



Constitutionality of the Discourse Extending the Term of Office of the President in Indonesia

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Abstract

A constitution is the foundation of the governance of a country. Constitutions regulate the separation of the division of authority of each state institution, the length of service of the president and his deputy as well as the protection of human rights. Currently in Indonesia, there is a discourse on extending the presidential term of office to 3 terms. Responses to this discourse varied. Some argue that each period is to be made with a longer period. Meanwhile, others argue to postpone the general election on the grounds that Indonesia is still recovering from Covid-19. This research is normative legal research with statutory and case approaches, using primary and secondary legal materials collected through literature. The theory of people's sovereignty is a theory that forms the basis of democracy, in which it states that the highest power in a country is in the hands of the people. From the results of this study, changes to the term of office of the President and Vice President and the postponement of general elections are unconstitutional if they are not carried out by amending the Constitution at the will of the people.

Keywords: *Constitution; Length of Service; President; Vice President*

Introduction

Almost all countries in the world have a national consensus, it could be written and sometimes unwritten. This consensus normally includes arrangements for the establishment, distribution of powers and operation of state institutions, and may also include the protection of human rights, thus known as a constitution.¹ E.C.S. Wade and G. Godfrey Phillips stated that the constitution is, "the rules which regulate the structure of the principal organs of government and their relationship to each other, and determine their principal functions."

The constitution is a document that defines the main framework and functions of the governing bodies of the state and describes the principles guiding the activities of these bodies or a text of the framework of the duties and functions of the principles of the organs of government of a country and states the principles governing the organs. In this Republic of Indonesia, what is meant by the constitution

¹ Mahkamah Konstitusi Republik Indonesia, "Sejarah dan Perkembangan Konstitusi di Indonesia", <https://www.mkri.id/index.php?page=web.Berita&id=11776>, 13/8/2015, accessed on 11/10/2022.

is a national consensus which is none other than the 1945 Constitution of the Republic of Indonesia which is the 4th amendment to the 1945 Constitution which was ratified as the state constitution on August 18 1945 (henceforth called the “1945 Constitution”).

In the 1945 Constitution, the presidential institution occupies a significant position, because the President of Indonesia is the head of state as well as the head of government.² The 1945 Constitution only stipulates that the positions of President and Vice President last for five years per period which can then be re-elected once.³ At that time, the re-election of a person as President and Vice President was not restricted. This resulted in the arbitrariness of the general authorities and deviation from the 1945 Constitution which is the state constitution.

Soekarno, who was elected as the first President of the Republic of Indonesia on 18 August 1945, continued to serve as President until 12 March 1967 (nearing 22 years long). During his term of office, Soekarno only changed terms of office twice, as if according to the 1945 Constitution that was in force at his time, Soekarno had to at least change terms of office and be re-elected four times. This deviation occurred due to the issuance of the Decree of the People's Consultative Assembly, TAP MPRS No. III/MPRS/1963 concerning the appointment of the Great Leader of the Indonesian Revolution which appointed Sukarno as President of the Republic of Indonesia for life. The second President of the Republic of Indonesia, Suharto, served as President from 27 March 1968 to 21 May 1998 (31 years long). During this second presidency, Suharto complied with Article 7 of the 1945 Constitution by changing positions every five years. However, Suharto took advantage of the weaknesses in the 1945 Constitution to perpetuate his power.⁴ As he has always been the sole presidential candidate; the only candidate.

To stop the authoritarian leadership system, restrictions on power have been carried out with the first amendment to the 1945 Constitution, which after the struggle, was ratified on October 19, 1999. Followed by the second amendment which was passed on August 18, 2000, the third amendment which was passed on November 10, 2001, and amendment which is the last amendment at this time, the fourth amendment which was passed on August 10, 2002. In this amendment to the 1945 Constitution, using the theory of trias politica by Montesquieu. Namely, the separation of powers by dividing the existing powers into legislative, executive, and judicial powers.

The discourse of three presidential terms first arose when the sixth President of the Republic of Indonesia, Susilo Bambang Yudhoyono (SBY) served his second term (2009-2014). At that time, the issue stopped without being followed up. This discourse reappeared in society when the seventh President of the Republic of Indonesia, Joko Widodo took office in his second term (2019-2024 period). It was first mentioned by the general chairman of the *Kebangkitan Bangsa* Party, namely Muhaimin Iskandar. He stated, at the very least, for now, Indonesia and its people still need President Joko Widodo. This idea was also supported by several chairmen of various political parties. The parties argued that postponing the election needed to be given consideration for the momentum of improving Indonesia's economy during the Covid-19 pandemic.

There are several kinds of ideas in the community about this presidential office. There are those who argue that the president and vice president should serve for 3 terms, some argue that each period is made for a longer period, while others argue that it is a necessity to postpone the general election due to Covid-19 recovery period. There are people within the Republic of Indonesia who want to push for a fifth amendment to the 1945 Constitution. However, will the fifth amendment conflict with the principles of constitutionalism that were built during the reform period and its prevailing principles?

² Juang Intan Pratiwi, Neneng Salamam dan Siti Ulfah, “Pembatasan Masa Jabatan Presiden di Indonesia,” *Jurnal Rechten: Riset Hukum dan Hak Asasi Manusia*, 3, 1 (2021): 18 <https://doi.org/10.52005/rechten.v3i1.23>.

³ Look at Article 7 of the 1945 Constitution (before amendment).

⁴ Pratiwi, “Pembatasan Masa Jabatan Presiden di Indonesia”, 19.

Through the description above, the author aims to examine the relationship between the discourse on changing the term of office of the president and vice president with the theory of constitutionalism and people's sovereignty, the Constitutional Court Decision Number 101/PUU-XX/2022, and to examine the effect of changing the term of office on the president and vice president.

From the above background, the formulation of the problem raised is: What is the constitutionality of the discourse on changing the presidential term of office according to the 1945 Constitution of the Republic of Indonesia? And how does the Constitutional Court Decision Number 101/PUU-XX/2022 provide legal certainty regarding the discourse on changing the presidential term of office?

This research is normative legal research that uses a statute approach to review existing regulations and a case approach by considering the Constitutional Court Decision Number 101/PUU-XX/2022. Therefore, this study uses primary legal materials and secondary legal materials collected through literature.

Discussions

1. Discourse on Changes of the Presidency Term of Office and Constitutionalism

Constitutionality is determined as the basis for making a constitution. When compared to building a house, constitutionalism is used as the foundation upon which is the constitution.⁵ Therefore it can be understood that the constitution and constitutionalism are something that cannot be separated. Constitutionalism. Andrew Heywood divides the concept of constitutionalism into "narrow sense" and "broad sense." In its narrow sense, constitutionality is defined as limited to the administration of government which is limited by the constitution. That is, a state follows constitutionalism if it has state institutions and state political processes that are effectively shaped and constrained by a constitution. At the same time, constitutionalism in its broadest sense is a set of values and an indication of people's political aspirations and a reflection of the desire to protect freedom through a system that controls government power.

C.J. Friedrich explained that constitutionality is an effective institutional system and a legal limitation of government action. In other words, constitutionalism is an effective and orderly institutional system that limits government action. The essence of the concept of constitutionalism is the limitation of authority (power).⁶ M.P. Jain says that a state can have a constitution but not practice the concept of constitutionalism. An example would be a country ruled by a dictator. Because the limitation of power is the essence of constitutionalism which is usually carried out through the system of *check and balances*.

Constitutionalism can be interpreted as a state understanding that protects human rights and how to protect these rights through the formation of a government.⁷ The scope of the constitution is the protection of human rights, the constitutional system, which is regulated in detail about state institutions, their duties and functions. Constitutionalism is also often interpreted as understanding the limitation of state power to protect human rights.

The function of the constitution is also to limit or provide guidance on the extent to which presidential powers are delegated in the exercise of state sovereignty. The concept of constitutionalism calls it the concept of "constitutionality." Then it is a serious violation when the presidential term is extended without changing the constitution. Even if the constitution is amended, constitutionality loses its

⁵ M. Yasin Al-Arif, "Aktualisasi Paham Konstitusionalisme dalam Konstitusi Pasca Amandemen Undang-Undang Dasar 1945," *Pandecta*, 12, 2 (2017): 174 <https://doi.org/10.15294/pandecta.v12i2.9926>.

⁶ Susu Dwi Hardjadi, *Konstitusi dan Konstitusionalisme di Indonesia*, <https://pusdik.mkri.id>, 10.

⁷ Moh. Mahmud MD, *Konstitusionalisme dan Konstitusi di Negara Republik Indonesia*, <https://pusdik.mkri.id>, 2.

foundation if the constitution which regulates the extension of the presidential term violates the principle of limiting powers or constitutionality itself.

Melvin J. Urofsky mentioned in the article Principle Base Democracy that system democracy is:⁸ "system Which is very complicated, even maybe shape management Which is most complicated or difficult. There is Lots of tension or conflict and needed determination from the organizer country to succeed. Democracy No designed for efficiency but for accountability, government Which democratic maybe No can act as soon as possible government dictator but If That happen can arrange that There is publicity for steps the. Democracy is not the end product, but something Which continues to grow and develop."

Countries usually have a national consensus called a constitution or Basic Law. Countries like England, which do not have a text constitution, still have rules that become the constitution.⁹ The constitution acts as the basic law, or law with the highest authority in a country. The constitution is a container that contains agreements about and for the common life of a community. Cheryl Saunders, a Professor of Constitutional Law at the University of Melbourne says that "a constitution is more than a social contract... It is an expression of the common will of a people." He is a reflection of the history, fears, concerns, aspirations and soul of his people.¹⁰ *The New Oxford American Dictionary* describes the constitution as a set of basic principles or precedents that are set for the administration of a state or other organization,¹¹ which serves as a guideline and highest-level reference document in organizational activities, whether in terms of state, organization or other organizations.

According to Donald L. Horowitz, every constitution has two characteristics, mechanical (*mechanical*) and ideological aspirations (*ideological-aspiration*). The mechanical features regulate the duties and authorities of the organs or instruments of the state, and the characteristics of ideological aspirations contain the goals that a society wants to achieve together.¹² Therefore, the 1945 Constitution is a guide for the government in carrying out its duties and functions.

The regulations contained in the 1945 Constitution are legal, in the sense that the holder of judicial authority (judiciary institution) recognizes, applies, and complies with these regulations. This is understood as control over government power so that it is not absolute. In general, the limitation of power is formed through a historical event, with the aim of avoiding the repetition of things that are not in line with the wishes of the people. For example, absolute power (*absolute power*) which is owned by the king of England limited by parliament. The Parliament was formed as a form of resistance by the Barons in England at that time. So that the limitation of state power becomes a culture.

In Indonesia, according to the 1945 Constitution, the president is the head of government and head of state. The President as the head of government has the following powers:¹³

1. Appoint and dismiss ministers and form a cabinet (Article 7 paragraphs 1 and 2);
2. Has the power to become the Commander of the Army, Navy and Air Force (Article 10);
3. Declare war, make peace and sign treaties with other countries (Article 11);
4. Declaration of a state of emergency (Article 12);
5. Appoint ambassadors and consuls and receive credentials from friendly ambassadors (Article 13);
6. Transfer of titles, awards and other rewards (Article 15).

⁸ Melvin J. Urofsky in King Faisal Sulaiman, *Teori Dan Hukum Konstitusi*, Bandung: Nusa Media, 2018, 110.

⁹ Jumadi, "Memahami Konsep Konstitusionalisme Indonesia," *Jurnal Jurisprudentie*, 3, 2, (2016):111.

¹⁰ Hardjadi, *Konstitusi dan Konstitusionalisme di Indonesia*, 4.

¹¹ "Constitution," *The New Oxford American Dictionary*, 2nd edition, Oxford University Press, 2005.

¹² Hardjadi, *Konstitusi dan Konstitusionalisme di Indonesia*, 5.

¹³ Cipto Prayitno, "Analisis Konstitusionalitas Batasan Kewenangan Presiden dalam Penetapan Peraturan Pemerintah Pengganti Undang-Undang," *Jurnal Konstitusi*, 17, 3 (2020): 463.

As such, it could be easily seen how much power the Indonesian President has over the country. Jimly Assidique quotes the words of Lord Acton, “*Power tends to corrupt and absolute power corrupts absolutely,*” which in Indonesian is defined as arbitrary power, and with absolute power arbitrariness is also absolute. This quote from Lord Acton truly reflects the reality of power and that is why this statement is so famous. Indeed, power is often misused for personal interests or benefits or certain groups that usually hold power. The greater the power, the greater the possibility of arbitrariness on the part of the authorities. That is why it is so important to limit authority.

Presidential term limits have been set in many countries around the world. George Washington, the first President of the United States made an unwritten policy of denying a third term in 1796. However, Franklin D. Roosevelt took advantage of a legal loophole regarding the term of office of the President of the United States and won the presidential election three times (from 1932 to 1944).¹⁴ Later, to avoid the same thing happening under President Franklin D. Roosevelt, the term limits for the 2nd president in the United States were established in the 22nd Amendment to the US Constitution in 1951. In addition, many other countries such as Latin America have successfully implemented term limits. During the emergence of a dictatorship in Argentina in 1853, Mexico in 1917 also established term limits for presidents. Indonesia also implemented a presidential term limit in the First Amendment to the 1945 Constitution. The presidential term limit is one of the steps to safeguard constitutionalism, the formation of democracy in society and also constitutional obligations in regulations. presidential term limits.¹⁵

The definition of unconstitutional is something that comes out of what is explained in the constitution or the Basic Law. In other words, it is contrary to the constitution, or in the case of the Indonesian state, contrary to the 1945 Constitution. Therefore, in the opinion of the author, if amendments have not been made to the provisions of the 1945 Constitution which regulate the limitation of presidential periods and presidential reappointments, it can be said that the presidential period is 3 periods is unconstitutional, a form of violation of the constitution and at the same time aspires to the law (*established right*) if indeed it is the will of the wider community. Precisely in Article 7 paragraph (1) of the 1945 Constitution. However, laws and regulations also do not close freedom of expression as set forth in Article 28E paragraph (3) of the 1945 Constitution, which states that everyone has the right to freedom of association, assembly and issuing opinions.

2. Discourse on Changes of the Presidency Term of Office and People’s Sovereignty

Humans as bearers of rights and obligations have dignity as a human being. These rights became known as Human Rights. Article 1 number 1 Number 39 of 1999 concerning Human Rights of the Republic of Indonesia states “*Hak Asasi Manusia adalah seperangkat hak yang melekat pada hakikat dan keberadaan manusia sebagai makhluk Tuhan Yang Maha Esa dan merupakan anugerah-Nya yang wajib dihormati, dijunjung tinggi dan dilindungi oleh negara, hukum, pemerintah, dan setiap orang demi kehormatan dan perlindungan harkat dan martabat manusia* (Human Rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law, government, and everyone for the sake of honor. and protection of human dignity).”¹⁶ Hence, a social structure is formed and the power needed to be used to run the social structure.¹⁷

Likewise, what is written in Article 1 paragraph (2) of the 1945 Constitution which states “*Kedaulatan berada di tangan rakyat dan dilakukan menurut Undang-Undang Dasar* (Sovereignty is in

¹⁴Kristen McKie, “Presidential Term Limit Contravention: Abolish, Extend, Fail, or Respect,” dalam *Journal Comparative Political Studies*, 52, 10 (2019):1502

¹⁵Pratiwi, “Pembatasan Masa Jabatan Presiden di Indonesia,” 18.

¹⁶See Article 1 paragraph (1) Law of The Republic of Indonesia Number 39 of 1999 concerning Human Rights.

¹⁷Jimly Asshidique, “Demokrasi dan Hak Asasi Manusia,” http://www.jimly.com/makalah/namafile/2/DEMOKRASI_DAN_HAK_ASASI_MANUSIA.doc, accessed on 2/12/2022.

the hands of the people and carried out according to the Constitution).” Sovereignty itself has the meaning of supreme power over the state, regional and other governments. In short, sovereignty is the power to form laws and the power to enforce their implementation, and is the highest power possessed by the state.¹⁸ Thus, the theory of popular sovereignty means that the sovereignty of the state is held by the people, and it is the people who are the highest authority in the country.¹⁹ Basically the notion of supreme power in sovereignty has an abstract, single, total and undivided meaning and does not originate from other higher powers.²⁰

Sovereignty of the people has the meaning of the right to self-determination, which describes the system of power in force in the state, which requires that the highest power be held by the people.²¹ Jean Jacques Rousseau, a philosopher, stated "people's sovereignty is a way of solving problems based on a certain system that fulfills the general will, which aims not only at a kind of implementation of government and judicial power, but also at the formation of power."²² Related to the topic above, here we know that the people are also willing to vote for a rule formation.

Democracy, in the etymological sense, comes from the Greek, namely "*Demos* (the people)" and "*Kratos* (government)", which means people's power. Democracy is a form/system of government in which all the people participate in governing by electing members in the government. As the people hold the highest authority in the state, the people have the right to choose members in the government, whether they choose the president, vice president, ministers, or others. Democracy itself can be interpreted as a populist government that empowers the people to exercise their right to self-determination, either directly or through representatives. In short, government by the people, of the people, for the people.

Al-Arif in his book *Actualization of Constitutionalism Understanding* states "If the state adheres to the sovereignty of the people, then the source of its constitutional legitimacy is the people. Meanwhile, if the country adheres to the understanding of the sovereignty of the king, then it is the source of constitutional legitimacy."²³ Indonesia is a country that adheres to people's sovereignty.²⁴ Therefore, the validity of the Indonesian constitution comes from the will of the people. If the majority of Indonesian people want an amendment (change) to the period or term of office of the President and Vice President in accordance with the provisions of Chapter XVI of the 1945 Constitution which regulates Amendments to the Constitution, then this amendment is very likely to be implemented. So that if an amendment is made to extend the term of office of the president, or adding that someone can be re-elected as president or vice president, this will become "constitutional."

3. Constitutional Court Decision Number 101/PUU-XX/2022

The Constitutional Court is a state organ that exercises judicial power in accordance with Article 24C of the 1945 Constitution. One of the many duties of the Constitutional Court is to become "the protector and interpreter of the constitution" to carry out a judicial review of statutory regulations. - invitation to the 1945 Constitution. The Constitutional Court is a court at the first and final level where the decision is final and binding with the application of the *erga omnes* principle. Therefore, there is no legal effort whatsoever and direct decisions have broad binding legal force.

¹⁸ C.F. Strong, *Modern Political Constitution: An Introduction to The Comparative Study of Their History and Existing Form* (Amerika: Prentice Hall, 1950), 6.

¹⁹ Jimly Asshidiqie, *Gagasan Kedaulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia*, (Jakarta: Ichtisar Baru Van Hoeve, 1994), 1.

²⁰ Saldi Isra, *Demokrasi Konstitusional: Praktik Ketatanegaraan Indonesia setelah perubahan UUD 1945*, Jakarta: Jakarta Konstitusi Pers, 2012, 11.

²¹ Look at Article 7 of the 1945 Constitution of the Republic of Indonesia, 4th amendment.

²² Look at Article 7 of the 1945 Constitution of the Republic of Indonesia, 4th amendment.

²³ Al-Arif, "Aktualisasi Paham Konstitusionalisme," 112.

²⁴ See Article 1 paragraph (2) The 1945 Constitution of the Republic of Indonesia, 4th amendment.

On Wednesday, 23 November 2022, the Constitutional Court issued a decision with Number 101/PUU-XX/2022 which is a material review of Law Number 7 of 2017 concerning General Elections (Election Law) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution). The Petitioners argue that Article 169 letter n of the Election Law reads “Requirements to become a candidate for President and candidate for Vice President are: n. have never served as President or Vice President for 2 (two) terms of office in the same position”, contrary to Article 7 of the 1945 Constitution which reads “President and Vice President hold office for five years, and afterwards can be re-elected in the same position, only for one term of office.”

The Petitioners state that Article 169 letter n of the Election Law does not provide legal certainty regarding the nomination of the President and Vice President because it can lead to misinterpretation. This is due to the difference in the use of conjunctions between the words "President" and "Vice President", as articles in the Election Law use the word "or" and articles in the Constitution use the word "and." When referring to Law Number 12 of 2011 concerning Formation of Legislation, the use of the conjunction "and: is used to show cumulative properties. So that the phrase used in the 1945 Constitution, gives the sense that the President and Vice President are an inherent package. Whereas the word "or" used in the Election Law provides an opportunity for interpretation that the President and Vice President are seen separately, so that if an individual has been President for two terms, it does not rule out the possibility for that person to nominate himself and be elected as Vice President in the next period.

Therefore, according to the Petitioners, Article 169 letter n of the Election Law is not firm in nature and gives a sense of doubt to the public, resulting in legal uncertainty. Thus, this also contradicts Article 28D paragraph (1) of the 1945 Constitution which guarantees the right of the population to recognition, security, protection and legal certainty and equal treatment before the law. The petition of the Petitioners is to grant the request, stating the phrase "President or Vice President" in Article 169 letter n of the Unconstitutional Election Law is conditional if the condition "President and Vice President are the same in one term of office" is not given, and to state the phrase " for 2 (two) terms of office in the same position: in that article it is conditionally unconstitutional as long as it does not provide the meaning "consecutively."

However, the Constitutional Court ruled that the articles submitted by the petitioners did not limit their right to vote, because as long as there are presidential and vice presidential candidates from whom they can be elected, there is no restriction or loss of voting rights in general.²⁵ According to his considerations, the things being postulated only raise the presumption of constitutional harm to individuals who have served as President or Vice President for two terms and have the opportunity to be renominated as candidates for President or Vice President. Therefore, the Constitutional Court decided that the petition could not be accepted without considering the substance of the petition because the Petitioners were deemed to have no legal standing to become Petitioners.

It is very unfortunate because it was decided without adjudicating the principal application. Clarification of the meaning of the phrases "or" and "for 2 (two) terms of office in the same position", can cause uproar in the community. Where the possibility of multiple interpretations due to the use of the word "or" in the formulation of statutory provisions shows an alternative nature. Thus, "President" and "Vice President" are two different positions. Supported by the next phrase, which states that two terms of office in the same position. Because previously the President and Vice President could be interpreted as two different positions, unlike the 1945 Constitution which saw the President and Vice President as a package. Therefore, it is possible that someone who has served as President for two terms (10 years) has the possibility to serve again as Vice President for two terms, or some other combination. Meanwhile, the possibility for someone to serve as head and deputy head of the executive power of the country should be expected to cause anxiety in society about the existence of authority in this country. The abolition of

²⁵ See Constitutional Court Decision Number 101/PUU-XX/2022.

authoritarianism, limiting power or setting the term of office of the president is one of the most important cores of the reformation era that was fought for by the people.

According to the author, another matter that is a problem is that the verdict containing the contents cannot be accepted because the Petitioners do not have legal standing. Which is due to Article 169 letter n there is no constitutional disadvantage for the right to vote in general elections. For this, the author also feels it is the right thing. The right to vote is the right of the people to take part in elections consisting of active voting rights for those who vote, and passive voting rights for elected candidates. Therefore, as long as the people are still able to choose between the candidates for President and Vice President, the right to vote remains. However, the rest of the Constitutional Court stated that the matter argued by the Petitioners had created a presumption of constitutional impairment for persons who had served as President or Vice President for two terms of office and had the opportunity to be renominated as a candidate for President or candidate for Vice President. Based on the *argumentum a contrario*, it can be interpreted that those who can submit the application are one or more former Presidents or Vice Presidents for two positions. In fact, if the person wants to run for office, the article in the Election Law has supported it unconstitutionally. In other words, they will close the right to serve again with another position.

Conclusion

Based on the description above, it can be concluded that the amendments to the Constitution regarding the addition of the possibility of re-election of a President and Vice President, postponing general elections, and extending the term of office of the president are in the hands of the people. This is in accordance with the sound of Article 1 paragraph (2) of the 1945 Constitution which states that the Republic of Indonesia adheres to people's sovereignty. The theory of popular sovereignty is a theory that is the foundation of democracy, where it states that it is the people who have the highest power in a country in the hands of the people, every decision made by the government is based on the majority group of people's sovereignty then given the meaning "governance of the people, by the people, and for the people." The fifth Pancasila precept reads "*Kerakyatan yang dipimpin oleh hikmah kebijaksanaan dalam permusyawaratan perwakilan* (Population led by wisdom in representative deliberations)." Therefore, the source of constitutional legitimacy is the people. Many of the people do not agree with the extension of the presidential term, to avoid the possibility of forming a dictatorship and maintain the image of the spirit of the reform period.

Thank You Speech

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