

# Prosiding Understanding Civil Society Through the Perspective of Ushul Fiqh (Basic Principle in Islamic Law)

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# Understanding Civil Society Through the Perspective of *Ushul Fiqh* (Basic Principle in Islamic Law)

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## ABSTRACT

The problem of civil society has become an issue among the academicians. The western terminology becomes an attention: is there any compatibility with Islamic teachings? This article explores civil society in the historical records of Islam and *ushul fiqh* (basic principle of Islamic jurisprudence). Based on historical-normative studies, it is found that there is a compatibility between civil society and Islamic teachings. The principles of civil society, such as democracy, pluralism, justice, and tolerance, do not conflict with sharia or Islamic law. Moreover, in Islam, these criteria must be owned by leaders and all citizens of a country. Because civil society is aimed to provide benefits for the country, it is compatible with some maxims in *ushul fiqh*, such as *tasharuful Imam 'ala al-raiyah manutun bi al-mashalah*, and *hukmu Hakim, irzamun yarfa'ul khilaf*, which means the country has to be able to create policies that generate common welfare and benefits for society in general.

**Keywords:** *Civil society, pluralism, Islamic law, justice*

## 1. INTRODUCTION

Democratic countries are those that emphasize the importance of citizens' existence. Referring to World Forum on Democracy at the end of June 2000 in Warsaw, Poland, it is concluded that there are three main prerequisites that are essential for democracy formation. They are, firstly, the existence of a powerful state; secondly, a powerful civil society; and thirdly, strong economy.[1] These three things are sustain the power of democracy.

Nahdhatul Ulama, the largest traditional Muslim organization in Indonesia, formulated in 1935 the so-called *Mabadi 'Khairu Ummah*[2], or the foundations for a civilized society", which include several principles. First, *Ash-Shiddiq*, which is honesty, trustworthy, sincerity, and openness. Honesty is when there is no contradiction between utterance, deed, speech and mind. Honest, in this case, means not being fickle, not distorting facts. Second, *Al-Amanah wal Wafa'bil'ahd*. *Amanah* includes all the responsibilities that must be carried out whether with or without a contract. While, *al-Wafa' bil 'ahd* is merely about deal. The combination of these two terms are characters of trustworthy, loyal and fulfilling a promise. Third, *Al-adala'* is being fair (*al-'Adalah*), meaning being objective, proportional and obedient to a given principles. This point requires that people embrace the objective truth and put everything in its place. Fourth, *al-Ta'awun*, or work together; it is the main principle in *people-lives-system*. Fifth, *Al-Istiqamah*, means means steady and not shifted from the path (*tariqah*) in accordance with the provisions

of Allah and His Messenger, especially given by the *salafus-salih* (the earlier generation of Muslim scholars) and rules that are mutually agreed upon.

The spirit to enact civil society (civil society) was already big in the pre independence period. Even after Indonesia gained its independence, there were many *Orsospol* (social and political organizations) emerged. But unfortunately, in the midst of the many social organizations, in the era of *Sokamo* and *Suharto*, the *Orsospol* that were not in accordance with Indonesian principles were submerged or even downsized. So it can be stated, as an expert on constitutional law *Mahmud MD* said it, that in the past, people's rights were completely suppressed and people were more burdened with obligations (towards the interests of the authorities).[3] After the New Order collapsed in 1998, reformation era (post-Suharto era) were emerged. During the reformation period, there was significant progress, namely freedom of speech and association became wider. This has put civil society into "something" that began to exist and felt by the Indonesian people.

The questions that arise are how to build civil society in Indonesia? What criteria that Indonesia should have, so that civil society can be practiced well in the country? How does Islam see civil society? Are these principles in accordance with the teachings of Islam?

## 2. METHOD

This article is a descriptive qualitative research, using inductive analysis. Through a historical-normative

approach, it will gain an understanding of the history of civil society in the early establishment of the teachings of Islam when the Prophet Muhammad was sent, as well as and its application in Indonesia.

### 3. DISCUSSION

#### 3.1. Definition of Civil Society

Civil society was originally a philosophical concept that is related to the state system. Historically, this concept began from the thought of Aristotle, which was later developed by Marcus Tullius, an Ancient Roman philosopher (106-43). He coined the term societies civilizes, a community that dominates other communities in the concept of a city state. In European tradition, until seventeenth century, the notion of Civil Society was considered to have the same meaning as the state, which is a group controlling other groups.[4] Civil society that was emerged in the West, is converted to civil society, a condition of the people in the city of Medina formed by the Prophet Muhammad, who upholds the principles of civil society emerged from the west. The term was first put forward by Dato Seri Anwar Ibrahim to characterize a society that already has advanced civilization, a civilized society, which upholds human values, upholds democratic values, and respects human rights.[4]

Al-Farabi (950 w), has<sup>11</sup> concept of main society / al-madinah al-fadhilah), in his book *Mabadi 'Ara' Ahl al-Madīnah al-Fadhilah*, as quoted by Din Syamsuddin.[5] al-Farabi described the main community as "a society through human society within it, aiming to uphold unity, so that real happiness can be realized". Al-Farabi stressed the need for social collectivity with collective ethics in achieving the highest ethical value, namely ultimate happiness (al-sa'adah al-haqiqiyah)

Civil society can also be identified with the Holy Brotherhood (Ikhwan al-Shafa), a concept offered by underground-philosophers, allegedly having a background of Syiah Ismailiyah. Rasail Ikhwan al-Safa, in his work, discusses the basic principles of the main community with the term "al-madinah al-fadhilah al-ruhaniyah / the main spiritual community". This concept is indeed a little different from al-Farabi, the Ikhwan al-Safa emphasizing the role and political functions of society. The main community is the ultimate goal of a political regime, because politics must be organized with and led to ethics (morals). Morals is the psychological politics/ siyasah al-nafs) which is the basis for all politics.[5]

#### 3.2. Civil Society Criteria

Several features of civil society which is free public sphere, the freedom public space is as a means of expressing their speech. In the historical record of Indonesian civilization, it will be found that the founding

fathers advocate philosophy that human rights are accommodated in the Indonesia, one of them is freedom of speech. This is like Muhammad Hatta and Muhammad Yamin, although they agree with the principle of kinship and opposed to individualism and liberalism, but in framework of preventing the emergence of a state of power (machtsstaat), it is necessary to include certain articles on human rights into in the constitution. Regarding this point, it is stated, as quoted by Jimly Ashshiddiqie:[6] ".... It would be good in one of the articles, for example, the article concerning citizens, it is also mentioned that besides the given rights, example, each citizen should not be afraid to speak up. It is necessary to mention here about the right to gather and meet or write and etc. the Foremuering or the text may be submitted to Panitia Kecil. However, this load must be maintained, so that our country does not become moneter, because we lay our country on the sovereignty of the people."

The second characteristic, democracy. This criterion is a part of the etiquette (steps) that upholds of civil society word, where in living a life, citizens have full freedom to do their daily activities, including interacting with their surroundings.

The third characteristic, tolerance. Tolerance is maturity part of a nation. Tolerance implies harmony and freedom for religious adherents to practice their respective religions and beliefs.[7] Believers are secured by the state to practice their religion. All elements of the nation must respect and trust one another.[8] Practicing religion for its adherents has the consequences of subservience has two definitions and responsibilities, namely (1) vertical obligation and responsibility, it obligates and responsible directly between the individual with his God; (2) horizontal responsibility, by making use the teaching of religion and social life in associating, which it is realized in various kinds of relationships. Although from they were born it is a relationship between humans, but the essence is not much different from the first obligations and responsibilities, which are both because of God and for God.[9]

To make tolerance between religions in Indonesia be realized properly, there are some formula<sup>6</sup>ns. First, frank witness and mutual respect. Second, the principle of religious freedom. The principle of freedom includes the principle of individual freedom and social freedom. It implies that every person has freedom to embrace religion he desires, even the freedom to convert. However, individual freedom without social freedom has no meaning at all. Third, the principle of acceptance, which is willing to accept others as they are. In other words, do not rely on our own views. Fourth, positive thinking and trustworthy. Thinking positively is an attitude that becoming human character. And by embracing each other's trust, all negative prejudice will be avoided to other religions adherents.[10], [11], [12]

The fourth characteristic, pluralism, it is objective condition in a society which is within a number of different groups, both economic strata, ideology, faith, and ethnic background.[10] Philosophically, plurality is built from the principle of pluralism, attitudes, understanding

and awareness of the reality of diversity, diversity as a necessity, as well as actively participating in giving significance to the context of the formation and realization of national and state life towards a humane and dignified state.[13] Pluralism must be deeply known by creating social order of society that respects and accepts diversity in daily life context.[14]

Indonesia is a country that has a high plurality, it proven by some factors, as stated by Ichtijanto SA.[15] (1) geographical situation, which is the main factor for the establishment of plurality of ethnic groups. Indonesian territory consists of approximately 1890 islands scattered in an equatorial area approximately 3000 miles from East to West and more than 1000 miles from North to South. Regarding of many ethnic groups, Hildred Geertz said there were more than 300 ethnic groups, each has different languages and cultural identities. Skinner said there were more than 35 ethnic groups, each has different languages and tradition. (2) "Indonesia is located between the Indonesian and the Pacific Ocean, it influences the creation of religious plurality in Indonesian people". "The first influences affected Indonesian are the influence of Hindu and Buddhist culture from India, Islam, and Christianity which affect pluralistic Indonesian culture "The influence of Islamic culture began known by Indonesian since the 13th century, but it is started expanding widely throughout the 15th century." The influence of Western culture began to come in Indonesia through the appearance of the Portuguese at the beginning of the 16th century. The missionary activities that accompanied their trading activities quickly succeeded in introducing the influence of Catholicism in the area. When the Dutch succeeded in pushing the Portuguese out from the area about in 1600, the influence of Catholicism was immediately replaced by the influence of Protestantism. However, the Dutch attitude was more lenient of religion compared to the Portuguese has resulted the influence of the Protestant religion to only be able to enter areas that were previously not strong enough to be influenced by Islam and Hinduism, as well as the Dutch succeeded in infusing their political power for no less than 350 years.

The philosophy of Indonesia is Pancasila, comprising the formulation of Unity in Diversity which originated from the philosophy of Mpu Tantular during Majapahit. The plurality of religion has been covered in the Pancasila as the first precept, the almighty God. So it can be stated that the values of Pancasila cannot be separated from religious values. In other words, according to Alamsjah Ratu Perwiranegara, "Do not convert Pancasila to religion, and 4. not convert religion to Pancasila".[16] Indonesia is a religious nation state that respects and fosters all religions adhered by its people as long as it is humane and civilized. Therefore, there should be no policies which let discriminatory laws (privileging one and demeaning the other), in religious life in group.[3]

Developing community cohesiveness as a pluralistic nation shows the awareness of togetherness as a nation. It is also necessary to develop a tendency to seek social consensus, through attitudes of mutual understanding and mutual respect.[17]

Religious diversity is like the ocean that surrounds thousands of Indonesian islands. The sea can function as a separator between one island and another, but it can also be seen as a bridge that connects one island to another if we are able to manage and navigate the seas well. As well as religious diversity, it is functioned as a sorter and at the same time engage the nation depending on how to manage it.[18]

Activating religious inclusiveness. Inclusive, in the sense of accepting and realizing the presence of other religions in a life together and as a state, does not make believers of the religion lose their identity, the existence of adherents. [10]

The fifth characteristic, social justice. Social justice has been explicitly and implicitly stipulated, in Article 1 paragraph (3) of the 1945 Constitution, the results of the amendment state that Indonesia is a "rule of law" without using word *rechtstaat* in brackets, as mentioned in the explanation before it was being amended. It must be interpreted that the Indonesian legal state accepts the principle of legal certainty (the emphasis on *rechtstaat* ) as well as the principle of a sense of justice (the emphasis on the rule of law) . Such an understanding is also emphasized in article 28H which emphasizes the importance of benefits and justice.[19]

### 3.3. *Civil Society in Islamic Perspective*

In fact, civil rights have had the basic concepts of Islam, such as issues of social justice, the issue of legal guarantees, freedom of religion, freedom of business, social welfare, protests of behaviour that harm others.[20] The cosmopolitan nature of Islamic civilization has been seen since its inception. The civilization was started with the ways of the prophet Muhammad to organize Medina people until the emergence of early Muslim encyclopedists (like al-Jahiz) in the third century Hijri. It reflects the process of absorbing with other civilizations around the Islamic World at that time, from the remnants of ancient Greek civilization in the form of Hellenism to the civilization of children Indian continent.[21]

For this reason, it would be nice for Muslims to be able to explore civil potentials to build a political fiqh in the context of fighting fiqh which has been oriented to supremacy.[22] In this context, civil society is used as a power of State. It should not be the opposite where the ruler as the power holder uses his power to suppress his people.

First, Freedom of Speech. The principle of freedom of speech has been accommodated in Islam. This can be referred to a statement referring to what Umar bin Khattab said (40SH-23H / 584-644M), "since when did you enslave humans, while they were born by their mothers in freedom?". What was stated by Umar implies that humans when they were born have freedoms, they are liberated from pressure and colony. So, it can be known that freedom of speech and association are parts of human rights that cannot be eliminated.

In fact, God himself gives freedom to humans to speech, encourage, and forbid humans to share the goodness, and mutually to reject harmful things. This is mentioned in surah Ali Imron verse 104.[23] Syaikhul Islam Ibn Taimiyah, in book *Majmu 'Fatawa* book related to verse 104, mentioned the meaning of الأمر هو الفعل is الأمر وإرادته meaning that " Truthfully command (*al-amr*) are ask and have willing to do something"[24]. Whereas word <sup>12</sup>منكم above, from the interpretation of al-Qurthubi, "*Al-Jami 'al-Ahkam al-Qur'an*" the commands are for knowledgeable people, and not all humans are knowledgeable.[25] This means that human beings, whether they are knowledgeable or not, have the right to speak, give speech, and explore what they see, hear and understand in their minds.

In addition to the above verse, freedom of expression and speech can be seen in surah Al-Isra verse 70. This verse speaks that humans have advantages and virtues. One of the virtues is the gift that God gives humans in form of mind.

In historical record, once at a time, the Prophet gave a chance to someone who collected debt from the Prophet using harsh words, even though his friends rebuked him, he said: "let it be, it is his right".[26]

In addition to the history above, according to AM Saefuddin,[27] Umm Salamah, one of Rasulullah's wives, is the one where Rasulullah was on important and strategic matters. Many of her suggestions and ideas had led Muslims to the victory and success in resolving disputes among Muslims and various problems of the Muslims. This treatment increases the dignity of women in their rights in contributing to public affairs and in giving speech.

"Umm Hani once guaranteed someone's safety when that person fled from the enemy army. This led to a dispute with Ali ibn Abi Talib who still wanted to kill him. Umm Hani rushed to meet the Messenger of Allah to report and tell the stance of his brother, Ali bin Abi Talib. The Prophet turned out to support the establishment of Umm Hani 'by saying, "We have guaranteed the salvation of those whom you guarantee, O Umm Hani ...."

If it is examined through ushul fiqh analysis, it can be concluded, in the context of al-ashl al-kulli , freedom of speech is limited, and it should be through bridge. So that it can be stated, in multilevel theory, ahkam kulliah 'amm (the general principle) is that it must go through organizations / mass organizations / sospel. The existence of an organization is an obligation, so the speech can be accepted by the authorities. This is as in the rules of ushul fiqh , your orphan al-wājib illā bihī fa huwa wājib, it is imperfectly obligations unless the means leading to there becomes mandatory. Because freedom of speech is a right, and this right can be heard only through a bridge, the bridge becomes mandatory. That is why an organization to express a speech becomes a must.

Second, democracy. Islam as a religion that brings mercy to all nature, has broadly mentioned about the problem of democracy. This is reflected in the Qur'an surah Ali Imran verse 159 and surah Asy-Shura verse 38. These verses

explain that in all matters whatsoever should be deliberated to seek consensus. This means, that Islam is a religion that provides democratic space for its followers.

In Mualana Abu A'la Almaududi views,[28] the meaning of shura or the legislative assembly, must include the following principles: (1) the chief executive of the government and the members of the assembly must be elected through free and independent elections by citizens. (2) the citizens and their representatives must have the right to criticize and express their speech freely. (3) The real condition of the State must be revealed to the citizens without any hidden facts, so that the people can decide whether the government has worked well or not. (4) There must be a strong guarantee that only those who obtain popular support will govern the State and those who do not receive the support must lay down their power.

In the Islamic civilization history, Once Caliph Umar bin Khattab became a leader. The Caliph Umar bin Khattab suspected a family of drinkers. Then one day the raid on the young men 's house by the Caliph Umar himself, by jumping over the walls of the house and they were caught red-handed. They pleaded guilty, but they also accused Caliph Umar of making even greater mistakes. In front of the Caliph Umar they said: "O Amir al-Mu'minin, we did violate one of Allah's prohibitions, but you did three kinds of violations. God forbid spying (wala tajassasu) but you have been spying on us. Allah has ordered to entry the house from the door (wa'atul buyuta min abwabiha) but the lord entry this house by jumping over the wall. God forbid entering the house of a person without asking permission (la tadkhulu great-grandfather ghairo buyutikum hatta tasta'nisu wa tusallimu ala ahliha) but the master entered our house without asking permission ".[26]

In another story, the Caliph Umar once made a claim on the 'Rabdzah' grazing land for the cattle grazing area belonging to the weak group, and forbade rich farmers from controlling the area. Included in those who were banned were Abdurrahman bin 'Awf and Usman bin Affan. Caliph Umar claimed the area on humanitarian grounds (in this case protecting the fuqara) who were threatened in the competition between the able and the weak. The reason was revealed, "If the livestock can die, they can still live on their own property, but if the weak (fuqara) livestock die (due to lack of food), they will come with their children to face Amirul Mukminin to obtain social security ..." All wealth essentially belongs to God, and all human beings are servants of God. In the name of Allah, I will not make a claim even on a piece of land from anyone, if I do not have the burden of the task of upholding the religion of God ... "[26]

<sup>14</sup>From the stories above, it can be concluded that the principle of democracy was common in the early days of Islam. So it is no exaggeration, if Marcel A. Boisard in his book *L'Humanism De L'Islam*, stated that the Prophet Muhammad was a humble leader and statesman who was bright, firm and democratic. He is also a gentle and honest diplomat.[29]

If it is examined in the ushul fiqh analysis, it can be concluded that the existence of freedom of speech is limited, and should be through a bridge. So that it can be

stated, in multi level theory, *ahkam kulliah 'amm* (the general principle) is the existence of community participation. When drawn deeper, then the principle is beneficial. Because without community participation, the values of goodness will not be gained. The government will act as a dictator and reject human values. So, it can be stated that with the participation of the community, will prevent damage (دفع الضرر) as in the rule *درء المفاسد اولى من جلب المنافع*.

Third, tolerant. Tolerant is an attitude developed in civil society to show mutual respect and respect (activities) done by others.[34] Even in Islam, as in a hadith, *bu'itstu abal hanafiah as-sambah*, which means "I am led for a religion that is straight and tolerant". Therefore, it is not permissible for Muslims to ridicule others, who knows those being mocked is better than those who are mocking. As in the surah al-Hujurat verse 11. The verse implies that fellow human beings are forbidden to mock each other both in terms of thinking and acting, because each person has a different perspective in looking at a thing.

If it is examined in the analysis of *ushul fiqh*, it can be concluded that the existence of freedom of speech is limited, and should be through a bridge. So that it can be stated, in multilevel theory, *ahkam kulliah 'amm* (general principle) is the principle of brotherhood / *ukhuwwah*. This principle of brotherhood implies mutual help, sharing, and mutual respect.

Fourth, Pluralism. When referring to the statement of Ibn Khaldun (1332-1406), sociologist and Muslim historian of the Middle Ages, revealed that the relationship of ethnicity (*ashabiah*) and religion was a factor to unite, so that a dynasty could reach the peak of glory. Emile Durkheim (1885-1917) in his study of religion concluded that religion serves to strengthen solidarity in society.[8] When put into context in a pluralistic society, *sharia* must be able to accommodate the interests of minorities, respecting them as part of the basic rights that must be recognized. It is necessary to foster understanding of pluralism between religious communities in many religious societies. It is necessary to develop thoughts that have theological perspective patterns that are better to give appreciation and respect to various variants of religious communities in Indonesia.[30] Limitation of pluralism in Islam is only in the area of pluralism in the political sense, that is, there is no religion that takes precedence in a State. The state is neutral and respects religious plurality.

Regarding pluralism, Surah al-Hujurat verse 13 can be used as a reference. In another verse, with the same substance about pluralism that is QS al-Baqarah verse 62. The verse implies that fellow creatures of God, both respect and may not feel the most righteous themselves. For this reason, what needs to be developed is the inclusiveness of Islam in social relations. Characteristics of Islamic inclusiveness is the understanding of Muslims of religious plurality, religious openness, in the sense that Islam rejects absolutism and exclusiveness, and highly appreciates plurality.[31] Therefore, what is necessary to be an attention is "in valuing someone with the truth, not the truth with someone or *ma'rifah al-rijal bi al-haq, la al-haq bi al-rijal*".[32]

Fifth, justice. The principle of equality, size and proportion leads to natural beauty and kindness in humans. According to Islamic doctrine, justice also shows the basis and purpose of all God's revelations. Justice can be viewed on two levels: God's justice towards His creatures and justice between humans and other humans. The Prophet Muhammad was obviously commanded by the God to bring justice between humans.[29] This is as mentioned in Surah Al-Mumtahabah verses 8-9. Justice is intended to mention a balanced and proportional distribution of the rights and obligations of every citizen which covers all aspects of life. With justice, social jealousy will not be found, because social jealousy starts from an obsession about economic growth and underdevelopment.[33]

In the context of justice, as addition to the above verses, history has also recorded the attitude of the Prophet and his friends in making a decision. This is like Umar bin Khattab's statement which deserves to be an afterthought, he said, "In Islam no one can be put in prison unless based on justice." [28]

Justice is a part of Islamic principles, known as *ummatan wasathan*, a fair people. So, putting justice is part of the command of religious teachings. Even in the hadith it is stated that they (authorities) have rights to you (the citizens), and you have rights to them as well. It is As long as they are asked to be compassionate, they are affectionate, if they keep their promise, and if they make legal decisions and they act fairly. And for those who does not do, he gets the curse of Allah, angels and all.[34]

In the history, it is recorded in a case of *Thu'mah* with the Jews in period of Prophet, it becomes a valuable lesson to understand the principle of justice in Islam. Even Ali ibn Abi Talib once said, "Every Imam must be fair and trustworthy, if he is so, his people must respect and obey him." [20]

If it is examined in the *ushul fiqh* analysis, it can be concluded that the existence of freedom of speech is limited, and should be through a bridge. So that it can be said, in multilevel theory, *ahkam kulliah 'amm* (general principle) is the principle of equal treatment (*al-muamalah bi al-misli*). Whatever labels, symbols and shapes were used by the State, as long as is useful for Islamic justice. Conversely, a State with any label, symbol and form, which tends to undermine the ideals of justice and the interests of the people is null and void. With equality in treatment, a sense of justice will be created, and persecution will disappear. This is as in a popular hadith, *لا ضرر ولا ضرر*.

If it is concluded from the criteria of civil society that have been explained and related with Islam, it aims at the benefit of a State. The aim is to avoid the absolutism of rulers in managing their people. The judge's legal norm, *irzaman yarf'ul khilaf*, is a solution for leaders in handling every problem that exists. The decision of the leader-government- will be valid and legitimate if in real terms solving the problem. However, if it causes problems, then the community has the right to criticize.[35] This is part of civil society, there are tradeoffs between the government and its people. So, it is expected that from the goal of civil society according to conical to the principles

of fiqhiiyah , namely the tasharuful Imam 'ala al-raiyah manutun bi al-mashalah, which means government policy.

### 3. CONCLUSION

This paper has shown that civil society practiced during the early history of Islam, is compatible with the Western ideas of civil society, a peaceful and harmony society as it is during the reign of the Prophet in Medina.

The principles or criteria of civil society such as democracy, pluralism, justice, and tolerance do not conflict with Islamic law or sharia. Moreover, in Islam, these criteria must be owned by leaders and citizens in a country. Moreover, the Prophet and his companions have applied and exemplified the application of these criteria as principles in organizing their people.

It was found that the existence of civil society aims to provide benefits in a country. This is in accordance with the basic principles of Islamic jurisprudence, namely the tasharuful Imam 'ala al-raiyah manutun bi al-mashalah meaning that government policy must be based on the benefits of society. So that it can be stated that if the leader is not able to provide benefits, then the community has the right to criticize it, as in the rules of hukmu Hakim, irzaman yarfau'ul khilaf.

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