

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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REVISITING PRISONERS' SUFFRAGE IN INDIA: A COMPARATIVE STUDY WITH THE UNITED KINGDOM

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ABSTRACT

This research paper evaluates India's statutory framework regarding inmates' voting rights with reference to UK. India is a democratic nation, and as such, voting rights are constantly being acknowledged on a local and national basis. The Indian Constitution's Article 326 allows for the adult suffrage, which states that everyone who has reached the age of eighteen is qualified to vote in elections, subject to the statutory disqualifications. Despite this, Section 62(5) of the Representation of People Act, 1951, in India, imposed blanket ban from exercising their right to vote. India really chose criminal disenfranchisement by passing this law. This paper critically evaluates India's criminal disenfranchisement statute by examining international agreements and other nations' relevant legislation. It also suggests that India amend its laws pertaining to criminal disenfranchisement by lifting the general prohibition on the inmates' ability to vote. Meanwhile which is also a democratic country, In UK from 2005 the voting right has been recognized and in 2017 the UK government came with a proposal to compliance with ruling of 2005 to give rights to the inmates.

Keyword - disenfranchisement, Indian Constitution's, Blanket ban, Right to vote, Representation of People Act, 1951

RESEARCH QUESTIONS

1. How UK has evolved and recognized the voting right to inmates should India also remove the blanket ban from it?
2. Why has the legislative framework regarding inmates' rights, specifically voting rights, remained unchanged in India, despite numerous judicial pronouncements on the matter?

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3. In order to keep up with the constantly shifting worldwide landscape regarding the recognition of voting rights to inmates. Is it necessary to make changes to the legal framework?

RESEARCH OBJECTIVES

1. *To examine the historical context and evolution of prisoners' voting rights in India, tracing the development of relevant legal provisions and landmark judicial decision*
2. *To analyze the constitutional framework and legal principles underlying prisoners' voting rights in India, with a focus on the interpretation of Article 21 and other relevant constitutional provisions.*
3. *To assess the current legal status and practical implementation of prisoners' voting rights across different states and union territories in India, including variations in policies and practices*

INTRODUCTION

When we discuss the about the definition of democracy the first thing which come in our mind is **Abraham Lincoln words about democracy that is “ Government of the people, by the people , for the people.**

This definition of democracy, articulated by a previous U.S. President, conveys a significant amount of information and encapsulates the fundamental characteristic of democracy, which is the inclusion of the people or citizens. An essential characteristic of a democracy is its emphasis on the active participation of individuals as citizens in both political and civic affairs.

Individuals in a democratic society are responsible for electing their representatives by which the government is formed. Voting is a critical component of democracy, acting as both a basic right. It promotes public participation and the voicing of preferences. While democratic involvement includes more than just voting, electoral participation is usually viewed as vital to democratic values. Alternative kinds of involvement, such as referendums, are also accepted, as seen by the process in New Zealand, which gauges public opinion via voting on particular issues

Every citizen's vote in an election preserves their dignity and uniqueness. Participating in the act of voting guarantees that the opinions and perspectives of all individuals have significance, within a country characterized by notable disparities in culture, religion, geography, caste, color, income, and power, it asserts that irrespective of our diverse backgrounds—whether

affluent or destitute, advantaged or marginalized, we all possess a common membership in the democratic nation. According to Article 326 of the Indian Constitution, adult suffrage will be used to elect members of the House of the People and the Legislative Assembly of each state. This implies that any Indian citizen who is at least eighteen years old on a date set by the relevant legislative body has the right to vote, unless prohibited by the Constitution or any legislation established by the appropriate authorities.

INDIA STATUS AS TO PRISONERS VOTING RIGHT

India is a democratic republic. Democracy can only be maintained by free, fair elections. Free, fair elections to legislative bodies are essential for building a democratic society. According to Article 326 of the Constitution, adult suffrage is used to elect members of the Lok Sabha and state Legislative Assemblies in India. All citizens over the age of 18 have voting rights without any discrimination. However, Section 62(5) of the Representation of People Act, 1951 prohibits inmates from voting in elections. As per section 62(5) of RPA 1951 it states

“No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force”.

Section 62(5) of the 1951 Representation of People Act prohibits convicted individuals from exercising their right to vote. In **Anukul Chandra Pradhan v. Union of India**, the Supreme Court upheld the constitutional validity of Section 62(5), which aims to decriminalize politics. Denying the ability to vote was justified based on the practical challenges of holding elections in jail, as well as the necessary infrastructure and assistance. The Supreme Court ruled that the right to vote is restricted by law and can only be exercised in the manner specified in the statute. Any challenge to a provision in the statute defining the right to elect cannot be based on a fundamental right in the Constitution. Over the years, the judiciary has rendered decisions pertaining to the right to vote in a way that seems to have created misunderstandings about the nature of the right. Referencing the findings in **Jyoti Basu v. Debi Ghosal**³ the court in **Rama Kant Pandey v. Union of India**⁴ said, "A right to elect, fundamental though it is to a democracy, is, anomalously enough, neither a fundamental right nor a common law right." It is a legislative entitlement, plain and simple. Then, Justice Reddi said in **People's Union for**

³ AIR 1982 SC 983

⁴ 1993 2 SCC 438)

Civil Liberties (PUCL) v. Union of India⁵ "One of the fundamental components of democratic polity is the ability to vote for the candidate of one's choice." Our Constitution recognizes this right, and the Representation of the People Act gives it particular implementation. Voting is undoubtedly a constitutional right, even if it isn't a basic one. The right has its roots in the Constitution, and it has been formed by the RP Act, a legislation that complies with Article 326 of the Constitution. To characterize it as a pure and simple legislative right would be inaccurate." Later, the argument that the majority opinion in the PUCL case is that the right to vote is a constitutional right in addition to being a component of a basic right under Article 19(1) (a) of the Constitution was rejected in the case of **Kuldip Nayar v. Union of India**⁶ Additionally, the court highlighted the careful distinction made between voting freedom and voting rights. Although the ability to vote is a kind of free speech, it is only a legally guaranteed right. The **People's Union for Civil Liberties v. Union of India**⁷ case, also known as the NOTA case, established that the right to abstain from voting is a form of expression in parliamentary democracies and must be respected and implemented in the same way as the right to vote. The Court further examined the uncertainty and ambiguity surrounding the nature of the right to vote, concluding that it is statutory in nature and that the cases of the **Association for Democratic Reforms**⁸ and **People's Union for Civil Liberties**⁹ have not altered the legal status of the right to vote.

All that has been contributed by these judicial pronouncements that voters have a basic right to know a candidate's past in order to make an informed choice about how to use their statutory right to vote and express themselves. It was decided in **Kesavananda Bharati v. State of Kerala**¹⁰ that the amendment authority does not allow for changes to the fundamental framework of the Constitution. The majority of seven judges agreed that the democratic system was a fundamental component of the Constitution. As a result, the right to vote is just a statutory right and not a fundamental one, even though it is necessary for free and fair elections, which are necessary for a democratic system that is a component of the constitution. This is a problematic stance in and of itself, in my view. Voting rights need to be guaranteed by the constitution, at the very least. I say this because it is far simpler to alter a law than it is to amend the Constitution, and a simple statute revision may revoke a statutory right. The right to vote is

⁵ 2003 4 SCC 399

⁶ 2006 7 SCC 1

⁷ 2013 10 SCC 1

⁸ 2002 5 SCC 294

⁹ 2003 4 SCC 399

¹⁰ 1973 4 SCC 225

fundamental to the democratic system, and it would be better protected if it had constitutional standing. As a result, the right to vote is just a statutory right and not a fundamental one, even though it is necessary for free and fair elections, which are necessary for a democratic system that is a component of the constitution. This is a problematic stance in and of itself, in my view. Voting rights need to be guaranteed by the constitution, at the very least. I say this because it is far simpler to alter a law than it is to amend the Constitution, and a simple statute revision may revoke a statutory right. The right to vote is fundamental to the democratic system, and it would be better protected if it had constitutional standing.

According to the Model Prison Manual 2016 issued by the Ministry of Home Affairs, Government of India, the words 'prisoner', 'convict', and 'undertrial prisoner' are defined.

“Prisoner: Any person confined in prison under the order of a competent authority.

Convict: Any prisoner under sentence of a court exercising criminal jurisdiction or court martial and includes a person detained in prison under the provisions of chapter VIII of the Code of Criminal Procedure of 1973 and the Prisoners Act of 1900.

Under-trial prisoners: A person who has been committed to judicial custody pending investigation or trial by a competent authority¹¹.”

In essence, the clause excludes from consideration anybody who is detained by the police or who is imprisoned for whatever reason. This implies that for the duration of their incarceration or detention, convicted criminals, undertrial inmates, and those in police custody are not entitled to vote.

In the case of **Praveen Kumar Chaudhary v. Election Commission of India**¹² in the Delhi High Court, the petition was filed to challenge the legality of Section 62(5) of the Representation of the People Act, 1951. The argument is that the lack of a legitimate distinction between those in prison and those on bail or out of jail violates Article 14 of the Constitution. It was contended in court that according to the second proviso of sub-section (5) of section 62 of the Act, a person who is not listed in the electoral roll will still be considered an elector and can run for election. However, if this person is in jail, they will not be able to vote. The High Court affirmed the constitutional validity of the portion in dispute by referencing prior Supreme Court judgments and their reasoning.

The case of **Anukul Chandra Pradhan, Advocate Supreme Court v. Union of India**¹³ has

¹¹ Ministry of Home Affairs | Government of India, Home | Ministry of Home Affairs, https://www.mha.gov.in/en/divisionofmha/Women_Safety_Division/prison-reforms

¹² (W.P. (C) 2336/ 2019)

¹³ (1997 6 SCC 1)

significant relevance and was cited by the Delhi High Court. In this instance, the Supreme Court declared that Article 14 allows for justifiable categorization that is logically connected to the purpose of the classification. The inclusion of this clause in the election legislation, which bars individuals with a criminal history, serves the purpose of limiting the involvement of criminals in politics and ensuring integrity in elections. Additionally, it emphasized the need of considering the prevailing circumstances in which the legislation is implemented when determining its legitimacy. The criminalization of politics is a detrimental aspect of society and a contradiction to the principles of democracy. It undermines the principles of open and equitable elections, which are fundamental aspects of the Constitution. Additional justifications for the categorization include the need of deploying a substantial police force in order to ensure the conduction of free, fair, and orderly elections. In support of this, I would like to cite the following judgment: *“Permitting every person in prison also to vote would require the deployment of a much larger police force and much greater security arrangements in the conduct of elections. Apart from the resource crunch, the other constraints relating to availability of more police force and infrastructure facilities are additional factors to justify the restrictions imposed by sub-section (5) of Section 62. A person who is in prison as a result of his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with the others who are not in prison. The classification of persons in and out of prison separately is reasonable. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable”*¹⁴

The ability to vote is fundamental to democracy and according to the progressive judgments mentioned above, prisoners should not have their voting rights limited for any reason. The justifications for denying prisoners the right to vote are not valid adhere to the legal requirements for denying someone's rights. In the case of **State of Andhra Pradesh v. Challa Ramkrishnan Reddy**¹⁵, the Supreme Court ruled that inmates retain their constitutional rights even when incarcerated. "The notion that prisoners forfeit their personal rights is not recognized under the law. Furthermore, the argument that this restriction acts as a deterrent to criminals lacks substantiated proof of its practical effectiveness"¹⁶.

¹⁴ Ibid

¹⁵ AIR 2000 SCC 2083, 2000

¹⁶ Id

The provision in clause 62(5) of the Representation of People's Act, 1951 conflicts with the provision in 8(3) of the same act. According to 8(3), those who are condemned to jail for less than 2 years are permitted to vote. However, the former clause classifies prisoners as civilly dead.

UK STATUS AS TO PRISONERS VOTING RIGHTS

The majority of inmates in the UK are ineligible to participate in voting. Any individual who is incarcerated in a UK prison or mental health facility due to a criminal conviction is prohibited from voting in UK Parliamentary elections. This restriction also applies to local government elections in England and Northern Ireland. However, it is important to note that not all prisoners are detained solely as a result of a conviction. Therefore, the following categories of prisoners are eligible to vote in UK Parliamentary elections as well as local elections in England and Northern Ireland:

- Individuals who are detained on remand, which refers to individuals who are awaiting trial or sentencing,
- Individuals who are detained for contempt of court,
- Individuals who are detained for a default sentence due to non-payment of a fine¹⁷

Certain individuals who have been found guilty of a crime and are now undergoing a punishment are not incarcerated. Individuals who are serving home detention curfew (HDC) or released on temporary licence (ROTL) are permitted to exercise their right to vote while they are residing in the community. These individuals who have committed crimes are not eligible for certain privileges or benefits while they are incarcerated. The responsibility for the franchise of the Scottish Parliament, Senedd Cymru/Welsh Parliament, and local elections in Scotland and Wales has been delegated.

The issue for Welsh inmates is same for both Senedd and municipal elections in Wales, as well as for UK Parliamentary elections. The Welsh Government is currently reviewing suggestions that would provide the right to vote in Senedd and Welsh municipal elections to Welsh convicts serving a prison term of less than four years. The situation in Scotland differs. Scottish residents who are serving sentences of less than 12 months are entitled to vote in Scottish Parliament, local government, and national park elections.¹⁸

¹⁷ Robert Jones & Gregory Davies, Prisoner voting in the United Kingdom: an empirical study of a contested prisoner right, 2022 Mod. L. Rev, <https://doi.org/10.1111/1468-2230.12778>.

¹⁸ Neil Johnston, Prisoners' voting rights, Common lib. j. rev., 2022

The Ministry of Justice has released guidelines on the voting rights of prisoners in England and Wales as part of its policy framework on limits on prisoner voting (announced in August 2020). The Electoral Commission has disseminated data. This initiative aims to provide assistance to eligible incarcerated individuals in Scotland to exercise their right to vote in the upcoming 2022 Scottish Parliament and council elections.¹⁹

ORIGINS OF THE BAN

In the UK, those who are condemned to jail are often deprived of their right to vote. Prior to the enactment of the Representation of the People Act 1918, suffrage was restricted to males who satisfied certain property requirements. Prior to 1870, those who were found guilty of a serious crime, they were compelled to surrender their property to the Crown, resulting in their disqualification from voting. Individuals who were found guilty of minor crimes were not had to give up their possessions and may have been permitted to participate in voting. Nevertheless, in reality, all incarcerated individuals were prohibited from participating in elections due to their inability to be granted temporary parole to attend polling stations.

The Forfeiture Act 1870 eliminated the practice of seizing assets from those found guilty of grave crimes. The 1870 Act not only granted voting rights to some convicts, but it also explicitly barred those who had received sentences exceeding 12 years. Several months away from the vote, similarly, in reality, all convicts were deprived of their voting rights since they were not granted freedom to participate in the electoral process on Election Day.²⁰

The Representation of the People Act 1948 granted the right to vote by postal ballot for the first time to voters who were no longer living at their qualifying address. Therefore, convicts who were not deprived of their voting rights by the 1870 Act were eligible to vote. Postal ballots were sent to those who were still registered at their home address. An item in *The Times* said that many postal ballots were sent from jails in Cardiff, Lincoln, Preston, and Manchester during the 1950 General Election. **The Criminal Law Act 1967** eliminated the distinction between felony and misdemeanor in the realm of English criminal law.

Consequently, all mentions of those convicted of serious crimes in the 1870 Act were eliminated. Consequently, there was no explicit legal provision that prohibited inmates (except those convicted of treason) from exercising their right to vote. Nevertheless, due to administrative limitations, only incarcerated individuals who were still registered to vote at

¹⁹ Ibid

²⁰ Id

their residential address were eligible to get postal ballots. The Representation of the People Act 1969 reintroduced a particular prohibition on inmates exercising their right to vote. According to the 1969 Act, those who were convicted of a crime were not allowed to vote while they were in jail. The prohibition was implemented based on the proposal of the Speaker's Conference, which published its report in 1968²¹.

The provision of the 1969 Act was substituted in **the Representation of the People Act 1983** as a component of the consolidation of electoral legislation. According to the 1983 Act, a jail cannot be considered a place of habitation for registration purposes. Consequently, those who had not been convicted of a crime were also unable to vote due to their inability to fulfil the registration criteria. Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR) stipulates that signatory states are obligated to conduct elections that are free, periodic, and conducted via a confidential voting process under circumstances that guarantee the unrestricted manifestation of the public's opinion in the selection of the legislative body. From 2005 until 2018, the European Court of Human Rights (ECtHR) determined that the UK's policies regarding voting rights for prisoners were not in line with Article 3 of Protocol No.1.²² The court ruled in favour of many convicts in a sequence of human rights verdicts, starting with *Hirst v UK* has been widely referenced as an instance of the European Court of Human Rights (ECtHR) exceeding its authority by those advocating for changes to the Human Rights Act 1998, including consecutive Conservative Governments from 2015.

THE HIRST LITIGATION

In 2001, three convicts who had been found guilty and sentenced, one of them was John Hirst serving a life sentence for manslaughter, contested the decision of an Electoral Registration Officer who had denied them the right to register for voting. The petitions made by the individuals were rejected by the High Court. The court's decision highlighted that the responsibility of determining whether inmates should have the right to vote, and to what degree, lies with Parliament rather than the judiciary.

Subsequently, John Hirst proceeded to present his case at the European Court of Human Rights (ECtHR). The Grand Chamber of the European Court of Human Rights (ECtHR) ruled in the case of **Hirst v UK**²³ that Article 3 of Protocol No.1 of the ECHR was violated. The prevailing

²¹ Robert Jones & Gregory Davies, Prisoner voting in the United Kingdom: an empirical study of a contested prisoner right, 2022 Mod. L. Rev, <https://doi.org/10.1111/1468-2230.12778>

²²European Court of Human Rights

²³ (No. 2) (2005) ECHR 681

On August 12, 2014, the European Court of Human Rights (ECtHR) issued a ruling in the matter of **Firth and Others v. the UK**²⁶, specifically addressing the first group of ten "clone cases" Greens and MT.

During the UK's membership in the European Union, there was a debate over whether British legislation regarding prisoner voting rights aligned with European Union law. According to Article 39 (2) of the European Union's Charter of Fundamental Rights, the election of Members of the European Parliament is mandated. The concept of "direct universal suffrage in a free and secret ballot" refers to the practice of allowing all eligible citizens to vote directly and independently, without any restrictions or interference, in a confidential manner.

On October 16, 2013, the UK Supreme Court rejected the appeals of **George McGeoch and Peter Chester**²⁷, both convicts serving life terms for murder. They had initiated legal actions in 2010 to challenge the restriction under domestic law. The Supreme Court dismissed a distinct argument arguing that the complete prohibition was not in line with European Union legislation. Nevertheless, the Supreme Court upheld the stance established in Strasbourg that the UK's comprehensive prohibition was in conflict with the European Convention on Human Rights (ECHR). However, it declined to issue a further "declaration of incompatibility" as outlined in Section 4 of the Human Rights Act 1998.

The Court of Justice of the European Union (CJEU), which has authority over EU law across the EU, issued its ruling on 6 October 2015 in the matter of **Thierry Delvigne v Commune of Lesparre-Médoc and Préfet de la Gironde**²⁸.

In 1988, a French court found Mr. Delvigne guilty of murder and sentenced him to 12 years in jail. As per the applicable French legislation, the implementation of this punishment resulted in the indefinite loss of his voting rights. In 2012, he was unable to register for voting in the European Parliament elections. The individual challenged the decision in a French court, arguing that it was not in line with the European Union's Charter of Fundamental Rights (CFR). The court then sought guidance from the Court of Justice of the European Union (CJEU) to clarify the correct interpretation of the CFR, as allowed under Article 267 of the Treaty for the Functioning of the European Union.

The CJEU's ruling in Delvigne determined that Article 39 (2) of the CFR, which guarantees that European Parliament members would be chosen by direct universal suffrage in a free and

²⁶ 2014 EHRR 874

²⁷ 2015 Application no. 51987/08

²⁸ 2013UKSC 63

secret ballot, establishes the right of Union citizens to participate in European Parliament elections. The CJEU subsequently evaluated whether the limits imposed by the French statute on that right satisfied the criteria outlined in Article 52(1), which mandates that restrictions be reasonable.

The decision of the CJEU reached significantly different findings compared to those of the Supreme Court in Chester. Some others questioned whether the UK's "blanket ban" would be in line with the CFR due to the way the proportionality test was used in the Delvigne judgments. No case was later brought to the Court of Justice of the European Union (CJEU) regarding UK voting rights during the UK's membership in the European Union. The UK legislation was never subjected to this kind of testing. On September 24, 2015, the Council of Europe's Committee of Ministers issued a resolution urging the UK Government to present a Bill to Parliament in order to address the Hirst (No 2), Greens and MT, Firth and McHugh cases.

PRISONERS VOTING RIGHT

In December 2016, the UK Government made a public promise to the Committee of Ministers of the Council of Europe that it will forward recommendations to deal with the issues expressed by the Hirst judgments. David Lidington assumed the position of Secretary of State for Justice after the General Election of 2017. On November 2, 2017, he delivered a statement to the House of Commons. The individual presented a strategy to the Committee of Ministers in order to tackle the concerns identified in Hirst. This strategy included two practical ideas that were not legislative in nature. The first step was to expressly inform inmates that upon conviction, they would lose their ability to vote. This was done by modifying the usual warrant of committal to jail, ensuring that prisoners be told of their disenfranchisement.²⁹

The second objective was to provide clear advice from the Prison Service about the voting rights of inmates who are released on temporary licence or home detention curfew. This guidance would enable a certain number of convicted prisoners to exercise their right to vote. In July 2018, the Government stated that it has provided advise to prison governors in England and Wales on a recent policy change. This information was disclosed in response to a Parliamentary question. This was accompanied with a pamphlet provided to inmates to educate them on their voting privileges.

In September 2018, the Council of Europe officially certified the closure of the case.

²⁹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c2f14

At its September meeting, they passed the guideline where

- a. *“prisoners on remand can vote;*
- b. *prisoners committed to prison for contempt of court can vote;*
- c. *prisoners committed to prison for default in paying fines can vote;*
- d. *eligible prisoners released on temporary license can vote;*
- e. *prisoners released on home detention curfew can vote; and*
- f. *Prisoners are notified of their disenfranchisement at the time of sentence.”³⁰*

CONCLUSION

Democracy endures via the fundamental right to vote, which is practiced diligently by the people. Democracy is enhanced when the constitution and government both guarantee and safeguard such a right where in UK have chosen to grant prisoners the right to vote, but with restrictions based on the length of their sentence and other conditions. Other countries have chosen to completely ban prisoners from voting, unless there is a specific legal justification. India, as the largest democracy in the world, should promptly shift its position from limiting the voting rights of convicts to actively advocating for the voting rights of prisoners.

Democracy has bestowed upon individuals a potent tool known as the freedom to vote. The government gains more power and stability when an increasing number of individuals participate in its development by exercising their right to vote. Within the act of depriving detained individuals of their rights in our contemporary society is indefensible. Countries such as Australia, China, USA (in certain states), Germany, and Iceland have chosen a moderate approach by granting the right to vote to convicts, with certain stipulations such as the length of their sentence being served voting rights are limited as an extra punishment depending on the severity of the offense.

In a nation like India, where the government institutions prioritize the safeguarding of basic, democratic, civil, and human rights of its people, it is more crucial to also ensure the preservation of the right in question of another subset of the population who are incarcerated in correctional facilities. There should not be a comprehensive prohibition on the convicts' ability to vote in India. The law should establish rational distinctions among inmates based on the gravity or nature of their offenses, as well as other social and psychological variables. Section 62 (5) of the Representation of People Act, 1951 requires amendment in this regard.

³⁰ Draft Voting Eligibility (Prisoners) Bill Joint Committee report, HL 103/ HC 924, 18 December 2013 p.67

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