

Preventive Detention and Section 54 of the Code of Criminal Procedure: The Violation of Human Rights in Bangladesh

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Abstract

The violation of Human rights has started from very beginning of our civilization. Arbitrary arrest, detention and custodial torture by law-enforcing agencies have remained a persistent feature of our criminal justice system. These practices have been widespread in Bangladesh irrespective of the forms of government and successive governments have failed to stop this endemic problem. It is being made in culture of the violation of human rights through preventive detention and abuse of Section 54 of Cr PC all over the world, especially in the third world countries. It is sorry to mention that Bangladesh is one of them. The paper aims is to show how the rights violated through preventive detention and Section 54 of Cr PC, because it is mostly used for the violation of rights of an individual. This paper highlights definition, history, nature, rationality of preventive detention and our constitutional safeguards to protect the human rights. It also examines social necessity of the law of the preventive detention for our country with citation of the leading cases relating to preventive detention in Bangladesh, Pakistan and India. It also urges that preventive detention should be used sparingly only in exceptional circumstances.

Keywords

Human Rights, Preventive Detention, Suo Motu Rule, Wrongful Arrest, Bangladesh

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1. Introduction

Since the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, humanities have been a very significant theme of discussion. The Human Rights Organizations have been working throughout the world to enforce human rights in different countries. Human rights are not limited or confined in any particular country. It is a universal right which the entire mankind can enjoy freely irrespective of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These

rights should be free from the clutches of despotic ruler or cruel man. Jacques Maritain says,

"The human person possesses rights because of the very fact that it is a person, a whole, a master of itself and its acts and which consequently is not merely a means to an end but an end which must be treated as such.....these are things which are owed to man because of the very fact that he is a man" [1].

Although there exists preventive detention laws directly or indirectly in all the countries of the world, yet there is no universal definition of preventive detention due to the difference in the application of law. The English people

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captured the ruling power of Indian sub-continent after their victory at the Battle of Plassey [2]. In order to stabilize their power they included for the first time the provision of preventive detention in the East India Company Act, 1784.

In *R. vs. Halliday* [3] the expression, "preventive detention", was used for the first time in Britain. The word "Preventive" means that restraint, whose object is to prevent probable or possible activity, which is apprehended from would-be deteneon grounds of his past activities [4]. The word "Detention" means keeping back [5]. The parliaments of Bangladesh, India and Pakistan have enacted laws regarding preventive detention. The term "preventive detention" means the detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder [6]. In *A. K. Gopalan vs. State of Madras* [7] it was held that: "there is no authoritative definition of the term 'Preventive Detention'..." It is not a punitive but a precautionary measure.

In *R. vs. Halliday* [8] it has been stated that: "One of the obvious means of taking precautions against dangers such as are enumerated is to impose some restrictions on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy."

Preventive detention is an abnormal measure whereby the executive is authorized to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety [9]. Preventive detention means detention of a person only on suspicion in the mind of the executive authority without trial and without conviction by the court [10]. Preventive detention is not to punish an individual for any wrong done by him but to prevent him from acting in a manner prejudicial to the state [11]. It is a pre-trial internment [12] Preventive detention is a serious encroachment upon the personal liberty of a person, for the simple reason that, unlike ordinary arrest or imprisonment, preventive detention is effected without trial [13].

Preventive detention is a peculiar measure in the sense that it imposes restrictions on the liberty of a citizen to the extent that a person who has not committed any offence may be presumed that he is about to commit an offence, which has been defined as prejudicial. As David H. Bayley said: "A law of preventive detention sanctions the confinement of individuals in order to prevent them from engaging in forms of activity considered injurious to the community and the likelihood of which is indicated by their past actions" [14]. The philosophy behind the powers of arrest without warrant is that prevention is the most effective approach to control crime. The object of s 54 Cr PC is to give widest powers to the police in cognizable cases subject to the limitation that

the powers must be used reasonably and cautiously. The words 'may arrest' signify that the powers of arrest is discretionary [15]. In this regard police abuse the power of s 54 and arrest by politically motivated any uses Handcuffs Frequently which is the violation of Human Rights. In guise of preventive detention law & Section 54 of Cr PC the executive authority exercises discretionary power regarding arrest and detention. This study will consider the validity of preventive detention law and discover to what extent the rights are infringed due to misapplication of preventive detention laws and will finally put necessary recommendations to stop the misuse of the law.

2. History of Preventive Detention

In *R. vs. Halliday* [3] the expression, the word Preventive detention was used in Britain first time. Preventive detention was first introduced in our sub-continent in 1818 by the Bengal State Prisoners Registration iii. The Presidencies of Madras and Bombay made similar regulations in 1819 and 1827. In 1935 through Government of India Act, provided for scope of Preventive detention and under the Defense of India Ordinance was promulgated. Afterward it was transferred into the Defense India Act 1939 and continued until the time of 2nd world war. Defense Act, 1915 also provided the scope Preventive detention. The Indian Constitution empowers the parliament to legislate on preventive subject to limitation laid down by Article 22 [16]. In India the Preventive detention was enacted in 1950 as named "Preventive Detention Act, 1950". Afterward it was amended and replaced by Maintenance of Internal Security Act, (MISA) 1971. Preventive detention also introduced by Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) 1974, National Security Act 1980, The Essential Services Maintenance Act (EMS) 1981, and lastly by the Terrorist and Disruptive Activities (Prevention) Act 1985. In Pakistan through Public Safety Ordinance Act 1949 [17], Public Safety Act (Amendment) 1950 [18], Public Safety Ordinance 1952 and lastly The Security of Pakistan Act 1952 [19] were provided Preventive detention in various ways. The constitution of Pakistan of 1956 and 1962 empowered and also constitution of 1973 empowered parliament of Pakistan to enact Preventive detention laws.

In Bangladesh the original constitution, there was no provision introducing for Preventive detention. But through 4th amendment by "The Special Powers Act 1974" (9th February) enacted Preventive detention act which was an anti-people black law still continuing. After enacting the provision by the Special Powers Act, Sheikh Mujibur Rahman used Preventive detention against the tribal people

of Chittagong Hill Tracts, and against the suspected members of Jatio Shomajtantirik Dol and Shorbohara Party. President Ershad gov. used this Preventive detention against Awami League and BNP during his regime (1982-90). But unfortunately two elected party BNP Govt. (1991-95) and Awami League Govt. (1996-2001) used it to oppress the opposition party severely.

3. Rationality of Preventive Detention: Violation of Human Rights

For every matter, there is nature and justification behind it. The nature of Preventive detention is different from the nature of punitive detention. The word Preventive detention is used in contradiction to the word punitive detention. Few people have described both actions as restraint of individual's freedom and personal liberty [20]. The Preventive detention laws allow many false and unlimited powers to the government authorities to detain a person. When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts, [21] he may be detained by Preventive detention to defend him from doing that act. The court presumed that many times detaining authority violate fundamental rights to satisfy the government. In *Sasti vs. State of West Bengal* [22], Indian Supreme Court elucidated the nature of Preventive detention as a detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof but may still be sufficient to justify his detention. On the other hand the philosophy lying behind the Preventive detention is the greater interest and security of the state and nation because National Security is more important than the personal liberally of citizen.

Justifying the measure Lord Atkinson in *R. vs. Halliday* said,

“----where preventive justice is put in force some sufferings and inconveniences may be caused to the suspected persons. This is inevitable. But the suffering isInflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defense of the realm” [23].

In the same case Lord Finlay has said,

“Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state”[24].

Similar view also expressed by Lord Alfred Denning. He said, “If there are traitor in our midst, we cannot afford to

wait until we catch them in the act of blowing up our bridges or giving our military secrets to the enemy, we cannot run the risk of living then at large, we must detain them on suspicion” [25]. Regarding preventive detention the Indian Supreme Court observed, “That appears to have been done because the constitutions recognize the necessity of preventive detention on extraordinary occasion when control over public order, security of the country, etc., are in danger of breakdown. But while recognizing the need of preventive detention without recourse to the normal procedure according to law, it provided at the same time certain restrictions on the power of detention, both legislative and executive, which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrarily used” [26].

In this way preventive detention in the name of crime control process violates the following Human Rights;

Article-32: No person shall be deprived of life or personal liberty save in accordance with law that means everyone has the right to life, liberty and security of person (BDC, 1972, UDHR, 1948 Article -3 and ICCPR, 1966 Article-3).

Article 35 (5): No person shall be subject to torture or to cruel, inhuman or degrading punishment or treatment (BDC, 1972, UDHR, 1948 Article -5 and ICCPR, 1966 Article-5).

Article- 33(1). (2). (3): No one shall be subjected to arbitrary arrest, detention or exile ((BDC, 1972, UDHR, 1948 Article -9 and ICCPR, 1966 Article-9).

Article- 35(3): Right to a fair trial (BDC, 1972, UDHR, 1948 Article -10 and ICCPR, 1966 Article-10).

Because preventive detention unrecognized the above Human Rights of the detainee in the following way;

It is true that most of the developing countries used the Preventive detention as a weapon to dominate, crush the opposition and to perpetuate rule. After achieving our independence, there are no situations of war or internal aggression or internal disturbance which are threatening our security but this The Special Powers Act, 1974 are using still to suppress anti-government movement and sometimes democratic movement also.

Firstly, in Bangladesh without trial six months detention can confer to the detainee. This is a bad process because now here in the world such a long period is not found anywhere. In India, this time is three months [27] and in Pakistan the initial period of detention is three months.

Secondly, in democratic countries Preventive detention is a method resorted to in emergencies like war [28]. The western developed countries like USA, UK, and Singapore, it is specifically mentioned that only in time of emergency, Preventive detention is applied for and also for specific

purposes, but there is no specification in our constitution and can be restored to in times of both peace and emergency.

Thirdly, we have not a fixed maximum period of detention not in our constitution or in the Special Powers Act 1974. This is also a negative aspect of Preventive detention. In Pakistan the period of Preventive detention is eight (8) months in a year [29] and in India maximum two years. Fourthly, in Bangladesh a large number of political workers and leaders are detained without trial through the preventive detention under the Special Powers Act 1974 and known as a “Black Law”. But this picture of detention without trial is not found in western countries where this preventive detention also exists. Fifthly, the Preventive detention under the Special Powers Act is keeping in line with the maintenance of Indian Security Act 1971 and the East Pakistan Public Safety Act 1958. But in Bangladesh the provision relating to Preventive detention made more draconian than those of twos. By 44th amendment the process of Preventive detention made something democratic in Indian constitution. Sixthly, police officer after arresting any person prays before Magistrate court for remand and in maximum cases police gets remand and starting bodily, mentally torture which is a violation of international human rights law [30].

Seventhly, there is nothing entitled against who a detention order has been made to appear by lawyer in any matter connected with the reference to the Advisory Board [31], and its report excepting that part of the report in which opinion of the Advisory Board is specified shall be confidential.

Eighthly, if any person is actually criminal that he or she would be arrested under general law and Magistrate can punish him or her but if it is happen then he or she must bring before Magistrate within 24 hours. But not to bring within 24 hours before Magistrate, a suspect is arrested under the Special Powers Act 1974.

Because by this a person without bring before Magistrate can put in prison month after month. Ninthly, many suspected people who are not actually criminal, for wrong information they kept inside the jail. Among them who are rich come outside through writ of Habeas Corpus in High Court Division but those who are poor, they have no chance.

4. Preventive Detention in Bangladesh & Constitutional Safeguards

In our constitution Article 33 deals with the rights of an arrested person.

Article 33 confers three constitutional rights or safeguards upon a person arrested.

Sub article (1) and (2) deals with;

- (a) He or she cannot detain in custody without being informed, as soon as may be of the grounds of his arrest.
- (b) He or she has the right to be produced before the nearest magistrate within 24 hours and cannot detain in custody beyond the period of 24 hours without authority of the magistrate.
- (c) He or she has the rights to consult and be defended by a legal practitioner of his choice and-

Sub article (3), (4), (5), (6) deals with three constitutional safeguards for detention. They are:

- Review by an Advisory Board.
- Right to communication of grounds of detention.
- Right of fight against the detention.

4.1. Review by an Advisory Board

No law providing for preventive detention shall have any authority of detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be person who are, or have been or are qualified to be appointed as, judges of the Supreme Court and the other shall be a person who is a senior officer in service of the republic [32]. No person can be detained more than 6 months without authority of the Advisory Board, if the board gives their opinion that, there is sufficient grounds for such detention only than the authority can detain the suspect more than 6 months. If the grounds of detention are not placed before the Advisory Board within 120 days from the date of detention, the detention will be illegal [33]. The opinion of the majority of the Advisory Board shall be deemed as an opinion of the board if there is a difference opinion among the members.

4.2. Rights to Communication of Grounds of Detention

Article 33(5) of our constitution and also in Indian constitution Article 22(5), in Pakistan constitution Article 33(5) says that the detaining authority must communicate as soon as may be to the detenu about the grounds of detention. “As soon as” means a reasonable time. According to the Special Powers Act the grounds must be communicated within 5 days from the date of detention [34]. Where the person arrested in illiterate, the grounds may be communicated to him verbally [35]. Where he is literate, they are to be made in the language, which the detenu could understand [36].

4.3. Rights of Representation Against the Order of Detention

It is the rights of the arrested person to engage counsel and

the consul will help the person to defend him. Article 33(1) of our constitution provides that the detaining authority must afford the detenu the earliest opportunity of making representation against his detention. The person arrested has a right to have purposeful interview with the legal practitioner out of the hearing of the police or jail staff through it may be within their presence [37].

4.4. Judicial Control-Satisfaction of Detaining Authority

The question of a person being detained under the law of preventive detention is left to be determined upon the subjective satisfaction of the detaining authority. This satisfaction is a matter into the existence of which the courts will not set on foot any inquiry unless it is alleged that the order of detention is a malafide one [38]. As the High Court in the case of Ranabir Das vs. Ministry of Home Observer, "A detention order is made malafide when it is made contrary to the object and purpose of the Act or when the detaining authority permits him to be influenced by conditions which he ought not to permit" [39].

In the case of Habibullah Khan vs. S. A. Ahmed the Appellate Division held that it is not only that the government is satisfied that the detention is necessary, but it is also for the court to be satisfied that the detention is necessary in the public interest. In Krisna Gopal vs. Govt. of Bangladesh, the Appellate Division held that an order which is going to deprive a man of personal liberty cannot be allowed to be dealt with in a careless manner, and if it is done so, the court will be justified in interfering with such order. The court held the detention order unlawfully [40].

5. Judicial Remedies Against Preventive Detention and Recommendations

Though the Government generally used this preventive detention against the opposition but there are so many steps to get justice against preventive detention in Bangladesh. They are-

5.1. Writ of Habeas Corpus

If any person illegally detained then any person in favor of him can file a writ of Habeas Corpus under article 102(b) (1) of our constitution. The detenu himself [41], or his father [42], or his wife [43], or his son [44], or his sister [45], or his relative [46], or even his friends can apply for this. Most of the cases the court found the weak grounds, vague & not any specific grounds. As a result the high court can relax the detenu for following grounds-

- Detaining by Governments unlawful authority.

- Failure to state the grounds within time.
- Failure to give chance to be defend himself.
- Lack of nexus with the reason of detention.
- Not to produce the detenu before advisory board within specific time.
- Mixing good grounds with bad grounds.
- Retrospective issuance of orders and
- Failure to submit essential documents before court or not in proper time.

For such grounds when high court is satisfied that the detenu has been detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of Habeas Corpus is withheld then a case filed under section 491 of Cr. Pc. to get directions or rule of the nature of a Habeas Corpus. Another interesting matter we want to highlight hat "though it is stated that special power act there is no chance of filing a Habeas Corpus writ but people can because the Special Powers Act is a general law but article 44 & 102 gives the power to High Court Division to exercise Habeas Corpus writ which is a constitutional law as it is a constitutional law strong than general law" [47].

5.2. Suo Motu Rule

The Suo Motu rule is now not very new to us. It is exercised by High Court Division's judges if any illegal or inhuman matters happen and it comes to knowledge of the court through newspaper or report publishing.

5.3. Compensation for Wrongful Arrest

There is no provision for payment of compensation for illegal detention under the preventive detention law. So the detaining authority exercises arbitrary and malicious discretion. High court division declared 198 detentions illegal in a day and such a huge detentions cases being declared illegal in a day in our judicial history 44. But Bangladesh Supreme Court does not usually give directions of compensation but in some exception cases like in "Bilkis Akter Hossain vs. Government" [48]. The court directed one lakh to the each detenu as compensation for illegal detention. Section 9(5) of the International Covenant on Civil and Political Rights 1966 days down "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to get compensation." The Indian Supreme court ordered for compensation in Rudul Sah vs. State of Bihar case [49].

5.4. Review of Advisory Council

We know it well that if the government wants to detain any person more than six months, he or she will be produced

before the Advisory Board consisting three members- among two from High Court judges and another one from senior civil servant. A person cannot be detained under preventive detention law more than six months except consent of advisory Board. So considering the above discussion, I forward the following recommendations:

1. As article 33(2) of Bangladesh constitution stated clearly that every person who is arrested and detained in custody shall be produced before magistrate court within 24 hours. But the detained person has been deprived of this opportunity and as such this provision should be repealed.
2. There must be constitutional provisions describing certain limited period when the powers of preventive detention exercised.
3. A judicial review should be held for those who are detained under different preventive detention law.
4. All reasonable opportunities should be provided to the detenu.
5. The detenu must not be kept with those who are regular convicts.
6. He or she will be informed as early as possible about the reasons behind his or her arrest.
7. The relatives of the detenu should be promptly notified of the detention and transfer of the detenu.
8. The detenu must be allowed immediate and regular access to lawyer family members and unbiased medical board.
9. The detenu shall not be tortured or other ill-treatment in detention.
10. All allegations of oppressions should be quickly and immediately investigated.
11. Government should add a provision in our constitution ensuring the right to get compensation at least in peace time if any person is detained unlawfully.
12. The judgment and orders of any court should be obeyed entirely, immediately and strictly.
13. Government should restrict the use of preventive detention as much as government can. To ensure the proper functioning of democratic environment and to maintain human rights, the recommendation state above should be followed.

6. Rationality of Section 54: Violation of Human Rights

Section 54 Cr PC gives wide powers to the police to make an arrest without warrant in certain circumstances. It provides

that a police officer may arrest a person without an order from a Magistrate and without a warrant if [50] –

1. Such a person has been concerned in any cognizable offence or a reasonable complaint has been made against him or her or credible information has been received or a reasonable suspicion exist of his or her having been so concerned; or
2. Such person having in his or her possession without lawful excuse any implement of house breaking; or
3. Such a person has been proclaimed as an offender either under Cr PC or by order of the Government; or
4. In his or her possession anything is found which may reasonably be suspected to be stolen property and he or she may reasonably be suspected of having committed an offence with reference to such thing; or
5. Such a person obstructs a police officer while in the execution of the officers duty; or
6. Such a person has escaped or attempts to escape from lawful custody; or
7. Such person reasonably suspected of being a deserter from the armed forces of Bangladesh; or
8. Such a person has been concerned in, or a reasonable complaint has been made against him or her or credible information has been received or a reasonable suspicion exist of his or her having been concerned in, any act committed in Bangladesh, would have been punishable as an offence, for which he or she is liable to be apprehended or detained in custody in Bangladesh under any law relating to extradition or under the Fugitive Offenders Act 1831, if otherwise; or
9. Such a person is a released convict who is committing a breach of any rule under s 563(3) relating to the notification of residence or charge of or absence from residence by released convicts; or
10. He or she is a person for whose arrest a requisition has been received from another police officer.

The philosophy behind the powers of arrest without warrant is that prevention is the most effective approach to control crime. The object of s 54 Cr PC is to give widest powers to the police in cognizable cases subject to the limitation that the powers must be used reasonably and cautiously. The words ‘may arrest’ signify that the powers of arrest is discretionary. However, it was not at all the intention of the lawmakers that the police officer may arrest any citizen of the country by abusing their power. Despite this, there is always an allegation that the powers of arrest without warrant is frequently misused by the police and therefore arrest under s 54 is a burning issue in Bangladesh. Recently this issue has become an important subject of judicial interpretation [51].

In this context the case of *BLAST v Bangladesh* (2003) is worth mentioning. The fact of the case disclose that a writ petition was filed in the High Court Division jointly by the Bangladesh Legal Aid and Services Trust (BLAST), Ain O-Salish Kendra (ASK), Shammilito Shamajik Andolon and some other individuals with the allegation that the police, by abusing the powers given under s 54 Cr PC have been curtailing the liberty of the citizens. The writ petitioners narrated several instances of such abusive exercise powers and violation of Fundamental Rights [52-60].

From the language used in s 54 Cr PC, the High Court Division found that the police can abuse the power abusively. This is because there is nothing in this section which provides that the person arrested be furnished with the grounds for his or her arrest though it has the basic human right that wherever a person for his or her arrest.

The Court observe that as s 54 Cr PC now stands, a police officer is not required to disclose the reason for the arrest to the person whom he has arrested, but under Art 33 (1) of the Constitution of Bangladesh the person who is arrested must be informed, as soon as may be, of the grounds for such arrest. The Court Further observed that unfortunately, the provision Art 33 (1) of the Constitution is not followed by the police officers [51].

In this same way S54 of Cr PC violates the aforementioned Article of the Bangladesh Constitution, UDHR, and ICCPR.

7. Judicial Guidelines on Prevention of Arbitrary Arrest by Section -54 of the Code of Criminal Procedure (Cr PC), 1898

Finally the Court held some recommendations related to S 54 of Cr PC, which can be summarized as follows [56]:

1. No police officer shall arrest a person under Section 54 of the Cr. P. C. for the purpose of detaining him under Section 3 of the Special Powers Act, 1974.
2. A Police officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.
3. He shall record the reasons for the arrest and other particulars in a separate register till a special diary is prescribed.
4. A police officer shall furnish reasons of arrest to the detained person within three hours of bringing him to the police station.

5. An arrested person should be allowed to consult a lawyer of his choice or meet his relatives.

6. If a police officer finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate from the attending doctor.

7. If the person is not arrested from his residence or place of business he shall inform a relation of the person over the phone, or through a messenger, within one hour of bringing him to the police station.

8. Conclusion

Right to personal liberty is an important right of an individual without which s/he cannot enjoy other Human Rights meaningfully. Considering its importance the Constitution of Bangladesh has mentioned the right to life and liberty in two of its articles, namely articles 31 and 32. Article 32 clearly declares that ‘no person shall be deprived of life or personal liberty saves in accordance with law’. The combined meaning of articles 31 and 32 is that the Constitution has guaranteed right to life and liberty to every citizen of Bangladesh and no police officer or Government agency can do anything determine to life, liberty and reputation of any citizen. A Police officer can curtail the liberty of a person by the name of preventive detention and abusive power of section 54 of Cr PC if that police officer has lawful authority to do that. The Constitution has provided some safeguards to a person who is deprived of his/her right to personal liberty. In limiting people’s liberty the police officers must follow the lawful procedure and respect the constitutionally guaranteed human rights of the arrested person. No compliance with the procedure and disrespect to the human right off accused will make the arrest and detention unlawful.

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