



Research Article

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Legal Reasoning of the Deconstruction of Protection Patters Ambiguity to Home-Based Workers in Indonesia's Labor Law

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Abstract

Increasingly widespread of self-employment and bulk jobs are triggered by the pressures of labor market flexibility, production process externality, and the high level of unemployment. One reason for this situation is the effects of globalization which stimulates transnational production system through the expansion of global supply chain in developing countries. Indonesia attempts to stay afloat of the competition by inviting transnational corporations to operate within it, offering low wage incentives and natural resources abundant to attract them. The purpose of this study is to examine the legislative products and policies of employment which are ambiguous in guaranteeing work protection for home-based workers, particularly the essential factors that hinder home-based workers from obtaining the assurance of the minimum standards of decent work in industrial employment relationships. The methodology that is used is based on empirical data followed by an evaluative examination on the interrelation between norms and facts. It is focused on deductive and inductive logic that reconstructs the construct of legal system in the field of labor, evaluates intensively the compliance with current provisions, and recommends currently required substantial changes in regulations and policies. A post-modern thought has emerged as a form of resistance to the state's hegemonic power of the law which demands that the dominant influences be gradually limited. Accordingly, a progressive law paradigm has been formed to delineate a legal reasoning to loosen the shackles of legal positivism. Legal transformation creates a bifurcation of legal patterns which are formalist, rationalist, and procedural-based, but in addition there is also the idea of giving precedence to substantial justice. It is also found that a legal enforcement which is bound to the literal implementation of law has a strong tendency to interpret the rule of law rigidly. It is important to adopt a progressive legal approach which promotes the fulfilment of the sense of substantial justice.

Keywords: legal protection ambiguity, home-based worker, progressive law paradigm

1. Introduction

ILO (2015) mentions that all over the world since the beginning of the twenty-first century, an increase has been observed in informal employment as well as a growing number of women in paid jobs. The current conditions of home-based work based on putting-out systems and other kinds of domestic work in Indonesia have not been visibly attended in regulations or other policies. The increasing use of home-based workers is due to the increasingly widespread self-employment and bulk jobs prompted by the pressures of labor market flexibility, the externality of production process, and the high level of unemployment and informal sector employment.

Home-based workers usually work outside company workplaces which are at their own homes or at others', without adequate supervision and appropriate health and safety at work protection, receive payments below the regional minimum wage standards, uncovered by employment social

security services, work under illegal sub-contract work agreement, have indefinite working hours, have no work continuity, and receive no severance pay in the case of dismissal (Imron and Sumarsono, 2017). Most of the home-based workers are female who work privately at their own homes and functionally as both housewives and self-actualizing individuals. They feel more financially secured with this home-based work. Specifically, for Indonesia, the situation is further exacerbated by the growing number of workers and the limited jobs and employment opportunities for women. This condition therefore presents a difficult choice for a woman: to survive as a good wife while receiving low wages from jobs that exploit her as a home-based worker (Malang City Agency of Planning, Research and Development, 2017).

Commonly, home-based workers live on very low income, however even with this condition they are hardly within the category of absolute poverty. Within the perspective of the national social protection program, they are excluded from the group of people eligible for a healthcare program (Ministry of Women's Empowerment and Child Protection, 2012).

Indonesia's labor law system, in the context of formulating the protection of the rights of home-based workers, applies ambiguous standards. Based on legal facts (*ipso jure*), putting-out system home-based jobs are implicitly covered within the scopes of employment relations, as determined by Article 1, point 15 of Law No. 13 of 2003 on Employment. However, in its implementation (*ipso facto*) the workers are not recognized as workers, either in the legal order of the labor law or in the social protection regulations. Home-based workers are treated and employed based on informal mechanisms; consequently, the legal enforcement mechanisms are not bound by Law No. 13 of 2003 as this provision is only intended to protect formal sector workers (Imron, 2015).

The purpose of this study is to examine the legislative products and policies of employment which are ambiguous in guaranteeing work protection for home-based workers, particularly the essential factors that hinder home-based workers from obtaining the assurance of the minimum standards of decent work in industrial employment relationships. While the benefit of this study, in addition to developing the study of law, is to contribute to the development of labor law in Indonesia, which to date has not recognized home-based work system performed in the pattern of industrial subcontract relationships. The data and information are expected to be used by the Indonesian government as a basis in formulating policies or regulations that will provide access for home-based workers to obtain assurance of decent work standards.

2. Literature Review

2.1 Home-based Work System amidst Economic Liberalization and Employment Flexibility

Since the 1990s, the worldwide impacts of globalization, economic liberalization, and employment flexibility have prompted the rise of subcontract employment and self-employment patterns. As a result, the quantity of home-based work and other informal sector jobs is growing rapidly at various points in the supply chain by placing the home-based workers at the end of the chain. Despite the difficulty of a definite estimate of the number of home-based workers in some countries and globally, there is a benefit gained from a large population in which the number is a part of the population of workers in the informal economy sector.

The free market era which marks the current development of world economy has affected the dynamics of the labor market. The increasing sensitivity of the world's economy, indicated by the frequent occurrence of crises, has made the role holders in market domination, i.e. the capitalists; try to create strategies to keep the economic shocks from affecting their business activities, leading to the implementation of labor market flexibility. It is needed to show that the conditions of labor market have become too rigid due to government intervention in its attempt to realize its constitutional responsibilities to protect workers. The emergence of a flexible work system was mainly motivated by, among others, efforts to smooth out the global supply chain wherein workers are seen as a factor that have to be made more flexible to allow for more ease in the processes of industrial relations, trade and market, so that the owners might gain maximum profit. This concept of labor market flexibility was first promoted by the World Bank, because a rigid labor market was judged to be incompatible with the increasingly competitive and liberal global economy (Nugroho

and Tjandraningsih, 2007).

The flexibility of labor market specifically opens opportunities for business actors to find new ways, such as the externalization of production process by involving home-based workers. Although there is no national or local data on the number and characteristics of home-based workers, surveys and peripheral records from civil society organizations reveal that most home-based workers in Indonesia are women (Malang City Agency of Planning, Research and Development, 2017). Home-based work (putting out system) is more attractive to women because of the flexibility inherent in their character in managing the household as well as working for payment even if the flexibility is one of the few benefits of working at home.

2.2 Challenges Faced by Home-based Workers in Indonesia

Home-based workers are known to work under informal, non-written regulations. Despite this, according to the perspective of Law No. 13 of 2003 on Employment these workers are labeled "workers" because they are bound by a form of employment relationship whose structure comprises elements such as "directive", "labor", and "wages" (Art. 1, pt. 15, Law No. 13 of 2003). Throughout the history of the development of industrial relations in Indonesia, the existence of home-based workers has not been facilitated by the government. The role and contributions of home-based workers are imperceptible in the production process, and statistically unrecorded as workers that merit legal and social protection.

The subsequent effect on home-based work system which still uses informal mechanism is that there is a treatment which is deliberately patterned to make it easier for employers to recruit or dismiss workers without any consequences. The highly flexible work patterns between home-based workers and business people/investors not only deny the workers their normative rights, but also adequate protection such as: protection from discrimination, freedom to negotiate, safety at work and health insurance, remuneration, social security, access to training, minimum age and childbirth protection. The shift of production risk from work-givers to home-based workers is another dilemma faced by the latter (Imron and Sumarsono, 2017).

During the last decade, national and local development priorities are on achieving growth target and the merely theoretical macro-economic stability. Programs related to welfare and health such as the creation of productive employment for the underprivileged group, improvement of workers' welfare, productivity improvement program for small farmers, community health financing, and social security programs are only minor targets of the development agenda.

The projections of policies or regulations formulated in National Medium-Term Development Plan (RPJMN) of 2015-2019 stated that employment development is included in the fields of human resources development and poverty alleviation. The framework of the employment regulation is oriented to a comprehensive social security system which covers health insurance, job insurance and other policies related to social support programs for the underprivileged and disadvantaged, which are synergized with empowerment programs for the near poor. Conducive implementation of the employment policy will correlate with the investment climate and business safety, whereas a just and firm legal foundation and enforcement will provide support and strength to the implementation of labor market policies.

As a comparison of community initiatives to encourage the strengthening of the bargaining position of home-based workers undertaken in some Asian countries, the ILO Office for Indonesia and Timor Leste, supported by the ILO Project/MAMPU reported that through the last 25-40 years, SEWA in India, PATAMBA in the Philippines, and HNTA and FLEP in Thailand have succeeded in developing the human resources capital and social capital of home-based workers as well as drawing local, national, and international financial resources through organizing and structuring home-based workers as well as the Indian SEWA (ILO, 2015). The joint organizing is intended to fight for the rights and representation of home-based workers, to achieve employment protection and social security under the umbrella of law and economic empowerment.

2.3 Unequal Governance in Industrial Relations Related to Global Supply Chain

In the last decade, there has been a phenomenal emergence of the role of multinational companies in the growth of international trade. Multinational companies have been acknowledged to have greatly contributed to technology transfer of and knowledge to local workers and entrepreneurs in developing countries. On the other hand, those transnational companies have also been instrumental in drawing workers from the low production sectors of agriculture to more productive sectors, especially in manufacturing, mining, plantation, and services (Silaban, 2016).

In line with the developments in progress, one of the most notable excesses in current social life is the emergence of criticisms on the deficiencies of the efforts to create decent works. An observed indication is that the traditional role of the government as the one who is responsible for the welfare of workers has been waning, given that multinational firms' supplying agents are dominating the determination of production cost, working period, product quality, and working hours. In such a situation, the government does not have a sufficient bargaining position appropriate to its role as the counterbalance in industrial relationships.

As suggested by Silaban (2016), the race of developing countries to become the favorite international destination led to many of these countries offering a special economic provision based on special regulations that were distinguished from national regulations; such as in the Philippines, Sri Lanka, and Mexico. There were also countries that had offered tax-free investment facilities for decades unrestricted by environmental regulations, such as Vietnam and Cambodia. In this case, there appears to be a regulation dichotomy in the legal system of a sovereign country which deviates from constitutional principles in favor of foreign investors. This transnational-corporations-controlled global economic governance will in turn replace the role of the government as both the regulator and the one responsible for the welfare of its subjects, including the vulnerable workers. There was an anomaly, wherein a business practice could run uncontrolled and unchecked by the national government or international authorities.

The capitalistic power of transnational corporations helps them securing a dominant position within the economy, in turn allowing them to increasingly be capable to find a variety of different and flexible ways of hiring workers. Among others, they try to create production flexibility and labor market flexibility. Production flexibility is conducted through the practices of outsourcing, subcontracting, and the tendency to create casualization of labor. The complexity of regulating and controlling this is exacerbated by the fact that these vulnerable and non-permanent work relations are often unrecorded or unmonitored, so that no adequate mechanisms of chastisements or enforcement of work norms are provided (Fajerman, 2013).

Labor market flexibility is illustrated as a flexible labor market without government intervention in providing protection to workers; the normative provision of labor only makes labor costs to be inflexible because the number and types of workers employed are unable to adjust to the fluctuations in the competitive pressures in commodity markets (Tjandraningsih, 2014). The logical consequence of this deviant practice is the creation of unfair industrial relations which tend to harm workers as members of the weakest socio-economic group in the presence of investors and government authorities.

3. Methodology

The study is aimed to find solutions to legal issues occurring in the life of the society. The goal is to provide a prescription of what should be done as mentioned in Mahmud (2007). It will be based on empirical data followed by an evaluative examination on the interrelation between norms and facts (Bruggink, 1999). The focus of this study is change-oriented, i.e. a research based on deductive and inductive logic that reconstructs the construct of legal system in the field of labor, evaluates intensively the compliance with current provisions, and recommends currently required substantial changes in regulations and policies.

The theme of the study raises issues of the marginality and vulnerability of home-based workers, which have been explored in previous research. Through juridical-empirical studies it is found out that employment opportunities for the putting-out system home-based work are mostly

filled by women. The existence of these home-bound workers is not visible to the public eye, so they elude the attention of the society and are unmonitored by the government. Developments through juridical-sociological studies, derived from the facts that reveal a dysfunction in labor norms, have encouraged labor activists to play the role of the catalyst in advocacy activities to reduce the marginalization and discrimination effects on home-based workers, which tend to lead to the practices of labor exploitation.

Developments of home-based workers' capacity which is initiated by the formation of an organization, socialization of home-based workers issues within the framework of advocacy program and empowerment of home-based workers economy through the establishment of a social business center to break the production chain, in relation to the development of the catalytic role of the Civil Society Organizations at least have begun to open the public eye and raise the awareness of policymakers on the facts of the socio-economic vulnerability of home-based women workers.

4. Results and Discussion

4.1 *The Character of Progressive Law as Liberation from Modern Law Culture*

Rahardjo (2005) found that the contemporaneous legal paradigm in Indonesia tended to be positivistic-legalistic which viewed and understood law in a linear, deterministic, and mechanistic way, so legal experts would incline to be prisoners of the law. The legal positivistic-legalistic paradigm comes from the philosophical school of positivism which developed within the Continental European schools of thought. In particular that of French thinkers such as Henri Saint Simon and August Comte that grew in the late eighteenth and early nineteenth centuries. Positivism is a school which believes that in order to achieve truth all metaphysical prejudices should be thrown away. When applied to the field of law, this philosophical school wishes that law no longer be conceptualized as an abstract meta-judicial moral principle on the nature of justice, but as an *ius* that has been positivized into a *lex* (Salman and Anthon, 2005).

Law, in accordance with its nature as a tool of happiness for mankind, never works in a linear manner, but is full of turmoil. Law in such quality does not proceed at the level of rule-making – as the mirror of order – but also at the level of rule-breaking, i.e. it has to be able to break the status quo unable to cope with the demands of a thriving life. Nonet and Selznick (1978) made a clear argument when writing a paper on law in a transition society. The law of a nation undergoes a dynamic for certain causes as described by Rahardjo (2010) which mentions that a nation which in certain circumstances “must” make authoritative and repressive laws to be used as a tool by the rulers, may in time be turned to autonomous law.

The repressive situation, wherein legal ways are based more on the use of force and coercion, can change to a situation that no longer depends on physical force but on the increasingly autonomous power of the law itself. Here one speaks of the emergence of the rule of law, not power. The change is due to the internal dynamics of a society that has succeeded in overthrowing the authoritarian social order.

An autonomous law is indeed a distinct achievement since it can end a type of repressive law full of vulgar coercion, but one day it may also be trapped in its own preoccupations. It means, when the autonomous law defines itself as “law exists for law itself” and allows itself to be isolated from the social dynamics outside. Broadly speaking, the autonomous order can be characterized as follows: first, the law is separated from politics to prevent government intervention to the judiciary; second, the structure of the order of law refers to “rule model”, in which the rules function to assist the evaluation of officials as legal operators; third, “procedure” is viewed as the essence of law, so its main purpose is regulation; fourth, loyalty to law requires the observance of all parties to the norms of positive law.

However, the responsive legal order according to Nonet and Selznick (1978) holds that law is seen as a means or a response tool to the needs and social aspirations of the society. At this level of responsive law, the inherent traits are: first, law should be functional, pragmatic, rational, and has a clear purpose; second, its objective is to set the standard for criticisms of everything in progress. Thus, a responsive legal order is always attributed to objectives beyond the textual formulation of

the law itself, intended to be functioned as a critique of the ongoing law.

4.2 *The Ambiguity of the Law in Protecting Home-Based Workers*

Home-based workers often work on the end of a long and complex supply chain. This informal work relation mechanism obscures the responsibilities of the main employers and intermediaries towards the workers. This situation may make it difficult for home-based workers to find out who holds the highest responsibility for their wages and working conditions, and to whom they should report if they have a complaint. They are usually employed by their employers or intermediaries to do their jobs at their own home. Hence, their presence is invisible from public monitoring and consequently they are not recognized as workers. This practice of employing home-based workers in industrial enclaves in some parts of Indonesia is not a new phenomenon. This practice grows along with the increasing flexibility of labor market and/or flexibility of production process, as well as the increasing unemployment and scarcity of jobs (Fajerman, 2013). Employers are increasingly free to find different and more flexible ways to reduce the production cost of labor component.

Models of labor market flexibility is created to replace labor markets that have become too rigid due to government interventions in the protection of workers, because the number and types of workers employed cannot adjust to the fluctuations in the competitive pressures in commodity markets. The symptoms of a flexible labor market as the main characteristics of a work relationship began to surface in the early 2000s and continue to expand up to now. Throughout the following decade, the implementation of flexibility in the forms of time-specific legal work agreement relationships (PKWT) and outsourcing has become one of the sources of concern among workers and has triggered industrial conflicts in Indonesia. Whereas it is still debated at the policy level, as the result of governance gaps in which a business practice controlled by multinational corporations (MNCs) can proceed without government control. As a result, the traditional role of the state as the one supposedly responsible for the welfare of workers is waning, given that the supplying agents of multinational corporations (MNCs) have taken a very strong bargaining position against the government.

While from a technically juridical point of view home-based work is implicitly included in labor law regulations, but in empirical facts home-based workers are employed through informal mechanisms and are outside the scope of government employment policies and programs. This results in the difficult enforcement of the law. However, it is worth considering the extent to which the current Indonesia's labor law offers a comprehensive protection to home-based workers and identifies which certain legal norms are incapable to respond to the situation of the home-based workers.

Policy advocacy for a legal reform based on the will to expand the scope of home-based workers under labor law, social protection, and civil or commercial industries, is essential to achieve the protection and development opportunities. It should be the right of home-based workers as with other workers in general. It is very important to start paving the way by lobbying for legal reform at regional and national levels. The next step of adopting some or all of ILO Convention No. 177 of 1996 and Recommendation No. 184 of 1996 into a legislation is a necessary condition for overall progress. Of course, adopting labor laws or regulations for sub-contracted home-based workers alone is not sufficient because at the level of effective implementation this is generally insufficient, as reported by ILO based on case studies from India, the Philippines, and Thailand (ILO, 2015). A decisive consideration is the need for representation of home-based workers in institutions involved in the decision-making processes, such as the Industrial Relations Tripartite Institution.

4.3 *A Paradigmatic Approach According to Progressive Law*

ILO (2015) mentioned that the whole twenty-first century world has witnessed an increase in informal employment and the growing number of women in paid work, many of whom undertake home-based work to combine work and family responsibilities. In Indonesia, despite the lack of official data, home-based workers constitute a significant proportion of informal labor in the fields of manufacturing, service, and agriculture, with poor working conditions and live in poverty. Based on

the data from the Central Bureau of Statistics (BPS, 2017), Indonesia's working population were 124.54 million people, divided into 51.87 million (41.56%) people working in the formal sector and 72.67 million (58.35%) people working in the informal economy. The Ministry of Women Empowerment and Child Protection (PPPA) estimated that half of informal workers in Indonesia were home-based workers that included putting-out system workers or workers with sub-contract production pattern relations. The practices of informal work relations with sub-contract production pattern as experienced by home-based workers often apply wage standards far below the Municipal Minimum Wages (MMW) and provide no work safety or protection, or social security. Despite falling into the category of vulnerable group, as earners of wages below MMW they are excluded from the category of absolute underprivileged and therefore are excluded from the category of vulnerable group entitled to receive the benefits of the Health Insurance Program.

The old paradigm was unable to cope with the growing crisis, resulting in a new paradigm. Since the current labor law is incapable to adapt to progress, a newer one is needed as an alternative way to see the realm of law, i.e. the progressive law paradigm. In essence, progressive law paradigm puts more emphasis on judicial subservience in community life which is oriented to a more substantial legal justice value than a procedural justice (Suteki, 2013).

Furthermore, Rahardjo (2010) asserted that there is no single legal type or legal enforcement in this world. There is a legal enforcement which abides literally to the exact sounds of legislation articles, but there is another one which uses the legislation as an inspiration and moral guideline to take more creative actions. These options need to be utilized. As a nation-based on the rule of law, Indonesia will be severely disadvantaged if it merely applies the literal interpretations of law. In today's crisis and moral decline, national law needs to be applied in a visionary way. Therefore, there should be a courage to do some rule breaking and out of the box lawyering (breaking the monotony of legal implementation). Legal enforcement should not stop at implementing law as it is, but it should also become a creative act. Progressive law tries to draw law out of the esoteric realm (narrow interpretation) and turns it into a socially meaningful institution.

The legal approach to labor practices in Indonesia should not depend too much on legalism or formalism as it has been proven to have failed to bring justice and unable to solve the root of the prevailing problems. The legal approach should, therefore, adopt the idea of a progressive law which promotes the fulfillment of the substantial sense of justice. The referred illustration of a legalistic and formalistic law in essence points to the nature of modern law that was conceived in modern European era, formed in a long process which peaked in a legal culture characterized by liberalism, capitalism and formalism.

The implication of a rational and bureaucratic modern law is that around the 21st century, a post-modern thought emerged as a resistance to the state's hegemony of law and demanded that this hegemony be gradually limited. At the same time there was an awareness of what was called local knowledge which justified the assumption that the state was not the only source of truth.

Home-based workers are factually a part of the actor element in the production processes of various Indonesian industries. Nevertheless, there is no explicit legal recognition of these homeworkers in the workers category, especially in Indonesian legislations. This is reflected in the behavior of national and regional bureaucracies towards home-based workers that are often apathetic and reluctant to serve any interests related to them. General indicators of this are visible in the following: first, the National Labor Survey Agency (Sakernas) is currently unable to identify homeworkers or home-based workers in Indonesia; second, home-based work is incomprehensible to survey instruments of industrial and other sectors; third, due to the invisibility of home-based work in national legislations and labor statistics, home-based workers working in various industries are regarded as informal workers beyond government monitoring and responsibility.

Progressive law attempts to loosen this positivistic-formalistic legal enforcement and prioritizes the factor of social benefit based on substantial justice. Data from BPS (2017) which compares the figures of national labor force in 2017 reveals that the interests of the 72.67 million informal workers that dominate the number of national workers (58.35%) are not sufficiently served by the state. For instance, home-workers who are part of informal workers generally do not have access to social security programs and are not provided by health benefits by their employers. When injured or ill, they receive little or no protection or safety net to assist them.

Insisting on the legal concepts of the prevailing labor law has practically force-stopped the turning of the wheel of law with all its ensuing consequences. Hence, as an alternative solution which derives from a sense of social justice for home-based workers with their unfavorable working conditions and vulnerability, these few following actions may be taken: first, creating a legislation specifically designed to protect home-based workers; second, formulating a social security net or a social assistance scheme addressed to home-based workers; and third, incorporating the homemaker communities in the National Vulnerable Worker Protection Movement Program (GNLingkaran) of the Social Security Agency to obtain occupational accident and life insurances with premiums gained from cross-subsidization taken from companies' CSR funds or from community donors.

5. Conclusions

The current working conditions of putting-out system in Indonesia has not received clear and definite attention, both in regulations or in other policies. Despite the lack of official data on the number, whereabouts or types of work performed, the use of this system tends to increase and it is estimated that half of the number of informal workers are home-based.

Labor market flexibilization and production externality are needed by entrepreneurs to deal with the conditions of labor market which have become too rigid because of government intervention as an implementation of their constitutional responsibility to protect workers. At the moment, the implementation of flexibility in the form of time-specific legal work agreement and outsourcing have become one source of concern among workers and have triggered industrial conflicts in Indonesia. It is still a subject of debate at the level of policy-making due to the impacts of governance gap, wherein a business practice controlled by multinational corporations (MNCs) can proceed without government control.

Home-based workers are employed via informal mechanisms and are outside the scope of government policies and labor programs, including labor supervision. This results in the ineffectiveness of the enforcement of the prevailing labor law, despite the workers' being inseparable components of production actors in various industrial activities in Indonesia. The absence of an explicit legal recognition of homeworkers as a category of workers in Indonesia's regulations results in national and regional bureaucracies exhibiting apathy, discrimination, and reluctance to provide any public services in relation with home-based workers.

A legal enforcement which is bound to the literal implementation of law has a strong tendency to interpret the rule of law rigidly. It is important to adopt a progressive legal approach which promotes the fulfilment of the sense of substantial justice. Such positivistic-individualistic model of law is sought to be unleashed by adherents of progressive law as the considerations of social benefit factor based on substantial justice are prioritized.

Another crucial consideration is the need for a representation of homeworkers in institutions involved in the decision-making processes, such as the Industrial Relations Tripartite Institution. As an implication of the rational and bureaucratic modern law which has affected national labor law, a postmodern thought has emerged as a resistance to the state's hegemony of law which demands that the dominant influence be gradually limited. At the same time there is an awareness of local knowledge which justifies the assumption that the state is not the only source of truth. Meaning, when labor law is regarded as being ambiguous in protecting the rights of homeworkers, the same incident has elicited the society's solidarity in creating a just law.

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