

The Regulation of the Death Penalty in Relation to Legal Certainty and Human Rights

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ABSTRACT

This study examines the ambiguity of legal norms governing the death penalty under Law No. 1 of 2023 concerning the Criminal Code and its implications for legal certainty and human rights protection. This research employs a normative legal method using statutory, conceptual, and historical approaches through library-based legal research. The findings reveal several normative ambiguities, particularly regarding the criteria for imposing the death penalty, the assessment of "commendable attitude and conduct," the mechanism of Presidential Decrees, and the procedures for execution. These ambiguities may give rise to legal uncertainty, inconsistent judicial decisions, and excessive discretion among law enforcement authorities. From a human rights perspective, such ambiguities also create uncertainty regarding the legal status of death-row convicts and may potentially violate the principle of due process of law. Therefore, clearer, more precise, and more operational legal provisions are required to ensure that the regulation of the death penalty under the 2023 Criminal Code guarantees legal certainty while remaining consistent with human rights principles.

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INTRODUCTION

The death penalty, as one of the most severe forms of punishment in the criminal justice system, has long generated both theoretical and practical debates. Two dominant narratives continue to shape this discourse. The first regards capital punishment as necessary to create deterrence and maintain public order, while the second criticizes its moral, legal, and humanitarian implications, thereby sustaining ongoing controversy among the public and academic communities (Yenny Febrianty et al., 2023, p. 93). Critics of the death penalty generally advocate for its abolition or reform and support a restorative justice approach that emphasizes rehabilitation rather than retributive punishment (Rifqi Alif Darmawan et al., 2024, p. 72). This view stands in contrast to those who argue that the death penalty remains relevant as an instrument for preventing serious crimes and preserving social order.

The reform of Indonesia's national criminal law through Law No. 1 of 2023 concerning the Criminal Code introduces a new legal framework by positioning the death penalty as a special punishment imposed alternatively. The reform of the Indonesian Criminal Code reflects a response to social transformation and affirms the recognition of customary law as well as the role of society in dispute resolution. Therefore, a comprehensive contextual analysis is necessary to understand its broader legal and social implications (Milenia Ramadhani, 2024, p. 22). One of the key aspects emphasized in the Criminal Code reform is the application of restorative justice, which is expected to establish a more humane legal system that is not solely punishment-oriented but also focuses on rehabilitation and social reintegration (Andrie Irawan & Wahyono Wahyono, 2024, pp. 78–169).

Several studies consider this policy to represent a compromise between those who support the retention of the death penalty and those who advocate for its gradual abolition. Nevertheless, this normative restructuring also gives rise to new legal issues, particularly in the form of normative ambiguity. Such ambiguity can be identified in the unclear criteria for

imposing the death penalty as a last resort, the absence of objective indicators in assessing “commendable attitude and conduct,” the lack of clarity regarding the mechanism and timeframe for Presidential decisions, and the insufficiently detailed procedures for carrying out executions.

From the perspective of criminal law theory, a penal provision must comply with the principle of legality, which requires clarity in the formulation of norms and certainty in their application. According to Utrecht, legal certainty refers to the existence of general rules that enable individuals to understand which actions are permitted and which are prohibited (Ismansyah, Yussy Adelina Mannas, & Siska Elvandari, 2023, p. 17). Normative provisions that are incomplete or fail to provide clear operational standards may lead to disparities in judicial decisions and inconsistencies in legal practice. In this context, the regulation of the death penalty under the 2023 Criminal Code still leaves considerable room for interpretation, which may potentially result in legal uncertainty if comprehensive juridical reconstruction is not undertaken.

Over the past three years, research on the death penalty in Indonesia has largely focused on human rights issues and legal policy. Existing studies indicate that social context significantly influences decision-making in law and public governance, although the available sources do not always directly address the specific regulation of the death penalty (Nur Efendi & Muh Ibnu Sholeh, 2023, pp. 45–67). Various segments of society contribute to the formulation and implementation of law, thereby influencing its legitimacy and effectiveness. Consequently, social dynamics must be taken into account in the process of legal reform (Ficky Dewi Ixfina, 2024, pp. 1–9). However, studies that specifically examine normative ambiguity and its juridical implications in the regulation of the death penalty remain relatively limited. Some literature in national legal journals has emphasized the importance of formulating objective indicators within the probationary mechanism of death sentences, particularly to avoid subjectivity in the assessment of convicts. This reflects a growing academic awareness of the need for clearer normative parameters in regulating capital punishment.

Furthermore, the implications of the death penalty for perpetrators of corruption offenses demonstrate that, although there is broad consensus regarding the harmful nature of corruption, the effectiveness of capital punishment as a sanction remains debatable (Yunizar Falevi et al., 2023, pp. 105–113). Their findings suggest that this policy may not be effective in reducing corruption rates in Indonesia, given the continued prevalence of corrupt practices despite the existence of severe sanctions. It is therefore important for the public to understand the *ratio legis* of the death penalty for corruptors, while also recognizing the need for a more holistic approach to eradicating corruption rather than relying exclusively on capital punishment (Said Munawar, 2025, pp. 1–19). The application of the death penalty is also an important subject of study in terrorism cases. Capital punishment may be considered legitimate and effective in responding to acts of terrorism; however, its implementation must still take human rights norms into account (Linda Novianti, 2023, pp. 50–70).

A balance between law enforcement and human rights protection is essential in determining the future direction of death penalty policy. In addition, the implementation of capital punishment must be strictly supervised to ensure that it does not violate the principles of justice and legal ethics (Lika Ananda, 2023, pp. 1–7). As the discourse develops, debates on the death penalty no longer remain confined to questions of effectiveness and legality but have expanded toward deeper humanitarian considerations. This demonstrates that capital punishment is not only understood through the lens of positive law but also through the moral and social values embedded in society. Within this broader context, the dehumanizing impact

of imposing the death penalty on narcotics traffickers may be examined from the perspective of Islamic law, which emphasizes the balance between justice, the protection of life, and public welfare. Accordingly, the application of the death penalty is not merely a juridical issue but also involves historical, cultural, and humanitarian dimensions that shape public perceptions of criminal justice (Maizul Imran, Aarsal Aarsal, & Sri Wahyuni, 2023, pp. 219–235).

Literature on normative legal research methodology emphasizes the importance of a systematic approach in analyzing and reconstructing legal norms so that they remain consistent with the principles of legality, legal certainty, and proportionality. This approach requires every criminal law norm to be formulated clearly, precisely, and consistently applicable in law enforcement practice. Based on the foregoing discussion, it can be concluded that a research gap remains in the field of criminal law, particularly concerning the conformity between general sentencing norms and the specific regulation of the death penalty under the 2023 Criminal Code. This gap is especially evident in relation to the clarity of legal formulation and the measurability of the norms that serve as the basis for its application.

The issues examined in this study concern the forms of normative ambiguity in the regulation of the death penalty in Indonesia following the enactment of Law No. 1 of 2023 concerning the Criminal Code, as well as the implications of such ambiguity for legal certainty and human rights protection. This study aims to identify various forms of normative ambiguity within the 2023 Criminal Code and to formulate an appropriate juridical reconstruction model to ensure legal certainty and the protection of human rights. The novelty of this research lies in its reconstructive approach, which focuses on a systematic analysis of normative ambiguity in the regulation of the death penalty, rather than merely addressing policy or human rights aspects. Thus, this study is expected to contribute academically to the development of criminal law doctrine in Indonesia and to serve as a reference for legislative policy-making and future judicial practice.

RESEARCH METHODS

This study employs a normative legal research method, as it focuses on the existence of normative ambiguity in the regulation of the death penalty following the enactment of Law No. 1 of 2023 concerning the Criminal Code. Normative legal research is selected because it emphasizes the examination of positive legal norms, legal principles, and the systematic arrangement of death penalty provisions within the statutory framework. Accordingly, this study does not rely on empirical data, but rather focuses on the analysis of legal materials to assess the clarity, consistency, and measurability of applicable legal norms.

The approaches used in this study consist of the statute approach, conceptual approach, and historical approach.

a. Statute Approach

According to Peter Mahmud Marzuki, the statute approach is conducted by examining all laws and regulations relevant to the legal issue under discussion, as well as by analyzing the consistency and harmony between one legal instrument and another. The results of this analysis are then used as legal arguments to address the issues being examined (Bahder Johan Nasution, 2016). In this study, the statute approach is used to systematically examine the provisions concerning the death penalty under the 2023 Criminal Code, along with other relevant laws and regulations, including the constitutional provisions contained in the 1945 Constitution of the Republic of Indonesia. This approach aims to identify normative ambiguity, unclear legal formulations, and potential inconsistencies in the regulation of the death penalty within Indonesia's criminal justice system.

b. Conceptual Approach

The conceptual approach is conducted by referring to legal principles derived from legislation, scholarly opinions, and legal doctrines. This approach is significant in the present study because the analysis requires various references from statutory provisions and the legal doctrines developed by legal scholars. The conceptual approach is applied by examining doctrines and theories of criminal law, particularly those related to the principle of legality, legal certainty, proportionality in sentencing, and criminal policy theory. This approach is used to analyze theoretically the normative ambiguity found in the regulation of the death penalty, as well as to assess whether the formulation of such norms satisfies the requirements of clarity, measurability, and certainty in criminal law.

c. Historical Approach

The historical approach is used to trace the development of death penalty regulation within Indonesia's criminal law system, beginning with the old Criminal Code and continuing through the reform introduced by the 2023 Criminal Code. This approach aims to understand the paradigm shift of the death penalty from an absolute sanction to a more flexible form of punishment through alternative sentencing and probationary mechanisms. In addition, this approach is used to examine the background of these normative changes so that the context underlying the emergence of normative ambiguity in the new regulation can be properly understood.

The sources of legal materials in this study consist of primary and secondary legal materials. Primary legal materials include relevant statutory provisions, particularly Law No. 1 of 2023 concerning the Criminal Code and the 1945 Constitution of the Republic of Indonesia. Secondary legal materials consist of legal textbooks, national and international law journal articles discussing the death penalty and criminal law reform, and the opinions of legal experts. The collection of legal materials is conducted through document-based or library research by reviewing relevant legislation, scholarly literature, and journal publications related to the research topic. All collected legal materials are then classified and systematized in accordance with the formulation of the research problems.

The legal materials obtained in this study are analyzed using qualitative descriptive analysis, namely by systematically describing and interpreting the collected legal materials. The analysis is carried out based on applicable laws and regulations, particularly the 2023 Criminal Code and the 1945 Constitution of the Republic of Indonesia. In addition, the analysis also refers to legal doctrines, the opinions of criminal law experts, and relevant legal theories, such as the principle of legality, the principle of legal certainty, and the principle of *lex certa*. This theoretical framework is used to assess the degree of clarity, measurability, and consistency of norms in the regulation of the death penalty.

In this study, the analysis focuses on identifying normative ambiguity in the regulation of the death penalty in Indonesia, including unclear formulations, the use of ambiguous terminology, and the absence of firm normative parameters in its application. All legal materials are then analyzed to examine the implications of such ambiguity for legal certainty and the protection of human rights. The results of the analysis are subsequently used as a basis for drawing juridical conclusions regarding the need to strengthen and clarify the norms governing the death penalty in order to provide greater legal certainty and ensure the protection of human rights within the framework of a rule-of-law state.

RESULTS AND DISCUSSION

1. Normative Ambiguity in the Regulation of the Death Penalty in Indonesia Following the Enactment of the 2023 Criminal Code

Indonesia has frequently been criticized internationally for its position on the death penalty, particularly in relation to alleged human rights violations. Critics argue that capital punishment contradicts the right to life as guaranteed under international human rights instruments (Kadek Arya Putra Gunawan & I Nyoman Bagiastra, 2023, pp. 1279–1286). This indicates that the regulation of the death penalty is not merely a national legal issue, but also a matter of concern in international law, with implications for Indonesia's reputation and its commitment to human rights protection.

Issues of justice and legal certainty also arise in relation to the implementation of the death penalty. Reports indicate that execution timelines are often unclear, reflecting inconsistency in enforcement practices (Agatha Jumiaty & Ellectrananda Anugerah Ash-shidiqqi, 2022, p. 26). This condition demonstrates a gap between the norms regulated in the Criminal Code and their implementation in practice, particularly with regard to certainty in the timing of executions. The complex legal process, from law enforcement to trial and appeal, often results in prolonged waiting periods for death-row convicts. In addition, legal processes related to the death penalty are frequently perceived as unclear and lacking transparency, thereby undermining public trust in the justice system and raising questions about the fairness of criminal proceedings (A. A. Topan & A. L. Mahfuz, 2023). This further confirms the existence of both normative and administrative issues in the implementation of the death penalty that have not been fully accommodated in the 2023 Criminal Code.

A shift toward a more moderate approach to the death penalty is reflected in Indonesia's recent legal reform, particularly through the enactment of the new Criminal Code. This evolving legal framework seeks to align the enforcement of capital punishment with human rights standards and to reduce its application by transforming it into a more regulated form of punishment rather than a default sanction (Yully Tjangklek Mulyana, 2024, p. 62). Thus, this reform indicates a more humane direction in criminal law policy, although it still requires further strengthening in terms of implementation and normative clarity in order to avoid multiple interpretations.

The regulation of the death penalty is one of the most sensitive and complex issues in criminal law studies. In the reform introduced by the 2023 Criminal Code, the death penalty has been redefined as a special form of punishment that may be imposed with a ten-year probationary period. This provision is expressly regulated in Articles 67, 98, 99, 100, and 101. Although this arrangement is regarded as an innovative step in sentencing reform, juridical analysis reveals the existence of normative ambiguity at various levels of regulation. Such ambiguity creates issues concerning legal certainty and the consistency between legal norms and the fundamental principles of criminal law.

The 2023 Criminal Code provides that the death penalty is a special punishment that is always imposed as an alternative sentence. This provision reflects a fundamental shift from the previous system, in which the death penalty was relatively absolute, toward a model that allows space for rehabilitation and the possibility of sentence modification. The phrase "a special punishment imposed alternatively" reflects the view that the death penalty is no longer a sanction that is automatically carried out after a court decision, but rather a sanction that may be mitigated under certain circumstances. However, this formulation has not yet been accompanied by an adequate normative and operational framework.

Key Provisions on the Death Penalty in the 2023 Criminal Code

Article 67

A special punishment, as referred to in Article 64 letter c, is the death penalty, which is always imposed as an alternative sentence.

Article 98

The death penalty is imposed alternatively and as a last resort to prevent the commission of criminal acts and to protect the public.

Article 99

1. The death penalty may be executed after the convict's clemency request has been rejected by the President.
2. The death penalty, as referred to in paragraph (1), shall not be carried out in public.
3. The death penalty shall be carried out by shooting the convict to death by a firing squad or by other means stipulated by law.
4. The execution of the death penalty against a pregnant woman, a breastfeeding woman, or a person with mental illness shall be postponed until the woman gives birth, stops breastfeeding, or the person with mental illness recovers.

Article 100

1. The judge may impose the death penalty with a probationary period of ten years by taking _____ into _____ account:
 - a. the remorse of the defendant and the prospect of reform; or
 - b. the defendant's role in the criminal act.
2. The death penalty with a probationary period, as referred to in paragraph (1), must be stated in the court decision.
3. The ten-year probationary period begins one day after the court decision obtains final and binding legal force.
4. If, during the probationary period, the convict demonstrates commendable attitude and conduct, the death penalty may be commuted to life imprisonment by Presidential Decree upon consideration of the Supreme Court.
5. Life imprisonment, as referred to in paragraph (4), shall be calculated from the date on which the Presidential Decree is issued.
6. If, during the probationary period, the convict does not demonstrate commendable attitude and conduct and shows no prospect of reform, the death penalty may be executed upon the order of the Attorney General.

Article 101

If a pardon application is rejected and the death penalty is not carried out within ten years after the pardon is denied, and such delay is not caused by the convict escaping, the death penalty may be commuted to life imprisonment by Presidential Decree.

The provisions above show that the regulation of the death penalty in the 2023 Criminal Code reflects a paradigm shift from an absolute sanction toward a more flexible and conditional approach. The death penalty is no longer positioned as a primary and final sanction, but rather as a special punishment that is imposed alternatively and may be accompanied by a ten-year probationary period. Although this change reflects a more humane reform of criminal law, from a juridical perspective, several forms of normative ambiguity remain and may result in uncertainty in its application. Normative ambiguity in this context refers to legal provisions that do not provide clear boundaries of meaning, lack precise parameters, and are not operational in nature, thereby leaving broad room for interpretation and potentially causing inconsistency in law enforcement practice.

First, normative ambiguity exists in determining the meaning of "special punishment imposed as an alternative." Articles 67 and 98 of the 2023 Criminal Code provide that the

death penalty is a special punishment imposed alternatively and used as a last resort. However, this formulation does not provide clear boundaries regarding the criteria for “last resort” or objective parameters for determining when the death penalty should be imposed instead of other forms of punishment. The absence of explicit indicators regarding the conditions for applying the death penalty makes sentencing highly dependent on judicial interpretation. This may lead to variations in court decisions across cases with similar characteristics. In addition, the phrase “imposed as an alternative” is not accompanied by normative guidelines for selecting the appropriate type of punishment, making the provision abstract and not fully consistent with the principle of legal certainty or *lex certa*.

Second, normative ambiguity is also found in the phrase “commendable attitude and conduct.” Article 100 of the 2023 Criminal Code stipulates that the death penalty may be commuted to life imprisonment if the convict demonstrates “commendable attitude and conduct” during the probationary period. However, this formulation is not further explained through objective and measurable indicators. The absence of clear parameters regarding the meaning of “commendable” makes the assessment of a convict’s behavior inherently subjective. As a result, there is potential for differences in interpretation among law enforcement officials, as well as the possibility of evaluative bias influenced by non-legal factors. Therefore, this provision contains normative ambiguity because it does not provide an assessment standard that can be objectively tested.

Third, normative ambiguity appears in the mechanism of the Presidential Decree. Article 100 paragraph (4) and Article 101 of the 2023 Criminal Code stipulate that the commutation of the death penalty into life imprisonment is carried out through a Presidential Decree upon consideration of the Supreme Court. However, these provisions do not provide detailed arrangements regarding procedures, administrative stages, or time limits for decision-making. The lack of clarity concerning the timeframe and decision-making mechanism creates uncertainty regarding the legal status of the convict after the probationary period ends. This condition indicates normative ambiguity because the provisions do not provide certainty regarding the procedural pathway that must be followed, thereby creating room for legal uncertainty in implementation.

Fourth, normative ambiguity also arises in relation to the President’s authority. The regulation granting the President authority to alter the death penalty is not accompanied by clear normative limits regarding the scope of considerations that must be used. The provision also does not explicitly clarify whether this authority is purely administrative or has a quasi-judicial character. Furthermore, the absence of clear substantive parameters that should serve as the basis for the President’s consideration makes the norm open-ended and susceptible to differing interpretations. This reinforces ambiguity in the aspect of executive authority, particularly because there are no adequate legal standards to limit the discretion granted.

Fifth, normative ambiguity is present in the procedures for executing the death penalty. Article 99 of the 2023 Criminal Code stipulates that the death penalty shall be carried out by shooting the convict to death or by other methods determined by law. However, the phrase “other methods” is not further explained, thereby creating uncertainty regarding which forms of execution are legally permitted. In addition, the provision does not provide detailed regulation concerning the stages of execution, the responsible authorities, standard operating procedures, or mechanisms for human rights protection at the final stage of implementing the death penalty. The absence of clear operational and technical provisions means that the norm remains general in nature, leaving room for variations in implementation. This condition

indicates normative ambiguity that weakens legal certainty in the execution of the death penalty.

Overall, the regulation of the death penalty in the 2023 Criminal Code still contains various forms of normative ambiguity related to unclear formulations, the absence of measurable parameters, and the lack of operational clarity in several important provisions. This ambiguity has implications for potential inconsistencies in legal application, the weakening of legal certainty, and the opening of broad interpretative space for law enforcement authorities. Therefore, it is necessary to strengthen these norms through more detailed regulatory provisions so that the principles of legal certainty and human rights protection can be fulfilled in a balanced manner.

2. Implications of Normative Ambiguity for Legal Certainty and Human Rights Protection

One of the fundamental issues in criminal law that is frequently debated among legal scholars is the issue of punishment, in addition to the issues of criminal acts and culpability. These three issues have their own characteristics and problems, yet they are closely related to the fundamental issue of human rights (Muladi, 1985, p. 16). The issue of punishment is highly sensitive because it is directly related to human dignity and worth, especially in the current era, where demands for the recognition and protection of human rights have increasingly strengthened in line with democratization and globalization (Muladi, 1995, p. 131). Therefore, every formulation and application of punishment must be carried out carefully, proportionately, and on the basis of legal certainty and human rights protection. In this context, the clarity of legal norms becomes particularly important, especially when dealing with the most severe form of punishment, namely the death penalty.

Normative ambiguity in the regulation of the death penalty under the 2023 Criminal Code is not merely related to the technical aspect of legislative drafting, but also has profound implications for legal certainty and human rights protection. In a state based on the rule of law, any restriction on fundamental rights, including the right to life, must be formulated clearly, explicitly, and without ambiguity. However, several provisions in the 2023 Criminal Code remain abstract and lack measurable parameters, thereby creating various consequences in their implementation.

From the perspective of legal certainty, normative ambiguity reduces the predictability of the imposition of the death penalty. Judges are granted broad discretion due to the absence of clear criteria regarding when the death penalty may be imposed as a “last resort.” This may result in variations in application across cases with similar characteristics, thereby preventing the principle of equality before the law from being fully guaranteed. In addition, the lack of clarity in determining the standard of “commendable attitude and conduct” during the probationary period makes the evaluation of convicts highly dependent on the subjective judgment of correctional authorities. As a result, the legal status of convicts may remain uncertain for a prolonged period because there are no indicators that can be consistently used to assess eligibility for sentence commutation.

Legal certainty is further weakened by the absence of a clear time limit in the Presidential decision-making process regarding the commutation of the death penalty. This creates administrative uncertainty because there is no guarantee as to when a decision must be issued after the probationary period ends. Convicts may be placed in a legally suspended condition without final certainty, which, in principle, contradicts the principles of a fast, simple, and low-cost justice system. Furthermore, the use of open-ended terms in death penalty provisions indicates that the principle of *lex certa* has not been fully satisfied, as the norms

do not provide sufficiently clear boundaries to limit overly broad interpretation by law enforcement authorities.

From the perspective of human rights protection, such normative ambiguity has equally serious implications. The absence of clear criteria for assessing a convict's behavior creates room for subjectivity in the evaluation process, thereby potentially leading to inconsistency and unequal treatment among convicts. In the context of human rights law, such a condition may give rise to arbitrariness because decisions are not based on objective and measurable standards. Moreover, prolonged legal uncertainty regarding a convict's status may affect their psychological condition, as they remain in a state of waiting without clarity regarding the final outcome. This may undermine human dignity, especially because individuals are placed in a prolonged state of uncertainty between life and death.

Furthermore, normative ambiguity also weakens the guarantee of due process of law, as there are no clear procedural standards in assessing sentence commutation or in determining the applicable decision-making mechanism. Excessive discretion without firm normative limits may reduce transparency in the legal process, thereby limiting the ability of interested parties to review or control the decisions made. Ultimately, this condition creates an imbalance between state authority and individual protection, where the state possesses broad discretionary power without being matched by adequate legal safeguards to protect the rights of convicts.

Thus, it can be concluded that normative ambiguity in the regulation of the death penalty under the 2023 Criminal Code affects not only legal certainty but also the quality of human rights protection. These two aspects are closely interrelated, because weaknesses in the formulation of legal norms may lead to the weakening of the protection of citizens' fundamental rights. Therefore, it is necessary to strengthen and clarify the relevant norms so that the regulation of the death penalty can provide legal certainty while ensuring proportional and consistent protection of human rights.

CONCLUSION

The regulation of the death penalty under the 2023 Criminal Code reflects a shift toward a more flexible sentencing approach through the concepts of special punishment and a probationary period. However, normative ambiguity remains evident in several provisions, particularly regarding the criteria for imposing the death penalty, the standard for assessing "commendable attitude and conduct," the mechanism of Presidential Decrees, and the procedures for carrying out executions.

Such ambiguity undermines legal certainty by creating uncertainty, allowing potential disparities in judicial decisions, and weakening the principle of *lex certa*. From a human rights perspective, it also creates room for subjectivity, may lead to uncertainty regarding the legal status of death-row convicts, and affects the protection of the right to life and human dignity. Therefore, further clarification and refinement of the relevant regulations are necessary to ensure that the implementation of the death penalty under the 2023 Criminal Code upholds legal certainty while also guaranteeing the balanced protection of human rights.

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