



# *The Concept of Adultery in Positive Law: Is There a Rational Basis in the Pancasila Legal State in Indonesia*

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**Abstract**— The lack of character education and the high influence of liberal western culture has led many people to enter into unhealthy romantic relationships, who instead of carrying out legal marriage relations, in accordance with religious beliefs and the provisions of marriage law, actually engage in sexual relations outside of marriage or commit adultery. Currently it is increasing to a very worrying level, for some people it is even considered normal because it does not harm other people. As a legal state, based on the Pancasila values and moral values in society, Indonesia views adultery as a bad thing. Through normative legal research with literature study as its conceptual approach and deductive analysis, this study attempts to see the basic rationality of adultery in Indonesia as a Pancasila legal state. The results of the research show that there is a rational basis for regulating adultery in the Pancasila legal state, namely the philosophy of divine law, where positive law as *lex humana* must not conflict with the law taught by God, which is contained in the first principle "Belief in One Almighty God."

**Keywords**— *Adultery; Rational Basis; Positive Law; Pancasila Legal State.*

## I. INTRODUCTION

Humans as social creatures created in pairs by God Almighty, have a need to be able to continue their offspring. In the course of their lives, humans have biological needs in the form of sexual relations between men and women, both for the purpose of continuing offspring and for fulfilling the inner needs of every human being. Sexual intercourse is an instinctive thing for normal humans which has physiological aspects as a reproductive function and psychology as a function of human inner happiness. If a human being has no desire or does not have sexual relations, then the function of the human reproductive organs cannot be utilized. Apart from that, in the psychological aspect, due to unfulfilled sexual relations, which are both biological needs (such as eating, drinking, sleeping, etc.), of course there will be problems in the psychological aspect that are not fulfilled. Sexual relations are a gift from God Almighty which is given to all humans without exception when physiological and psychological maturity has been reached.[1]

Ideally, sexual relations are carried out by married men and women. This means that sexual relations have justification if both the man and the woman are in a legal marriage. In the positive law in Indonesia, its define that marriage is considered valid if it is carried out in accordance with the provisions of their religion. This shows that religion has an important role in the marriage affairs of the man and woman in question. In Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage Chapter I Article 1, marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the belief in the Almighty God.[2] The state, through the Ministry of Religion, is also obliged to register marriages between men and women for the purpose of administering the marriage in addition to obtaining legitimacy regarding the rights and obligations of a husband and wife. Marriage is actually a sacred agreement or binding between a man and a woman. A marriage between a man and a woman is based on mutual love for each other, mutual willingness and liking between the two of them, where there is no compulsion between one another.[3]

Although it has been explained previously that sexual relations should be preceded by a legal marriage procession according to religion and the provisions of laws and regulations, however, it cannot be denied that there are still many individuals who engage in sexual relations outside of a legal marriage. This illegal sexual

relationship is usually called adultery or fornication. Basically, adultery is a heinous act where there is a romantic relationship carried out by two people of the opposite sex without being bound by a legal marriage bond, whether one or both of them are married or not.[4] The act of adultery is believed to have various negative impacts on civilization and human health, such as disturbances in the reproductive system and maternal health conditions which are prone to causing complications such as unwanted pregnancies so that there is a risk of injuring human rights to be able to build a happy and eternal family in accordance with one's religion, as explained in the paragraph above.[5] Apart from that, adultery also has a high risk of causing health harm such as the transmission of sexually transmitted diseases because in sexual relations there is no commitment such as a marriage bond, making it possible to carry diseases to both the man and the woman.[6]

The various kinds of losses or bad impacts caused by adultery, in fact, have not caused the rate of adultery to decrease, but on the contrary, it has actually increased every year. Among students, more and more people are forming intense friendships or also known as dating. This dating activity is often the beginning of other sexual activities ranging from holding hands to adultery.[7] The majority of sexual relations outside of marriage or adultery occur among teenagers who have never been married before. Adolescence, which is a transition between children and adults, is the cause. During adolescence, individuals become independent and physical, mental, emotional and social changes occur. Adolescent development includes 3 aspects, namely physical development, social development and personality development. Physical development can be interpreted as meaning that all body organs undergo a maturation process, especially the reproductive organs as the main organs in sexual intercourse. Social development means that adolescent individuals have begun to have an interest in the opposite sex due to increasingly widespread interactions, not only as school colleagues or friendships, but also romantic desires that begin to emerge due to hormones resulting from the maturity of physical development in question. Apart from that, personality development can also mean a transition into the adult phase where the adolescent phase has begun to have the courage to try to make their own decisions regarding the things they will do. Premarital sexual behavior among adolescents is based on sexual urges or activities to obtain pleasure from sexual organs, such as sexual fantasies, masturbation, hugging, kissing, making out, and having sex.[8]

Apart from occurring among teenagers or individuals of early adulthood who are not yet married, adultery also cannot be denied among married couples. In this case, the husband or wife is having an affair with another man or woman of his dreams. Even though you have a legal partner to have sexual relations with, infidelity still occurs due to various factors, including: economic factors, minimal time with family, age difference, poor quality of communication, high intensity of using social media, high reunion activities, openness. opportunities, to low levels of moral character education. Cases of infidelity that lead to adultery also result in the divorce rate in Indonesia.[9] In this case, it does not only happen to men but also women as perpetrators of infidelity or adultery, which occurs not only in big cities, but is also common in small towns and even remote areas.[10] One of the consequences is that legally married couples choose to end their marital relationship by divorcing, where data from the years in Indonesia has always seen an increase in the divorce rate, which is dominated by contested divorce, where infidelity is still one of the main reasons why someone files for divorce.[11]

The data from year to year above shows that the number of illicit sexual relations continues to increase. These are certainly worrying things. If this continues, sexual relations outside of marriage will continue to increase and be considered normal among adult male and female couples. Indonesia as a country based on Pancasila law certainly cannot allow that to happen. The rule of law, which should protect human rights and maintain order and the welfare of its citizens, has an important role in being able to provide legal protection against deviant behavior in question. The Indonesian Criminal Code regulates adultery. Article 411-413 of Law No. 1 of 2023 states that adultery is the act of sexual intercourse with a person who is not the husband/wife and is punishable as adultery. The offence of adultery in question is an article on the offence of complaint, which can be committed by husband/wife for persons bound by marriage, and also by parents/children for persons not bound by marriage. In contrast to the previous Criminal Code where adultery complaints could only be filed by husband/wife, the expansion of the meaning of adultery is the basis for the criminalization of sexual relations outside marriage between single men and women.[12] Based on the description above, the author is interested in understanding and explaining the concept of adultery in positive law in Indonesia. Through this research, the author tries to see the rationality of the concept of adultery in the Pancasila legal state.

## II. LITERATURE REVIEW

Even though discussing sexual relations is often considered a taboo matter, especially when discussed in public, sexual relations are actually a part of human life, which essentially cannot be separated as a process of human development itself. So far, sexual relations have only been understood as reproductive activity, however, in reality, sexual relations are also inextricably linked to issues of customs, culture, religion, morals and law. Sexual relations are often interpreted as a private matter, and not to be discussed in the public domain. However, basically, good sexual education has an important role in efforts to prevent sexual violence and deviant sexual behavior.[13] As discussed previously, sexual activity is one of human's biological needs. In fulfilling these sexual

needs, marriage becomes a way to gain access to legal and justified sexual relations. Preceded by marriage, sexual activity between men and women is considered to have legitimacy and neither party has a problem with it.[14]

The Indonesian Dictionary explains: "Adultery is an act of sexual intercourse between a man and a woman who are not married. The act of adultery is usually based on mutual love between both parties, both the man and the woman. In contrast to rape, where the act of sexual intercourse is carried out with coercion, adultery is often considered an act that does not harm each other, because indirectly, the parties, both men and women, do it voluntarily without any coercion. Based on this explanation, many people also think that adultery is something that is usually done by lovers, or non-lovers, to fulfill their biological needs. This is exacerbated by the norm in western countries that sexual relations outside of marriage are considered normal, especially based on mutual consent or affection, then it is believed that the most important thing in having sexual relations is that they are 'healthy'. Healthy here means having sexual relations before marriage using contraception is something that is normal and actually useful as an effort to overcome unwanted pregnancies. The usual effort is to use contraception to prevent pregnancy and for health reasons.[15]

In contrast to adultery, even though they both discuss sexual relations, Marriage is defined as a spiritual and physical union between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on faith in the Almighty God, as contained in Marriage Law in Indonesia. In Indonesian, "marriage" means forming a family with the opposite sex; having sex or having sexual intercourse. According to the Compilation of Islamic Law, marriage is a very strong agreement or *miisâqan ghalîzan* to obey Allah's commands. Carrying it out is an act of worship. Marriage aims to create a household life that is *sakinah, mawaddah* and *rahmah*. So, marriage can be interpreted in a narrow sense and in a broad sense. Marriage in the narrow sense is a contract that justifies sexual relations between a man and a woman. Meanwhile, marriage in the broadest sense is a contract or bond between a man and a woman to form a happy family or household, *sakinah, mawaddah* and *rahmah*. [16]

Basically, humans have stages of development from childhood to adulthood. In human development, there is a period of puberty experienced by teenagers which is a transition from childhood to adulthood. Hormonal drives and physiological maturity of the reproductive organs cause sexual desire to increase at this time. Attraction to the opposite sex is also a natural result of these hormonal changes. However, emotional instability and lack of self-control can lead people to have sexual relationships outside of marriage in order to fulfil their sexual desires. Premarital sexual behavior will have an impact on teenagers, including regret and moral guilt. Especially if there is a pregnancy out of wedlock, which in Indonesia is considered a disgrace for the perpetrator and his family.[17] However, the influence of social media exposure has also contributed to the shift in the meaning of adultery from being a shame to becoming something normal among teenagers or adults.[18] In addition, exposure to western culture does not have a problem with adultery as long as it is done in a 'healthy' way, meaning using contraception which only prevents pregnancy and the transmission of sexually transmitted diseases.[19]

The very rapid development of civilization is certainly unavoidable. Reflecting on the course of history, progress over time and everything related to technology cannot be resisted. Advances in science and technology have given rise to the widest open access to information, which is not limited between countries. The progress of science and technology, which is expected to be able to create a civil society, especially among teenagers and every child of the nation, has actually eroded the values of politeness, good teachings about actions and behavior or what we often call morals. The phenomenon of moral decline among the nation's youth today is very worrying. Therefore, in order to overcome the moral decline that has befallen the nation's children, there is no other effort that must be made, one of which is to instil good character education in the family, school and community as early as possible. This is important because if it is not done as early as possible, it will be very difficult to instil positive character when they grow up.[20]

Moral degradation is seen as a decline in values and quality of life as well as a decline in national identity. Moral degradation is becoming increasingly worrying due to the large number of behavioral deviations by teenagers, one of which is sexual deviance, which is actually increasing from year to year. Character education is an effort to overcome moral degradation. By forming good morals, it will become a reminder and limitation in taking action. Cultivating good character in the education process will produce a superior and dignified generation.[21] Apart from that, character education is also able to protect the younger generation from bad sexual behavior.[22] Apart from character education, knowledge about good reproductive health is also able to prevent risky sexual behavior, especially in teenagers who have sexual urges that are difficult to control during their puberty phase, which is a transition from childhood to adulthood. Knowledge is one of the predisposing factors, namely factors that trigger behavior, thoughts and motivation to behave.[8]

Prior to the enactment of Law No. 1 of 2023 on the Criminal Code, the old law stated that adultery could only be prosecuted by a husband or wife for people who were married. This means that it can be interpreted that adultery is a very limited complaint offense, which can only be filed by the legal husband or wife. In other words, the act of adultery is only interpreted as adultery by a legal husband or wife, where if a pair of unmarried lovers have sexual relations, then this does not constitute an adultery complaint, because there is no legal husband/wife who can report the complaint. This of course makes someone who commits adultery feel safe if they feel that they

are both adults and feel that they like each other. However, Law No. 1 of 2023 concerning the Criminal Code currently adds provisions for complaints against parents or children for people who are not married. This means that a pair of men or women who commit adultery, even if they commit adultery consensually, can be reported by the parents/children of the man or woman to be held accountable for their actions in the eyes of the law. With the expansion of the meaning of zina, it has become the basis for the criminalization of sexual relations outside marriage between single men and women. This is because the act of adultery is an act that is not in line with the moral and religious values of Indonesian society.[12]

Of course, the expansion of the meaning of this offense also received mixed reactions from some parties. This rejection is due to the assumption that adultery is a private matter that cannot be turned into a public matter. This is the same as that adopted by the legal perspective in western countries. If the adultery is based on consensual feelings and no party is harmed, for example by using contraception to prevent unwanted pregnancy and avoid sexually transmitted diseases, then this is not considered a complaint offense.[19] However, this is different from the noble values of the Indonesian nation contained in Pancasila, where the constitution states that the State is based on Belief in One Almighty God.[23] As a result, the legal values that exist in Indonesia certainly cannot be simply equated with the legal values that exist in other countries. Marriage matters are no exception, as access to legal sexual relations which should take place after marriage.[24]

The uniqueness of this law must be recognized because basically law is born from the human will to create safe, peaceful and orderly social conditions so that its goals can be easily achieved. Likewise, the law, which is a reflection of human will, has an important role in protecting humans from all bad possibilities that arise as a result of interactions that occur. This means that the law functions as a means of realizing security and order. The existence of law exists in society. Thus, it can be concluded that "where there is society, there is law", which can also be interpreted as meaning that law is the values contained in society, which are agreed upon as norms that apply to provide legal order for society. Thus, the Pancasila values that grow in society have an important role in the formulation of laws.[25]

### III. METHOD

Methods are needed in conducting research. This is because stages are needed in carrying out research activities, which can later carry out the research function, where this research function is needed to find the truth. Legal research generally has two types of methods, namely empirical studies and normative studies. The method used in this research is a type of normative juridical research. Normative juridical research is carried out using an approach that attempts to study legal materials including theories, concepts, legal principles, as well as statutory regulations that are relevant or related to this research. In this case, the author also takes a statutory regulatory approach and a conceptual approach by reviewing all laws and other regulations as well as other basic ideas that are related to each other with the study topic being handled.[26]

### IV. RESULT AND DISCUSSION

Law is a social engineering tool that is used to change society's patterns and behavior to be in accordance with the regulations required by law. Laws are formed with a purpose, one of the purposes of law formation is to obtain legal certainty.[27] Law can act as a means of reform, but in many ways law is a reflection of society.[28] Law was born from the human will to create social conditions that are safe, peaceful and orderly so that its goals can be easily achieved. The law, which is a reflection of human will, has an important role in protecting humans from all bad possibilities that arise as a result of interactions that occur. This means that the law functions as a means of realizing security and order and also as a tool of social engineering where the law can encourage the creation of a desired situation.[29] Law in the sociological jurisprudence approach believes that as a product created by society, law also aims to protect the interests and satisfy society, which ultimately becomes a means of controlling society itself.[30]

Laws that are part of human life must of course be able to have an adaptive character, vary according to the times without losing the noble values established by the originator or maker of the law. In Islam, for example, in the essence of the law that is built, God (Allah SWT) is the maker of the law, while the task of humans is to discover the law, not to be the maker of the law, where the law is discovered by humans to guarantee the interests and rights of humans themselves.[31] In the context of sexual relations, for example, the same act (sexual relations) can be halal and can also be haram. If it is preceded by a marriage, taking into account the terms and conditions that are valid according to religious law and positive law, then the marriage becomes valid and the consequences of the marriage will also be considered valid by law, including sexual relations. On the other hand, if there is no legal marriage, then sexual relations become invalid and are condemned by law as adultery.[24]

Sexual relations outside of marriage or adultery also have various bad impacts. These bad impacts include the emergence of venereal diseases, abortion, early marriage, unwanted or unplanned pregnancies and birth problems that cause death in mothers and babies. Teenage pregnancy also has quite severe psychological consequences. Women are the ones who suffer the most losses in this case because they suffer heavy psychological impacts, such as the emergence of depression due to the negative stigma that society places on pregnant

women.[32] Many women who are pregnant out of wedlock become victims of men who do not want to take responsibility and choose to run away, resulting in women who are pregnant out of wedlock experiencing severe depression because they have to bear the shame of their actions which can then trigger them to carry out abortions because they are unable to bear the burden alone. Of course, on the other hand, with sexual relations within marriage, such things will not happen.[33]

The progress of science and technology that cannot be stopped today also has a correlation with sexual activity before marriage among teenagers. Other previous research also explains that there is a significant positive relationship between exposure to social media and premarital sexual relations in adolescents. This significant positive relationship can be interpreted as meaning that the higher the exposure to social media received by teenagers, the higher the sexual activities among teenagers. This is because social media exposure that cannot be controlled often contains sexy or vulgar content related to sexual activities that should be carried out by married couples who are legally married.[18]

In Indonesia, there is one province that enforces Islamic law for perpetrators of adultery, namely Aceh Province. With its special autonomy, the application of Islamic law (or what is often called jinayat law), provides strict sanctions against perpetrators of adultery. Jinayat law considers any sexual relations outside of marriage to be adultery and threatens it with severe punishment, whether the perpetrator is married or not, whether it is done consensually or not.[34] Meanwhile, according to the Criminal Code, adultery can only occur if sexual relations outside of marriage are carried out by people who are married. According to Qanun Jinayat's view, the concept of adultery according to Article 284 of the Criminal Code is much narrower compared to adultery concept in jinayat law. In Positive Law, based on article 284 paragraph 1, it only provides a prison sentence of 9 (nine) months. Meanwhile, in Jinayat law, in giving sanctions to the Qanun Jinayat based on Article 33, the penalty is a maximum of 100 (one hundred) canings. If you repeat this adultery, you are subject to a maximum of 100 (one hundred) canings and a fine can be added.[35]

In the Islamic Law approach itself, marriage has a noble purpose. The aims of marriage are: 1. The aim is to build a peaceful family; 2. Aims at human regeneration and/or reproduction; 3. Aims for biological (sexual) fulfillment; 4. Aims to maintain honor; 5. Aims at worship, which can be understood implicitly from a number of verses in the Koran and explicitly mentioned in the hadith. Marriage continues the process of human survival in this world from generation to generation. It is also a channel for halal lust, through a legitimate relationship between a man and a woman, and to avoid the temptations of Satan that can lead you astray. Marriage also serves to regulate the relationship between men and women, based on the principle of mutual support in the area of love, and the obligation to carry out household tasks such as managing the house, educating the children, and creating a pleasant atmosphere. This is so that husbands and wives can fulfil their duties well for the good of this world and the Hereafter.[16]

As the country with the largest Muslim population in the world, Indonesia, with its majority Muslim population, is certainly very keen on practicing Islamic religious values in everyday life. As has been explained, the law is a reflection of the values that exist in society [29], of course it is a very natural thing if adultery is considered a criminal act with the offense of complaint, although many Western countries consider adultery to be a private matter and does not need to be a public matter, especially if it is done 'safely' without harming other people.[19] However, Indonesia as a Pancasila legal state with the first principle "Belief in One Almighty God", states that the state is based on Belief in One Almighty God in its constitution.[23]

The practice of adultery, whether through prostitution or romantic relationships, is a social problem because it is not in accordance with existing norms, does not correspond to the values contained in Pancasila, and is immoral. Therefore, adultery is a social problem that must immediately be eradicated. One of the government's efforts to suppress the increase in the number of adultery cases is by using criminal law to instill fear in those who are subject to the practice of adultery, whether through prostitution or non-prostitution. However, until now there are no statutory regulations that can threaten users of prostitution services, where users are important subjects in the practice of prostitution as a form of adultery, as an analogy, it is impossible for there to be sellers without buyers. In this case, if there are no general complaints that can be reported by other people if they are caught, it will be very difficult for the practice of adultery, whether through prostitution or non-prostitution, to be eradicated. In this way, social problems will never be resolved because the roots of the problems are not touched to be resolved.[36]

In essence, the dimensions of national and state life always have the concrete reality of society in a country. Belief in legal development must be based on the original values of a nation, so that the direction of legal development will be clear and measurable in its development. The reflection of legal development in Indonesia which is based on Pancasila, cannot be separated from the paradigm of prophetic legal relations in every legal policy that is made, so that understanding of the law is manifested in national and state life. Therefore, Pancasila as the source of all sources of law itself cannot be separated from the original values of the archipelago which are formulated in national life and state life. The essential meaning of prophetic can be defined as a being who tries to prepare and equip himself to be able to read and understand divine messages, to draw lessons from them, and

then to try to implement these divine messages in everyday life so that he can bring good to himself, society and the whole universe.[37]

According to Thomas Aquinas in his natural law approach, law is divided into 4 parts, namely: 1. *Lex Aeterna*, which means the law that comes from God to regulate the universe which is difficult for the human mind to grasp; 2. *Lex Divina*, namely laws originating from God that can be understood by human reason; 3. *Lex Naturalis*, is known as natural law and is the incarnation of human reason; 4. *Lex Humana*, namely positive law or legislation made by humans that is in accordance with and does not conflict with natural law. In this case, *lex humana* can be incorrect if it ignores the good of society, serves the desires and arrogance of its creator, originates from arbitrary power, and is discriminatory towards the people. The law is invalid if it conflicts with the moral laws of nature and God.[38] In the Pancasila legal state philosophy, the five precepts are divided into 5 main things, namely: 1. Divinity; 2. Humanity; 3. Unity; and 4. Democracy; and 5. Justice. This shows that the Pancasila legal state has the main foundation of divine philosophy as the source of all its legal sources.[39] The context of adultery itself is certainly not in line with the religious norms that are the main basis of the Pancasila legal philosophy in Indonesia. This is in accordance with Thomas Aquinas' explanation that *lex humana*, as positive law, is not permitted to conflict with the laws taught by Almighty God.

Prophetic law as an alternative law that is an answer to the challenges of the times, provides legal certainty where the law is made by God the Almighty Creator, and humans as God's creatures just have to try to obey the commands of God and his messengers. The prophetic paradigm provides solutions to crucial problems in law enforcement in Indonesia. Prophetic legal science is an alternative paradigm to the paradigm dichotomy between the Islamic epistemological basis in legal science and legal science itself so that just law gets closer to reality.[40] In the context of adultery, since Indonesia is a country of law and is based on belief in the Almighty God, the concept of adultery in Indonesian positive law is based on rationality, in accordance with the noble values of Pancasila, especially the first principle "Belief in the One Almighty God".

## V. CONCLUSION

Based on the explanation as explained in the previous paragraph, the author tries to draw the conclusion that the regulation of adultery in the Indonesian Law has a basis of rationality with the Pancasila legal state. This is enshrined in Article 29(1) of the 1945 Constitution of the Republic of Indonesia, which states that "the State shall be founded on the belief in One Almighty God".[23] This can be interpreted as meaning that every legal provision in Indonesia must truly take into account the religious values contained therein. If there are legal provisions that are not in accordance with religion, in a Pancasila legal state, this will cause its own problems, either through rejection or through judicial review efforts through the Constitutional Court to carry out legal review of the basic law which is the constitution of the Republic of Indonesia. This is also further strengthened by the fact that of all the religions recognized in Indonesia, not a single religion condones sexual relations outside of marriage or adultery.[12]

In the life of society in Indonesia as a country based on Pancasila law, it can also be found that the act of adultery is a heinous act, which violates moral values. A person who commits adultery will be given a bad label by society, especially if that person is in a legal marriage. As for unmarried lovers, who commit adultery, they often get married but with a negative label where their marriage is considered not an ideal marriage but because of compulsion or also known as getting married by accident. Not infrequently, for those who have previously become pregnant due to the act of adultery in question, the child born later is also given a negative label, or what is usually called an 'illegitimate child' in society.

Basically, law is a reflection of the values that exist in society. If these values are believed to be rules that are mutually agreed upon, then society can make these values into applicable law.[25] Apart from that, positive law as *lex humana*, as has been explained, is law that does not conflict with the law that has been taught by God Almighty.[38] Indonesia as a Pancasila legal country also places the first principle in the context of divine philosophy as the source of all sources of law.[39] Thus, even though the act of adultery is a private domain related to male and female genital activities, which may be considered not to harm other people, but with the noble values of Pancasila that grow in Indonesian society, adultery is a heinous act so it has a rational basis in positive law that applies in Indonesia. So, apart from implementing general legal provisions, positive law in Indonesia also applies divine values in society to be accommodated in Law No 1 of 2023 on the Criminal Code. Thus, the concept of adultery in positive law in Indonesia as a Pancasila legal state, has a basis of rationality that is in accordance with the noble values of Pancasila, especially the first principle "Belief in One Almighty God".

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