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## **Problems in the pathways to judicial success: women in the legal profession in Northern Ireland**

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# **Problems in the Pathways to Judicial Success: Women in the Legal Profession in Northern Ireland**

## **Abstract**

This paper considers women's representation in the under-explored context of the judiciary in Northern Ireland. Previous research into the experiences of women practitioners in the legal profession in Northern Ireland has indicated that women are discouraged from pursuing judicial careers for a variety of reasons associated with their gender. Further research into the gendered barriers these women practitioners face is required in order to assess the extent to which same may impede their career progression. This paper uses a critical, social constructionist feminist approach to explore some of the gendered barriers influencing women's under-representation in Northern Ireland's judiciary. It is contended that representation can only be improved when women's retention and progression through the ranks of the legal profession is addressed. Employing gender as a lens, this paper will analyse potential difficulties faced by the women solicitors and barristers in Northern Ireland in order to assess future judicial gender parity prospects in this jurisdiction as it is these women solicitors and barristers who form the female 'talent pool' from which future members of the judiciary will be selected.

## **Introduction**

The absence of women in the legal profession is, arguably, most readily visible at judicial level. Patterns of male-dominance in the judiciary are replicated across several jurisdictions (CEPEJ, 2016). Thus, it is perhaps unsurprising that the relationship between gender and the judiciary is one which attracts much academic interest in

jurisdictions across the globe (Rackley, 2013; Valdini and Shortell, 2016; Bessière and Mille, 2014; McLoughlin, 2015; Crandall, 2014).

Whilst there have been some notable works considering gender and the Northern Irish judiciary (Feenan, 2005; Leith, Dickson, Morison, Wheeler & Lynch, 2013; Morison, 2015), there is a comparative scarcity of research centring on the women solicitors and barristers who form the ‘talent pool’ from which future judges are drawn. This conceptual paper adopts the working hypothesis that it is only through addressing the difficulties women face in the pathways to judicial careers, that real progress, in terms of diversity in the demography of the Northern Ireland judiciary, can be realised. This paper calls for future research using gender as a ‘lens’ (Ahl, 2004; Marlow, Henry & Carter, 2009) to explore some of the potential explanations for women’s disproportionate attrition from legal practice and the gendered obstacles they may face in continuing professional practice in Northern Ireland.

This paper will begin by outlining the professional legal landscape in Northern Ireland. It will then move on to consider the demographic of the Northern Ireland judiciary and the initiatives which have sought to enhance judicial diversity in this jurisdiction. This will set the context for the subsequent discussion of the realities of practice for the women barristers and solicitors who represent the women judges of the future.

### **Northern Ireland in Context**

Following the partition of Ireland, two separate legal jurisdictions were created on the island: Ireland and Northern Ireland. Comparatively speaking, Northern Ireland is a very small jurisdiction, serving a population of approximately 1.8 million (NISRA,

2017). However, notwithstanding its size, there are 782 barristers and over 2,300 solicitors qualified to practice law in Northern Ireland, (Bar Library, 2019; Law Society of Northern Ireland, 2019).

In many jurisdictions, there is just one kind of professional legal practitioner e.g. *l'avocat* in France or *the lawyer* in the United States. In Northern Ireland, however, there are two separate branches of the legal profession: solicitors and barristers. Arguably, the distinction between the two is becoming increasingly academic. However, for present purposes, the key distinction lies in the structural differences between the professions. Unlike solicitors, barristers are self-employed. They are not permitted to form partnerships, to incorporate, nor to advertise. References herein to the 'legal profession' encompass both solicitors and barristers. Where it is necessary to draw distinctions between the two, the appropriate titles will be construed accordingly.

At present, none of Northern Ireland's most senior judges (i.e. none of the 4 judges in the Northern Ireland Court of Appeal) are women. In 2015, the first two women were appointed to the High Court Bench, (Judiciary NI, 2019). This was the first time since 1921, when the two jurisdictions were first established in Ireland, that Northern Ireland has had a woman High Court Judge; the other 7 High Court Justices are men. Whilst it has taken almost a century for women to penetrate the upper echelons of the Northern Irish judiciary, the picture becomes slightly more promising as one descends the tiers of the judiciary. At County Court level, 6 of the 18 sitting County Court Judges in Northern Ireland are women. At District Judge level, just 9 of all 25 sitting District Judges are women, (Judiciary NI, 2019). Thus, overall, women account for 30% of current judicial office holders in Northern Ireland, (Judiciary NI, 2019). But what, if anything, is being done to address the visible lack of women in our judiciary?

## **Northern Ireland Judicial Appointments Commission**

In order to combat the under-representation of women in the judiciary, many jurisdictions have established specific bodies tasked with handling judicial appointments.<sup>1</sup> Northern Ireland's Judicial Appointments Commission ("NIJAC") was established in 2005 with the aim of ensuring transparency in judicial appointments and providing a diverse judiciary, reflective of the society it serves. In Northern Ireland, it is a statutory requirement that "the selection of a person to be appointed, or recommended for appointment, to a listed judicial office ... must be made solely on the basis of merit."<sup>2</sup> The explicit reliance on merit as the *sole* criterion for judicial appointments is, arguably, problematic due to its inherent scope for unconscious bias (Davis and Williams, 2003; Malleson, 2006; Thornton, 2007). Owing to the innate equivocality of merit, it has been suggested that it is susceptible to both "misidentification and misinterpretation" (Rackley, 2013, p.193); often, along gendered lines. As such, merit may, consciously or otherwise, be used as a "mask through which stereotypes and heuristic biases operate" (Iyer, 2013).

Somewhat unhelpfully, the legislation conferring power of appointment on NIJAC does not substantively engage with the concept of merit; failing to offer either definition or criteria for its assessment. In any event, as the experience in England and Wales would appear to suggest, the provision of criteria, of itself, does not preclude criticism on the basis of ambiguity. Indeed, it has been argued that such "criteria might be fleshed out in a way that means men are more likely to display a characteristic than women" (Rackley, 2013) as "even seemingly neutral merit criteria can be subverted by

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<sup>1</sup> For instance, Scotland's Judicial Appointments Board was established in 2002, England's in 2006 and similar measures were adopted in Australia in 2008.

<sup>2</sup> Justice (Northern Ireland) Act 2002 s5(8).

masculine bias” (Iyer, p.116). If such criticisms can be made of systems in which efforts *have* been made to delineate the scope of merit, it is not difficult to envisage the implications for Northern Ireland.

Research considering the effectiveness of judicial appointments committees concluded that whilst, at the outset, such committees may have positive outcomes for women, their effectiveness wanes over time (Iyer, p. 114). It has been suggested that this may be due to merit commissions unconsciously ‘over-compensating’ for previous male bias in the earlier years, though this is unproven (ibid.). In the context of Northern Ireland, a recent report indicated that Northern Ireland had one of the lowest proportions of women in judicial power in Europe (Cromie, 2014). Perhaps somewhat embarrassingly, this report post-dates the establishment of NIJAC by almost 10 years.

Whilst research considering whether women perform better when merit commissions are used has been somewhat inconclusive (Iyer, p.105), critical feminist evaluation of the concept of merit, as operationalised by such bodies, arguably goes some distance in explaining why this may not be the case. Acknowledging merit as a product of social construction, Malleson (2006, p.391) contends that that which constitutes evidence of merit “can only ever be determined with reference to the nature of the recruitment pool as a whole.” She argues that,

“as the definition of what constitutes evidence of merit adapts to reflect changes in the experiences and career patterns of the recruitment pool ... the potential pool itself adapts as groups and individuals opt in and out, making early and mid-career choices on the basis of whether they

see themselves as likely to be well-qualified and favoured candidates.”

(ibid.)

The process of constructing merit is thus both transactional and ‘dynamic’ (Thornton, 2007). This maintains sufficient space for merit’s problematic subjectivity to thrive; thereby permitting the misidentification and misinterpretation referred to earlier and, in turn, undermining “the argument that diversity and equality can be achieved by application of a neutral or unbiased notion of merit” (Malleon, 2006, p.392).

### **Merit, Gender and Judicial Appointments**

A recent study into the role of merit in judicial appointment in Northern Ireland found that, generally speaking, many were sceptical as to whether NIJAC was, in fact, rewarding ‘merit’. Respondents indicated that, in the context of Northern Ireland, demonstration of merit requires both “a certain background and particular expertise” (Leith et al., 2013, p.5). In particular, merit was “widely seen as based on qualities mainly possessed by the bar ... based on seniority and experience of advocacy in court” (ibid.). Furthermore, “women generally believed themselves to be less likely to be seen as having this sort of merit or ... the opportunities to gain it” (ibid.). Interestingly, it also concluded that, in Northern Ireland, “generally female merit is something different and does not seem to be transferable” (ibid, p.53).

Whilst this notion of ‘female merit’ remains undefined, such findings appear to support the notion that merit *is* gendered. It is suggested that, in seeking to identify and fully understand this relationship, it is necessary to explore the experiences of the women legal practitioners who represent the prospective judicial talent pool. It is argued

herein that, in doing so, it is appropriate to utilise gender as a lens to permit exploration of both the gendered nature of women's individual experiences and of the professions within which they operate.

For social constructionists, gender is understood in the context of the cultural roles and expectations associated with the sexes, as opposed to a biological identity. As such, gender is not a static characteristic which can be possessed by an individual. Rather, it is a dynamic, performative process by which such cultural expectations are both produced and re-produced through behaviour (Butler, 1990).

Understanding gender in this way permits greater depth of analysis in terms of the construction of both individual gendered identities and of the gendering of organisations and professions. This is possible through moving away from the traditional gender dichotomy towards a more flexible and nuanced view of how gender operates. The conflation of sex and gender creates a temptation to utilise gender as a mere variable in order to facilitate comparison between the sexes. However, in the area of gender and the professions, there have been several recent calls for a more sophisticated approach to undertaking feminist research utilising gender as a 'lens' (Ahl 2004; Marlow et al., 2009). Employing gender as a lens in feminist research permits the researcher to explore women's experiences and seeks to counter the normative androcentric approach to sociological research of the past, wherein women were either 'invisible' or were presented as the 'underside' of male lives, culture and experiences (McCarl Nielsen, 1990 p.10; DuBois, 1983 p.110). In order to ensure that women are appropriately represented, research exploring *their* experiences is necessary. In the absence of such research emanating from Northern Ireland, research considering the



experiences of women lawyers in other jurisdictions is instructive. At this juncture, some of the key themes discernible therefrom will be explored and contrasted with the extant literature relating to Northern Ireland.

### ***Eligibility***

The apparent homogeneity of the judicial talent pool in Northern Ireland may, partially, be attributed to the fact that many women may be at a disadvantage in terms of attaining the requisite length and breadth of experience necessary to take judicial office. In order to become eligible to become a Judge in Northern Ireland, one must have been in practice as a lawyer for a period of *at least* seven years. This requirement, of itself, may serve to limit the number of eligible women, particularly in the context of those located within the self-employed Bar which presents its own difficulties in terms of women's ability to sustain careers for such extended periods. It is unfortunate that there is a lack of contemporary research considering gendered patterns of attrition from the profession in Northern Ireland. However, membership figures themselves are somewhat telling. Of the 782 barristers holding current practising certificates for the year 2018/19, just 269 are women (34.4%) (The Bar Library, 2019).

Generally speaking, judges are more likely to be male and are less likely to have practised as solicitors before coming to the bench (Rackley, 2013, p.79). The view that the Bar is the 'traditional route into the judiciary in the eyes of much of the legal profession' (Constitution Committee, 2017) is not novel. Acknowledging this, Lord Neuberger (2017) recently said, "there is still an in-built assumption that it will tend to be a barrister, not a solicitor, who becomes a High Court judge ...". Indeed, it is clear that this view prevails in Northern Ireland, wherein appointments to the High Court are

seen as ‘the final phase of a career at the Bar (Leith et al., 2013). Interestingly, when asked about that which constitutes ‘merit’ in the context of judicial appointments, many solicitor respondents felt that too much weight was placed on advocacy as a requirement (Leith et al., 2013). Thus, it is clear, that the manner in which judicial ‘merit’ is constructed in Northern Ireland is problematic and may preserve the homogeneity of the judicial talent pool through encouraging suitably qualified solicitors to self-select out of the recruitment process or, alternatively, through disadvantaging those in certain practice areas.

### ***Gendered Occupational Segregation***

In addition to potential difficulties in attaining the length of experience necessary, undoubtedly of even greater significance is the difficulty in attaining the quality and/or type of experience necessary to demonstrate ‘judicial merit’. A recurring theme in the literature on gender and the legal profession is the segregation of women into certain types of legal work, in particular, family law (Leith et al., 2013, p.53). Such sex-typing of work continues to affect even those women who are successful in their appointments to judicial roles, with many women reporting that they experienced explicit discrimination in the form of gendered work allocation (Canadian Bar Association, 1993). Anecdotally, this would appear to be the experience of women in private practice at the Bar of Northern Ireland, wherein women are disproportionately represented in family law practice. The literature on the sex-typing of work is instructive insofar as such practices may be related to wider, macro-level conceptualisations of the ‘female’.

The familiar notion of women having a natural propensity for caring and nurturing is closely related to the sex-typing of certain work (Bradley, 2010). Women’s

disproportionate over-representation in family law may be attributed to essentialist assumptions about women's suitability for such work which, typically, concerns children, families and vulnerable individuals. In addition, from a practical perspective, such work also involves a greater deal of 'pastoral' client care work. The assumption that women are more naturally suited to practice areas involving such emotional labour, which may be viewed as an extension of their domestic caring roles, is undoubtedly derived from macro-level gender schema (ibid.). This has the result of preserving and justifying gendered divisions of labour within the profession (Acker, 1990; Witz, 1991).

However, such occupational segregation may serve to impede women's careers on a more fundamental level. Unlike criminal or commercial practice, employment and family practice offer fewer advocacy opportunities and carry less prestige. It is fair to suggest that women's segregation into such practice areas may prevent them from attaining the required degree of advocacy experience (Davis and Williams, 2003) or, indeed, the required degree of 'visible' and 'accepted' advocacy experience necessary to evidence merit. This is particularly true in the case of family law practice wherein the knowledge, skills and experience of practitioners are often trivialised and undermined. Indeed, the potential for family matters to settle out of Court may also serve to reduce the advocacy opportunities available to practitioners therein (Douglas, 2018).

It may be that a failure to value work such as family law, typically undertaken by women practitioners, renders it less valuable in terms of demonstrating the sort of qualities, skills and experience which have come to constitute merit in judicial appointments in Northern Ireland. This, coupled with the apparent ease with which merit can be recognised in men who fit the 'traditional criteria', can only serve to

perpetuate masculine homogeneity within the profession. Through reproducing widely-held essentialist ascriptions, such practices serve to reinforce the notion of women as natural ‘carers’ more suited to emotional work, thereby subjugating the feminine and, by corollary, reinforcing the prevailing narrative of the ideal professional as ‘male’ (Bolton and Muzio, 2008; Acker 1990). This gendered division of labour permits the subordination of women practitioners in the legal profession (Sommerlad and Sanderson, 1998; Hagan and Kay, 1995). Thus, work such as family law is not only devalued in comparison to traditionally male-dominated practice areas but, also, contributes to the ‘othering’ of women within the profession (Bolton and Muzio, 2008).

### ***The ‘Motherhood Penalty’***

A second theme from the literature concerns the relationship between work and domestic/caring responsibilities, which can be problematic for those aspiring to a judicial career. Despite both part-time and deputised judicial roles offering greater flexibility, life on the bench is often regarded as incompatible with domestic obligations. A recent study found that a ‘lack of flexibility in working practices on the Bench’ was the most commonly cited barrier to judicial appointment (Turenne and Bell, 2018). Perhaps unsurprisingly, the majority of women respondents raised this as an issue (65% as compared with 24% of men).<sup>3</sup> The perceived inflexibility in judicial working patterns is identified with regard to working hours and, further, geographical deployment and specialism.<sup>4</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Turenne and Bell (n 20).

The notion that ‘a part-time approach to judicial appointments’ does not align with what is ‘required for a judicial post (i.e. a full commitment to the role)’ appears to endure.<sup>5</sup> In a previous study in Northern Ireland, respondents indicated that

*‘... fulfilling family duties; seeking a few disparate judicial roles; not being focused on a judicial career were all viewed as undermining the respondents view of whether a candidate had merit or not. The judge, in this light, is never part of society – always apart and always focused on the needs of the judicial task.’<sup>6</sup>*

It is clear from the literature that inflexibility in working patterns, in all its forms, is particularly important to women. It has been suggested that perceptions of inflexibility in this regard can and does discourage suitably qualified women from pursuing judicial roles (Feenan, 2005; Mack and Anleu 2014). In 2010, the Advisory Panel on Judicial Diversity recommended that ‘it should be assumed that all posts are capable of being delivered through some form of flexible working arrangements, with exceptions needing justifying.’ Notwithstanding this recommendation, at present ‘part-time working is not clearly addressed by any of the Judicial Appointments Commissions in their advertisements, though the Northern Irish Commission at least opens up that possibility.’ (Turenne and Bell, 2018).

Generally speaking, the majority of requests for part-time work or flexible working arrangements are made by women and arise from maternity leave and domestic and/or care-giving responsibilities (Law Institute of Victoria, 2006). The effect of a

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<sup>5</sup> Queen’s University (n 10) 6.

<sup>6</sup> Queen’s University (n 10) 48.

move to part-time or flexible working can often be seen in the quality of work offered to those availing of such arrangements. In the context of legal practice, it would appear that those transitioning to part-time/flexible work can expect stalled career progression (ibid. 159), less autonomy and responsibility and, in some cases, being allocated work in a different field of law (AEQUUS Partners, 2005). Such outcomes reflect the enduring ‘stigma’ associated with part time workers generally, namely, that they are less committed (Fuchs Epstein, Seron, Oglensky & Sauté, 1999). This perceived failure to prioritise work, and thereby to conform to gendered norms of the ‘ideal worker’, serves to undermine part time solicitors’ contributions to the workplace, rendering them invisible. This, in turn, positions them as lacking the commitment required to progress to partnership (Williams and Calvert, 2001). It has been reported that requests to work part-time are not always well-received and can have consequences with regard to the career advancement of women solicitors aspiring to partnership (Campbell & Chalmers 2011, p.157). The advent of so-called ‘mommy track’ (Jacobs, 2017), whereby women are effectively ‘opted-out’ of the running for partnership and retained at associate level following childbirth, represents a worrying development in the landscape of legal practice.

Indeed, women barristers availing of maternity leave have reported similar detriments to their practices upon return. In the context of the self-employed Bar, maternity leave has been described as ‘career suicide’, with women barristers facing returning ‘to nothing except a devastated practice’ (The Guardian, 2011). Recognition of the particular difficulties faced by self-employed women barristers availing of maternity leave prompted the Bar Standards Board of England and Wales to issue

revised equality and diversity guidance pertaining to parental leave policies in what has been described as a ‘watershed moment’ (Simmons, 2017).

“The motherhood penalty” (Sterling, 2016) whilst not specific to the practice of law, is a recurring theme in the literature relating to legal practice (Pinnington and Sandberg, 2013; Reichman and Sterling, 2002; Walsh, 2012) and serves as a closure mechanism, blocking off women’s routes to career progression. Interestingly, it would appear that the motherhood penalty extends even to those who are not mothers (Budig and Hodges, 2014; Gough and Noonan, 2013). Cockburn (1991) describes how women, generally, are “defined in domesticity... even if the woman ... is celibate or childless she is seen and represented as one of the maternal sex” (Cockburn, 1991, p.76).

Research in other professional contexts suggests a wider tendency to assume that women’s priorities lie in the domestic realm, as opposed to within their professional careers; as a result, women, as professionals, are perceived as less ‘committed’ than men (Fuchs Epstein et al., 2013; Twenge, 2010). A full exploration of the relationship between such gendered notions of commitment is out-with the ambit of this paper. However, it may be argued that a changing legal marketplace has conferred an enhanced significance on ‘commitment’ as currency, particularly in relation to demonstrating ‘merit’.

In considering the legal services sector, Wald (2010) refers to that which he calls a ‘hypercompetitive’ work ethic whereby individuals are expected to demonstrate commitment through maximum availability to deal with clients. In practical terms, this often means ensuring availability to deal with phone calls and emails in the evenings or at weekends - a prospect much less challenging for the unencumbered ‘ideal’ (male)

worker (Acker, 1990). These structural changes, intersect with cultural changes in the legal marketplace which have been described as a move towards “commercialized professionalization” (Hanlon, 1999). This notion of commercialized professionalism embodies the more ‘entrepreneurial’ approach to legal service provision which has appeared to dominate in recent times. This, alongside the redefinition of merit as temporal commitment, may present particular difficulties for women solicitors as time, in a professional context, is often a gendered resource.

### ***Reluctance to Apply for Judicial Roles***

Reflecting a wider ‘recruitment crisis’ within the UK judiciary, the Lord Chief Justice for Northern Ireland has recently acknowledged recruitment difficulties in Northern Ireland (SSRB, 2017). Whilst these have been attributed to various factors, e.g. judicial pension changes, loss of respect for the judiciary, remuneration and workload (Morison and Dickson, 2019; Turenne and Bell, 2018), it would appear that there is a specific problem recruiting women.

We have seen how the homogeneity of the judicial talent pool may be, in part, explained by the masculine notions of merit underpinning recruitment and, by corollary, the homosocial reproduction this permits. However, the reasons for women’s apparent reluctance to apply for judicial roles warrants further exploration. Research has indicated that women require more encouragement than men to apply for such roles. (Feenan, 2005, p.6). Universally, the so-called ‘confidence gap’ means that, unlike their male colleagues, many women often do not apply for roles unless they fulfil 100 per cent of the criteria. (Clark, 2014; Mohr, 2014).



Relatedly, it may also be the case that many women are deterred from pursuing judicial appointment due to their perceptions of the bench as male-dominated. (Genn, 2017). Generally speaking, the internalisation of macro-level gendered schema plays an important role in shaping individual perceptions of available opportunities (Wilson, 2003; Baughn, Chua & Neupert, 2006; Welter and Smallbone, 2008.) This can encourage individuals to make gender-congruent choices which, in turn, can serve to reproduce those gendered norms (Evans and Diekman, 2009). For instance, the male-dominated nature of the judiciary may contribute to the notion that judicial business is ‘men’s work’ and may discourage women from pursuing judicial careers due to perceptions of limited possibilities for women therein (Blanton, 2001). The judiciary is, undoubtedly, sex-typed as a ‘male’ profession with ‘the judge’ conjuring images of ‘man’. Such traditional masculine bias inevitably results in women being perceived as ‘non-judicial’ (Rackley, 2013, p.602) with the double bind that women who do satisfy masculine merit are seen as ‘too aggressive’ (Davis and Williams, 2003, p.832). This positioning of women as ‘non-judicial’ or ‘other’ may go some distance in explaining why male candidates appear to be preferred; it may be that it is easier to recognise merit in those who resemble current judicial office-holders, of which the majority are men. In addition, perceptions about “the ethos of the back corridor” (Leith et al., 2013; Morison, 2015) and reports of women judges experiencing exclusion at the hands of their male-majority colleagues (Solberg, 2006) represent tangible deterrents for would-be women judges.

## **Conclusion**

This paper offers an overview of the extant literature relating to gender and the legal profession. It is clear that there are number of factors which conspire to sustain

women's under-representation in the judiciary in Northern Ireland and that efforts made, thus far, to re-dress the balance have been less than effective. Even so, it must be borne in mind that any solution to women's under-representation at judicial level must address those issues which impede women's career progression across all branches of the legal profession. General assumptions about men and women appear to be influential in shaping both notions of what it means to be a legal professional and, also, the types of work which are appropriate for men and women. It is clear that further research is required into the gendered division of labour within professional legal practice and the potential implications thereof for the career progression of these women professionals. It is hoped that future research considering these women's experiences in legal professional practice will further our understanding the reasons for women's poor representation at judicial level and, importantly, the most effective means by which this issue can be addressed.

Whilst there appears to have been something of a recognition of the need for greater diversity within the Northern Irish judiciary in recent times, there remains a distance yet to travel. It is hoped that exploration of the experiences of women in professional legal practice in Northern Ireland will provide a roadmap for future travel, as "a diverse judiciary is an indispensable requirement of any democracy" (International Association of Women Judges, 2006).

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