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Climate Change Litigation in India

Its Potential and Challenges

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20.1 INTRODUCTION

India is the third-largest emitter of carbon, and evidence suggests that it will overtake China and the United States soon given its increasing dependence on fossil fuel for energy and with 29 per cent of its population living in poverty and without access to electricity.[1] India is in a difficult position as it seeks to balance the competing priorities of economic growth, energy security, and climate change.

In the coal-rich state of Odisha, a new coal mine is set to expand. The coal from the mine is being used to feed the energy demands of a growing economy. The local community, whose land is to be acquired, is currently challenging the ongoing destruction of 120,000 trees and the endangerment of the ability of these forests to mitigate climate change.[2] This contestation provides a glimpse into the multiplicity of factors that shape the challenge of addressing climate change in India.

The Indian judiciary has played an active role in addressing issues of environmental protection and human rights. Public Interest Litigation (PILs), which allows those without *locus standi* to approach the courts over an issue of public interest, has become the dominant pathway through which environmental cases are filed, oftentimes on human rights grounds. PILs in India have incorporated international human rights and environmental law

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[1] See Jocelyn Temperly, 'The Carbon Brief: India Available,' CarbonBrief, 14 March 2019, <https://www.carbonbrief.org/the-carbon-brief-profile-india>.

[2] See Sushmita, 'Digging Continues in Talabira Open Cast Mine Despite Protests' *The Wire*, 10 February 2020, <https://thewire.in/rights/talabira-mine-odisha-digging-continues-protests>.

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principles such as the polluter pays principle; the public trust doctrine; and the right to free, prior, and informed consent.[3] The judiciary in India, in particular within the context of the environment and climate change, has been selectively progressive and overreaching, as its judgments affect the activities of regulatory bodies and shape governance structures for the environment.[4]

The Narendra Modi administration came into power promising economic development and a business-friendly regulatory environment. It began with an aggressive overhaul of environmental laws, where it sought to eliminate safeguards put in place for processes like the environmental and forest clearances. This was followed by attempts to change land acquisition laws to enable easy acquisition of land for industries. Initiatives to address climate change sit within this broader neoliberal growth agenda. The government's efforts to address climate change concerns have focused on certain mitigation strategies like renewable energy and afforestation.[5]

Climate change litigation in India is still in the nascent stages. A recent case filed before the National Green Tribunal explicitly argues for the court's intervention in addressing climate change.[6] While environmental organizations and activists have often approached the courts to address environmental issues ranging from deforestation to pollution, before this case, they had not explicitly called for intervention on climate change, though it may have appeared in the broader orbit of the judgment. The court, nevertheless, has been the space where regulatory failures to address environmental issues have been checked, and the judiciary has taken a far-reaching role in compelling the government to protect the environment.

The looming contestation on climate change in future litigation may strain environmentalism. India has historically been a place where environmentalism was shaped both by concerns for the natural environment and demands for social justice. Ramchandra Guha spoke to this form of environmentalism as the environmentalism of the poor. In India, human rights and the rights of the local community impacted by environmental harms were at the heart of the environmental question. This strain of environmentalism, however, exists alongside exclusionary conservation, particularly in forest areas where the

[3] See Lavanya Rajamani, 'Rights Based Climate Litigation in Indian Courts: Potential, Prospects and Potential Problems' (2013) Center for Policy Research Working Paper 2013/1.

[4] See Geetanjoy Sahu, *Environmental Jurisprudence and the Supreme Court* (Hyderabad: Orient Blackswan, 2014).

[5] See Arpitha Kodiveri, 'Changing Terrain of Environmental Citizenship in India's Forests' (2016) 12 *Socio-Legal Review* 74.

[6] See Rajamani, 'Rights Based Climate Litigation in Indian Courts', above note 3.

recognition of the rights of forest-dwelling communities is viewed as hampering the conservation of these areas.[7] The role of the judiciary in climate change litigation will continue to be shaped by the choices that courts make between these different strains of environmentalism and the impact these choices have on forest-dwelling and other local communities.

In response to the questions animating this collective volume, I seek to address two issues in this chapter. First, what has the role of courts been with respect to climate change? Second, what is the potential role for courts in addressing climate change in India, given the associated challenges? These questions are interrelated, and they will help contextualize the discussion on the strategic potential for climate change litigation in India, given the country's ambitious growth agenda and divergent strains of environmentalism.

I argue that courts have played a significant role in environmental governance, which carries into the regulation of climate change. However, I qualify this argument by examining the vulnerability of court decisions in PILs that have adversely impacted forest-dwelling and other local communities shaped by India's development agenda. Given this caveat, I argue that courts can play an important role in climate change governance, provided they adopt a more sensitive approach to questions of climate justice.

This chapter begins with an overview of courts and environmental jurisprudence in India and then focuses on climate change in the courts. It then will then contextualize the role of the courts in environmental decisions in light of the neoliberal economic growth paradigm and divergent strains of environmentalism. Section 20.3 will trace the potential for climate change litigation and its associated challenges. The chapter concludes by arguing that courts can play an important role in climate change governance, but their potential must be approached cautiously.

20.2 COURTS AND ENVIRONMENTAL JURISPRUDENCE IN INDIA

Courts in India have been the sites of discussion for key questions of public policy, pollution, and environmental governance. The innovation of public interest litigation in post-emergency India prompted passionate environmental lawyers and local communities adversely impacted by development projects to approach the courts. This avenue opened by PILs ultimately produced a mixture of progressive and problematic environmental jurisprudence.

[7] See Ramchandra Guha, *Environmentalism: A Global History* (New York: Penguin Books, 2016).

Progressive environmental jurisprudence in India has spurred ailing environmental governance bodies into action and helped secure the rights of forest-dwelling communities to land and resources and democratize environmental decision-making. The creation of the National Green Tribunal (NGT) in 2010, moreover, opened a specialized and dedicated avenue for environmental disputes. With the creation of the NGT, many progressive judgments followed.

The progressive streak of environmental jurisprudence in India exists simultaneously with decisions that undo the progressive impact of this jurisprudence. The undermining of the progressive impact results from the prioritization of economic concerns and the demands of exclusionary conservation, which will be elaborated below. As a result, looking to courts to push for action on climate change carries the risk of creating bad precedent that does not prompt better laws.

20.3 CLIMATE CHANGE IN THE COURTS

In identifying the cases that come within the ambit of climate change, and drawing from Peel and Lin as well as Lavanya Rajamani,[8] I identify two categories of cases: (1) those cases where climate change forms the core of the legal arguments made by the petitioners and (2) those cases where the legal claims at issue relate to climate change concerns but do not explicitly refer to it. Looking at these two categories generates a wide range of cases that relate to climate change mitigation but fewer cases that relate to adaptation. I, moreover, restrict the scope of my inquiry to landmark cases in the Supreme Court, High Court, and the National Green Tribunal.

20.3.1 *When Climate Change Is at the Core of the Case*

Climate change litigation, as stated earlier, has been underexplored by environmental activists and lawyers. A number of these cases, moreover, have used climate change as a means to draw the judiciary's attention to environmentally destructive practices. The key cases that emerge are before the High Court of Delhi, Allahabad, and the National Green Tribunal.

In *Manushi Sangathan* v. *Government of Delhi*,[9] the petitioners challenged a ban against cycle rickshaws by using the IPCC's fourth assessment report,

[8] See Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679.

[9] See *Manushi Sangathan* v. *Government of Delhi*, W.P. (C) 4572 (2007).

which encouraged policies that promoted the use of more fuel-efficient vehicles. The High Court ruled that the restriction on the plying of cycle rickshaws was arbitrary and violated the cycle rickshaw drivers' right to livelihood.

In *We the People* v. *Union of India*,[10] the petitioners challenged the cutting down of trees for the expansion of roads in Uttar Pradesh, which contributed to global warming. They further argued that trees were not being planted elsewhere to compensate for the loss of these trees. The Allahabad High Court held that additional trees needed to be planted to compensate for the trees that had been cut down.

Lastly, in 2017, Ridhima Pandey, a nine-year-old from Uttarakhand, filed a case before the National Green Tribunal challenging government inaction on climate change. The grounds upon which the case has been filed are as follows:

> The Applicant is invoking the principle of sustainable development and the precautionary principle, as envisaged under Section 20 of the National Green Tribunal Act, 2010, as well as the inter-generational equity principle and the Public Trust Doctrine. The application also raises the issue of non-implementation of various environmental laws, more particularly no implementation of the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, and the Environmental Impact Assessment Notification, 2006, which has led to adverse impacts of climate change across the country.[11]

This case is being heard before the National Green Tribunal. No significant decisions have been made yet. The case has attracted significant media attention, but this has not yet translated into concrete policy changes.

There are too few cases to comment on the role that the judiciary has played on climate change, but what these cases provide is an insight into the way climate change concerns have been argued in the courts. Climate change has been invoked by petitioners on a number of grounds, including air pollution, the cutting of trees, and government inaction. Though these issues have been framed as climate change concerns, there have also been a litany of other cases where these claims have been made by petitioners without reference to climate change.

[10] See *We the People* v. *Union of India*, Order of the Allahabad High Court in Misc. Bench, 16 June 2010, No. 5750 of 2010, <http://www.indiankanoon.org/doc/1558452/>.

[11] See 'Pandey v. India', Sabin Center for Climate Change Law, <http://climatecasechart.com/non-us-case/pandey-v-india/>.

20.3.2 *Cases That Relate to Climate Change*

As stated earlier, litigation has been the dominant strategy used by activists to address environmental issues. Public interest litigation in particular has been employed by leading lawyers to challenge environmental harms. It is difficult to identify which are specifically climate cases, as there have been many landmark cases that have addressed a range of issues concerning the environment while invoking climate change. The few cases that have had important implications for the potential for climate change litigation in India have been rights-based cases, which raised the right to a clean environment, among others.[12]

Lavanya Rajamani and Shibani Ghosh, in their exploration of the possibilities for climate change litigation in India, argue that the progressive, rights-based jurisprudence on environmental issues provides a fertile ground for climate change litigation.[13] Rights-based environmental jurisprudence in India has hinged on the expansive interpretation of fundamental rights, particularly the right to life. In *Subhash Kumar* v. *State of Bihar*,[14] the Supreme Court held that the right to the enjoyment of pollution-free water and air comes within the ambit of the right to life. This precedent has been followed by a slew of other decisions that have read the right to a clean and healthy environment into the right to life.

While the judiciary may provide a fertile ground for intervention on climate change, a case currently before the Supreme Court serves as a warning of the dangers associated with PILs. This case has been filed by Wildlife First, an NGO committed to securing conservation, and aims to dilute the Forest Rights Act, 2006, a progressive law that recognizes the rights of forest-dwelling communities by evicting forest-dwellers whose rights have not yet been recognized.[15] The challenge with PILs, as analyzed by Anuj Bhuwania, has been that many of them have resulted in the violation of the rights of those very people that they were meant to protect: the marginalized. This should, consequently, serve as a note of caution for the proponents of climate litigation, and it underscores the potential challenges associated with using

[12] See Rajamani, 'Rights Based Climate Litigation in Indian Courts' above note 3.

[13] See Lavanya Rajamani and Shibani Ghosh, 'India', in Richard Lord et al. (eds.) *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2011), p. 139.

[14] See *Subhash Kumar* v. *State of Bihar*, 1991 AIR 420, 1991 SCR (1)5.

[15] See *Wildlife First and Others* v. *Ministry of Environment and Forests*, Writ Petition(s)(Civil) No(s). 109/2008.

litigation to address climate change.[16] Lavanya Rajamani and Shibani Ghosh, in their exploration of the possibilities for climate change litigation, are more optimistic, given the present political context in which the judiciary has been careful in its decisions on the environment.[17] Climate change litigation will require careful thought and planning in order to achieve the intended results and avoid unintended consequences for marginalized communities.

20.4 THE CHALLENGES ASSOCIATED WITH CLIMATE CHANGE LITIGATION

Though the judiciary has been responsive to environmental issues in India, there have been some limitations. Below is a schematic overview of those limitations that have a bearing on climate change litigation. The list is not exhaustive but rather is intended to be diagnostic while bearing in mind the role that the judiciary has played thus far on the environment.

20.4.1 *India's Aggressive Development Policies*

How to balance development with environmental protection has been at the heart of environmental jurisprudence in India. The environmental clearance and forest clearance processes have constituted the legal arena where this question has been contested within the judiciary. The judiciary, in turn, has repeatedly failed to curtail developmental activities at the expense of environmental protection. A noteworthy case where this dynamic is visible is the *Narmada Bachao Andolan* case, where local communities filed a case before the Supreme Court calling for restrictions on the height of the dam. The Supreme Court instead permitted the dam construction, reasoning that it would not be an ecological disaster. The Supreme Court held:

> In the present case, we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment, but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that the

[16] See Anuj Bhuwania, *Courting the People* (Cambridge: Cambridge University Press, 2017).
[17] See Rajamani and Ghosh, 'India,' above note 13 at 139.

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construction of a large dam is not cost-effective or leads to ecological or environmental degradation.[18]

The judiciary has been selective and restrained in how it deals with balancing development and environmental concerns. On the one hand, in instances where biodiversity hotspots in the Western Ghats have been impacted by mining, the court ruled for a complete ban on mining. The court ruled similarly in the ecologically fragile areas of the Eastern Ghats.[19] On the other hand, the Modi administration has pursued an agenda of deregulation with respect to the environment and, in spite of this, there have been fewer instances where the judiciary has taken an activist role in securing environmental rights.[20]

The Modi government has recently pushed to open the coal mining sector by privatizing coal. This move is bound to increase carbon emissions, and, despite criticism, the government has justified this move by pointing to India's need for energy security.[21] Aggressive development policies, including the reliance on coal and the interlinking of rivers, create a political climate where environmental considerations rank towards the bottom of the government's list of priorities.[22]

20.4.2 *Exclusionary Conservation*

India has two competing strains of environmentalism: one that stems from 'environmentalism' and another that is purely exclusionary. The judiciary has at different points in time complied with each one of these two competing strains. The previously mentioned case currently before the Supreme Court – which is challenging the constitutionality of the Forest Rights Act, 2006 – is an example of a visible conflict between these two strains of environmentalism. The adversarial setting of the court has brought the conflict to a crossroads, and the judiciary must choose between these two competing strains. In a recent order, it called for the eviction of forest-dwelling community members whose claims for rights had been rejected.

[18] *Narmada Bachao Andolan* v. *Union of India*, 2000 10 SCC 664.

[19] See *Goa Foundation* v. *Union of India and Others*, Writ Petition (Civil) No. 435/2012.

[20] See Kodiveri, 'Changing Terrain of Environmental Citizenship in India's Forests', above note 5.

[21] See Arpitha Kodiveri, 'Privatisation of Coal in India', Ambitious Accounts, 5 June 2018, <http://www.amphibiousaccounts.org/#!/en/publicacion/privatization-of-coal-in-india-threats-to-the-rights-of-local-communities-and-climate-change-commitments>.

[22] See Mayank Agarwal, 'What Modi's and BJP's Return Means for India's Environmental Laws', *Huffington Post*, 25 May 2019.

The current failure to reconcile these two competing strains of environmentalism outside the courts – either within other branches of government or through discourse – leads adversarial settings like courts to make more polarizing decisions. Exclusionary conservation has had devastating effects on the rights of forest-dwelling communities. Discussions on climate change, particularly in the context of forests and forest governance, have been dominated by this strain of environmentalism as a result of compensatory afforestation efforts and the prevention of the exercise of forest rights to avoid fragmentation.

20.5 THE STRATEGIC POTENTIAL FOR CLIMATE CHANGE LITIGATION IN INDIA

The strategic potential for climate change in India is one framed by its limitations. The judiciary has been effective in fostering a culture of compliance with environmental norms and accountability on the part of environmental regulatory bodies to their citizens. The judiciary is an important actor in the constellation of actors involved in climate change governance and policy. The judiciary cannot, however, be viewed in isolation of the political economy in which it operates. As India becomes increasingly dominated by an aggressive development agenda, many have viewed the judiciary as a hurdle to speedy growth.

20.5.1 *Connecting Existing Jurisprudence on Environmental Justice with the Climate Crisis*

The strategic potential of climate change litigation in India lies in the ability to harness rights-based environmental jurisprudence and frame it relative to existing climate change policies in India. India has an ambitious National Climate Action Plan with eight missions, including one that is specific to the Himalayan region.[23] Yet, cases have not yet been filed in which climate change concerns are pegged to rights-based environmental jurisprudence informed by the discourse of environmentalism of the poor.

There is a significant need to connect India's rich jurisprudence on environmental justice to the impending climate crisis. The jurisprudence on the rights of forest-dwellers, as seen in the *Niyamgiri* case, needs to frame future

[23] See 'National Action Plan on Climate Change', Prime Minister's Council on Climate Change, <http://www.nicra-icar.in/nicrarevised/images/Mission%20Documents/National-Action-Plan-on-Climate-Change.pdf>.

interventions in the courts. While the challenge of exclusionary conservation remains, interventions in court need to harness the progressive jurisprudence that exists and strengthen its position as a precedent and guiding force that shapes future jurisprudence.

India's environmental jurisprudence, which articulates key legal principles like the public trust doctrine and the stewardship rights of forest-dwelling communities, can be drawn upon to reinvigorate these core legal principles and the role the jurisprudence can play in addressing climate change. The application filed by Richa Pandey draws on some of these principles, but its thrust was based on India's international legal obligations. The order by the National Green Tribunal thus stated that there is

> no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances.[24]

Shibani Ghosh alerts us to a cautionary note in her work on litigating climate claims: Indian courts remain superficial in their understanding of international environmental law obligations. Specifically, she states:

> Indian environmental judgments often rely on international environmental law while interpreting statutory obligations, but judicial reasoning in such situations is not always robust, and the engagement seems superficial at times. A similar treatment can be seen in the context of climate claims where the courts refer to the UN Framework Convention on Climate Change, the Kyoto Protocol, the Paris Agreement, and India's NDCs. Like elsewhere, the courts' reliance on these instruments is not always accompanied by strong judicial reasoning that explains how India has violated or is required to comply with, an international obligation.[25]

The ability to frame climate claims within the boundaries of India's climate policies and environmental frameworks can help progressively develop the jurisprudence on climate change. Although it's hard to predict the precise outcome of approaching the courts, couching legal arguments in existing jurisprudence can create a jurisprudential arc that connects the existing understanding of environmental justice to the impending climate crisis.

The court should be viewed as an important node and institution within the overall climate change and environmental governance system. Courts can inform

[24] See *Pandey* v. *India*, App. No. 187/2017, Nat'l Green Tribunal (15 January 2019), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5cb424defa0d60178b2900b6/1555309792534/2019.01.15.NGT+Order-Pandey+v.+India.pdf>.

[25] See Shibani Ghosh, 'Litigating Climate Claims in India' (2020) 114 *AJIL Unbound* 45.

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and influence future legislative decisions and administrative actions. They can also catalyze powerful change across spheres of environmental governance, which, in turn, can be harnessed to change India's approach to climate change while at the same time remaining mindful of the limitations of such an approach.

In addition to existing environmental jurisprudence, inspiration can be drawn from movements on the ground, including ongoing campaigns by younger students and Adivasi communities. A recent campaign called #I AM A CLIMATE WARRIOR reframed the struggle of forest-dwellers to control their land and resources as being important for the conservation of forests in the face of climate change (see Figure 20.1).

Interventions outside courts like this one will inform future court cases and the arguments that are made. As forest-dwelling communities begin to re-articulate their rights as being necessary for climate stewardship, a new opportunity for legal mobilization emerges. This strategic potential must be explored, bearing in mind the risks associated with approaching the courts.

To understand the strategic potential of a particular case, I suggest the development of a sort of litigation impact assessment process, which can be undertaken to understand how a particular case will impact the rights of Indigenous and other local communities and develop a strategy to overcome any adverse impacts. For instance, the ban on mining in the Western Ghats has led to large-scale unemployment and, consequently, highlights the need to incorporate aspects of just transition in future court interventions.

A strategic case that, after a thorough impact assessment, has the potential to join the many aspects discussed is a constitutional challenge, under Article 21,

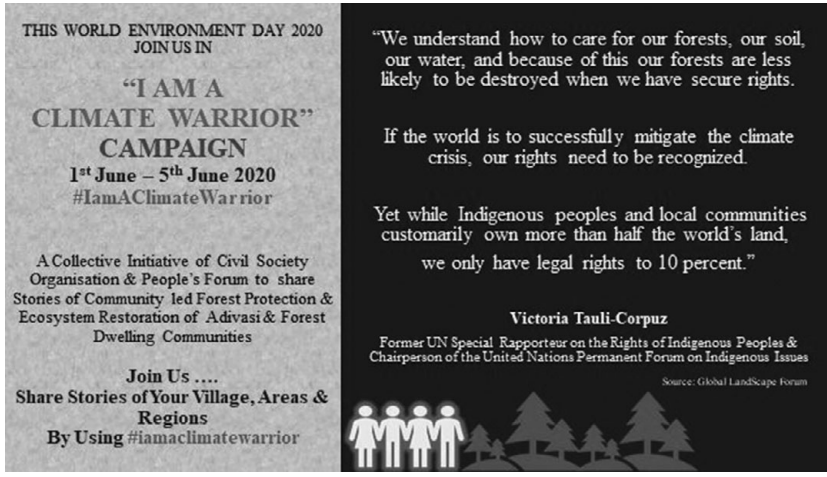

FIGURE 20.1 Image of the Climate Warrior Campaign

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to the Indian government's recent move to privatize its coal resources and make them available for commercial coal mining. At the same time that the Indian government moves to expand coal mining, the state has an impressive plan already in place to transition to renewable resources as part of its climate change mitigation strategy and in line with the solar mission in the national climate action plan.

The Indigenous communities living in different parts of India's coal belts are often subject to land grabs, deforestation, and pollution. A case brought by these impacted communities, like the communities in Talabira, Odisha, can pave the way for the judiciary to grapple with the many features of climate change while addressing the aims of the state's policies on climate change mitigation and environmental justice. Although it is difficult to predict how the judiciary would decide such a case, the case would nevertheless bring the reality of climate change governance and policy to the courts and may foster the development of a more nuanced jurisprudence that avoids the mistakes identified earlier.

20.6 CONCLUSION

In this chapter, after an overview of climate change litigation in India, I have argued that courts are an important site for the negotiation of pertinent questions regarding the environment and development. I qualified this with the limitations of the judiciary, which has failed to curtail development activities that harm the environment and the marginalizing discourse of exclusionary conservation.

As India opens the coal mining sector, a legal challenge has been mounted by sub-national states like Jharkhand and Chhattisgarh, as this opening would be detrimental to the forest-dwelling communities living in and around these coal mines. It interestingly makes no mention of the impact increased coal production will have on India's climate change commitments.[26] Forest-dwelling communities living near these coal mines have started to protest this move on the grounds of climate change. Thus, new developments are underway, and climate change concerns that are being mobilized from below will eventually make their way to the courts. Yet the strategic potential of the judiciary needs to be explored bearing in mind the limitations. As a result, I propose that the test cases brought before the courts reflect the complexity and the reality of climate change governance and policy in India, as opposed to cases that shy away from the nuance of climate change decision-making in India.

[26] See Writ Petition No – of 2020 filed by the State of Jharkhand before the Supreme Court (obtained by the author from the State of Jharkhand Department of Environment).

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