

Problems of Qualifying Environmental Criminal Offences in the Republic of Kazakhstan

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Abstract

To protect the environment from ecology-related encroachments, countries implement environmental policy, determine legal, as well as criminal liability for violations in this area. The purpose of paper is to identify common features that allow distinguishing ecological criminal offences into a separate group and to investigate criminal penalties for committing such offences, as well as to highlight the problem of qualification of these crimes. The important tasks of this study include defining the term "environmental crimes", which will clearly analyse this category of offences. The following scientific methods are employed in this study: functional and dialectical approaches, the method of logical analysis, the method of synthesis, the method of comparative analysis, the method of analysis of scientific literature, the method of generalisation. This paper analysed statistical data, scientific research, court decisions, and regulations of the Republic of Kazakhstan. Using practical examples, the most typical environmental criminal offences in Kazakhstan were identified. Notably, in the Republic of Kazakhstan, as in other countries of the world, environmental problems intersect with social ones.

Keywords: Ecology; Criminal Law; Constitution; Offence; Criminal Liability.

Introduction

Nowadays, due to the deterioration of the ecology of the planet Earth, the attitude towards environmental protection is changing in international communities and individual states. This is manifested in the search for the most effective legal means that contribute to the prevention of criminal manifestations

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in the field of environmental safety. The concept of environmental crimes was first introduced into the scientific literature in 1980 by W. Pakutin (Kotlan et al., 2021). Ecological criminal offences can be defined as socially dangerous actions that encroach on the established ecological order and environmental safety and cause certain harm to nature and the health of citizens (Pētersone et al., 2021). Environmental law and order are the norms prescribed by regulations protecting the habitat for the safe existence of humans and other organisms. Environmental safety is the conditions that form a favourable life for all living things, preserve nature, and are aimed at its development. The Constitution of the Republic of Kazakhstan (1995) proclaims that everyone has an inalienable right to a favourable living environment.

There are 2 groups of signs of environmental offences. Such signs allow more accurately defining the concept of environmental crimes and distinguish this type of crime from others. The first group is the main signs of offences – the general danger of these criminal offences (the degree of danger of environmental offences is determined by the significance of the right to a comfortable environment), the illegality of actions (a rather complex sign, since the norms prescribing criminal liability for ecological criminal offences are blanket, and therefore, to address the issue of liability, not only the criminal law norms should be analysed, but also other branches of law), guilt and punishment. The second group of signs of ecological criminal offences are supplementary. This group comprises the following signs: violation of the rules of security and protection of the environment, causing considerable damage to the environment and adverse consequences (Daubasova and Erkebaeva, 2018). The object of criminal offences in this area are public relations for the rational exploitation of natural resources, the preservation of the natural environment at the proper level for the comfortable existence of humans and other living beings, as well as ensuring adequate environmental safety for the population. The objective side of these offences lies in actions or inaction. The subjects of environmental criminal offences are sane individuals who have reached the age of 16. The subjective side is guilt in the form of intent or negligence (Bernik, 2018; Nurtayev, 2018).

According to the Criminal Code of the Republic of Kazakhstan (2014), there are 20 elements of crimes in the field of environmental protection. Thus, measures of criminal legal impact are applied in case of "Violation of environmental requirements for the implementation of economic and other activities" (Article 324), "Violation of environmental requirements when handling environmentally potentially hazardous chemical and radioactive substances" (Article 325), "Violation of environmental requirements when handling microbiological or other biological agents or toxins" (Article 326), "Violation of

veterinary rules or rules established for the control of plant diseases or pests" (Article 327), "Pollution, clogging, or depletion of waters" (Article 328), "Atmospheric pollution" (Article 329), "Pollution of the marine environment" (Article 330), "Violation of legislation on the continental shelf of the Republic of Kazakhstan and the exclusive economic zone of the Republic of Kazakhstan" (Article 331), "Land damage" (Article 332), "Violation of the rules and protection of the subsoil" (Article 333), "Unauthorised use of the subsoil" (Article 334), "Illegal extraction of fish resources, other aquatic living resources or plants" (Article 335), "Violation of the rules for the protection of wildlife" (Article 336), "Violation of the rules for the protection of fish stocks" (Article 337), "Illegal hunting" (Article 338), "Violation of the rules of wildlife objects" (Article 339), "Illegal handling of rare and endangered disappearance, as well as prohibited plant and animal species, their parts, and derivatives" (Article 340), "Destruction or damage to forests" (Article 341), "Violation of specially protected natural objects" (Article 342), "Failure to take measures to eliminate the consequences of environmental pollution" (Article 343).

The purpose of paper is to identify common features that allow distinguishing ecological criminal offences into a separate group and to investigate criminal penalties for committing such offences, as well as to highlight the problem of qualification of these crimes. The important tasks of this study include defining the term "environmental crimes", which will clearly analyse this category of offences.

Materials and Methods

Kazakhstan has faced numerous environmental issues. The environment of this country has suffered greatly at the hands of man. Most of the hydrosphere is polluted by industrial effluents, pesticides and fertiliser residues, and sometimes radioactive substances. The greatest damage to the environment was caused by improper exploitation of the waters of the Aral Sea, which began to decline rapidly when irrigation and other activities increased dramatically. The topic of ecology is quite relevant at any time and sparks countless heated debates. An environmental criminal offence is a socially dangerous, culpable, punishable act prescribed by the Criminal Code of the Republic of Kazakhstan (2014), encroaching on public relations in the field of environmental conservation, rational use of natural resources and ensuring environmental safety for the population. The methodological framework of this study constitutes a system of general scientific methods and approaches that provided an objective analysis of the subject under study. The following methods are employed in this study: functional and dialectical approaches, the method of logical analysis, the method

of synthesis, the method of comparative analysis, the method of analysis of scientific literature, the method of generalisation.

The first method is a functional methodological approach. This approach is fundamental because it is based on the plan and stages of the study. Using this approach, the main purposes and objectives to be achieved during the study were identified, namely: to define the concept of environmental crimes, to investigate the features of environmental safety as an object of criminal law environmental protection, to consider the main classifications of criminal offences in the field of environmental safety, to investigate what criminal penalties entail environmental crimes and misdemeanours. The analysis of scientific literature allowed forming the main part of this paper. Studies conducted by various researchers and experts in law and partly ecology on problems related to the concept, system, classification, and qualification of environmental crimes and crimes against environmental safety have generated a considerable amount of scientific information. Thus, statistical data, various articles, dissertations, theses, monographs, as well as some laws, the Constitution of the Republic of Kazakhstan (1995), and the Criminal Code of the Republic of Kazakhstan (2014) were used and analysed. Another method involved was a dialectical approach, using which the logical structure of this study was formed – first defining the concept, then considering the system of criminal law norms in the field of environmental safety, which constitutes a set of norms that establish exactly which encroachments on this category are crimes, and analysing statistical data.

Logical methods, namely the method of analysis and synthesis, were also employed in this paper. The former was used in the analysis of sources, and the latter helped formulate all the information in a logically structured study. The generalisation method also played an important part. Using this method, all the information was summarised. The method of comparative analysis is useful when writing conclusions. For greater detail, this study was divided into three stages. The first stage lies in the development of a work plan and structure, the main tasks and purposes of the study are highlighted along with the issues to be considered in this paper. The second stage investigates the essence of the concept of environmental safety. The scientific literature and the legislative framework were analysed, and the main part was formed based on the information considered. At the third stage, the results of the study were analysed and conclusions were formed.

Results

Environmental crimes constitute a rather dangerous and complex phenomenon, which in its consequences is one of the most dangerous categories

of crimes because their combined harm creates a real threat to the biological foundations of human existence. All ecological criminal offences are described in Chapter 13 of the Criminal Code of the Republic of Kazakhstan (2014) "Environmental criminal offences", which includes 20 articles that prescribe responsibility for these criminally punishable acts. All ecological criminal offences and environmental safety, depending on the object, are divided into 2 groups. The first group comprises general environmental offences (encroachments on the natural environment in general). This group includes the following articles of the Criminal Code of the Republic of Kazakhstan (2014): Article 324 "Violation of environmental requirements for economic or other activities"; Article 325 "Violation of environmental requirements when handling environmentally potentially hazardous chemical or biological substances"; Article 326 "Violation of environmental requirements when handling microbiological or other biological agents or toxins".

The second group comprises specialised criminal offences. These include the following articles of the Criminal Code of the Republic of Kazakhstan (2014): Article 327 "Violations of veterinary rules or rules established to combat plant diseases or pests"; Article 328 "Pollution, clogging or depletion of waters"; Article 329 "Atmospheric Pollution"; Article 330 "Marine Pollution"; Article 331 "Violation of the legislation on the continental shelf of the Republic of Kazakhstan and the exclusive economic zone of the Republic of Kazakhstan"; Article 332 "Land damage"; Article 333 "Violation of the rules and protection of subsoil"; Article 334 "Unauthorised use of subsoil"; Article 335 "Illegal extraction of fish resources, other aquatic living resources or plants"; Article 336 "Violation of the rules for the protection of wildlife"; Article 337 "Violation of the rules for the protection of fish stocks"; Article 338 "Illegal hunting"; Article 339 "Violation of the rules of wildlife objects"; Article 340 "Illegal handling of rare and endangered, as well as species of plants and animals prohibited for use, their parts and derivatives"; Article 341 "Destruction or damage to forests"; Article 342 "Violations of specially protected natural objects"; Article 343 "Failure to take measures to eliminate the consequences of environmental pollution". There is another classification of criminal offences in this area. Depending on the subjects, motives and goals, environmental criminal offences are divided into offences committed by officials; employees of an enterprise, institution, or organisation; offences committed by persons in the form of intent for their own purposes; offences committed from hooligan motives (Baymordina, 2019).

Legal responsibility for an ecological criminal offence compromising environmental safety is the relationship of the state, namely between the authorised bodies and officials in the field of environmental protection with the

subject of a criminal offence in this area with the application of appropriate measures to the offender (Kidalov and Snizhna, 2021). According to Article 40 of the Criminal Code of the Republic of Kazakhstan (2014), the implementation of measures of criminal enforcement for the commission of criminal offences makes provision for the application of one of the following types of sanctions: fine, correctional labour, community service, arrest. According to Article 41 of the Criminal Code of the Republic of Kazakhstan (2014), the possibility of applying the following types of criminal penalties is defined: confiscation of property, deprivation of a special, military or other rank, diplomatic or class rank, qualification class or state award; deprivation of the right to hold certain positions or engage in certain activities; export of a foreigner or a stateless person outside Kazakhstan. Deprivation of the right to hold certain positions is applied for a period of up to 1 year, 2 years, 5 years. Correctional labour is used for up to 180 hours, up to 240 hours, up to 300 hours. Notably, the calculation of correctional labour is a special stage and lies in the fact that it is determined not in a temporary understanding, but regarding monthly calculation indicators. The amount of correctional labour corresponds to the amount of the fine, which is an alternative sanction for performing correctional labour. In other words, correctional labour is a method of paying a fine. The arrest is applied for up to 60 days, up to 75 days, up to 90 days. Restrictions on freedom are applied for up to 5 years. Imprisonment is applied for up to 7 years. The maximum term of imprisonment is applied when particularly serious consequences of committing an environmental crime occur – the death of a person or the death of animals.

In general, the court applies non-custodial penalties for environmental crimes. The imposition of penalties is the most commonly used for committing environmental crimes and misdemeanours according to the current legislation of Kazakhstan. The amount of the fine in this country is determined in monthly calculation indices. The size of the monthly calculation index (MCI) is reviewed every two years and is determined by the respective law on the state budget of the Republic of Kazakhstan. The effectiveness of the implementation of a criminal law depends on its design and the type of sanctions. The types of punishments (from the lower to the upper aisle) are prescribed in the sanctions of the article and the judges themselves decide the scope of criminal law enforcement on the defendant. The individuality and justice of punishment depend on the type of sanction and the correctness of its construction (Konurbayeva, 2020). A study of statistical data showed that in 2020, about 459 ecological criminal offences and encroachments on environmental safety were registered in the country, which is 2.1% times less than in previous years. As of 2021, there were 10.7% fewer criminal offences in this area than in 2020. The most common offences are illegal

access to rare, as well as endangered and prohibited species of plants and animals (almost 164 offences per year). Less common offences are as follows: illegal fishing of fish resources and other aquatic animals and plants – 134 offences per year, and illegal hunting – 65 offences per year. Recently, environmental smuggling has become increasingly widespread, i.e., the export of endangered species of flora and fauna that are expensive on the world market. Another negative activity that is gaining momentum is poaching (Registered environmental criminal..., 2020).

Having analysed the practical activities and norms of the Criminal Code of the Republic of Kazakhstan (2014), which make provision for liability for ecological criminal offences, there are many shortcomings that affect the effectiveness of combating offences in this area. The main disadvantage is that soft penalties are prescribed for environmental crimes. This is explained by the fact that according to the Criminal Code of the Republic of Kazakhstan (2014), every third element of an environmental crime refers to an environmental offence. According to the current legislation of Kazakhstan, the classification of socially dangerous actions into criminal offences and criminal misdemeanours is prescribed. Since the penalties are quite mild, it is quite often possible to avoid criminal liability. Another considerable disadvantage is that Kazakhstan does not establish criminal liability of legal entities for committing environmental criminal offences. Unscrupulous business leaders frequently exploit this disadvantage. Since all decisions are made collectively, then according to the principle of personal responsibility for an illegal collective decision, no one is subject to criminal liability (Sarpekov and Sattar, 2018).

Discussion

The Criminal Code of the Republic of Kazakhstan (2014) contains a set of norms protecting public relations in the field of environmental protection and environmental safety. The relevance of this problem has increased due to the adoption of the Constitution of the Republic of Kazakhstan (1995), Article 31 of which states as follows: "The state pursues the goal of protecting the environment favourable for human life and health". There is no precise definition of the concept of environmental crimes in the Criminal Code of the Republic of Kazakhstan (2014). This concept is not interpreted in the "Dictionary of Criminal Law" and "Dictionary of Basic Concepts and Terms of the General Part of Criminal Law". This is explained by the fact that the definition of the term "environmental crimes" and the identification of its several main features are experiencing some difficulties. The main difference between environmental crimes is a socially dangerous act (action or inaction) that encroaches on the

environment and its main components, the rational exploitation and protection of which ensures a decent life for a person and lies in the use of natural objects as a social value, which leads to adverse consequences (Sarpekov and Sattar, 2018).

Later, the Russian researcher O.L. Dubovik (2007) supplemented this definition and highlighted the main features of environmental crimes. According to O.L. Dubovik (2007), an environmental crime is a socially dangerous act (action or inaction) prescribed by the Criminal Code and prohibited by it, encroaching on the environment and its components, the rational exploitation and protection of which ensures a decent life for a person and environmental safety for citizens and territories, which lies in the illegal exploitation of natural components as a social value, which entails adverse consequences for the state of the environment. The researcher identified the following main signs of an environmental crime, which distinguishes it from other crimes: environmental friendliness, public danger, and illegality. Kazakh researcher in the field of law R.T. Nurtayev (2018) interprets this concept as hooliganism, manifested in encroachment and the environmental order established by the Criminal Code of the Republic of Kazakhstan (2014), environmental safety of the population and territory, which entails adverse consequences for the environment and the health of persons. There is also a version that an environmental crime primarily encroaches on human rights, namely the constitutional right of everyone to a favourable sphere of stay and entails severe adverse consequences of pollution or reduction of environmental components (Ladychenko and Mykytiuk, 2023).

Many researchers have addressed the issue of classification of ecological criminal offences and environmental safety. Many studies have been conducted on this subject, but the most common and accurate, according to many legal experts, is the classification of environmental crimes into general and special, which was discussed above. Having analysed the materials of judicial and investigative practice, it can be argued that currently there are several issues associated with determining the qualification of environmental criminal offences. When opening criminal proceedings, the pre-trial investigation bodies must correctly qualify the criminal's actions, since in case of an error, the offender will have the opportunity to evade criminal responsibility. The committed act or the post-criminal behaviour of a person can be qualified by the subject itself, who committed the corresponding act, or the subject whose behaviour is qualified, the victim, its representatives, lawyers, scientists, and other persons. However, questions regarding the qualification of an offence should be resolved exclusively by the respective state authorities – pre-trial investigation bodies (Opolska and Overkovska, 2020; Kolisnyk and Nikitenko, 2021).

For the correct qualification of ecological criminal offences and environmental safety, it is necessary to analyse the composition of the offence. According to the definitions, the object of environmental crimes is social relations arising from relations ensuring the existence of a multifunctional balanced system comprising individuals, their protection, rehabilitation, rational operation and reproduction of such a unified system for present and future generations that would guarantee a safe environment for life and health. Making an error when defining an object in environmental criminal offences can lead to the definition of an incorrect qualification of a crime. It is the object of encroachment on an environmental safety that distinguishes it from other, similar criminal offences. The subject of ecological criminal offences and encroachments on environmental safety are elements of the environment that perform different functions in terms of content and are harmonising with nature. The subject of an environmental offence is a legally capable and sane physical person who is charged with the obligation to comply with the corresponding regulations of the legislation regarding the rules of environmental safety. The subjective side of criminal offences against ecology and environmental safety is determined by the legislator, since the dispositions of the article are not specified at the moment (Daubasova and Erkebaeva, 2018; Serikova, and Bazhenova, 2021).

In the Republic of Kazakhstan, there is a system of bodies fighting crimes in this area, but, according to many researchers, the main problem affecting the effectiveness of combating environmental crimes is the absence of one special authorised law enforcement agency. This is explained by the fact that of the entire system of bodies, only the Ministry of Internal Affairs of the Republic of Kazakhstan, namely the Environmental and Veterinary Police unit of the Ministry of Internal Affairs of the Republic of Kazakhstan, conducts measures to combat environmental offences (Murikhin, 2019). According to the statistical data of the Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan (2021), most of the crimes were not initially registered, although criminal proceedings were subsequently initiated. This indicates the latent attitude of the authorities and authorised officials towards the state of the country's ecology and the health of citizens. As a consequence of this attitude, permissiveness and impunity arise. Studies indicate that such a latent attitude reaches 95-99% of cases. For example, most poachers who were detained with carcasses of endangered animals claim that they bought these carcasses. Accordingly, law enforcement agencies do not verify the authenticity of such words, and there are no grounds for criminal prosecution. However, law enforcement agencies still apply preventive measures to thwart environmental

crimes, subject the perpetrators to criminal liability and try to oversee that material damage is covered.

Attention should also be paid to the fact that the dispositions of the article do not indicate the form of guilt (intentionally or by negligence). This creates complexity in the qualification of offences. For example, Article 336 of the Criminal Code of the Republic of Kazakhstan (2014) prescribes responsibility for violation of the rules of flora protection. This offence is intentional, since the disposition does not indicate guilt in the form of negligence. Therefore, there is such a problem in the qualification of the offence. The question arises: if a subject commits an act intentionally, consciously understands the danger of their actions, wants or assumes their occurrence, then can this offence be qualified as an ecocide according to Article 161 of the Criminal Code of the Republic of Kazakhstan (2014) (Shumilo, 2021). Since the sanctions provide for lenient penalties for an environmental crime, there is a practice of avoiding criminal liability in Kazakhstan. In most cases, for registered ecological criminal offences and environmental safety, the criminal case is terminated at the pre-trial stage. According to the statistics of 2018, approximately 1973 offences were registered in total, of which 1768 cases were terminated at the pre-trial stage, only 613 cases reached the court. This practice adversely affects the effectiveness of the fight against environmental crimes (Aubarikov, 2010). Confirmation of the above is the results of a survey of investigators and court employees. Half of the respondents noted that most crimes are committed intentionally, 31% noted that most offences can be recognised as intentional, but guilt in the form of negligence is no exception, others could not give an exact answer (Nurtayev, 2019).

Notably, the consequences of an environmental offence create certain problems of qualification of a crime in this area. Environmental crimes, depending on the consequences, can be divided into two groups. The first group of consequences is environmental consequences. The second group is harm to a person. Environmental consequences are manifested in causing considerable damage to biosystems, the environment or its individual elements. They can be expressed in changes in the radioactive background, the destruction of animals, plants, fish, the spread of epidemics or isotopes, pollution of the atmosphere, hydrosphere, and lithosphere. The consequences that have an adverse impact on a person are manifested in death, a negative impact on the health of citizens, as a rule, they appear as a consequence of environmental consequences. For the correct qualification of the composition of an environmental criminal offence, an accurate legal assessment of socially dangerous consequences should be made. In the articles of the Criminal Code of the Republic of Kazakhstan (2014), this paragraph is not described accurately enough. This leads to the difficulty of qualifying a

crime because there are no scientifically sound practical methods. In law enforcement, this becomes the cause of errors at the pre-trial stage, which leads to the inability to bring an individual to criminal responsibility for the committed act.

The impossibility of bringing legal entities to criminal responsibility leaves a negative trace on the effectiveness of the fight against environmental crimes. Although enterprises harm the environment, no one raises the issue of criminal liability for this. For example, the Atyrau Regional Court will pay a fine of more than a billion tenge to the enterprise for storing sulphur in the open air, which causes great damage to the habitat. According to the Criminal Code of the Republic of Kazakhstan (2014), if the fine exceeds 300 MCI, then criminal liability is prescribed for this act. However, so far, not a single head of the company has been held accountable (Bakishev et al., 2019; Baymordina, 2019). The Ecological Code of the Republic of Kazakhstan (2021) stipulates criminal liability for environmental crimes. According to Article 320 of the Ecological Code of the Republic of Kazakhstan (2021), violation of the environmental legislation of the Republic of Kazakhstan entails criminal liability according to the Criminal Code of the Republic of Kazakhstan (2014).

To fill in the gaps in the legislation of the Republic of Kazakhstan, researchers have identified several tasks for the authorities. The first step should be to identify and consolidate the concept of environmental crimes in the Criminal Code of the Republic of Kazakhstan (2014). This concept should be consolidated in the law itself because it would play a great role in identifying the signs by which the act would be recognised as an environmental crime under the criminal code. And as a result, this circumstance would improve the enforcement practice. Correctly identified signs of an ecological criminal offence and encroachment on environmental safety would allow separating the crime from the offence, as well as distinguish it from other crimes that are similar in characteristics or similar in composition. In the concept of environmental criminal offences, its main features should be clearly identified and concisely formulated. It is necessary to introduce criminal liability for legal entities that cause great harm to the environment through their activities and do not bear any legal responsibility for these actions. To improve the effectiveness of combating environmental criminal offences in practice, active preventive measures should be taken to thwart the commission of environmental crimes. Law enforcement agencies should quickly transmit information about an environmental crime and organise the interaction of various services of internal affairs bodies with environmental police departments to improve the operational search work of persons who have committed a crime in this area.

Conclusions

Consequently, there is no precise definition of environmental crimes in the regulations of the Republic of Kazakhstan. Researchers explain that an environmental crime is a socially dangerous act (action or inaction) prescribed by the criminal code, which encroaches on the environment and its components, the rational use and protection of which ensures a decent life for a person and environmental safety for citizens and territories. All ecological criminal offences are described in Chapter 13 of the Criminal Code of the Republic of Kazakhstan "Environmental criminal offences", and includes 20 articles that prescribe responsibility for these acts. All criminal offences in this area are divided into 2 groups. The first group comprises general environmental offences that encroach on the natural environment in general. The second group comprises specialised criminal offences. The most commonly used punishment for environmental criminal offences is the imposition of penalties. The court rarely applies the punishment associated with deprivation of liberty. The investigation of statistical data revealed that the number of ecological criminal offences and encroachments on environmental safety has considerably decreased. The most common offences are illegal handling of rare, as well as endangered and prohibited for use species of plants and animals.

The system of bringing to criminal responsibility and the qualification of these offences has many disadvantages. For the correct qualification of ecological criminal offences and environmental safety, it is necessary to analyse the composition of the offence. The main problem in the fight against environmental crimes is the absence of one special authorised law enforcement agency. Another problem is the latent attitude of law enforcement agencies and authorised persons. In most cases, for registered ecological criminal offences and environmental safety, the criminal proceeding is terminated at the pre-trial stage. Another major drawback is that soft penalties are prescribed for environmental criminal offences (according to the Criminal Code of the Republic of Kazakhstan, every third element of an environmental crime refers to an environmental offence). The main difficulty in the qualification of environmental crimes is that there is no indication of the form of guilt in the dispositions of the articles – intentionally or negligently. All these shortcomings adversely affect the quality of the investigation, which entails a continuing negative impact not only on the state of the environment, but also on the health of citizens. Therewith, the negligent attitude of law enforcement agencies leads to permissiveness and impunity.

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