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## Ideal Construction of Collective Wealth Sharing

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**Abstract** : This article discusses the issue about collective wealth sharing. In principle of Islam does not regulate the detail of collective wealth sharing except according to *svirkah*, but in the Marriage Law that any wealth is obtained during the marriage period becomes joint wealth, regardless of who works or obtains the assets and in whose name, as long as the wealth is not an inheritance, gift or inheritance, and there is not marriage agreement in terms of joint ownership. With the problem of how the ideal construction of distribution wealth sharing for wife who has income. The research method uses normative juridical research with case and approach regulations . The results of this research proves that distribution wealth sharing for wife who works and does not forget the responsibilities and duties as a wife, then when a divorce occurs, the distribution of joint wealth can deviate from the law (Article 97 KHI) this is in accordance with the Supreme Court decision MA No. 266K / AG / 2010 with the wife's acquisition of 3/4 share, while the husband's remaining is 1/4 share. Meanwhile, in the decision of the Banjarnegara Religious Court Number 1372 / Pdt.G / 2011 / PA.Ba. In this verdict, a wife gets more share than the husband gets, with the husband's share being 2/5 and the wife 3/5 of the share. This decision provides a sense of justice, and this is an ideal construction in the distribution of collective wealth by considering the principle of balance.

**Keywords:** Ideal Construction, Distribution, Joint Wealth,

### *Konstruksi Ideal Pembagian Harta Bersama*

**Abstrak** : Artikel ini membahas masalah pembagian harta bersama, Pada prinsipnya Islam tidak mengatur secara rinci pembagian harta bersama kecuali secara syirkah, namun dalam Undang-Undang Perkawinan bahwa setiap harta yang diperoleh selama masa perkawinan menjadi milik bersama, terlepas dari siapa yang bekerja atau memperoleh harta tersebut dan atas namanya siapa, sepanjang harta itu bukan merupakan warisan, pemberian atau warisan, dan tidak ada perjanjian nikah dalam hal kepemilikan bersama. Dengan permasalahan bagaimana konstruksi ideal pembagian harta bersama bagi isteri yang mendapatkan penghasilan. Adapun metode penelitian menggunakan penelitian yuridis normatif dengan pendekatan perundang-undangan dan kasus. Hasil penelitian ini membuktikan bahwa pembagian harta bersama bagi isteri yang bekerja dan tidak melupakan tanggung jawab serta tugas-tugas sebagai isteri, maka ketika terjadi perceraian pembagian harta bersama dapat melenceng dari undang-undang (Pasal 97 KHI) hal ini sesuai dengan keputusan MA No. 266K/AG/2010 dengan perolehan isteri sebesar  $\frac{3}{4}$  bagian, sedangkan suami sisanya yaitu  $\frac{1}{4}$  bagian. Sedangkan dalam putusan Pengadilan Agama Banjarnegara Nomor 1372/Pdt.G/2011/PA.Ba. dalam putusan tersebut seorang istri memperoleh lebih banyak bagiannya daripada perolehan suami, dengan bagian suami  $\frac{2}{5}$  dan istri  $\frac{3}{5}$  bagian. Putusan ini memberikan rasa keadilan, dan merupakan kontruksi ideal dalam pembagian harta bersama dengan mempertimbangkan asas keseimbangan.

**Kata Kunci:** Kontruksi Ideal, Pembagian, Harta bersama,

## INTRODUCTION

Building a good relationship, is a dream of every husband and wife couple, there are not a few people give up for building a family and the end on divorce, but there are those who defend with reasons for the integrity of the family. Husband and wife help each other for the sake of the integrity of the household. But in this era where wife also works as an effort to help the family economy, so that housing needs can be fulfilled by dividing time to take care of the family. That has common done in this era, so when a wife is the main support of the family's economy as the breadwinner. And when a divorce occurs, the sharing of collective wealth can not be separated, that can also be a division that is not in accordance with the concept of the *Compilation of Islamic Law*, because a wife also works. In such cases it can occur when the wife is the main source of family finances, while the husband is

not working. Divorce has an impact on the birth of distribution "*joint wealth*" (gono-gini) between husband and wife. In principle of Islam does not regulate in detail the distribution of joint wealth, Al – Qur'an, hadith, or the opinion of jurists. Therefore there are different views on this concept among the scholars regarding (ulama) joint wealth, one of them said that Islam does not recognize the existence of joint wealth except in syirkah, what belongs to the husband remains the husband's, the husband's and is controlled by the husband while the wife's property . owned by the wife and controlled by the wife.<sup>2</sup>

But in the book of fiqh there is a discussion about (household furniture). In this discussion, the fiqh expert explained that in the event of a dispute between husband and wife regarding joint wealth ownership, they are divorced or not, for determining the ownership of wealth according to Imam fiqh Imam Syafi'i is as follows.<sup>3</sup> Whereas according to the concept of Imam Shafi'i, husband and wife who fight over wealth in the form of household furniture are required to be sworn of it. If one party wants to take an oath and the other does not want to take an oath, then the contested property will belong to the person who wants to be sworn in. If they both swear, then the assets are divided into two, are the assets household items that are usually used exclusively for men, specifically for women, or which are commonly used together.<sup>4</sup>

The prevailing provisions in the State of Indonesia are that every assets obtained during the marriage period becomes joint wealth, regardless of who works or obtains the assets and on his behalf, as long as the property is not an inheritance, gift or inheritance and or not. there is not marriage agreement in terms of joint ownership<sup>5</sup>. Because the purpose of marriage is forever and they have no intention since the beginning of their marriage to divorce, and if a divorce occurs, they must follow the provisions in the applicable regulations, namely Article 35 (1) of the Marriage Law, which is textually clearly stated in the regulation that asset objects obtained during their marriage, will become joint wealth in the event of a divorce. However, Article 36 paragraph (1) explicitly states that in relation to joint wealth, both parties (husband and wife) can act according to the agreement of the parties, namely husband and wife.

Furthermore, in article 37 of the Marriage Law the states clearly that if a marriage breaks up due to divorce, joint wealth is regulated according to their respective legal provisions. If we look closely at the explanation of Article 37 of the Marriage Law, the legal arguments for division are as follows: First, It is carried out under religious law if religious law is a living legal awareness in regulating divorce procedures; Second, the distribution rules will be carried out in accordance with common law, if the law is a legal awareness that lives in the community; Third, or some other law. So if we as Muslims our provisions are contained in the Compilation of Islamic Law in accordance with article 96 KHI that if there is a death divorce, then half (1/2) of the collective wealth becomes the right of the partner who has lived the longest. Furthermore, Article 97 of the Compilation of Islamic Law states that widow and widower are entitled to joint wealth of half (1/2) of the collective

<sup>1</sup> The compilation of Islamic Law in article 1 letter (f) clearly states: "Wealth in marriage or syirkah is property that is obtained either individually or together with husband and wife while the marriage is in progress and hereinafter referred to as joint wealth, without question being registered in anyone's name. "

<sup>2</sup> <https://pengacaraperceraian.xyz/apakah-istri-sirih-bisa-mendget-hak-harta-gono-gini/>. read also at Firdawaty, Linda. "The Philosophy of Sharing the Assets Together." ASAS 8.1 (2016). See Mesraini, <https://studylid.com/doc/3233528/konsep-harta-bersama-dan-implementasi-di-pengadilan>

<sup>3</sup> Mesraini, Mesraini. "The Concept of Joint Assets and Its Implementation in Religious Courts." AHKAM: Journal of Sharia Science 12.1 (2012). Also accessible inside. <http://journal.uinjkt.ac.id/index.php/ahkam/article/download/980/865>

<sup>4</sup> *Ibid*, Mesraini in Muhammad Idris al-Syâfi'i, al-Umm, Juz 5, p. 160.

<sup>5</sup> Rahmat Raharjo, Reconstruction of the Sharing of Assets Together, <http://www.pa-lewoleba.go.id/>. Retrieved 12 December 2020

wealth, as long as there are no other provisions in the marriage agreement.<sup>6</sup> This is understandable because indeed the understanding of the position of the wife in the KHI is balanced with the position of the husband in household life and the association of living together in the community (vide article 79 paragraph (2) KHI), so the legal consequence is that the amount of joint wealth ownership is also balanced.

The provisions contained in the Compilation of Islamic Law require a balanced distribution in equal portions. The distribution is irrespective of who gets, and who gets the property, the concept of Compilation of Islamic Law states so. This is in accordance with the expected objectives. The Compilation of Islamic Laws provides an equal portion of justice, (*half*) but not necessarily justice seekers (*justice seekers*) feel that way. Because, although the Compilation of Islamic Law does not pay attention to the position of these assets on whose efforts and on whose behalf, the reality in society is that there are still many who cannot forget their services during marriage. Such behavior can spark disputes so that they feel "*aggrieved*" because of the sharing of joint wealth. With these conditions, judges must get serious attention by striving for peace, through mediation, so that justice seekers get real justice. But in reality, there is a research in 2018 that said that as many as 75% of respondents from wives said they agreed that joint wealth were a mixture of assets obtained from the salaries of husband and wife in marriage. Meanwhile, 25% do not agree that the wife's assets are included in joint wealth, and the salary of a wife is still the full property of the wife, because the wife is not burdened with providing for the family.<sup>7</sup> In relation to the distribution of joint assets, judges in hearing and examining a case must be able to consider aspects juridical, philosophical, sociological, so that the justice to be achieved in the judge's decision is justice oriented towards legal justice, moral justice, community justice (social justice). Because the most important factor is juridical factors which are the most important components guided by the applicable laws. Because a judge is an applicator of legislation and must understand statutory provisions and seek laws related to the elements of the case (*rechtsvacuum*). So based on the description above the writer takes a question in this study, namely: how is the ideal construction of collective wealth sharing for the wife who earns income?. So to answer that question require a comprehensive analysis. To answer the question above, the writer uses normative juridical research methods.

## RESEARCH METHODS

In this paper, the writer uses a normative juridical research method, namely research that is based on library research sources or secondary data, namely by conducting research on regulations, literature and court decisions related to the problems in this study. The type of this research is qualitative research this is the research to analyze the form of word descriptions. By using an approach statutory and case.

## RESULTS AND DISCUSSION

### A. Ideal Construction Sharing Of Property

In domestic life, disputes that lead to divorce always cause new problems, In such cases, the ability to manage conflicts is needed, the potential for divorce can occur, they usually want to immediately end the household relationship, without thinking about sharing joint wealth, there are also those who at the time of divorce proceedings include claims for sharing of joint wealth and such conditions currently developing in the community. To share assets together, it is attempted to be fair in the distribution, whether to use the concept of Compilation of Islamic Law with a ratio of each half

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<sup>6</sup> Compilation of Islamic Law Article 97. "A widow or divorcee is entitled to one half of the joint property as long as it is not stipulated otherwise in the marriage agreement"

<sup>7</sup> Fitri, Nurul. Husband's and Wife's Perception of Wife's Salary as Collective Property (Case Study in Bendahara District, Aceh Tamiang District). Diss. UIN Ar-Raniry Banda Aceh, 2018.

(1/2 - 1/2), but this kind of distribution often creates injustice for a wife who feels that her income is far greater than her husband's opinion, because in Islam a husband has an obligation to provide a living to his wife through his assets, and use it for household needs.

in the decision of the Banjarnegara Religious Court number 1372 / Pdt.G / 2011 / PA.Ba.<sup>8</sup> Regarding the distribution of joint wealth, the panel of judges decided that the portion that was not in accordance with the provisions of the prevailing laws, namely in article 97 of the Islamic Law Compilation (KHI), where a divorced widow or widower is each entitled to half of the joint wealth as long as the marriage contract does not specify otherwise<sup>9</sup>. In the verdict, the wife received more shares than the husband, with the husband's share being 2/5 and the wife 3/5. This happens because the husband whose main task is to earn for household and the wife takes care of the household is the wife who plays a bigger role in economic income.<sup>10</sup>

Meanwhile, the legal argumentation, or the basis for consideration used by the panel of judges, is because it is based on existing realities, and this is a form of implementation as a manifestation of justice that lives in society, so that in deciding this case the panel of judges ignored the existing statutory provisions because they were deemed insufficient. provide a sense of justice. So that the ruling gives benefit, this is in accordance with the purpose of Islamic law for "benefit" which means that benefit is a form of justice, and justice is an abstract while in real terms is benefit.<sup>11</sup> And in the Qur'an it is also mentioned in breaking the case must be fair. That justice also contains the notion of consideration (*mauzun*), not lame, justice also means equality (*musawah*), there is no discrimination, justice will also not be complete if the meaning is not paid attention to personal rights and fulfillment of rights to anyone who has the right.<sup>12</sup>

In handling cases the distribution of wealth is not the same as the percentage, for reasons that violate the provisions of the law. So in this case a judge can be guided by the principle of the judge's freedom to find or change the law on problems or cases that do not or do not have legal regulations (*rechtsvacuum*).<sup>13</sup> The sociological legal approach by making new interpretations of other regulations related to the problems faced so that the law does not stagnate, but develops following the development of society as stated by Ibn al-Qayyim al-Jauziyah that law changes due to changes, time, place, circumstances, customs.<sup>14</sup>

There are at least three characteristics consistent with the discovery of progressive law: first, the method of legal discovery *visionary* by looking at legal issues for the long-term interest in the future by looking at case by case; (*case by case*) second, the method of legal discovery that dares to

<sup>8</sup> Prabawati, Menuk Sukma. Sharing of Collective Assets Due to Divorce for Working Wives (Analysis Study of the Banjarnegara Religious Court Decision NUMBER: 1372 / PDT. G / 2011 / PA. BA). Diss. IAIN Purwokerto, 2016.

<sup>9</sup> Andri, Muhammad. "The legal consequences of Sirri's marriage are viewed from Islamic law and Act No. 1 of 1974 concerning marriage." *Justicia Journal* 4.1 (2015): 18-18.

<sup>10</sup> *Op.cit.*

<sup>11</sup> Mahmutarom, HR "*Reconstruction of the Concept of Justice*." Undip Publisher Agency. Semarang (2010). *Thing. 106*; in Andri, Muhammad. *Reconstruction of Alternative Dispute Resolution (Adr) as an Alternative to Settlement of Divorce Disputes in Justice-Based Religious Courts*. Diss. Sultan Agung Islamic University, 2020.

<sup>12</sup> *Loc.cit.* page 53

<sup>13</sup> Legal arguments 1). Article 5 (1) of Law Number 48 of 2009 concerning judicial power. "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and a sense of justice that live in society."; 2). Article 10 (1) Law Number 48 of 2009 concerning judicial power. "The court is prohibited from refusing to examine, try and decide a case that is filed on the pretext that the law does not exist or is unclear, but is obliged to examine and try it."; 3). Article 56 Paragraph 1 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts, reads: "The court may not refuse to examine and decide a case filed on the pretext that the law is not clear or unclear, but obliged to examine and decide. "

<sup>14</sup> Andri, Muhammad. "Implications of Isbath Marriage on the Status of Wife, Children and Marriage Assets in Under-Handed Marriage." *Journal of Indonesian Law Enforcement* 1.1 (2020): 1-96.



make breakthroughs or ideas (*rule breaking*) by paying attention to the dynamics of society, but still guided by law, truth and justice, and is impartial, and sensitive to the fate and condition of the nation and state; third, legal discovery methods that can bring prosperity to society and bring the nation and state out of the downturn and social instability today.<sup>15</sup>

### 1) Break the Promise and Sharing of Collective Wealth

In household life, husband and wife have their respective duties and responsibilities, they carry out the rights and obligations arising from the marriage relationship, because marriage is a sacred bond and agreement in Islam. In an engagement theory where a person can be said to be incurred by a promise (*default*) when that person does:

- a) Not doing what was agreed to do;
- b) Do what he promised, but not as promised,
- c) Do what was promised but too late;
- d) Do something according to the agreement he should not do ;.<sup>16</sup>

So in this case legal action can be taken, namely the sanctions that can be imposed on debtors who are negligent or negligent, there are four types, namely:

- a) Paying losses suffered by creditors or in short, called compensation;
- b) Cancellation of agreement or also known as agreement breakdown;
- c) Transfer of risk;
- d) Pay the court fee, if it comes to trial in front of a judge.<sup>17</sup>

In carrying out the main task of a husband is to earn a living, which is according to the husband's ability to bear "a living, *kiswah* and a place to live for the wife";<sup>18</sup> then husband and wife take responsibility together to carry out their duties in accordance with their obligations.

However, if you look closely, there are differences in the rules between the Marriage Law and KHI regarding when the search for assets of husband and wife is considered joint wealth. According to the Marriage Law, assets in marriage are basically divided into two types: joint wealth and personal wealth. Status of personal wealth can change to be joint wealth if the husband and wife make an agreed upon agreement, which states that all personal assets, whether existing before marriage or after the marriage contract, will become joint wealth controlled jointly. If there is no agreement that they agree on, private wealth remains separate and controlled by each party. Meanwhile, search assets automatically become joint wealth.

According to the KHI, basically there is no mixing of the husband's and / or the wife's assets in a marriage. However, the wife's wealth remains the wife's wealth and the husband's wealth remains the husband's wealth. If this is the case, the husband and wife can make a marriage agreement that is mutually agreed upon regarding the mixing of personal assets and the separation of their respective search assets.<sup>19</sup> If there is no agreement that they mutually agree on, then their personal wealth or

<sup>15</sup> Ahmad Rifai, SH, MH, Legal Discovery by Judges in a Progressive Legal Perspective, Jakarta: Sinar Grafika, Cet. I, 2010, p. 93

<sup>16</sup> Afhami, H. Sahal. Reconstruction of Bank Credit Agreements in the Form of Standards Based on Fairness Values. Diss. Faculty of Law UNISSULA, 2017.

<sup>17</sup> Afhami, Sahal. "Legal Protection for Consumers in the KPR-BTN Standard Agreement (Study of KPR Agreement in Candimulyo Village, Jombang District, Jombang Regency)." @ Trident 2.6 (2019): 18-18.

<sup>18</sup> In the Compilation of Islamic Law, article 80 paragraph (4) states "according to his income the husband bears: a. A living, *kiswah* and a place of residence for the wife; b. Household expenses, treatment costs and medical expenses for the wife and children; c. Education costs for the wife and children. Then in Article 34 paragraph (1) of Law No. 1 Year 1974: Husbands are obliged to protect their wives and provide all the necessities of household life according to their abilities.

<sup>19</sup> KHI Article 47 paragraph (1): "At or before the marriage the bride and groom take place by making a written agreement legalized by the Marriage Registration Officer regarding the position of assets in the marriage." Paragraph (2), "The agreement referred to in paragraph (1) can include mixing personal assets and separating the livelihood assets of each as long as it does not contradict Islamic law."

search assets will remain the private wealth of each party. So the concept of joint property in a marriage can only be realized if it is made through a marriage agreement first.

## 2) Ideal construction for sharing assets together for wives who earn income

In marriage, the law determines and explains the obligations of each party. What achievements have been stipulated in the law in accordance with the provisions set forth in article 77 Compilation of Islamic Law,<sup>20</sup> This means that in carrying out the duties and obligations of husband and wife, there are provisions that must be guided, if a husband and wife neglect their duties, point paragraph (5) KHI then "can file a lawsuit to the Religious Court". Actually, this is a general rule because those who violate will certainly receive punishment. If the one who neglects his obligations is a husband who does not work, does not provide a living, has no place to live, and commits acts of domestic violence, all of which result in a wife's lawsuit, and the process of sharing joint assets can ignore article 97 of the KHI. To file a divorce suit, because the purpose of the marriage is not fulfilled, he often acts in tyranny so that the wife can sue. If it is a wife who neglects this obligation,<sup>21</sup> sanctions for the wife are clear, in neglecting her obligations, and can also lead to divorce from a husband. In this study, juridically, it is clear that the wife has neglected her obligations, the rules are very clear, namely nusyuz. In the sharing of assets with a wife who feels that she is working and carrying out her achievements or obligations has never been negligent to uphold life in her household, then when a divorce occurs, the percentage should change, unlike in the concept of Article 97 Compilation of Islamic Law.<sup>22</sup>

There is a decision that ignores the concept of Article 97 of the Compilation of Islamic Law. One of them is the Supreme Court decision No. 266K / AG / 2010<sup>23</sup>, the panel of judges gives 3/4 of the share to the wife, and the rest (1/4part) to the husband because based on the evidence and facts at trial it turns out that the husband does not provide a living from his work and all joint assets are obtained by the wife from his own work. So that this deviates from the provisions of Article 97 of the Compilation of Islamic Law.

Then as another example is the decision of the Banjarnegara Religious Court Number 1372 / Pdt.G / 2011 / PA.Ba.<sup>24</sup> In this verdict, a wife gets more share than the husband gets, with the husband's share being 2/5 and the wife 3/5. It happens because of the husband, whose main task is to earn for household and the wife takes care of the household, should instead be the wife who plays a greater role in their economic income. So that the judge's decision according to the author is ideal for the distribution of husband and wife's assets to provide a sense of justice and balance in the decision.

From various examples of the decisions above, it proves that the judge also saw the conditions contained in these cases, the judge's decision provided a sense of justice for *justice seekers*. And the verdict is also not in accordance with the provisions of the law, because of the sociological conditions that live in the community. The basis of consideration used by the Panel of

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<sup>20</sup> In the Compilation of Islamic Law, article 77 reads: 1) Husband and wife bear a noble obligation to uphold a *sakinah, mawaddah and rahmah* household which is the basic foundation and structure of society; 2). Husband and wife are obliged to love each other, respect respect, be loyal and provide physical and mental assistance to one another; 3). Husband and wife have the obligation to care for and care for their children, both in terms of their physical, spiritual and intellectual growth and religious education; 4). Husband and wife are obliged to maintain their honor; 5). If the husband or wife neglects their respective obligations, they can file a lawsuit at the Religious Court.

<sup>21</sup> Article 84 paragraph (1) A wife can be considered nusyuz if she does not want to carry out the obligations referred to in Article 83 paragraph (1) except for valid reasons

<sup>22</sup> Compilation of Islamic Law. Article 97 "A widow or divorcee is entitled to one half of the joint property as long as the marriage agreement does not specify otherwise."

<sup>23</sup> Putri Maya Sari, 131209502 (2018) Sharing of Collective Assets (Comparison of Supreme Court Decision No. 412 K / AG / 2004 with Decision No. 266 K / AG / 2010). Thesis, UIN Ar-Raniry Banda Aceh.

<sup>24</sup> Op.cit, Prabawati, Menuk Sukma.

Judges is based on current conditions and to realize living justice in the community, so that in deciding this case the Panel of Judges overrides the provisions of the law. And in accordance with the view of Islamic law that in deciding a case must be fair, justice in Islam is based on balance, equality and non-discrimination, granting rights to those who are entitled, and this is in accordance with the form of justice based on level and appropriateness.

## CONCLUSION

From the description above explains that the sharing of joint wealth for a wife who works to help her husband, and carries out her achievements or obligations as a wife's duty, then, when a divorce occurs, the sharing of joint wealth can deviate from the provisions of the law, namely article 97 Compilation of Islamic law, this is in accordance with the decision of the Supreme Court No. 266K / AG / 2010, and the Banjarnegara Religious Court Decision 1372 / Pdt.G / 2011 / PA.Ba, proving that the judge's decision can see the real conditions in society, that a wife who works and can fulfill her household needs with money from her work, then when there is a divorce, the distribution of joint wealth can ignore the provisions of the law, and this is a fair decision. So the percentage the distribution of joint wealth the wife gets more than the husband.

## SUGGESTION

In this era where the wife also participates for helping to earn money for family needs, so that the wife can fulfill her own needs, and to guarantee the property obtained by the wife, it is better if a marriage agreement is made to provide more legal certainty for the status of assets in marriage, so it can minimize disputes in mutual assets conflicts.

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**Legislations :**

- Law Number 48 of 2009 concerning judicial power.
- Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts.
- Law Number 1 of 1974 Concerning Marriage.
- Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law.
- Supreme Court Decision: MA No. 266K / AG / 2010
- Banjarnegara Religious Court: Number 1372 / Pdt.G / 2011 / PA.Ba

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