to separate the judiciary from the executive it would be impossible. Though most of the political parties have commitment to separation of judiciary but after formation of government they technically avoid the matters. That’s why the process of separation of judiciary is going on endlessly.

3. **Lack of Interaction with Other Courts:** Lack of interaction of the judges in Bangladesh with their counterparts in other countries is a possible factor for their insular understanding of law. Of course, the courts’ scarce resources limit the opportunities for such interaction. And, the very limited judicial interaction with foreign courts, when it does occur is arranged in hierarchical order. This means that older judges, who are usually less amenable to fresh ideas and have less time left on the bench, undertake such interactions most often, receiving the most limited results possible (ADB, 2003).

4. **Lack of Strong Civil Society:** Civil society now days play a very important role
for any positive change or form of a country. The civil society of Bangladesh is not so strong that’s why they also failed to compel the government to separate the judiciary from the executive.

5. **Lack of Democratic Culture**: We have reached upon 34th years of our independence from the dictatorial and autocratic rule of Pakistan. In 1991 we claim to have set up a democratic government. But we have so far made little progress in practicing parliamentary culture. Our leadership instead of guiding the nation toward setting up a strong parliamentary democracy has so long been engaged in the politics of mutual hatred and vengeance. Tolerance and respect for opposition party is now foreign in our politics. Such intolerance and enmity between political parties have adversely affected the nation as a whole and virtually has divided the nation into some group antagonistic to each other. This inimical attitude of our political parties has not only polluted the politics of our nation but has created groupings among public servants in general and bureaucrats in particular. Of late the highest judiciary has reportedly been politicized (Rahman, 2004).

6. **Executive Dominated Judiciary**: Article 115 of the constitution: Appointments of persons in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf. It is noticeable in this article that the President with exercising this power is not required to consult the Chief Justice of Bangladesh. We know that the President cannot exercise his powers whatever, without the advice of the Prime Minister, except of course his power to appoint the Prime Minister. This is how the executive organ of our state is controlling the judiciary. Their appointments, postings, transfers, promotions, punishments etc. are at the hands of the President or for that matter, the government.

7. **Lack of Popular Access to Justice**: Unlike neighboring India, where legal aid, access to justice and alternative dispute resolution were largely judge-pioneered initiatives, the situation is completely different in Bangladesh. The very wide powers of the highest court to deliver justice have been under-utilized. Less than a dozen-suomoto case during the last ten years have succeeded, perhaps reflecting judicial conservatism.

8. **Overlapping Competencies**: Often, executive branch ministries to work as their legal officers recruit judges from the subordinate judiciary. Generally ministries do not have legal officers of their own, and the public prosecution service is an adhoc arrangement. Arguably, judicial independence is compromised when a person acts as both a prosecutor and a judge. Law officers have to defend government positions while judges might rule against the government. A directive of the Masdar Hossain Judgment calls for the roles of judges and prosecutor to be separated. Unfortunately, so far this directive has not been carried out.

9. **Corrupted lawmakers**: The air of separation of judiciary is entering, side by side it has also bad smell. Maximum judges and lawmakers are corrupted. The
takes bribe spontaneously and make the case diverted. It is a very common phenomenon in our country. So if the independent judiciary is vested upon the dishonest lawmakers, there must be disorders in law and order situation of Bangladesh. Recently Transparency International of Bangladesh (TIB) exposed the corruption of the lawmakers (Table-1).

Table: Corruption of Lawmakers.

<table>
<thead>
<tr>
<th>Footing</th>
<th>Case Number</th>
<th>Bribe Providers</th>
<th>Whom was bribe given</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Court Servant</td>
</tr>
<tr>
<td>Rural Area</td>
<td>198</td>
<td>63.6%</td>
<td>70.8</td>
</tr>
<tr>
<td>City</td>
<td>21</td>
<td>57.1%</td>
<td>77.8</td>
</tr>
<tr>
<td>Total</td>
<td>219</td>
<td>63.0%</td>
<td>71.3</td>
</tr>
</tbody>
</table>


It is also alarming news that maximum lawmakers are concerned with any of the major parties of the country. So it is a matter of great tension whether public will get justice or not that is why, first of all politics among them must be banned. Otherwise there will be use of separation of judiciary from the executive.

10. **Government Negligence:** The High Court Division of the Supreme Court of Bangladesh in a judgment directed the government to take steps for separation of judiciary from the executive organ quite a few years back. But the government has so long remained headless and negligent to the High Court Division’s directives. When the government itself does not honor the highest court of the country, how can the people in general confide in the judicial system and such underhand practice?

However, the government has sought, and the Appellate Division has granted, a number of extensions in time for the implementation of the Supreme Court’s directives. Formally and officially the government is committed to implementing these directives, which would also include some changes in the criminal procedural laws. However these repeated extension suggest continuing challenges to the ultimate implementation of University of Rajshahi, Rajshahi the directives (ADB, 2004). It is strongly felt everywhere that immediate steps are taken for separation of the judiciary from the executive organ of the state (Rahman, 2004).

**Recommendations**

From the above discussion I have some recommendations for removing the judicial problems and separating the judiciary from the executive and ensure the judicial independence in Bangladesh.

1. Political interference is a major impediment to the proper justice. If the judiciary is separated, cases can be dealt without political interference. We cannot expect proper justice if judiciary does not work independently. There is hardly a little chance for case to be biased in case of independent judiciary. So from this point of
view separation of judiciary is necessary.

2. The citizenry and government must have more respect for judicial decisions. This would go a long way in centralizing the notions of the rule of law, defining the limits of government, creating parameters of accountability, and ensuring other necessary pre-conditions for an ordered and predictable society (ADB, 2003).

3. In Bangladesh with immediate technical assistance for carrying out the directives of the Masdar Hossain judgment, particular knowledge of how the functional separation of powers is initiated and implemented in other countries should be seriously considered. The creation of judicial service commission (JSC) implies a drastic expansion of administrative responsibilities for the Supreme Court, a burden that it is currently ill suited and to shoulder (ADB, 2003). The rudimentary technical competence of the administration of the Supreme Court is an area of concern, and courts in general are in need of more technical assistance.

4. The appointment of Judges of the Supreme Court, currently done by the President, is susceptible to external influences in a selection process that is nontransparent. A change in the system of selecting and appointing judges of High Court Division is another aspect requiring attention. The courts themselves must encourage ordinary citizens to seek justice through their chambers. At present, lower courts are mistrusted and the judiciary in general, if it is to be effective, must encourage and support citizens’ access to justice.

5. Improvements in court administration must be made at both the national and the District levels. Administrative reorganization is vital at this time in order to put in place the structures and processes necessary to administer an independent judiciary. At sometime in the future the judiciary may be expected to perform all of those necessary functions, which are now being performed by the Executive. At the national level, the Registrar’s Office in the Supreme Court will be studied and reorganized along functional lines, i.e. case management, planning budgeting and financial management, general administration, human resources, and research. Institutions such as the existing Judicial Council will be studied and other administrative reorganizations may be recommended and implemented.

6. At the district level, to reduce the administrative workload of the District Judges, the administrative officer and other staff, on whom the judge relies in administrative matters, would be upgraded, in part by developing career path for them. The District Court’s administrative office would be modernized and would have appropriate and trained staff, e.g., a planning and budgeting officer, a purchasing and accounting officer, and other customary staff, e.g., a court order clerk, a process/decree officer, and process servers. Office manuals would be developed documenting the new procedures and standard forms; office space would be created adequate for staff, records and equipment, and technology, including computers and suitable software, with linkage to the Court Management Information System (CMS), would be supplied by the government. Yet these I have some other specific recommendations:
i) The establishment and enforcement of a procedural calendar for the life of a case;

ii) The enforcement of time limits for processing cases, backed by a regime of costs and/or other sanctions to discourage non-compliance;

iii) The elimination of unnecessary procedural steps for, and other hurdles to, the enforcement of judgments;

iv) Improved courtroom facilities, as well as technology support, with automated case tracking systems, as part of the CMIS to be installed in the Supreme Court and the District Courts.

Concluding Remarks

Judiciary forms the basic element of the statehood shaped by deliberate policies to establish social justice and equality of all citizens. In a modern society it must, therefore, reflect the fundamental principle of state policy as well as universal value and ethics of international human rights regime, which are not fundamentally altered by cultural or class differences. In order to meet the challenge of the next century and to accomplish the constitutional goal, to secure equal justice in economic, political and social life, it is important to extend the judicial mind and the due process in all spheres of administrative dealings with the affairs of men and society. Pressure on the government to implement the 12-point the 12-point directive continues to mount in the current heat of Bangladeshi politics. The Attorney General has threatened not to ask for a further time extension on behalf of the government and the recent creation of an alternative political base headed by former President Badruddoza Chowdhury and Dr. Kamal Hossain has threatened the political legacies currently dominating politics in Bangladesh (Hadley, 2004). In order to get back the trust of the public upon the Judiciary, it is essential to be separated from the Executive. First of all the government has to take steps to remove all the impediments. Such as recently the Govt. Has formed the Judicial Service Commission, the will play an important role to make the judiciary independent. But it is also true that all the roads of justice may not be opened even after the separation of judiciary. Civil society should come forward, and the politicians and executive authority should understand that a sound judicial system keeps equilibrium of a society. If the judicial edifice weakens, the democratic system will not function, and social fabric will be broken down. So, here all the people concerned with judiciary have to play active and effective role from honest point of view. Then the independence of judiciary will bring effective fruits in future.

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