

Ethical Perspectives of Equal Opportunities*

Traian PALADE, *PhD. candidate,*
“Ștefan cel Mare” University of Suceava, Romania
traianpalade@yahoo.com

Abstract

This paper focuses on the analysis of the fair equality of the concept of opportunity from the perspective of the moral and reasonable justifications brought to support positive discrimination. Although contemporary democratic societies guarantee the absence of discrimination by securing the formal equality of opportunity, this seems to be insufficient to balance opportunities. The Rawlsian model has gained ground, by advancing a redistribution of the resources to support the disadvantaged ones, which is implemented through special measures. The compulsory quotas for admission to higher education or public institutions, addressed to some disadvantaged groups, are one of the effective means of implementing fairness. As this system has shattered the principle of reward judging by one's merits, and ending up as a form of inverse discrimination of the majority groups, it is necessary that we analyse the arguments and the boomerang effects of the special measures. The undertaking proposed by the present paper is structured around highlighting the ethical aspects, as well as the consequences resulting from the arguments in favour of positive discrimination. Do we have the moral obligation to make up for the past inequalities suffered by some groups? Does preferential treatment really ensure the genuine integration of such groups? Do special measures contribute in creating social justice? Without the claim of having responded definitively and exhaustively to these questions, this paper attempts to emphasise the ethical dilemma that raises when special measures favour one group or another, when a group is protected judging by only one criterion, or when only an implementation area is selected.

Keywords: *fair equality of opportunity, formal equality of opportunity, discrimination, affirmative action, positive discrimination, special measures.*

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Preamble

The origins of the term equal opportunity can be traced as early as the modern era, in the classical antinomy between liberty and equality, but the proper conceptual delimitation started in the first decades of the twentieth century.¹ The philosophical and political approach to equal opportunity has crystallised into two major directions: formal equal opportunity and fair equal opportunities. The former entails providing a procedural fairness so that everyone could have their chance in occupying a desirable social position. In this respect, formal equal opportunity equals the absence of direct discrimination, equality before the law or equality of access, and constitutes one of the pillars of contemporary democracy. Starting with the latter half of the 20th century, formal equal opportunity has started being criticized in what moral fairness is concerned, as it does not consider different social circumstances which affect the individuals' real chances in acquiring a desirable position. Thus, according to some author, even though formal equal opportunity ensures the procedural fairness of competition, it remains quiet in what concerns the effect of the older, persistent, social inequality by which a given group has been systematically deprived of social advantages or education, but whose possession is an implicit condition for obtaining the targeted position or advantage.² The prerequisite that all candidates should participate in having their skills tested under rigorously equal criteria, disregarding the fact that some candidates' different economic and social condition has created for some the opportunity of being better prepared for the test, accentuates pre-existing social inequality.³

As concerns the theoretical background, the Rawlsian theory of fair equal opportunity, outlined in his famous work *A Theory of Justice*, has had the largest impact, triggering debates which continue so far. In search of justice as fairness, Rawls postulates two principles, abstract enough to be applied in all societal fields: the former affirms that each person should have equal rights to basic liberties, whereas the latter entails that social and economic inequality be rearranged so that

¹ The term was used for the first time in 1906 in *The Montreal Gazette*: "The coming President of France is the grandson of a shoemaker. The actual President is a peasant's son. His predecessor again began life in a humble way in the shipping business. There is surely *equality of opportunity* under the new order in the old nation." available from http://www.gutenberg.us/articles/Equality_of_opportunity.

² Thomas Nagel, "Equal Treatment and Compensatory Discrimination," *Philosophy and Public Affairs* 2, 4 (1973), 349.

³ Nicole Richardt and Torrey Shanks, "Equal Opportunity," in *International Encyclopaedia of the Social Sciences*, vol 2, ed. W.A. Darity Jr. (Detroit: Macmillan Reference USA, 2008), 612.

they be to everyone's advantage, with each person benefiting from real equality of opportunity.⁴ By postulating these principles, Rawls attempts to reconcile liberty with equality: "justice is neither in perfect equality (which sacrifices the deserving), nor in complete freedom (which abandons the disadvantaged ones). It is on via the media."⁵

The question of ensuring fair equality of opportunity, which constitutes the core of the present paper, refers to the arguments and solutions proposed for fulfilling this aim. Why, how much and how should society consume its resources in order to fairly level the differences of opportunity? The first answer is that social reality has produced and still produces inequality among groups, which affects the opportunities of those in the disadvantaged groups, so that there is a moral necessity for the redistribution of resources through special measures in order to compensate for the effects of discrimination. The term "special measures" is intended to describe a situation in which a differentiated treatment is applied to the benefit of a person who belongs to a disadvantaged group. The terminology is diverse: in the United States, such measures are classified under "the affirmative action" concept, while in Europe they go under "positive discrimination" or "preferential treatment", and in the Romanian law, they are seen as "acțiune pozitivă" [positive action]⁶ or "măsuri positive [positive measures]."⁷ Special measures are meant to lead to the proportional representation of the disadvantaged social groups in various fields: business environment, labour market, administration, public institutions, healthcare, education, etc., areas where the said groups are considered underrepresented.

What are the ethical arguments which justify a preferential treatment for a minority group rather than a majority one? What is the moral background for resorting to positive discrimination measures to fix old but long gone social injustice?

The main arguments for preferential treatment are the following:

- the moral obligation to make up for the effects of past injustice
- securing social justice;
- favouring social integration and encouraging diversity.

⁴ John Rawls, *O teorie a dreptății* (Iași: „Alexandru Ioan Cuza” University of Iași Publishing House, 2011), 73.

⁵ Olivier Nay, *Istoria ideilor politice* (Iași: Polirom, 2008), 601.

⁶ See in this respect *Law 202 April 19 2002 on equal opportunity and treatment between women and men*, as amended .

⁷ See in this respect *Order 137 August 31 2000 on the prevention and sanctioning of all forms of discrimination*, as amended.

The moral obligation to make up for the effects of past injustice

This type of argument takes into account the past and asserts that the current generation is responsible for the descendants of the past victims of discrimination. Even though formal equal opportunity is now provided, in the sense that non-discrimination is currently guaranteed, it is regarded as insufficient, as the members of the groups that were disadvantaged in the past are still indirect victims and that they enter the competition from a disadvantaged position. Thus, society must compensate injustice through present measures meant to favour them and, at the same time, to gradually erase the effects of past discriminations. This compensatory action, also known as the principle of redress entails the following: “in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into less favorable social positions. The idea is to redress the bias of contingencies in the direction of equality”.⁸

It is my belief that, in order to unreservedly accept the moral argument of compensating for past discrimination, it should at least address the objections below.

First of all, a redress action cannot be justified based on Lex Talionis or on Aristotelian ethics, which entail direct and proportional compensation of injustice, between the agent and the victim of injustice.⁹ On the one hand, it is not the victims of discrimination that are compensated but their descendants, and on the other hand, the redress cannot be proportional since discrimination took place in various ways, in the fields extant at that time, and the present-day special measures may or may not have been related to those discriminatory ways and apply to different fields. Another aspect concerns the intergenerational obligations. Thus, if this generation has certain obligations to the next generations, one cannot argue that it also has an obligation of fairness to the dead, but only a form of refraining related to their reputation.¹⁰

Secondly, by promoting norms meant to compensate for past injustice, positive discrimination is, in effect, an inverse discrimination. We understand the choice of terms such as “positive” and “affirmative” to avoid pejorative nuances but, in the end, providing obligatory quotas for minorities actually produces discrimination of majority. It is regrettable that, during certain times, people were treated differently by virtue of some morally insignificant characteristics: gender,

⁸ Rawls, *O teorie a dreptății*, 105.

⁹ Aristotel, *Etica Nicomahică* (București: IRI, 1998), 111.

¹⁰ Axell Gosseries, *Despre dreptate între generații* (București: Paideia, 2011), 123-160.

sexual orientation, religion, ethnicity, etc., but does not equality of opportunity by positive action actually favor minorities on the strength of the same irrelevant traits for which they were once done wrong? Are not the special subsidised study places for Roma people in higher education actually a copy of the past mechanism for which society is currently made responsible?

Let us exemplify with the case in which fair equality of opportunity entails allotting a quota for Roma people's admission to university. It is not relevant whether the quota of the total number is allocated quantitatively or according to a percentage. Who are the Roma who will benefit from these study places? They are, of course, those who meet the other requirements: they have a baccalaureate diploma, they present the notarized documents, they pay the admission tax, etc. Thus, the most advantaged members of Roma community are in fact those who take benefit of this opportunity – those who had the means to meet the admission criteria and who still have the possibility to access higher education. If the ethical argument for ensuring equal opportunities through positive action is that of supporting the disadvantaged ones, one may note that, in fact, those who suffered the most from discrimination, the poor members of Roma community, have little chance of benefiting from affirmative policies. Why can't we allot quotas based on poverty? Why is not there, inside the quota reserved for this ethnicity, a sub-quota allotted to the most disadvantaged ones?

Non-discrimination entails the absence of preferential treatment based on certain criteria. These criteria, "protected" by national or international democratic legislation are usually exhaustively stated: gender, race, color, language, religion, political opinion or other opinions, national or social origin, belonging to a national minority, wealth, birth, handicap, age and social orientation. The obvious question that arises is why only some of these criteria benefit from special measures and not all of them? Why quotas in labor force or higher education are not allotted according to social origin or wealth? What were the arguments which the selection relies on? Why can an individual benefit from redress measures if she or he belongs to an ethnicity and one who belongs to the poor class cannot do that?

One can assert that the poor benefit from some compensatory financial support in some directions, but pursuing the analysis further, one may also wonder why the ethnicity criterion is favored and the wealth criterion is not in what the access to higher education is concerned. Weren't the poor deprived from access to higher education in the past to the same extent to which were the members of Roma community?

From an ethical perspective, one may reflect on the fairness of compensating the injustice suffered by the ethnic, religious and linguistic communities in relation to those suffered by some social categories such as the poor, the unemployed, the homeless. Multiculturalism attempts to answer this moral question by making a distinction between “condition” and “state”.¹¹ Thus, being unemployed or poor is a condition that may be overcome as it does not create identity affiliation, but being a Romani, an African-American or a Hungarian language speaker is a “state” which cannot be overcome, as it is not a choice of the individual who strongly identifies with the respective social group through shared language, tradition and beliefs.

We believe that this problem is far from having been definitively and unanimously answered for the following reasons:

- Identity has a subjective side given by the individual’s sense of belonging to a social class, but also an objective one, determined by several explicit, stable and visible criteria. Even though the pauper hopes to go beyond his or her condition and to not belong to this category for good, the objective criteria, such as the quantity of income and possessed goods categorically bind him or her to this social class. Moreover, the awareness of belonging to this social class is also supported by the reason often expressed as “bad luck”, in other words, by inequality of opportunity.

- How can one claim, in the moral field, that the inequalities that require compensation deriving from “the state” are higher in the hierarchy of inequality than those deriving from “the condition”? Why should be privileged in a certain area – such as the access to higher education – the individuals of a certain ethnicity, and not those who are born in pauper or institutionalised families? Moreover, since usually the candidates to the admission to higher education are near the age of entering legal capacity, the poor ones could not have had the chance to go beyond their “condition” by their own forces, as they would not have had the time to free themselves from this condition since their coming of age until the moment of the admission. If one argues that the poor might access higher education later, at an age which allows them to provide for themselves, we answer that it is not fair to claim that the admission and graduation of higher education at an age different from that of the majority does not affect the chances to acquire the necessary experience for exercising a profession. On the other hand, this argument can also be posited in the case of those who belong to a linguistic minority, who,

¹¹ Nay, *Istoria ideilor politice*, 639.

in turn, might enrol in higher education when they possess the linguistic skills of the majority, skills that are required both upon admission and during the university cycles.

Securing social justice

The second category of moral arguments in favour of the special measures does not refer to past situations but makes reference to an ideal of social justice specific to a just society which would have occurred or should occur in the absence of any forms of discrimination. Equality, equity, solidarity are the basic concepts which support that of social justice. There are significant differences between leftist ideologies, which claim that a just society exists inasmuch as the resources are equally distributed among all its members, and the rightist ideologies, which consider unjust a society which does not observe the unequal contributions of its members in accumulating resources and which does not give rewards proportionally to the contribution. Classical liberalism asserts that equity consists in the equality of opportunity to access benefits and not in the equal allotment of these benefits. We shall not subject this equity type to an ethical assessment as it is reasonable and corresponds to formal equality of opportunity. A society is just when social positions and their respective rewards are acquired regardless of the particularities of the groups to which individuals belong: gender, race, age, religion, etc. However, the evaluative ethical judgment is compulsory when it is asserted that procedural equality does not suffice and that the disadvantaged groups must benefit from special measures to secure them a genuine equality of opportunity.

As a principle of social justice, “jusnomia is the principle according to which justice is, socio-economically speaking, equality, by virtue of the fact that all individuals have the same social value... What the political phenomenology of Law reveals is the fact that although an individual has the same chance for justice as everybody else (ideonomically), he or she does not have the same chance to access social benefits as a form of justice (socio-economically).”¹² As long as there is the questionable premise that there is no real equality of opportunity, it is considered fair that social wealth be redistributed among the members of the disadvantaged groups.

¹² Anton Parlăgi, “Jusnomia-justiția socială ca premisă politică a dreptului,” *The Transylvanian Review of Administrative Sciences* (TRAS) 13, 29 (2011), 119-120, accessed May 14, 2016, <http://rtsa.ro/rtsa/index.php/rtsa/article/view/57>.

As long as an individual is rewarded for the simple belonging to a protected minority, could not this be hindrance to diligence and efforts, considering that there is a permanent claim to the benefits resulted from the efforts of the majority members? Is not the fact that minority is protected an incentive for dissensions between majority and minority groups? These perverse outcomes of the special measures taken in view of securing the substantial equality of opportunity have also been noted at the level of social economy. “However, there is a systemic contradiction: the social measures will not work at their peak ever if the cultural mentality which lays down the economic structure of the social world will not change. The individualistic economy cannot accurately guide or support a sustainable social-economic policy. If the providers (taxpayers) and the beneficiary (social assisted persons) keep the same egotist view on economic life, they will relate competitively to each other. The former will be concerned to not be tricked by the latter and the other to make the most from this relation”¹³

Does not this model of fulfilling social justice encourage individuals to declare themselves members of a minority community in order to profit from the effects of the special measures? An eloquent example in this respect is the case at the European Court of Justice, Sarah Margaret Richards versus Secretary of State for Work and Pensions¹⁴. Richards was born a man but underwent a sex reassignment surgery. Richards claimed that s/he should benefit from women’s retirement age, which was of 60 years old at that time in the UK, whereas for men it was of 65. S/he was refused by the authorities on the grounds that s/he was legally acknowledged as a man and therefore s/he could not retire before the age of 65. The European Court of Justice decided that this was a discriminatory situation, resulting into inequality of treatment on sex reassignment criteria, which infringed on Art. 4 para 1 Directive 79/7/CEE on equal treatment between women and men in the field of social security. As sexual orientation is part of the private life, it does not result from this example that the sex change was undergone only in view of profiting from the special measure addressed to women, but such examples are nevertheless susceptible of being interpreted as such.

Securing social justice by positive measures subverts the reward granted according to each one’s skills and efforts, and occupying a social position, access

¹³ Bogdan Popoveniuc, “The Quest for Social Economy,” in *Annals of “Ștefan cel Mare” University of Suceava. Philosophy, Social and Human Disciplines Series*, Vol. 2, *Social Economy. Trend or Reality*, eds. Bogdan Popoveniuc, Sorin Tudor Maxim and Marius Cucu, (Suceava: “Ștefan cel Mare” University of Suceava Press, 2012), 60.

¹⁴ CEJ, Richards/ Secretary of State for Work and Pensions, case C-423/04 [2006] RJ I-3585, 27 April 2006, accessed April 12, 2016, <http://curia.europa.eu/juris/recherche.jsf?cid=164671>.

to higher education or obtaining a sum of money should not be the result of one's belonging to a certain group because this way we would rather near injustice than social justice. By reducing individual responsibility and the competition based on competences, the citizens' dependence to the state increases, a dependence also increased by the political speeches in which the promise of positive action becomes the rule instead of exception.

Fair equality of opportunity favours social integration and encourages diversity

The arguments in favor of the special measures addressed to minority groups are based on the usefulness of social integrity and diversity to the advantage of all members of society. This type of arguments emphasise the advantages of diversity and social integration, among whom: increasing the degree of innovation and creativity, decisional flexibility, improvement of motivation and efficiency, etc., considering that positive discrimination, while it may not be compulsory from a moral point of view, should at least be accepted from the functional perspective of economic efficiency.¹⁵ While insisting on the economic aspect is not an aim here, several consequences are nevertheless worth mentioning.

The supporters of positive discrimination do not mention the actual means of the social integration coming into effect. Can it be accomplished through the levelling of skills? What is the timeframe for the application of the special measures and what are the indices which show that the process of applying positive discrimination has reached its objectives? How come that, from the numerous criteria of defining diversity (age, gender, physical appearance, education, wealth, etc.) only some are selected to be protected, thus limiting the global aspect of diversity? The Cartesian lack of precision and clarity of a concept is a major drawback in logic but an advantage in the political field.

A first trend is that of asserting that the effect of the special measures leads to a levelling of skills and results rather than to one of opportunities. Social integration of the minority groups by positive action usually follows this scheme: statistical data of the results of the groups' members are compared, then the differences between the results of majority and minority are compared, claiming the existence of discrimination, and after that, mass-media and the politicians hasten to advance proposals of measures of positive discrimination. We do not

¹⁵ Harry Holzer and David Neumark, "Assessing Affirmative Action, *Journal of Economic Literature* 38(3) (2000): 483-568, accessed April 12, 2016, <https://www.aeaweb.org/articles.php?doi=10.1257/jel.38.3.483>.

deny here the important role of statistics, but let us not forget that one could interpret absolutely anything from statistics – e.g. that the men who celebrate less birthdays live the least!

The boomerang effects of results leveling are revealed by Thomas Sowell, an economist and political philosopher at Stanford University, in a series of articles published in *Townhall* magazine. The American author considers that *fairness* is “the word that has done the most damage to people’s thinking” and negatively influenced their actions.¹⁶ To support his claim, he gives the example of a Berkeley high school, where the principal reduced four teaching positions in order to reallocate funds from the Sciences department to that of social activities, in view of providing aid through counseling, leisure planning, notes, etc., to the African-American students as their outcomes were below those of the Caucasians or Asians. The aim of this plan, the principal argued, was to raise everybody’s results. Sowell asserts that, with such integration methods, „the point is to close educational gaps among groups, or at least go on record as trying. As with most equalization crusades, whether in education or in the economy, it is about equalizing downward, by lowering those at the top. «Fairness» strikes again!”¹⁷

In fact, the origins of affirmative action are to be found in Executive Order 11246/1965 enforced by President Lyndon Johnson: “You do not wipe away the scars of centuries by saying, «Now you are free to go where you want, and do as you desire, and choose the leaders you please.» You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, «You are free to compete with all the others,» and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. [...] And this is the next and the more profound stage of the battle for civil rights. [...] We seek not just legal equity, but human ability; not just equality as a right and a theory, but *equality as a fact and equality as a result.*”¹⁸

This aspect of social integration in reference to the results and favouring some groups through positive action leads to the mentality that the resources and the goods are like a cake to which everyone is invited, even those who did not contribute in its making, and the state’s role would be, in this case, that of allotting

¹⁶ Thomas Sowell, “The Fallacy of «Fairness»,” *Townhall* (Feb.09, 2010), accessed December 15, 2016, http://townhall.com/columnists/thomassowell/2010/02/09/the_fallacy_of_fairness.

¹⁷ Idem, “The Fallacy of «Fairness»,” Part II, *Townhall* (Feb.10, 2010), accessed December 15, 2016, http://townhall.com/columnists/thomassowell/2010/02/10/the_fallacy_of_fairness_part_ii.

¹⁸ L. Johnson, qtd. in Borgna Brunner, *Affirmative Action History. A History and Timeline of Affirmative Action*, accessed December 10, 2015, <http://www.infoplease.com/spot/afirmative1.html>.

a bigger slice to the latter. In other words, when popping the champagne bottle, we do not invite the winners and those who deserve it but also those who are alcohol intolerant and society is to blame for their intolerance! Consequently, society will further allot them champagne to diminish inferiority. Such a society which aims to reduce the gap between the levels of achievement without observing inequality resulting from individual effort, different attitudes or priorities, acquired skills, different cultural or family environments is susceptible to being unjust. In this respect, Elizabeth Anderson asserted that “People lay claim to the resources of egalitarian distribution in virtue of their inferiority to others, not in virtue of their equality to others.”¹⁹

Instead of conclusions

The fight against inequality is a convergence point of ethics and political philosophy, both attempting to establish the moral and legal norms which control the relationships between human beings, and balancing from the right to freedom and equality claims.

If we admit that an ethical judgment is an assessing judgment which actually reports a situation, an action based on criteria which define what is good and right, the outlined reflection on equality of opportunity has aimed at emphasising, on the one hand, the lack of coherence of the moral justifications of the special measures in favor of some disadvantaged groups, and on the other hand, at revealing the secondary effects of applying these measures.

Formal equality of opportunity is a basic political value and a moral principle of democratic societies, whose absence would not guarantee procedural fairness, non-discrimination and access to higher positions and resources, regardless of the specificities of the groups. Nonetheless, it seems that, currently, when the concept of equal opportunity is employed, either in political debates or at the level of the public sphere, people tend to think rather of fair equal opportunity, of reserving some quota, of special measures of state support and assistance.

Formal equality of opportunity, by promoting non-discrimination, may not diminish the gaps between groups, gaps triggered by past inequity, but there is no guarantee that these special measures will reduce them either. The special measures for securing fair equality of opportunity were initially brought forth as temporary measures, in force until the elimination or acceptance of a reasonable gap between groups. In default of quantifiable objectives and exact terms, these

¹⁹ Elizabeth S. Anderson, “What Is the Point of Equality?,” *Ethics* 109 (1999), 306.

measures have not proved their efficiency after decades since their implementation. Moreover, social mobility, in which individuals can no longer be stably identified as belonging to a group, as they migrate from one group to another, had determined more groups to require and benefit from positive discrimination, according to various criteria. We admit that, in what some of these criteria are concerned, such as age or physical inability, positive action is and may be morally justified, but we just cannot expand these criteria ad infinitum to cover the entire diversity of situations.

The stand expressed above in regard to the criticism of fair equality of opportunity should not lead to the conclusion that society should not be concerned with the fate of the disadvantaged and that the social environment would better follow the example of the business environment, which is, unfortunately, dominated by a jungle paradigm, the acerb competition, lack of tolerance and compassion to the other.²⁰ Maybe egalitarianism is not the key, but humanitarianism, which contends that we must take care of those who suffer for the simple reason that suffering is bad, and not in order to become equal. "Humanitarianism considers the way in which people live, while egalitarianism is concerned with how people live *in relation to others*."²¹

The ethical perspectives of utilitarianism or libertarianism cannot be convincingly supported. On the one hand, utilitarianism is unsatisfactory in the moral field, as it favours an efficiency principle and contends that, in the organisation of social life, the well-being of the crowd must prevail, accepting, at the same time, the sacrifice of the poor and the disadvantaged. On the other hand, libertarianism promotes the blind freedom from inequality, considering that the individual has no obligation to sacrifice himself for the community, and the equality objective is impossible, dangerous and discouraging for the individual initiative.

Therefore, the debate on the effective securing the equality of opportunity should observe not only the allotment of resources, but also the ethical dimension of the individual, as the human being is not only after material aims, but also aims at aspects based on altruism, duty or tradition. The special measures cannot be applied at the global level, in any culture, tradition or society, based on simple

²⁰ An ethical perspective in this respect: Marius Cucu, "The Non-Ethics in Business," in *Annals of "Ștefan cel Mare" University of Suceava. Philosophy, Social and Human Disciplines Series*, Vol. 2, *Social Economy. Trend or Reality*, eds. Bogdan Popoveniuc, Sorin Tudor Maxim and Marius Cucu (Suceava: "Ștefan cel Mare" University of Suceava Press, 2012), 159-165.

²¹ David Schimdtz, *Elemente ale dreptății* (București: Humanitas, 2012), 162.

dichotomies (black and white, woman and man, etc.), in varied circumstances (access to education, labor market, decisional organs, etc.) without a solid and morally satisfactory reasonable argumentation.

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