

THE APPLICATION OF JUDICIAL PARDON IN THE INDONESIAN MILITARY JUSTICE SYSTEM: AN ANALYSIS OF SUBSTANTIVE CRIMINAL LAW

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Article History

Received: 15 October 2026

Accepted: 15 November 2026

Published: 02 December 2026

Abstract

The reform of Indonesian criminal law through Law Number 1 of 2023 on the Criminal Code brings a significant shift in the national sentencing paradigm. The orientation of sentencing is no longer treated merely as a means of retribution against criminal offenders, but has evolved toward an approach that places substantive justice, proportionality, utility, societal protection, and respect for human values as essential parts of the criminal law enforcement process. One manifestation of this reform is reflected in the provision regarding judicial pardon. Article 54 paragraph (2) of Law Number 1 of 2023 provides discretionary space for judges not to impose a criminal sentence or action upon a defendant who has been proven to have committed an offense, based on specific considerations. This provision presents complex issues when applied within the military court system, which possesses distinct characteristics compared to general courts. Military justice not only functions to enforce criminal law but is also closely linked to military personnel development, enforcement of discipline, hierarchy, obedience to service orders, and national defense interests. This study aims to analyze the normative standing and material criminal law construction of judicial pardon, as well as to examine its limitations and relevance within the Indonesian military court system. The study employs normative legal research methods utilizing statutory, conceptual, case, and comparative approaches. Legal materials were analyzed qualitatively-normatively through legal interpretation and systematic juridical analysis. The findings indicate that judicial pardon can be positioned as an instrument of individualization of punishment that enables judges to consider the concrete circumstances of the defendant more comprehensively. Its application in military courts requires clear boundaries and parameters so that sentencing flexibility does not undermine legal certainty, the authority of the military judiciary, or the effectiveness of enforcing soldier discipline and professionalism. Judicial pardon can be relevant in specific cases characterized by a low level of culpability, limited impact of the offense, special conditions of the offender, and circumstances indicating that sentencing is no longer required to achieve the objectives of criminal law and soldier development.

Keywords: Judicial Pardon, Material Criminal Law, Military Court, Sentencing

A. INTRODUCTION

Criminal policy is an essential part of state policy in determining acts considered criminal offenses, defining forms of criminal liability, establishing the types and severity of penalties, and determining the objectives to be achieved through criminal law enforcement. The evolution of criminal law thought reflects a shift in orientation from a sentencing paradigm centered on retribution toward one that pays greater attention to the balance between the interests of the state, victims, society, and the individual circumstances of the offender. In a modern perspective, sentencing cannot be detached from the goals of achieving substantive justice, protecting society, preventing crime, rehabilitating offenders, and maintaining social equilibrium. This shift shows that sentencing should not be understood as an automatic consequence that must always be imposed once a person is proven to have committed a crime. Assessing the necessity and objectives of sentencing is an integral part of the criminal justice process.

This paradigm shift gains a clearer normative form through national criminal law reform with the enactment of Law Number 1 of 2023 on the Criminal Code. Provisions in the National Criminal Code show a tendency to afford broader space for judges to perform the individualization of punishment by considering the concrete circumstances of a case. The concept of judicial pardon serves as one of the instruments illustrating this change. Judicial pardon allows judges not to impose a criminal sentence or action even though the defendant has been proven legally and convincingly to have committed an offense. This authority cannot be understood as an erasure of the crime or a justification for the act, but rather as a mechanism to determine whether sentencing remains necessary and proportional when evaluated against the nature of the act, the offender's condition, the circumstances at the time of the offense, and the conditions after the offense occurred. The research proposal grounds this concept normatively through Article 54 paragraph (2) of Law Number 1 of 2023.

Judicial pardon exhibits distinct characteristics from pardons or the removal of criminal responsibility in the general sense. Judges must still conduct a thorough examination of the elements of the crime and criminal responsibility before reaching a conclusion regarding the applicability of a judicial pardon. The unlawful nature of the act and the offender's culpability do not automatically vanish due to a judicial pardon. The difference lies in the sentencing stage, where the judge determines that the purpose of sentencing does not necessarily have to be achieved through imposing a penalty on the defendant. This concept places sentencing as a means rather than an absolute goal, making judicial pardon relevant in criminal law developments that increasingly emphasize proportionality and the individualization of punishment.

The issue becomes more complex when the concept of judicial pardon is placed within the military court system, which possesses distinct institutional and functional characteristics compared to general courts. Indonesian National Armed Forces (TNI) personnel are not only subjects of criminal law but also members of a military organization operating on principles of hierarchy, discipline, obedience to service orders, and official duties. Law enforcement within the military directly impacts the organization's capacity to execute national defense duties. Sentencing military personnel is not merely a reaction to a criminal act, but also carries

developmental and educational dimensions so that soldiers understand their mistakes, reform their behavior, and maintain professionalism if legally and duty-wise they remain fit for service. The research proposal emphasizes that military sentencing is oriented toward development and education, alongside deterrence and retribution.

Applying judicial pardon in military courts presents a need to reconcile two legal interests that do not always align. The first interest is protecting the rights of soldiers as legal subjects entitled to fair and proportional treatment. The second interest is the institutional requirement to maintain discipline, hierarchy, obedience, professionalism, and the authority of the military organization. Applying judicial pardon without clear parameters risks inconsistent verdicts and undermines legal certainty, whereas an overly restrictive application may strip judicial pardon of its corrective function in preventing disproportional sentencing. This dilemma highlights the need for a legal framework capable of setting limits while providing space for military judges to consider judicial pardon.

The status of military criminal law as *lex specialis* adds another critical dimension. While the National Criminal Code forms part of overall criminal law reform, military criminal law addresses specific subjects, acts, and interests unique to military life. The research proposal refers to Article 187 of Law Number 1 of 2023, which affirms the applicability of Book One provisions to punishable acts under other laws and regulations unless specified otherwise. This structure serves as a foundation for analyzing the relationship between general norms in the National Criminal Code and special provisions in military criminal law.

Examining judicial pardon in military courts carries academic relevance because prior research has predominantly discussed the concept within general criminal justice, restorative justice, punishment individualization, and national criminal law reform. The research proposal identifies several previous studies, including judicial pardon as judicial authority in restorative sentencing, the application of *rechterlijk pardon* in the Indonesian criminal justice system, *rechterlijk pardon* as an instrument of individualization, the judicial pardon principle in Law Number 1 of 2023, and the urgency of judicial pardon in military courts. This study aims to deepen the material criminal law aspect and connect it to the specific traits of military courts.

The originality of this study lies in integrating the judicial pardon framework in the National Criminal Code with the characteristics of military criminal law. It treats judicial pardon not merely as judicial discretion, but as a penal policy instrument that must be contextualized within a system with distinct goals and characteristics. The analysis explores whether this authority can be applied in military courts, under what conditions it is relevant, and what parameters are necessary to align its application with military sentencing goals and functions. This focus aligns with the proposal's emphasis on discipline, hierarchy, service interests, and soldier development as crucial factors in determining the relevance of judicial pardon.

The research questions address two main issues: how the normative standing and material criminal law construction of judicial pardon are shaped in the Indonesian legal system and their implications for military courts; and how the limits and relevance of applying judicial pardon in military courts should be evaluated given the military's sentencing functions focused on development, discipline, and service duties

B. LITERATURE REVIEW

Criminal Policy Theory (*Penal Policy*) (Barda Nawawi Arief)

The Criminal Policy Theory explains that criminal policy is an integral part of social policy aimed at achieving public welfare and societal protection. This policy is not merely restricted to the law-making process, but also encompasses how criminal law rules are rationally applied to achieve substantive justice. Sentencing is no longer viewed as an automatic consequence of a criminal offense, but rather as an instrument whose application must consider utility and proportionality. Through a criminal policy approach, instruments such as judicial pardon serve as a corrective mechanism to evaluate whether imposing a criminal sanction is truly necessary in a concrete case. Therefore, the rationality of criminal law enforcement is measured by the extent to which sentencing can integrate social goals, legal balance, and individual protection.

- Societal Protection Orientation: Considerations of the extent to which legal/sentencing decisions can maintain order, justice, and social balance.
- Rational Sentencing Approach: A logical evaluation regarding the relevance and efficiency of imposing criminal sanctions as a means, rather than an absolute goal.
- Utility and Proportionality: A balance between the severity of the act, the offender's level of culpability, and the tangible impact of the sentence on both society and institutions.
- Judicial Corrective Function: The use of judicial discretion to prevent injustice resulting from an overly rigid application of the law (*judicial pardon*).
- Integration of Criminal Law Objectives: Aligning formal rule enforcement with the achievement of substantive justice and social welfare.

Individualization of Punishment Theory (Muladi & Barda Nawawi Arief)

The Individualization of Punishment Theory focuses on the principle that the imposition of criminal sanctions must be tailored to the specific characteristics and individual conditions of the offender. This theory rejects a rigid and uniform sentencing approach based solely on the type of offense committed, as the objective and subjective conditions of each offender always vary. Judges are granted room to evaluate motives, level of culpability, track record, remorseful attitude, as well as circumstances during and after the offense before rendering a verdict. Within this construct, judicial pardon becomes the ultimate instrument of individualization, allowing judges to withhold punishment even when the offense has been legally and convincingly proven. The application of this theory ensures that imposed sanctions are oriented toward offender rehabilitation, proportional justice, and the restoration of conditions without sacrificing legal accountability.

- Offender's Subjective Characteristics: Assessment of personal background, official/social track record, and the motives driving the offense.
- Level of Culpability and Offense Severity: In-depth evaluation regarding the degree of offender culpability and the concrete impact caused by the criminal act.
- Post-Offense Attitude and Circumstances: Indicators of remorse, admission of fault, good faith in mitigating consequences, and a cooperative attitude during legal proceedings.

- Rehabilitative Needs: Evaluation of whether the goals of rehabilitation, education, and behavioral improvement can be achieved without imposing criminal sanctions.
- Judicial Sentencing Flexibility: The authority of judges to select the most just and proportional legal response suited to the concrete circumstances of the case.

C. RESEARCH METHODOLOGY

This study is a normative legal research that positions law as norms or rules prevailing within the positive legal system. Normative legal research is used to examine legal principles, legal systematics, legal synchronization, legal developments, and various concepts and doctrines related to the legal problems under study. This study is descriptive-prescriptive in nature because it does not merely describe the normative status and construction of judicial pardon, but is also directed toward formulating application boundaries and constructions that can offer solutions to legal issues arising within the military court system. This methodological framework aligns with the research proposal, which designates the study as normative, descriptive, and prescriptive legal research.

A statutory approach is utilized to examine provisions related to national criminal law, military criminal law, military courts, military disciplinary law, and the status of military personnel as legal subjects. A conceptual approach is used to analyze the concept of judicial pardon, sentencing objectives, individualization of punishment, judicial discretion, substantive justice, and concepts of military personnel development and discipline. A case approach is employed to understand how criminal law norms are applied in concrete cases relevant to the research issue. A comparative approach serves as an instrument to gain insight into the development of the judicial pardon concept and its relevance within criminal law construction. The research proposal explicitly uses statutory, case, conceptual, and comparative approaches.

Primary legal materials of this study include the 1945 Constitution of the Republic of Indonesia, the Military Criminal Code, Law Number 31 of 1997 on Military Courts, Law Number 34 of 2004 on the Indonesian National Armed Forces as amended by Law Number 3 of 2025, Law Number 25 of 2014 on Military Disciplinary Law, Law Number 1 of 2023 on the Criminal Code, Law Number 20 of 2025 on the Criminal Procedure Code, and relevant military court decisions. Secondary legal materials, consisting of books, journals, theses, research findings, doctrines, and legal expert opinions, are used to reinforce the analysis of primary legal materials. Tertiary legal materials are used to provide explanations and understanding of legal terminology used in the research.

The collection of legal materials was conducted through library research and document studies. The retrieved legal materials were inventoried, classified, and subsequently analyzed based on their relevance to the research questions. Interviews with relevant parties within the Military Court III-14/Denpasar serve as supporting materials to enrich the understanding of institutional practices and perspectives. The proposal lists the Head of the Military Court III-14/Denpasar and several judges at the court as planned interviewees.

The analysis of legal materials was carried out qualitatively-normatively through legal interpretation and systematic juridical analysis. Collected legal materials were selected and organized according to the research problems, then analyzed using statutory, case, conceptual,

and comparative approaches. Deductive reasoning was used to draw conclusions from general principles and norms toward specific issues regarding the application of judicial pardon within the military court system

D. RESULT AND DISCUSSION

Normative Standing of Judicial Pardon in Indonesian Criminal Law

The normative standing of judicial pardon in Indonesian criminal law cannot be separated from the shift in the sentencing paradigm evolving within the National Criminal Code. Sentencing is no longer positioned as a purely retributive reaction to an offender's culpability. The modern sentencing system requires consideration of the objectives to be achieved through punishment, as well as the relationship between the severity of the act, the degree of fault, the circumstances of the offender, the situation of the victim, and the public interest. These conditions demonstrate that the sentencing process requires a mechanism allowing judges to assess whether punishment is truly necessary in a concrete case.

Article 54 paragraph (2) of Law Number 1 of 2023 provides room for judges not to impose a criminal sentence or action upon a defendant who has been proven to have committed a criminal offense. This discretionary space must be understood as a judicial authority granted by law, rather than unlimited judicial freedom. Judges remain obligated to provide rational and accountable reasoning regarding why sentencing is unnecessary. The light or severe nature of the offense, the personal circumstances of the offender, the situation surrounding the offense, and the circumstances after the offense occurred are aspects directly related to assessing the necessity of sentencing.

Judicial pardon can be understood as a concrete manifestation of the individualization of punishment. Individualization of punishment requires that criminal sanctions are not determined solely by the statutory type of offense, but also account for the characteristics of the offender and the concrete circumstances of the crime. Identical offense definitions do not always result in the same need for punishment. Two offenders proven to have committed an offense under the same statutory provision may stand in vastly different positions regarding motive, degree of fault, consequences of the act, post-offense attitude, social condition, and rehabilitative needs. The application of judicial pardon provides space for judges to weigh these differences.

Criminal policy theory provides a conceptual foundation that criminal law must be directed toward achieving broader social and legal goals. Criminal policy does not end at defining prohibited acts, but also includes policies regarding when punishment ought to be utilized and when it is actually unnecessary. Judicial pardon forms part of this policy because it offers a corrective instrument for situations where the formal application of punishment would potentially result in injustice. The proposal places penal policy as one of the primary theories in analyzing judicial pardon.

The theory of sentencing objectives provides an additional perspective that criminal punishment serves diverse purposes, including retribution, deterrence, public protection, rehabilitation, and reform. These goals must be placed in a balanced relationship. Sentencing that fails to deliver relevant benefits to society, the victim, the offender, or the legal system

must be re-evaluated from the aspect of proportionality. Judicial pardon gains relevance in this context because it allows judges to declare that while an offense has been legally proven, the necessity to impose a criminal sentence no longer possesses a sufficiently strong basis in the concrete case.

Judicial Pardon as a Form of Judicial Discretion

Judicial discretion in applying judicial pardon must be distinguished from subjective freedom of action. Discretion is the deliberative space granted by law to judges to choose the most appropriate decision within defined normative limits. Article 54 paragraph (2) of the National Criminal Code provides a normative basis for this deliberative space. Judges do not merely assess whether the elements of an offense are fulfilled, but also evaluate whether sentencing remains a necessary legal response under concrete conditions.

This authority carries direct consequences for the quality of judicial reasoning. Applying judicial pardon requires a verdict capable of explaining the connection between legal facts, the defendant's circumstances, the nature of the act, the level of culpability, and the objectives of sentencing. Generic or unmeasurable reasoning can generate uncertainty and inconsistent application. Discretion lacking adequate legal argumentation risks being perceived as preferential treatment toward the defendant. Transparent and systematic reasoning serves as an essential instrument to ensure that judicial pardon remains strictly within the corridors of the rule of law.

This concept becomes even more critical within the military environment due to the institutional consequences attached to a soldier's status. A decision not to impose punishment can affect not only the individual defendant, but also public and organizational perceptions of discipline and legal authority within the military. Military judges must simultaneously weigh individual and institutional dimensions. This balance constitutes one of the defining characteristics distinguishing the application of judicial pardon in military courts from its application in general criminal cases.

Relationship Between the National Criminal Code and Military Criminal Law

Military criminal law possesses the character of *lex specialis*, regulating criminal acts and liability within the military environment. This special status stems from the necessity to maintain the organizational integrity of the military, which relies on a hierarchical structure and specialized duties in national defense. The principle of *lex specialis* does not mean that military criminal law is entirely severed from developments in national criminal law. The relationship between general and special norms must be viewed based on the scope of applicability of each provision.

Article 187 of the National Criminal Code, as referenced in the research proposal, illustrates the structural connection between the National Criminal Code and criminal provisions found in other legislation. This framework allows general provisions of criminal law to remain an integral part of the national legal system, while special provisions continue to apply as long as they regulate specificities that are legitimately required.

Applying judicial pardon in military courts thus requires an analysis of normative compatibility. The question is not simply whether the concept can be applied, but how it should be positioned within a legal system serving specific institutional goals. The norm of judicial

pardon can become part of the evolution of material criminal law, whereas the parameters for its application must strictly account for the specialized provisions governing military criminal law and the military justice system.

Characteristics of Sentencing in Military Courts

Military sentencing possesses a strong developmental dimension. A soldier who commits an offense is evaluated not merely as an individual violating a legal norm, but also as an organizational member with specialized duties. A soldier's act can directly impact unit discipline, chain of command relations, institutional trust, and organizational professionalism. Consequently, the objectives of military sentencing cannot be detached from the interest of maintaining order within military life.

This developmental function does not imply that military sentencing loses its repressive nature. Criminal punishment remains a legal consequence for the offense committed. Development functions to ensure that the imposed sentence produces behavioral change and preserves the soldier's professionalism. The research proposal explains that sentencing within the military environment is oriented toward development and education, requiring this function to be evaluated when analyzing the relevance of judicial pardon.

This framework prevents the application of judicial pardon in military courts from being equated entirely with general criminal cases. Military judges must evaluate whether withholding punishment can still fulfill the goals of soldier development and disciplinary enforcement. Acts that are objectively minor with a low degree of fault serve as candidates for judicial pardon if the offender's conditions, post-offense circumstances, and service interests demonstrate that punishment is unnecessary. Conversely, acts that directly undermine discipline, hierarchy, obedience to orders, or strategic military interests demand far stricter scrutiny.

Limitations on the Application of Judicial Pardon in Military Courts

The first limitation relates to the nature and severity of the offense. Conceptually, judicial pardon is more relevant to acts with low severity and limited impact. This assessment relies not only on statutory penalty threats, but must also account for concrete consequences, degree of fault, motive, manner of commission, and the relation of the act to official duties. A comprehensive evaluation is necessary to prevent judicial pardon from turning into a mechanism for evading accountability for acts that substantively endanger military interests.

The second limitation concerns the offender's personal circumstances. A soldier's personal condition may serve as a consideration provided it shares a relevant connection with the offense and sentencing goals. Service record, attitude toward the mistake, remorse, efforts to remedy the consequences, and underlying circumstances behind the offense form part of the judicial assessment. These considerations must not devolve into preferential treatment based on rank or position; the principle of equality before the law must remain paramount.

The third limitation pertains to post-offense circumstances. The defendant's attitude after the offense provides critical information regarding the necessity of punishment. Admission of fault, remorse, mitigation of damage, cooperation in legal proceedings, and behavioral changes can indicate that developmental goals have been achieved without punishment. These

conditions must be proven through verifiable facts rather than relying solely on subjective statements.

The fourth limitation involves the interest of military discipline. Applying judicial pardon must not convey the impression that service violations are tolerated without consequences. Judges must consider whether withholding punishment could impair other soldiers' compliance with regulations. Disciplinary considerations do not require every offense to end in punishment, but highlight that maintaining discipline must be balanced with proportionality and fairness.

The fifth limitation relates to service interests and soldier professionalism. Offenses bearing a direct connection to official military duties require cautious analysis, as their consequences often extend beyond the offender-victim relationship. Acts potentially affecting operations, security, military secrets, chain of command, or institutional trust possess broader organizational dimensions. Applying judicial pardon in such cases requires significantly stronger reasoning to justify why punishment is unnecessary.

Relevance of Judicial Pardon to Soldier Development

Judicial pardon holds potential relevance within the soldier development system because criminal law need not always produce suffering as its ultimate goal. Overly severe punishment for minor infractions can produce consequences disproportionate to developmental aims. Losing personnel who retain capability, integrity, and potential for reform presents its own set of challenges for the organization. Judicial pardon serves as an instrument to avoid disproportionate sentencing when concrete circumstances indicate that rehabilitation and restoration can be achieved without imposing a sentence.

The developmental perspective cannot be detached from disciplinary interests. A soldier granted a judicial pardon must still understand that the act constituted a proven criminal offense. A pardon does not transform an unlawful act into a justified one. This distinction is critical to prevent judicial pardon from being misunderstood as an erasure of guilt. Judges must explicitly state in the verdict that the decision not to impose punishment is grounded in an assessment of sentencing necessity, not because the defendant's act was considered lawful.

This framework demonstrates that judicial pardon can serve as a mechanism reinforcing the individualization of punishment in military courts. Judges can adapt legal responses to the severity of the act and developmental needs without sacrificing the principle of criminal responsibility. Proportional sentencing creates a balance between law enforcement needs and the interest of retaining personnel who remain fit for development.

Ideal Construction for Applying Judicial Pardon in Military Courts

An ideal construction for applying judicial pardon requires clear parameters to prevent judicial authority from generating disparities. The first parameter is certainty regarding the proof of the offense and the defendant's guilt. Judicial pardon becomes relevant only after the judge is satisfied that all statutory elements and criminal liability have been established. Scrutiny of legal elements must not be compromised simply because pardon is being considered.

The second parameter involves assessing the severity of the act. Judges must weigh the consequences, losses, victims, motives, manner of execution, and the relation of the offense to

service duties. This evaluation allows for classification regarding whether a case possesses the degree of severity that permits judicial pardon.

The third parameter is evaluating the soldier's subjective circumstances. Personal condition, service history, post-offense attitude, remorse, and efforts to repair harm serve as valid considerations. These factors must possess legal relevance and must not be applied discriminately.

The fourth parameter requires assessing sentencing objectives. Judges must explicitly address whether imposing punishment remains necessary for retribution, deterrence, development, protection of military interests, or other criminal law aims. Reasoning for a judicial pardon gains a solid foundation when judges demonstrate that these objectives can be fulfilled without imposing punishment.

The fifth parameter involves evaluating the impact of the decision on discipline and service interests. Judicial pardon must not erode the authority of military law. This assessment is conducted by examining the type of violation, defendant's position, duty connection, potential unit impact, and consequences for broader soldier compliance.

The sixth parameter is the obligation to provide adequate legal reasoning in the verdict. Judges must articulate all grounds utilized in granting a pardon. Transparent reasoning functions as a supervisory mechanism over discretionary power. Well-reasoned verdicts guide jurisprudence development and prevent the inconsistent application of judicial pardon.

This structure aligns with the proposal's conceptual framework, which positions offense characteristics, offender subjective conditions, developmental objectives, and disciplinary enforcement interests as core factors determining the application of judicial pardon.

E. CONCLUSION

Judicial pardon or *pemaafan hakim* represents a significant development in Indonesian criminal law reform, demonstrating a shift in sentencing orientation toward a more proportional, humanistic, and goal-oriented approach. Its normative standing in Law Number 1 of 2023 provides discretionary space for judges to consider not only the proof of the offense and the defendant's guilt, but also the actual necessity of imposing a criminal sentence. Judicial pardon does not erase the unlawful nature of the act or the offender's culpability, but rather offers the possibility of withholding punishment when concrete circumstances indicate that sentencing is unnecessary or disproportionate to achieve the objectives of criminal law.

The application of judicial pardon within the military court system carries relevance because military criminal law likewise recognizes an orientation toward soldier development and education. Discretion for judicial pardon can be utilized in specific cases characterized by low severity, limited culpability, favorable personal circumstances of the offender, demonstrated remorse and remediation, as well as conditions showing that sentencing goals can be attained without imposing a penalty. Nevertheless, its application must continually account for the specialized characteristics of the military environment, particularly discipline, hierarchy, obedience to orders, professionalism, and service interests.

Applying judicial pardon in military courts requires clear normative parameters and well-reasoned verdicts. Judges must establish the proof of the offense and guilt before entering the

phase of considering a pardon. Evaluating the severity of the act, the soldier's subjective circumstances, post-offense conditions, sentencing objectives, impact on discipline, and service interests forms an essential part of determining the relevance of a pardon. This construction is necessary to maintain a balance between individual justice for the soldier and institutional interests in upholding military discipline and professionalism.

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