

THE LEGAL PROTECTION OF WOMEN FROM VIOLENCE (HUMAN RIGHTS PERSPECTIVE)

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Abstract

Violence against women is a form of human rights violations. Law of the Republic of Indonesia No. 39 Year 1999 concerning Human Rights states that, Human rights violations are every act of a person or group of people, including state apparatus, whether intentional or unintentional, or negligence against the law which reduces, obstructs, restricts and or revokes the human rights of a person or group of people which guaranteed by law, and do not receive, or it is feared that they will not get a fair and correct legal settlement, based on the existing legal mechanism. Legal protection towards women is regulated in Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights in Chapter III concerning Human Rights and Basic Human Freedom, specifically in the ninth part of Article 45-51 concerning Women's Rights. To deal with and overcome the problem of domestic violence, the Indonesian government ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 24 July 1984 through Law of the Republic of Indonesia No. 7 Year 1984 and authorized Law of the Republic of Indonesia No. 23 Year 2004 on Elimination of Domestic Violence. Temporary protection is mentioned specifically in Law of the Republic of Indonesia No. 23 Year 2004. Temporary protection is a form of protection granted by the police and/or social institutions or other parties, before the issuance of court protection order. On the other hand, the form of protection order under Article 1 No. 6 of Law of the Republic of Indonesia No. 23 Year 2004 states that protection orders are stipulations issued by the court to provide protection to anyone, including victims, witnesses, escorts and friends of victims with the longest period of time one year and can be extended by court.

Keywords: legal protection, violation, woman.

I. Introduction

Republic of Indonesia is a law-based state (*rechtsstaat*) and not a power-based state (*machtsstaat*), therefore the law must be placed above all things and every act must be done in accordance to the law without any exception.¹ The conception of law-based state contained in Article 1 point (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) affirms that Indonesia is a state of law, meaning that all forms of actions carried out in this country must be based on provisions of existing law which means there is normative and empirical recognition of the principle of rule of law. All problems are solved by law as the highest guideline. In the perspective of the rule of law, in essence, the highest state leader is actually not a human being but a constitution that reflects the highest law.

The state holds that all forms of violence that occur in the household (hereinafter referred to as domestic violence) are seen as violations of human rights and crimes against human dignity and are a form of discrimination against women.² This view is the basis of Article 8 of the 1945 Constitution along with its amendments. In Article 28 G paragraph (1) of the 1945 Constitution, stipulates that “everyone has the right of personal protection from the threat of fear of doing or not doing something, which is a human right”. Furthermore, in Article 28 H paragraph (2) of the 1945 Constitution affirms that “every person has the right to receive facilities and special treatment to obtain equal opportunities and benefits to achieve togetherness”.³ In addition to the 1945 Constitution, there was also Pancasila, which is the state foundation and philosophy or view of the Indonesian society. One of the principle among all the five (5) principles of Pancasila, is the second principle which reads “Fair and Civilized Humanity”, has the meaning that every human being or every

¹ Jimmy Asshiddiqie. (2006). *Konstitusi dan Konstitusionalisme Indonesia*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, p. 69

² Badriyah Khaleed. (2015). *Penyelesaian Hukum KDRT (Penghapusan Kekerasan Dalam Rumah Tangga dan Upaya Pemulihannya)*. First edition. Jakarta: Pustaka Yustisia, p. 12

³ *Ibid*

individual, or every person has the right to be treated equally and fairly before the law. The second principle has a close relationship with the first principle which reads “Belief in the one supreme God”, because human existence is always related to God’s creation. The purpose of this principle is that God created humans with same dignity, so that the relationship that exists between civilized human beings to another is the basis of daily life.

Crime of violence against women is a form of human rights violations. For this reason, in facing and overcoming the issue of domestic violence, the Indonesian government ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 24 July 1984 through Law of the Republic of Indonesia No. 7 Year 1984. In the CEDAW there is a very broad arrangement for the state and the international community to take in guaranteeing the equal rights of women and men, and ensuring the elimination of all forms of violence against women, both in personal (or private) and public sphere of life.¹ Then, on 22 September 2004, Indonesia ratified Law of the Republic of Indonesia No. 23 Year 2004 concerning the Elimination of Domestic Violence (hereinafter referred to as PKDRT Law). In this law, various provisions and steps are found which aim to eliminate domestic violence and to deal with violence against women.

Philosophically, the establishment of the Elimination of Domestic Violence Law is to protect women as housewives from domestic violence, this is as stated in legal considerations that read: “that every citizen has the right to get a sense of security and freedom from all forms of violence in accordance with the philosophy of the Pancasila and the 1945 Constitution”. In this case the protected ones are citizens. Citizens including women as housewives. The right of citizens is to get a sense of security and be free from all forms of domestic violence. In juridical basis, the establishment Law of Elimination of Domestic Violence is referring to all forms of violence, especially domestic violence, which is a violation against human rights and crimes against human dignity. This can be seen as forms of discrimination that must be eliminated. While in sociological foundation, the establishment of the this law is due to the high frequency of occurrences of this type of violence in society, while Indonesian legal system had not guaranteed the protection of victims of domestic violence at that time.

The problem of violence against women today is not only an individual or national matter, but it is a global problem. In certain cases it can even be said to be a transnational problem. Many terms are used to identify this type of violence, namely violence against women, gender-based violence, gender violence, female, focused violence, domestic violence, and others.² Violence that occurs in a household is causing by a imbalance power relationship between the victim and the perpetrator. In relation to power there is an element of trust and dependency to a certain extent. There is an unequal relationship between women and men, which in turn creates male dominance and discrimination to women, with such power relations. Therefore women as victims of domestic violence, often experienced a high psychological burden.³ Any violence that occurs in society actually departs from a certain ideology that legitimizes the oppression on one side of both individuals and groups towards other parties that caused by inequalities that exist within the community. The position of women (as wives) is subordinate to husbands, where a woman must always submit and obey her husband.

Erlangga Masdiana argued that violence was strongly influenced by ideology and understanding of the culture of the people. The presumption that is commonly believed states that women are number two in the household so they can be treated in any way⁴. This shows that to realize wholeness and harmony in the household is very dependent on the quality of behavior and the ability of self-control of each member in the household. If the quality of behavior and self-control ability of each member in the household is uncontrollable, hence the integrity and harmony in the household can be disrupted and potentially can cause domestic violence which ultimately lead to unfair treatment or insecurity for people within the household.

The formulation of domestic violence itself can be seen in Article 1 paragraph (1) Law of the Elimination of Domestic Violence which states that “Violence in the household is any act against someone, especially women, which results in physical, sexual, and/or neglect of household including threats to carry out

¹ Harkristuti Harkrisnowo. (2010). *Kekerasan Dalam Rumah Tangga, Dalam Perspektif Yuridis-Sosiologis*. First edition. Jakarta: Penerbit Sinar Grafika, p. 711

² Muladi. (1997). *Hak Asasi Manusia, Politik dan Sistem Peradilan Pidana*. Semarang: Universitas Diponegoro Press, p. 31

³ Henny Wiludjeng. (2005). *Dampak Pembakuan Peran Gender Terhadap Perempuan Kelas Bawah*, Pustaka Kajian Pembangunan Masyarakat Unika Atmajaya Jakarta in cooperation with Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia untuk Keadilan, Jakarta, p. 2

⁴ Erlangga Masdiana, *Kekerasan Dalam Rumah Tangga Dipengaruhi Faktor Ideologi*, see <http://www.kompas.com>, accessed on November 20, 2018

illegal acts, coercion or deprivation of liberty within the household". The elements contained in the Elimination of Domestic Violence Law are:

- a. Any act or threat to commit an act, or coercion, or deprivation of liberty against the law:
- b. Which results in emergence of:
 - 1) Misery
 - 2) Physically, sexually, and psychologically suffering, and / or
 - 3) Household negligence
- c. Carried out within the scope of the household, including :
 - a) Husband, Wife, Children;
 - b) People who have family relations with people as referred to in letter a because of blood relations, marriage, who live in the household; and / or
 - c) People who work to help the household and settle inside the household.

Forms of domestic violence can be divided into four forms, including :

1. Physical violence is an act that results in pain, illness, or serious injury.
2. Psychic violence is an act that results in fear, loss of self-confidence, loss of ability to act, feelings of helplessness, and / or severe psychological suffering in a person.
3. Sexual violence is any act in the form of coercion of sexual relations in an unnatural manner and / or dislikes, forcing sexual relations with other people for commercial purposes and / or other purposes.
4. Household neglect is activity of not providing life support, care or maintenance to a person who according to law is an obligation of the person concerned.

based on the explanation, the problems that will be discussed in this paper is how is the legal protection of women from violence in the perspective of human rights?

II. Research Method

The type of research used is the type of normative legal research, using a legal and conceptual approach.¹ Data collection techniques are conducted through library research by studying and reviewing a number of national legal rules and international agreements, textbooks, research papers, legal journals, legal dictionaries, and then analyzed descriptively.

III. Results and Discussion

A. Violence Against Women in the Human Rights Perspective.

Violence experienced by women is a violation of human rights. Harkriswono argues that the meaning of violence is not limited to physical sense but also includes psychological violence. Violence against women in general was originally seen as a crime against the body and possibly life it self in a form of torture and ordinary murder, as well as sexual harassment and so on.² Saparinah Sadli put forward that the issue of women's human

¹ Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Prenadamedia Group Jakarta, p. 35

² Harkristuti Harkriswono. (2004). *Domestic Violence (Kekerasan Dalam Rumah Tangga) Dalam Perspektif Kriminologis dan Yuridis*. *Jurnal Hukum Internasional*, 1 (4),709-734, see <https://media.neliti.com/media/publications/67825-ID-domestic-violence-kekerasan-dalam-rumah.pdf>, accessed

rights began to advance as a universal human rights issue, when women from various countries who attended the 1993 Human Rights Conference in Vienna solidly stated that the existing human rights mechanism was not enough to protect women's needs.¹

Furthermore Sadli states that "They demand that gender-based violence to be the agenda of the discussion whenever there is a meeting agenda on human rights. The women's movement also demands to monitor and strengthen efforts so that the issue of violence against women is integrated into international agreements made on human rights". It is this women's solidarity that has driven the transformation of the concept of human rights according to women's needs.² The problem of women as a whole is that there is a great spirit related to human rights. Human rights encompasses the dimensions of politics, economics, socio-culture, education and so forth, that must be comprehensively and integrally explored. In the development of women's desires pioneered by Charlotte Bunch who wants human rights transformation in accordance with women's needs, such as prevention of violence against women, must enter serious problems juridical dimension.

Women's rights, as with men's, are guaranteed in Article 1 of the Universal Declaration of Human Rights (UDHR), namely;

1. The right to get freedom and personal security.
2. Free from torture and cruel treatment
3. Free from inhumane deeds.
4. Free from actions that demean human dignity.
5. Free from attacks on honor and good name
6. Have the same rights to obtain legal protection against these attacks.³

All of them fall into the category of "non-derogable rights". The rights of women mentioned above require legal formulation, especially in the framework of protection of women, and more specifically concerning domestic violence against women. Saparinah Sadli⁴ stated that: "the problem is that the elaboration of these rights from a gender perspective is not available, due to the definition of human rights as well as the mechanism of strengthening these rights refers more to the types of violations conceptualized by men". According to Law of the Republic of Indonesia No. 39 Year 1999 on Human Rights states that, human rights violations are every act of a person or group of people, including state apparatus, whether intentional or unintentional or negligence which illegally reduces, obstructs, limit, and or revoke the human rights of a person or group of people guaranteed by law, and do not obtain, or fear that they will not obtain a fair and correct legal settlement, based on existing legal mechanism.

The persecution is different from torture, and the meaning of torture in severe human rights violations and in the Convention on Against Torture is not the same as the meaning of persecution in the Criminal Code. Torture in severe human rights violation and in the Convention against Torture as ratified in Law of the Republic of Indonesia No. 5 Year 1998 means persecution. Persecution means making someone suffer for some purpose based on beliefs, race or feelings of hostility.⁵ For this reason, it can be concluded that the problem of violence against women is one form of crime that harasses and tarnishes human dignity, and should be categorized as a violation of human rights.

on November, 20 2018

¹ Achie S. Luhulima (Penyunting). (2000). *Pemahaman Bentuk-bentuk Tindak Kekerasan Terhadap Perempuan dan Alternatif Pemecahannya*, Kelompok Kerja "Convention Watch" Pusat Kajian Wanita dan Gender, Universitas Indonesia in cooperation with New Zealand Embassy. Bandung: Alumni, p. 5

² *Ibid.*

³ Boer Mauna. (2001). *Hukum Internasional: Pengertian, Peranan dan Fungsi Dalam Era Dinamika Global*. Bandung: Alumni, p. 601-602

⁴ Achie S. Luhulima. *Op.Cit.*, p.1

⁵ Hornby A. S. (1995). *Oxford Advance Learner's Dictionary of Current English*, Fifth Edition. United Kingdom: Oxford University Press oxford, p. 862

B. Legal Protection of Women from Violence

Protection in Indonesian Dictionary (Kamus Besar Bahasa Indonesia) is a protective act; help.¹ In general, the Black's Law Dictionary defines the word legal protection, consisting of two words, namely the word protection and the word law. The word protection or protection means "A writ by which the king might, by a special prerogative, privilege a defendant from all personal and many real suits for one year at a time, and no longer, in respect of his being engaged in his service out of the real. In former times the name (protection) was also given to a certificate given to a sailor to show that he was exempt from impressment into the royal navy".² While law means "That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences".³

M. Syukri Akub and Baharuddin Badaru explained that legal protection for citizens' rights is a necessity because it is an integral part of human rights regulated in the constitution and international human rights instruments ratified by the Government.⁴ As a concept, human rights has a very broad meaning, considering that the issue of human rights is universal, knows no boundaries, territories, politics, economics, social, culture and laws. As a gift, human rights is a fundamental right granted by God Almighty to mankind without questioning social, cultural, political and economic background.⁵ Legal protection is aimed at people in general, both personal and private groups and in their relations with the state.⁶ This is also stated in the first international legal instrument. International legal instruments that explicitly portray equality between men and women are stated in the Charter of the United Nations, which is repeated in the Universal Declaration of Human Rights, then refined and extended in the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economy and Cultural Rights (ICECR).⁷

In essence, human rights do not distinguish rights from the perspective of sex (female or male). Both are human and have the same human rights. This affirmation can be seen in human rights documents, such as in the UDHR, among others, affirmed.⁸ Article 1 "All human beings are born free and equal in dignity and rights" and Article 2 "Everyone is entitled to all the rights and freedom set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status".

The Universal Declaration of Human Rights in 1948, contained universal traits and was directed towards humanity as a whole, which ended all claims that the validity of human rights was only exclusively for certain communities or countries.⁹ The orientation of the Declaration seems to be very individualistic and almost all of the problems begin with the word "everyone", but the social aspects of human rights are not rejected, and are used also in legal forums other than political forums and also have legal ties.¹⁰

Article 3 of the Universal Declaration of Human Rights states that "Every person has the right to livelihood, liberty and independence of a person". Even though Peter Baehr made a note, it was found that the right to livelihood stipulated in this instrument is not guaranteed as absolute rights, but the need for a decent level of life for women encourages the need for legal protection for women in the social, economic and cultural fields. This means that within the scope of human rights law even though there is no binding nature of the

¹ W.J.S. Poerwadarminta. (2003). *Kamus Umum Bahasa Indonesia*, reprocessed by Pusat Bahasa Departemen Pendidikan Nasional. Jakarta: Balai Pustaka, p. 707

² Henry Campbell Black, 1986, *Black's Law Dictionary*, St. Paul Minnesota, West Publishing, p. 1386

³ *Ibid*, p.1379

⁴ Syukri Akub dan Baharuddin Badaru. (2012). *Wawasan Due Process Of Law Dalam Sistem Peradilan Pidana*. Yogyakarta: Rangkang Education, p. 36

⁵ *Ibid*

⁶ P. van Dijk. "Hukum Internasional Mengenai Hak-Hak Asasi Manusia", in Peter Baehr, *et.al.* (2001). *Instrumen Internasional Pokok-pokok Hak Asasi Manusia*, Jakarta: Yayasan Obor Indonesia, p. 7

⁷ C. de Rover., de Boer (translated). (1998). *To Serve and to Protect: Acuan Universal Penegakan HAM*, International Committee of the Red Cross. Geneva. Jakarta: PT. Raja Grafindo Persada, p. 342

⁸ Barda Nawawi Arief. (2007). *Masalah Penegakan Hukum Pidana dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*. Jakarta: Kencana Prenada Media Group, p. 65

⁹ Peter Baehr, *et.al.* (2001). *Instrumen Internasional Pokok Hak-hak Asasi Manusia*. Jakarta: Yayasan Obor Indonesia, p. 59

¹⁰ *Ibid*, p. 62-64

provisions of rights to livelihood, in the international community at large, but proper attention to the fulfillment of rights in the economic, social, and cultural fields are points that cannot be ignored.

Then, Article 5 of the Universal Declaration stated that “No one may be persecuted or treated cruelly without the sense of humanity or any humiliating method of treatment or punishment”.¹ In the scope of this provision, in essence, it covers the prohibition on anyone who has the tendency to prosecute or persecute women”. The goal is that, “there should be no women anywhere in their position, including in the household, who are persecuted or abused, and do not suffer from degrading treatment”.² This objective is ensured, desired by every civilized human being. Here lies one of the social dimensions contained in the protection of women from aspects of human rights which then try to eliminate violence against women.

Legal protection for women based on Article 27 paragraph (1) of UDHR, stated through;

1. CEDAW which was adopted and opened to be signed, ratified, and accessed through General Assembly Resolution No. 34/180 dated December 18, 1979, entered into force September 3, 1981. This Convention is in accordance with article 27 paragraph (1) of UDHR.
2. Beijing Declaration on September 15, 1995. Point 23 of the Beijing Declaration concerns the author, argues “Ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms”. In it, mentioned “take effective action against violations of these rights and freedom.”
3. The Government not recognize discrimination, (2) Condemn discrimination, (3) The state agrees to eliminate discrimination, in all appropriate ways without delay (4) State apparatus, provincial officials and other regions are required to be held responsible if there is still discrimination.³
4. It is clear here that the state has a commitment to protect women from violence. This can be seen from the protection of women's rights, then special commitments, namely protection against discrimination, and even the elimination of discrimination itself.
5. Regarding the protection of women from violence, the concept of legal protection on human rights can be seen in the body of the 1945 Constitution, also signed the convention and ratified it with the Law of the Republic of Indonesia No. 7 Year 1984 on Ratification of CEDAW.

CEDAW (July 24, 1984), which is published in the State Gazette of the Republic of Indonesia Year 1984 Number 29, implies that (1) The State of Indonesia does (after the amendment), namely:

Article 27

- (1) All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions.

Article 28 G

- (1) Every person shall have the right to protection of his/herself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.
- (2) Every person shall have the right to be free from torture or inhumane and degrading treatment, and shall have the right to obtain political asylum from another country.

Article 28 I

- (1) The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried

¹ *Ibid*, p. 155

² *Ibid*, p. 188

³ Gusti Arini. (2005). *Gender dalam Hukum*. Seminar Ilmiah Regional Dies Natalis Universitas Udayana ke-43 dan HUT Fakultas Hukum Universitas Udayana ke 41, di Denpasar 30 Agustus, p.2

under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

- (2) Every person shall have the right to be free from discriminatory treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment. .

Article 28 J

- (1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state.
- (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society .

Some provisions of the 1945 Constitution described above provide guarantees to every citizen for personal security and tranquility, protection from threats of fear, freedom from torture or treatment that demeans human dignity, not to be tortured, not enslaved, the right to be personally recognized before law, the right not to be prosecuted on the basis of retroactive law, free from discriminatory treatment. All of them lead to the principle of equality before the law.

The issue of justice and human rights in the enforcement of criminal law is closely related to legal protection against victims of crime. In the settlement of criminal cases, many victims of crime are found to lack adequate legal protection, both immaterial and material protection, as Geis argues “to much attention has been paid to offenders and their rights, to neglect of the victims”.¹ Legal protection against women in Law of the Republic of Indonesia No. 39 Year 1999 on Human Rights, regulated in Chapter III, especially in the ninth section of Article 45-51 concerning Women's Rights is as follows :

Article 45

Under this Act, women's rights are human rights.

Article 46

The general election system, political party system, system of electing members of people's representative organizations, and the system of appointing executives, judges and civil servants must ensure that women are adequately represented.

Article 47

The nationality of a woman married to a foreign citizen shall not automatically change to that of her husband; rather, she has the right to maintain, change, or re-gain her nationality.

Article 48

Women and men have equal rights to adequate access to and conditions of schooling and education.

Article 49

- (1) Women have the right to select, be selected and appointed to an adequate job, position or a profession, in line with prevailing law.
- (2) Women have the right to special protection in the undertaking of work or a profession that could put her safety and/or her reproductive health.
- (3) The special rights to which women are entitled arising from their reproductive function are guaranteed and protected by law.

Article 50

¹ Gilbert Geis. (1983). *Victims and Witness Assistance Program*, in Sanford H. Kadish, *Encyclopedia of Crime and Justice*, Volume 4, New York : The Free Press : A Division of Macmillan Inc., p. 160

Women of full age and/or who are married have the authority to take both criminal and civil legal action as individuals, unless determined otherwise under religious law.

Article 51

- (1) During marriage, a wife and husband have equal rights and responsibilities with regard to all aspects of marriage, contact with their children, and rights to joint control of assets.
- (2) Following dissolution of marriage, a wife and her former husband have equal rights and responsibilities with regard to all matters concerning their children, taking into account the best interests of the child.
- (3) Following dissolution of marriage, a wife and her former husband have equal rights with regard to all matters concerning joint assets while not undermining children's rights, in accordance with prevailing law.

The Indonesian government has responded to the form of protection of domestic violence by making a policy in the form of statutory provisions, namely Law of the Republic of Indonesia No. 23 Year 2004. Even in this law, it is also mentioned about temporary protection. Temporary protection is protection provided by the police and/or social institutions or other parties, before the issuance of a court protection order. While on the other hand the protection orders contained in the Elimination of Domestic Violence Law in Article 1 No. 6 states that the protection order is a stipulation issued by the court to provide protection to anyone, including victims, witnesses, escorts and friends of victims for the longest time period 1 (one) year and can be extended by court.

IV. Conclusion

Violence against women is a violation of human rights, for that women as housewives must get legal protection with adequate regulations. This can be seen at the national level that the Government of Indonesia has ratified the ratification of CEDAW Convention with Law of the Republic of Indonesia No. 7 Year 1984, and other laws and regulations relating to legal protection for women, including Law of the Republic of Indonesia No. 39 Year 1999; and Law of the Republic of Indonesia No. 23 Year 2004. However, the fact that violence against women as housewives continues to occur, this requires Indonesian government to further improve its socialization regarding legal protection to raise awareness in the community about women's rights in accordance with statutory provisions.

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