

## Legal Interpretation of Obscenity Law Elements and Law Enforcement

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### Abstract

*Obscenity is a criminal act that violates immorality. The judge's verdict is a very important in every process. The definition of obscenity in the judge's verdict often has different meanings. This is considered an obscene act that does not have a limit on the meaning of an act that can be said to be obscene and not. This article aims to examine the elements of obscene acts and the law enforcement. This study uses normative juridical research method, by analyzing existing data and reviewing the data. The results of this study are the regulations that have been in effect are considered not to have elements in more detail. Especially in 289 KUHP has a vital element.that have been in force are considered not to have elements in a more detailed and comprehensive manner. Law enforcement officials must prioritize a sense of justice for victims of sexual abuse in accordance with the actions that have been carried out. In this case, the government cooperates with other relevant agencies to provide counseling regarding the offense of sexual abuse so that people can be more careful and increase their awareness. In addition, it needs to be formulated in the Criminal Code or other regulations regarding obscene acts which have a broad meanings that they include acts of intercourse. The provision of sanctions by law enforcement officials is also expected to take into account the deterrent effect that will be caused to the perpetrators, this can be done through the provision of maximum sanctions demands.*

### Keywords

sexual violence; obscenity;  
legal interpretation; feminism



## I. Introduction

In essence, Indonesia is one of the countries that prioritizes Human Rights (HAM) as a guarantee for the fulfillment and protection of their rights. Human rights are patent rights, eternal and owned by every human being (Nuraeny, 2012: 120). The 1945 Constitution of the Republic of Indonesia has made very complete changes based on the arrangements contained in the previous constitution, regarding issues related to human rights (Siallagan, 2016: 6). One form of human rights problems in Indonesia is a crime of decency. Based on this, people judge the definition of decency itself, which is an act of good or bad and is related to sexual acts (Mudzakkir, 2010: 12). Morality has an understanding related to politeness, both in word and deed. Indonesia considers that the criminal law that has been applied in Indonesia has a positive legal basis, not against legal norms (Hwian, 2013: 25). For this reason, decency has a strong understanding of behavior in accordance with the laws and regulations (Marpaung, 2008a: 3). In the Criminal Code, it is explained that a crime or what is called *Strafbaarfeit* is

an act of someone who violates the rule of law accompanied by criminal threats for anyone who commits a violation (Moeljatno, 2008: 59).

The crime of decency which is very contrary to the law and norms, one of which is the act of obscenity. Obscenity is a crime that violates human rights and destroys dignity so that it has a bad effect, especially on the psyche and mentality. In the Criminal Code, although the crime of obscenity does not yet have a clear definition, the Criminal Code classifies it into a crime against decency which has been regulated in book II Chapter XIV in crimes against decency. Cases of sexual violence such as rape and obscenity dominate during the Corona Covid-19 virus pandemic. Data from Service Institutions for 2020 at CATAHU 2021 Komnas Perempuan shows that in acts of obscenity there were 166 cases and in 2021 it increased to 412 cases. In this case, the terms obscenity and sexual intercourse still have the same elements in the courts and the police. This is because it still has a legal basis for articles in the Criminal Code to ensnare perpetrators (Komnas Perempuan, 2021).

Sexual violence which has the highest impact on vulnerable groups is included in cases that must be more focused because it considers the impacts that occur not only in the form of physical injuries but also have an impact on trauma and even psychological disorders. Sexual violence is also a separate spotlight, especially for women. Even though there have been many campaigns and socializations that encourage gender equality, inequality between women and men still exists. Besides that, what makes a strong reason is that the Indonesian state still adheres to patriarchal understanding. In law enforcement still has many obstacles in its interpretation.

In a crime basically must have the elements of the act that has been done. This is formulated in a legislation to find out and determine the elements and characteristics of the actions that have been carried out so that they can be categorized as criminal acts. This criminal act has also been regulated in Article 1 paragraph (1) of the Criminal Code with the existence of the principle of legality. The elements in a crime can be assessed based on two elements, namely, the subjective element and the objective element. The subjective element assesses that the element arises from oneself (the perpetrator) or relates to the perpetrator with an element of error. While the objective element is a certain situation with all actions against the law that have been carried out by the perpetrator (P.A.F. Lamintang, 1984: 183). Criminal acts are committed not because they have committed a crime but also have to be able to prove it in front of the public prosecutor. The evidence is needed elements to consider a criminal act.

Legal interpretation is one of the main things in understanding a legal explanation in order to resolve a case in making a decision. Judicial Interpretation or the judge's interpretation has a very important impact in dealing with legal vacuums that must be filled or completed. In this case, the judge may not refuse to examine and even adjudicate a case on an appropriate and complete pretext. Therefore, the Judge is here to fill the legal vacuum. (Khalid, 2014). The current Criminal Code regulates decency and has some philosophical ambiguities. There are several other things that are acceptable but the basis or background of the violation is considered to have a principal difference (Adjie, 1981: 360). In such a case in the Criminal Code there are articles which are considered to have elements that still have broad definition, making it difficult to impose articles on the perpetrators. For example, there is article 289 of the Criminal Code which contains the crime of obscenity (ACT NUMBER 1 YEAR 1946, n.d.). In this case, Article 289 of the Criminal Code, which discusses the crime of obscenity, is still considered to have elements with a broad definition, making it difficult to impose articles on the perpetrators. Where the limits of obscene acts still have different limits. There is no benchmark until it is said that the act is included in obscene acts. Along with restrictions on lewd acts and rape. In this context, if the victim is judged to have

experienced an act of rape, the perpetrator should not be charged with Article 289 of the Criminal Code and have a heavier criminal threat. In this case, there will be more perpetrators who will commit obscene acts but it is not stated that the act is included in Article 289 of the Criminal Code.

## **II. Research Methods**

Legal research is a procedure used to solve the problems of the legal issues faced. Normative juridical research (legal research) is used in this study. This research focuses on discussing the rules and norms in positive law. The approach used uses a statutory approach which is carried out to examine all laws through the cases discussed. The author also uses a case approach which is related to legal principles such as legal views and doctrines to support solving problems in this paper. In addition, it also uses a conceptual approach, namely through views and doctrines in legal science.

Sources of legal materials applied in the form of primary legal materials with binding legal force include the Criminal Code. As well as secondary legal materials such as official documents on law, scientific works, news, and legal theory as complementary materials. The collection of materials is very important with the results of the writing. This writing uses the method of collecting materials with library research (library research) analyzing systematically through legislation (KUHP) (Peter Mahmud Marzuki, 2005: 83). This writing applies descriptive analysis, in which the author draws conclusions based on the analysis through the judge's decision and several expert judgments with the data that has been obtained.

## **III. Discussion**

### **3.1 Legal Interpretation of the Elements of Obscene Acts of Article 289 of the Criminal Code**

An immoral crime (delict) in Dutch is “*strafbaar feit*”, which is further defined by the expert, namely Van Hammel as an act/action in wet, which is against the law so that it is appropriate to be subject to a crime (Prakoso, 1988: 124). The judge's interpretation is a very important part in resolving cases by making a concrete decision. In interpreting a law in resolving the case before the court. Article 1 of Law No. 48 of 2009 discusses judicial power, including state power in administering justice for justice and law enforcement. In carrying out their duties, judges have an absolute nature, this is because law enforcement is in accordance with Pancasila and the 1945 Constitution of the Republic of Indonesia (M. Yahya Harahap, 2008: 2).

R. Soesilo assesses the article that all acts that violate decency and vile acts are within the scope of sexual lust. Furthermore, this article does not only force people to commit obscene acts but also allows the obscene acts to be carried out on them (R. Soesilo, 2003: 212). In the Criminal Code, R. Soesilo explains that these acts include kissing, groping the genitals and even the breasts. The classification of the crime of obscenity which is included in the crime of morality has been described in the Criminal Code. Although this is already contained in the Criminal Code, but regarding criminal penalties for perpetrators of obscene acts, it is included in one of the crimes that still often occur in society. Furthermore, the formulation of the article (Article 289 of the Criminal Code) mentions the crime as "an act that attacks the honor of morality" or if it is described then in the element of the article this is defined as violence to force an obscene act. The elements are as follows:

- 1) Whoever;
- 2) By force or threat of violence;

- 3) Forcing someone;
- 4) To commit or condone obscene acts. (R. Soesilo, 2003: 212)

Based on the elements in (Article 289 of the Criminal Code) it still has a broad understanding and there is no detailed explanation regarding the definition of obscenity. Examining based on the explanation in the article of the Criminal Code, sexual intercourse is included in the category of understanding of obscene acts but in a separate law. The use of the term from sexual intercourse which is included in the element of obscene acts is considered to give rise to several opinions regarding the regulation of obscene acts in the sexual offense system. In this context, criminal acts are considered to impose obscene acts used for perpetrators of sexual intercourse or only specifically obscene acts that are not actually sexual intercourse as criminal acts. Sexual intercourse means that there is contact between the male genitals that enter the female genitals, resulting in pregnancy. Moreover, it does not require women to excrete semen. Based on several definitions of obscene acts, experts have different definitions and limitations. In addition, the author also analyze based on the judge's decision regarding the elements of obscene acts in Article 289 of the Criminal Code.

#### **a. Decision Number: 39/Pid.B/2020/PN/Jth**

Case Position: The defendant in August 2019 to be exact on 1 night, at 21.55 contacted the victim to meet with the intention of asking for clarity on the relationship between the defendant and the victim's witness. Then the victim waited for the defendant in front of the pharmacy, a few moments later the defendant came using a car. At that time the victim was approached by the defendant and asked to get into the car by being pushed. Arriving in the Lhoknga area, the victim was afraid after arguing with the defendant, and asked to get off but the defendant forcibly pulled the victim's bag so the victim could not get off where the defendant locked the door of the car he was driving. The following day, on August 2 2019, early in the morning at 01.00 WIB, after passing through PT. Semen Andalas the defendant forced the victim to take off her clothes which the victim refused, but the defendant threatened and forcibly put his left hand under the victim's shirt and grabbed both of the victim's breasts, then the defendant put his right hand into the victim's underwear until it touched the victim's vagina, even though the victim resisted. The defendant continued his actions. Then the defendant took out a knife to scare the victim and the victim managed to throw the knife into the back seat of the car. Furthermore, the defendant also threatened the victim with a gun he took from the dashboard of the car. The defendant continued to force the victim to undress and have sex with him and the victim refused. Then the defendant stopped the car and lay down on the back of the chair occupied by the victim and then forcibly removed the pants that the victim was wearing and held the victim's vagina and inserted 3 fingers into the victim's vagina to bleed.

1st Element: "Whoever"

"Whoever" is the subject who commits a crime, and in this case the element is found in the defendant.

2nd Element: "By violence or/ or threats of violence to force a person to commit obscene acts"

In the description of this case, the defendant committed violence by pushing and grabbing the victim with the aim of having sex. Then the defendant also threatened by pointing a knife and a gun and threatened to kill the victim or the defendant himself if his wishes were not fulfilled. This triggers the fear felt by the victim, especially when it is past midnight and causes prolonged trauma for the victim due to his actions.

#### **b. Decision Number: 194/Pid.B/2020/PN/Tte**

Case Position: May 2020, precisely on the 30th of the morning, at 04.00 the defendant in a drunken state entered the victim's witness room to discuss a problem regarding their friend. The door to the room was closed at the request of the defendant but the victim's witness did not feel suspicious because there was still a family relationship. However, when the room was closed, suddenly the defendant hugged the victim from the side and laid the victim's witness on the bed and kissed her. The victim tried to refuse but because he was still in the defendant's arms, he had a hard time letting go. The defendant also inserted his finger into the victim's vagina and then moved it several times. When there was an opportunity the witness tried to push the defendant and crawled out of the room but the defendant continued to prevent and tried to have sex with the victim. The defendant then wanted to take off the victim's pants and the victim said that she would report the defendant's actions to her brother so that the defendant immediately stopped what he was doing, put on his pants and ran by jumping through the window.

1st Element: "Whoever"

Starting from the minutes of the investigation to the trial, the legal subjects in this case are defendants with complete and appropriate identities so that whoever's legal element has been fulfilled.

2nd Element: "By force or threat of violence"

In the description of the case above, the defendant took actions to push the victim's body, gripping the hand and kissing the victim, which were considered as a form of violence desired by the coercion.

Element 3: "Forcing to do or allow obscene acts to be carried out"

The description of the case above shows that the defendant forced to carry out obscene acts which was also proven by the results of the post-mortem which stated that there were old tears in the blood membrane. The results then show that in the case above, the element of coercion to carry out obscene acts has been fulfilled.

#### **c. Decision Number: 60/Pid.B/2020/PN/NGB**

Case Position: The defendant in October 2020 to be exact on the 15th, at 09.00 WIB, together with the victim departed from their office, namely the Sumber Makmur Cooperative and headed for the Savings and Loans Section in Bina Bakti Village by using an office inventory motor vehicle to deliver customer loan money from their office. At 19.00 WIB, the defendant and the victim's witness had finished their work and drove back to the office. In the middle of the trip, the victim felt dizzy so the defendant decided to stop the motorbike he was driving, at the same time the defendant wanted to urinate and move away from the motorbike parked in the oil palm plantation area. The victim was standing next to a parked motorbike and was quite far from the defendant. Shortly after, the defendant returned and ordered the victim to take off her pants, but the victim refused. The defendant continued to insist on having sexual relations and tried to kiss the victim's face, then the defendant took the victim's hand and forced the victim to have sex or hold the defendant's genitals. The defendant lay down on the jacket he had laid on the ground and used the victim's right hand to shake his genitals to release sperm. The victim is then threatened if he tells other people about his actions, his life is at stake. The next day the victim told the incident to the cashier where the victim worked, and with advice from the leadership, the victim reported the incident to the police. For his actions, the defendant was sentenced to 1 year in prison.

1st Element: "Whoever"

"Whoever" is the subject who commits a crime, and in this case the element is found in the defendant.

2nd Element: “By violence or/ or threats of violence to force a person to commit obscene acts”

Violence or threats are any act that can cause fear to a person or the wider community, and can be in the form of speech, writing, pictures, symbols or body movements with or without supporting facilities with the aim of committing obscene acts. In the description of this case, the defendant carried out physical violence by pushing and gripping the victim with the intention of wanting to have sex and threatening to hit the victim if he did not comply with his wishes, which caused fear, especially when the situation was quiet, at night, when it was raining and in the middle of the night. an area of oil palm plantation which is far from residential areas. So the victim thinks that there is no other choice but to comply with the desire not to have sex. This includes threats of violence to force someone to act obscenely.

Based on this, the explanation of the meaning of obscene dam in the Criminal Code has a different meaning. In short, rape is an obscene act, but sexual abuse is not considered rape. The author analyzes that the things that have been done by the Defendants are considered not entirely the act is included in obscene acts but has included rape and can even get into intercourse. In this case, the meaning or definition of rape and obscenity in Indonesian laws and regulations still creates problems. Rape and sexual abuse in general also require coercion in the form of violence and threats of violence by the perpetrator. However, in this case, the maximum penalty for obscenity is 9 years and where 3 years is lower than the criminal threat for rape. The obscene act itself does not have a definite explanation because it is not formulated in the Criminal Code so that the Judge with his knowledge and wisdom gives his own interpretation of this element. In this case, there needs to be a limitation and a definition that expands the scope of obscenity and emphasizes the importance of approval in the meaning of obscenity for now.

### **3.2 Law Enforcement Against Perpetrators of Obscene Acts**

Law enforcement is a process to carry out the administration of law which has the aim of being a guide in behaving in accordance with legal norms in accordance with the life of the nation and state (Jimly Asshiddiqie, 202: 1). Law enforcement as a form of way of implementing the law in the form of a law that is formulated based on legal regulations and can be realized. Law enforcement is made to further emphasize the legal regulations that have been implemented (Rahardjo, 2019: 24). Soejono Soekanto considered that its implementation must involve all components and factors involved (Soerjono Soekanto, 2010: 11). In enforcing the law against the perpetrators can be subject to criminal penalties in accordance with the rules of law. Obscenity is a crime that carries a severe penalty. It does not look at the perpetrators who are adults or still children. In this case, through criminal law, the perpetrators of criminal acts should be given a clear definition of this matter. In the formation of Article 55 of the Criminal Code, it is explained that the perpetrators are not only people who commit other people for offenses but also those who have ordered them to commit and even participated in doing them (P.A.F. Lamintang, 1984: 565). R. Soesilo explained that in Article 55 of the Criminal Code there are 4 types of perpetrators, namely:

- 1) People who commit acts in criminal acts (dader plagen).
- 2) People who ordered and ordered (doen plagen).
- 3) People who participate in activities that mean a group of at least two people (Mede Plagen).
- 4) The person who, with the gift, is intended to intentionally commit the act (R. Soesilo, 2003: 72-74)

In this case, in reality, the perpetrator must have criminal responsibility for what he has done. Based on the law, which includes written regulations that have a principle of having an

impact that achieves goals. Laws that are still considered to have no fixed regulations in their implementation in accordance with law enforcement should be enforced immediately, this is assessed to get a punishment that is in accordance with the criminal acts that have been committed (Soerjono Soekanto, 2010: 12). According to ethical theory, law is fair and aims at promoting justice. Gustav Radbruch also argues that the law is the will to be fair (Soerjono Soekanto, 2010: 45). This proves that law enforcement has a very important position in influencing social life.

In some cases of obscene acts in practice the courts issue decisions where acts that attack the honor of morality such as forcing to open the victim's clothes or pressing the victim's body can be charged with article 289 of the Criminal Code, where these acts are acts intended to commit rape or sexual intercourse. Meanwhile, rape is regulated in a separate article, namely Article 285 of the Criminal Code.

When reviewing based on the Bill on the Elimination of Sexual Violence in Article 88 Paragraph 3, there is an element of rehabilitation for perpetrators of sexual violence. The PKS Bill not only protects victims of sexual harassment, but also provides rehabilitation for perpetrators of sexual violence. Apart from that, the impact that must be experienced by the victims must be the main consideration in the enforcement. The psychological impact experienced by victims of sexual abuse is often in the form of psychological disorders, usually in the form of anxiety, depression, trauma, and hysteria. In addition, sexual abuse has the potential to trigger health problems such as sexually transmitted diseases.

The obscene crime itself has been given a name or qualification by Article 289 of the Criminal Code as an act that violates decency or *engelbrecht*, an act that attacks the honor of decency and an act that violates decency (Swingly Sumangkut, 2019: 191). There are several other articles, in addition to article 289 which can ensnare perpetrators of sexual harassment in the Criminal Code, to be precise in articles 289 to article 296. The definition of lewd acts that is not clear, causes various interpretations as a result of being confused with the terms sexual intercourse and obscene acts which raises the question of whether a crime is a crime. forcing obscene acts can be used to indict the perpetrators of sexual intercourse or only specifically for obscene acts without intercourse.

According to a feminist perspective, sexual abuse is one of the acts of violence (Dwiyanti, 2014: 30). Feminism itself is a movement that arose as a result of violence and anti-authoritarian and anti-acceleration movements during the Cold War (Supramudyo, 2008: 1). After the existence of women's rights fighters, then it expanded into an understanding of feminism. Coomarawamy revealed that sexual violence is coercion in a sexual relationship with threats, intimidation or physical coercion where the sexual relationship is not desired by other parties, in this case the victim (Hasriani, 2018: 132). Feminism perspective, using the benchmark of 'disagreement' or without consent in measuring the presence or absence of an harassment, where all forms of actions that have a sexual connotation and are carried out without the consent of the other party or are not expected by the target party can be said to be a form of sexual violence. Hasriani, 2018: 2). Sexual violence here includes rape, intercourse between family members or incest, and sexual harassment that causes emotional discomfort to women (Hasriani, 2018: 126). Sexual violence against women is generally caused by the perception of gender differences, where women are considered inferior and men are positioned as superior. In several cases of sexual violence against women, the characteristic possessed by perpetrators of acts of violence is a superior feeling which feels more powerful than the victim, namely women who are considered weak (Hasriani, 2018: 129).

During 2019, the National Commission on Violence against Women or better known as Komnas Perempuan collected data on violence against women (KTP). Sexual violence is one of the cases where women are the most victims, and in line with this, the law enforcement process for perpetrators of sexual violence does not reduce the number of crimes of sexual

violence. Astuti Nurlaila Kilwouw revealed that the number has not decreased acts of sexual violence against women caused by cases of sexual abuse are resolved by prosecuting criminal responsibility against the perpetrators which then ignores the fact that sexual violence is a structural crime that involves political views on the body and sexuality. This is a cultural heritage where people still adhere to a patriarchal culture and consider sexual desire a crime, a taboo subject and must be tightly shrouded in various norms (Astuti Nurlaila Kilwouw, 2020: 82).

The condition of a society with a patriarchal culture is considered unfair which results in the position of women being subordinated in front of men, especially in the context of sexual violence which creates a stigma on women's bodies and the power imbalance between perpetrators and victims. Feminism then emerged, triggered by the discomfort over inequality in patriarchal culture and feminist thoughts continued to develop indefinitely because feminism was born in a context, as expressed by Prabasmoro where feminism is a problem that was born and grew up in a socio-cultural context. and being in a certain community condition and in the environment of women (Khusnul Khotimah, 2020: 73).

The explanations above, both obscenity contained in articles 289 and 285 and obscenity according to a feminist perspective, which is more often referred to as sexual violence is an act of coercion by one party against another party in this case the victim or if in a feminist perspective is a woman. to have sexual intercourse. Where acts of obscenity in Article 289 of the Criminal Code refers to acts intended for intercourse or in short before an act of rape and Article 285 of the Criminal Code refers to acts of rape. Meanwhile, in the perspective of feminism, acts of sexual violence refer to all acts including rape, intercourse between family members or incest, and sexual harassment that causes emotional discomfort to women, where these acts are carried out without consent. Acts of sexual violence according to the perspective of feminism have law enforcement that does not provide a deterrent effect and does not reduce the number of crimes of sexual violence, especially in general the victims of these acts are women. The number of acts of sexual violence against women has not decreased due to the settlement of cases that only demand criminal accountability from the perpetrators and still adhere to a patriarchal culture.

#### IV. Conclusion

Regarding obscene acts, there is no firm formulation regarding the definition of obscene acts so that there are often different interpretations by law enforcement in interpreting obscene acts in existing legal instruments. Various definitions of obscene acts are expressed by legal experts, along with the perspectives that also emerge. One of them is the feminist perspective on obscene acts which are widely viewed as acts of sexual violence. In Article 289 of the Criminal Code, obscenity is not clearly defined, whether in this article includes acts of sexual intercourse or separately. Although Article 285 of the Criminal Code has regulated rape, the formulation of the definition which still tends to be abstract causes different interpretations. The act of obscenity in article 289 of the Criminal Code refers to acts aimed at raping or in short before the act of rape. The feminist perspective has a different view, where acts of sexual violence refer to all acts including rape, intercourse between family members or incest, and sexual harassment that causes emotional discomfort to women where these actions are carried out without consent or without consent.

Law enforcement efforts against the crime of sexual abuse still need to continue to get attention because even though the existing legal instruments have many regulations regarding obscenity, their implementation is often still unable to fulfill the sense of justice for the victims, given the magnitude of the impact felt by the victims. Against the law according to



(Bemmelen in Purba, 2019) is an act that is contrary to the proper accuracy in the association of people regarding other people or goods, and contrary to the obligations. Within the scope of the law, if someone commits a crime, then that person must comply with the positive legal procedures (Tumanggor, 2019). The existence of RKHUP is a forum for defining and limiting obscene acts even to intercourse. There are still many conditions and needs that cannot be accommodated in the meaning of criminal acts for now. Reviewing in addition to the RKUHP, the immediate ratification of the PKS Bill has the right function and purpose, with the perpetrator being rehabilitated, it will minimize acts of sexual violence from happening again.

Not only physically, but also psychologically considering the culture of the community which still tends to be patriarchal, especially the media publish to the public without paying attention to the journalistic code of ethics and revealing the identity of the survivors/victims, this of course affects the psyche of the victims who have borne the burden. as a result of the sexual abuse experienced as well as the burden of media disclosure.

Acts of sexual violence according to the perspective of feminism have law enforcement that does not provide a deterrent effect and does not reduce the number of crimes of sexual violence, especially in general the victims of these acts are women. The number of acts of sexual violence against women has not decreased due to the settlement of cases that only demand criminal responsibility from the perpetrators, where the sanctions given to the perpetrators are considered not commensurate with what has been done to the victim to cause physical and mental trauma. Moreover, the culture of society is still closely related to the patriarchal culture which views women as inferior compared to men who are more superior. Until now, a deeper understanding is still needed to break the existing gender asymmetry. This is also what causes acts of sexual violence to continue to appear in the wider community because when those who feel they have more power exercise their power in a sexual context.

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