

Forensic Mental Health in Kuwait: Between Western Laws and Conservative Society Lays a Challenge



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Abstract

The case of M'Naughton in 1843 laid out the insanity defence test that is used in the British legal system. The test was later adopted in many countries that base their criminal legislation on the British common law system. The Criminal Act of Kuwait is one example that uses M'Naughton test. The Act forms the ground that governs forensic psychiatric assessments. Over the years, several countries amended their criminal laws to provide a better balance between public safety and protection of human rights. The Criminal Act of Kuwait, however, remains unchanged, for issues concerning mentally ill offenders, since it was enacted in the early 1960's. Is it time for the country's legislative bodies to consider amending it? This paper will describe the function of the Forensic Psychiatric Unit (FPU) at the Kuwait Centre for Mental Health (KCMH) and the legal and clinical principles applied in performing forensic psychiatric assessments. The forensic psychiatric system in Kuwait will be described including the management for offenders found non-criminally responsible due to mental disorder. The Criminal Act of Kuwait will be discussed and compared with other international criminal laws. Flaws of the Criminal Act of Kuwait regarding the assessment and management of the mentally ill will be discussed. The authors hope that this study might aid in the much-needed legal reform of Kuwait Criminal Act to have a better balance between protection of the public and protecting the rights of the mentally ill.

Keywords: Forensic psychiatry; Kuwait; Criminal act; Mental health act

Introduction

James Hadfield attempted to assassinate King George III of the United Kingdom in 1800 after he fired a shot at him from his horse. He was tried for high treason but pleaded insanity and subsequently was found not guilty for reason of insanity. However, at the time, an accused who was found not guilty for reason of insanity was acquitted and released back to their families. However, the judge, Lord Kenyon, Chief Justice, despite declaring that the verdict "was clearly an acquittal", he opined that "the prisoner, for his own sake, and for the sake of society at large, must not be discharged; for this is a case which concerns every man of every station, from the King upon the Throne to the beggar at the gate; people of both sexes and of all ages may, in an unfortunate frantic hour, fall a sacrifice to this man, who is not under the guidance of sound reason; and therefore it is absolutely necessary for the safety of society that he should be properly disposed of, all mercy and humanity being shown to this most unfortunate creature. But for the sake of the community, undoubtedly he must somehow or other be taken care of, with all the attention and all the relief that can be afforded him... for the present we can only remand him to the confinement he came from..." [1,2]. As a result, the British Parliament passed the Criminal Lunatics Act, 1800, (39

& 40 Geo, 40 Geo.III, c.94) (U.K.), which gave the court authority to commit an accused found to be not guilty by reason of insanity to "strict custody, in such place and in such manner as the court shall deem fit, until His Majesty's Pleasure is known [3].

The case of Hadfield shaped the modern day forensic mental health practice. Where the dilemma between protecting the society from the dangers of the mentally ill offenders and at the same time protecting the rights and treating their illness came at large. With the advancement of the field of medicine, it became clear that psychosis in the form of delusions and hallucinations is not a sign of intentional criminal behavior but rather an unfortunate medical condition, biological and environmental, which is fortunately treatable [4]. Another landmark case that shaped the practice of modern day forensic mental health is the case of Daniel M'Naughton in 1843, United Kingdom. The case of M'Naughton laid out the insanity defence test that is used in the British legal system. The test was later adopted in many countries that base their criminal legislation on the British common law system. The Criminal Act of Kuwait is one example that uses M'Naughton test [5].

The Criminal Act of Kuwait was enacted during the British mandate of Kuwait in 1960 (Law No. 60/1960) and was amended ten years later. The Act was based on British legislations [6]. Section 22 of Kuwait Criminal Act deals specifically with the test for criminal responsibility due to mental disorder. Section 23, on the other hand, deals with criminal responsibility with substance-induced disorders. These only two sections of the Criminal Act governing assessment and management of the mentally ill remain unchanged since the legislation was enacted [6]. There are several gaps in the Act regarding issues related to mentally ill offenders. Mental disorder is not defined in the Act. Moreover, the Act also leaves the decision for discharge for the non-criminally responsible patient in the hands of the treating team, without addressing an independent review board to look into matters of detained mentally-ill offenders, which by default, might create bias in the decisions taken and also put a huge responsibility in the hands of the treating team. The Act is also silent on whether admission of the mentally ill offender to a psychiatric facility means "treatment" or is it only detention. Furthermore, the Act only describes, vaguely, the test for discharge of the detained mentally ill, without adding a midway conditional discharge that is often needed before giving the decision of final discharge [6].

Mental health in Kuwait

Kuwait Centre for Mental Health (KCMH) is the only government-run psychiatric facility in the State of Kuwait. It was founded in 1958 under the name of Kuwait Psychiatric Hospital. The name changed to Psychological Medicine Hospital in 1980 and finally to KCMH in 2013. KCMH has a capacity of more than six hundred inpatient beds distributed through a complex of several buildings. It receives over two thousand patients every month from across the country's six provinces. The psychiatry department is divided into thirteen different units including five adult psychiatry units covering the different governorates of the country. Other units include forensic psychiatry, geriatric psychiatry, child and adolescent, consultation liaison, day care and outreach, rehabilitation, neurophysiology, and emergency psychiatry [7]. Since KCMH was founded in the late fifties, the center's priority was the treatment and rehabilitation of patients with mental illness in a safe environment that safeguard their rights and dignity. As with many other psychiatric centers across the globe, KCMH through the years faced many challenges.

One of the biggest challenges is finding a balance between the management of patients with mental illness and protecting their rights. Some of the challenges stem from the nature of the conservative culture of the country. Families are very protective of their members and not uncommonly interfere in the person's decision to seek clinical help. Likewise, most traditional society, family tradition and values often form an obstacle to the treatment and management of people with mental illness. Stigma is undeniably a big challenge towards people with mental illness in the country. Moreover, Kuwait continues to lack a mental health law. Several attempts have been tried by both mental health professionals and legislatures to draft a mental health law but

several unfortunate political events, with multiple dissolution of the parliament in the past years, formed an obstacle in the face of finalizing the draft/s into law [8]. Both patients with mental illness as well as mental health professionals are in desperate need for a mental health law. Such law would regulate the process of admission, detention, and management of patients with mental illness. Currently, the admission and discharge process depend on the consent of a relative.

This, however, has been creating significant ethical concerns. Some families refuse to discharge their relatives on a timely manner after being cleared by the treating team. Hence, unnecessary delay in discharge is not uncommon. On the other hand, psychiatrists cannot admit patients who are at risk and need admission without consent from a relative [8]. Due to the close-family nature of the country, it is generally assumed that all patients are to be residing with their families when discharged. This, however, is not entirely true as several mentally ill patients have been abandoned by their families and consider KCMH as shelter. Because those patients are rejected by their families, and it would be inhumane to discharge them to the street, they have been residing at the Center for decades. This has created a financial burden to the Center and unnecessary occupation of much needed resources.

Forensic Psychiatry in Kuwait

The Forensic Psychiatry Unit (FPU) at KCMH was established in 1981. The Unit occupies one ward of the hospital and has a capacity of 36 inpatient beds divided between assessment and detention beds [8]. Cases referred for assessment at the FPU can be divided into criminal and civil. The majority of the criminal cases seen are for criminal responsibility and violence risk assessments while very few are for fitness to stand trial. For civil cases, the vast majority are court-ordered assessments for financial capacity with few referrals for assessment of fitness for duty, contractual capacity, child custody and parenting capacity, and impairment/disability due to mental illness. Unlike Western countries where psychiatric assessments and final reports are performed by one psychiatrist, all psychiatric assessments in Kuwait are carried out by a three-member committee of psychiatrists (legal authorities usually request a committee when requesting an assessment) [8].

Criminal cases referred for assessment come from the court, public prosecutors for felonies, police stations for infractions and misdemeanors, and National Security Apparatus for national security type of crimes like terrorism suspected cases. Most of the mentally ill offenders found to be not criminally responsible due to mental disorder are ordered for detention by the court, however public prosecutors also have the authority to order for detention in some cases [8]. When a court, for example, refers an offender for criminal responsibility assessment, the forensic psychiatry team examines the individual thoroughly and depending on the case, the individual may get admitted at the Unit for few days to few weeks for the assessment. If the court finds the offender to be not criminally responsible due to a mental disorder after the forensic psychiatry team opines on same, the court can order the accused to be detained in the FPU at KCMH. The accused remains

detained on the forensic psychiatry ward until the court orders for his release after the recommendation of the forensic psychiatric team that the non-criminally responsible patient is ready for discharge.

Is the Practice of Forensic Psychiatry in Kuwait Different Than Western Countries?

Most of the evaluations carried out at the FPU are civil in nature with financial and testamentary capacities, custodial capacity, and fitness for duty occupying the vast bulk of the assessments performed. On the other hand, even though the FPU is the only forensic psychiatric facility in the state of Kuwait that runs specialized psychiatric assessments for offenders, the number of evaluated criminal cases is generally low [1]. In a study published earlier by the authors, it was found that only 95 criminal assessments were carried out in over one year in 2016-2017 [8]. This is extremely small in comparison to other countries. In Santiago, Chile, which has a similar population to Kuwait, a total of 1605 offenders were psychiatrically evaluated within one year (St. Denis, Sepulveda, Tellez, Stuart, et al.) Arboleda-Florez [9]. The likely reason behind this is that many cases are not being noticed by the authorities or judicial system in Kuwait. Of all the offenders seen, there was no fitness to stand trial assessment despite that being one of the most common type of psychiatric assessments ordered for offenders in western countries [8].

It has been estimated that around 25,000 annual fitness to stand trial assessments were performed in the USA in 1978 Steadman et al. [10]. increasing to around 60,000 assessments in 2000 [11]. The population of Kuwait in 2016-2017 was over 4 million with almost 3 million being non-Kuwaitis World Population Review, [12]. Despite that, only 23% of offenders evaluated were non-Kuwaitis [8]. Again, we hypothesize that this is due to many cases being missed by the legal authorities or given that non-Kuwaitis are mostly labour workers, so the majority do not have financial means for good legal support Central Statistical Bureau's Labor Market Information System, [13]. The criminal court, most often in most developed countries, is the main entity that requests psychiatrist assessment either by the judge himself or through the defence or the public prosecutor. From the results gathered in the previous study done however, the court was the least referring source for psychiatric evaluations of offenders in Kuwait [8].

Most criminal responsibility and violence risk assessments were referred from police stations and the public prosecutor office [8]. This could be due to the Procedures and Penal Trials Law of Kuwait that gives any investigative body the right to ask for assessment that could help in the investigation. However, where the public prosecutor has the right to order for the detention of not criminally responsible offender similar to the court, police do not have that authority to do so and therefore the matter should be referred to court to take that decision [14]. In a study done by the authors, it was found that most of the crimes committed by offenders referred were misdemeanour crimes as they were referred by the police for criminal responsibility and violence risk

assessment [8]. Misdemeanour crime under the Procedures and Penal Trials Law of Kuwait is a crime that is less serious than a felony and is punishable by up to 3-years in jail (Procedures and Penal Trials Law, 1960). Moreover, it was found on the study that crimes against person were the most common type of all crimes committed [8].

This is consistent with previous studies showing that psychiatrically evaluated offenders are more likely than non-evaluated offenders to commit violent crimes [9,15,16]. On the same study performed by the authors, most common psychiatric diagnosis in evaluated offenders was substance use disorder followed by personality disorders [8]. This is also consistent with other studies showing high rate of substance abuse and personality disorders in offender population [15,17]. Committing a crime under the effect of alcohol or illicit substance does not negate responsibility under Kuwait Criminal Act and therefore all offenders who had only suffered from substance use disorder were found criminally responsible [8]. Moreover, the minority (24%) of offenders with co-morbid substance use disorder were found non-criminally responsible due to mental disorder. On the other hand, majority of offenders diagnosed with psychotic or affective disorders were found non-criminally responsible due to mental disorder [8].

This is consistent with other studies showing that most offenders found not criminally responsible due to mental disorder are those diagnosed with psychotic disorders followed by affective disorders [11,18]. In contrast to other studies done on offender population, majority of female offenders evaluated on the study conducted by the authors were charged with crimes against person [15,19]. This is possibly due to the nature of the conservative nature of the society of Kuwait where psychiatric evaluations are only ordered for serious crimes committed by females. While most male offenders evaluated were found criminally responsible, the opposite was true for female offenders [8]. This is again possibly due to the conservative and protective nature of the society for females where only those known to have a history of mental illness or those showing marked signs of mental illness are ordered to undergo a psychiatric evaluation.

The Criminal Act of Kuwait

Patients admitted to the Forensic Psychiatry Unit at KCMH are held under the Criminal Act of Kuwait (Law No. 60/1960). Most of the patients are admitted under Section 22 of Kuwait Criminal Act that deals specifically with the test for criminal responsibility due to mental disorder. On the other hand, Section 23, deals with criminal responsibility with substance-induced disorders. The Act remains unchanged, for issues concerning mentally ill offenders, since the legislation was enacted Kuwait Criminal Act [6]. There are several gaps in the Act regarding issues related to mentally ill offenders that will be described in detail below. Criminal responsibility assessments are governed by Kuwait Criminal Act through its section 22 and 23. Section 22 of the Act states, "No person is criminally responsible for an act committed, where at the time of the act, the person was incapable of appreciating the

nature and quality of the act or of having the capacity for rational choice, due to a mental disorder or cognitive impairment or any other abnormal mental condition.

If the person is found to be not criminally responsible, the court shall admit the person to a treating facility, if the person constitutes a threat to the public, until the treating facility orders for the discharge of the person, after the cause that resulted in the admission had ceased" Kuwait Criminal Act [6]. Section 23 of the Act states, "No person is criminally responsible for an act committed, where at the time of the act, the person was incapable of appreciating the nature and quality of the act or of having the capacity for rational choice, due to substance-induced state, if the state resulted from forceful ingestion or if the person was not aware of the presence of the substance, or if the substance resulted in a mental disorder, where in the latter the second part of the previous section applies" [6]. On the other hand, fitness to stand trial assessment is governed by the Criminal Procedures Act under section 118 where it states, "If it turns out that the accused, having referred to a forensic doctor, is mentally ill or cognitively impaired or suffers from any abnormal mental condition that impairs his ability to defend himself, the court, or the investigator in the preliminary investigation, must suspend the proceedings until the accused is returned to his senses and can defend himself..." Procedures and Penal Trials Law [14].

The Missing link in the Criminal Act of Kuwait

There are several missing links in the Criminal Act of Kuwait for mentally ill offenders who get detained under the Act as described above. We will discuss several of them in more detail below:

No Definition of Mental Illness

The Criminal Act of Kuwait is silent about defining mental illness and since there is no mental health law in Kuwait, and no local legislation that defines mental illness, the Court depends on expert opinion in defining mental illness. However, anyone who worked in the field of mental health would quickly relies the confusion this would create. First, there is no single standardized definition for mental illness from a medical perspective [20]. The argument continues between experts in the field on what constitutes a mental disorder [21,22]. Moreover, vast majority of psychiatrists working in Kuwait do not have any training or experience in forensic psychiatry [8]. Therefore, using any of those psychiatrists by the court as expert witnesses might result in unfortunate consequences both for the right of the accused and the safety of the public. Moreover, the court would certainly find it challenging if it decides to rely on the legal definition of mental illness found in the mental health laws in neighboring countries, as there are some differences. Saudi Arabia Mental Health Law that was enacted in 2014, for example exclude intellectual disability and substance use disorders from the definition of mental disorder whereas the Mental Health Law of Qatar that was enacted in 2016 does not (KSA Mental Health Care Law 2014, Qatar Rights of Patients with Mental Illness Law [23].

No Independent Tribunal

The Criminal Act of Kuwait does not set an independent tribunal that overlook into the matter of the detained mentally ill offender. The Act however only states that the offender should be discharged "until the treating facility orders for the discharge of the person...". Therefore, the decision for the length of detention as well as the test for discharge is left solely in the hands of the "treating facility". One can imagine the amount of bias that this can lead when all the responsibility of discharge of the patient is in the hands of the treating facility. What has been practiced in the past since the FPU was founded was that the treating team at the FPU opines for the release of the offender and the final verdict has to come from court. Never the less, it is rare for the court to object on the release of the offender since the treating team members are seen as the experts in the field. On the other hand, most of those working at the FPU during the years do not have official training or experience in forensic psychiatry, so again one can imagine the amount of bias and subjectivity this might have created for several hundred patients over the years. Moreover, it is the treating facility that has the opinion of release from the "treating facility", which means the administration of the facility, and not the treating team, which again one can imagine the possible interference from the administrative body of the facility in the final decision of release of the patient.

The Test for Discharge is Not Clear whether it Means "Until The Patient Is Cured" or "Until the Patient does not Constitute a Significant Threat to the Public"

When the court finds a mentally ill offender non-criminally responsible due mental disorder, the patient is admitted at the "treating facility" until the treating facility "orders for (his) discharge" when the treating facility opines that "the cause that resulted in the admission had ceased". The Act is however silent on the method that should be applied in determining when the patient should be granted absolute discharge. "The cause" that resulted in the mentally ill offender to commit the offence and get detained as a result could mean either the mental illness the offender suffered from at the time of the offence or the risk to the public he constituted at the time of sentencing. Even though the Act applies the danger test as a requirement for detention "If the person is found to be not criminally responsible, the court should admit the person to a treating facility, if the person constitutes a threat to the public", the Act however, is not clear about the test that should be used for discharge of the detained mentally ill.

No Appeal Processes

When the court orders the mentally ill offender to be detained in a treatment facility, the decision to discharge the patient is in the hands of the treating facility. The detention period can last from few weeks to indefinite period depending on many factors including but not limited to: the patient's mental state and severity of his illness, treatability of his illness, dangerousness to the public, support of the patient in the society, and the treatment program the treating facility is providing for the patient. Therefore,

and based on variable factors, no specific time of detention can be predicted for any patient who get admitted. During the whole period of detention, which can take several years if not decades, the patient does not have any form of appeal to the treating facility's decision for continuing to detain him.

No Midway Disposition between Detention and Absolute Discharge

The Act is silent about a conditional discharge that act as a midway disposition which is often needed before the treating team comfortably opine that the patient does not constitute a significant threat to the public. The conditional discharge or passes for the patient to use in the community are needed to reintegrate the patient to the society and also used as a measure for whether the patient is safe to be given absolute discharge disposition. What has been practiced during the years at the FPU is the selectivity in giving passes for the detained mentally ill offenders. Only those who have close support in the community have been given passes while those who do not have community support are kept without passes. One can imagine the discomfort the treating team has been going through with the bias in decisions and unfairness especially when those who do not have community support object for the unfair decision. On the other hand, the decision of giving the pass is not protected by any legal authority and if the patient commits a crime while in a pass, the treating team and the treating facility would be held responsible. Therefore, the treating team carefully calculates the risks and benefits associated with the pass before granting it to the patient. Thus, a very close family support in the community for those detained at the FPU has been an important condition for the treating team to consider before giving passes.

Does Detention Mean Treatment?

The Act specifically says that the Court should "admit" a non-criminally responsible due to mental disorder offender to a treating facility without mentioning treatment. On the other hand, the practice at the FPU since it was founded was that patients are subjected to treatment on admission, which undoubtedly violate their rights and put the treating team and the treating facility at risk of lawsuit. Moreover, given that Kuwait continues till date to not have a mental health law, non-criminally responsible patients admitted who are actively psychotic and violent will undoubtedly create havoc in the ward if they decide to challenge the treatment decision by the treating team. Furthermore, even the Procedures and Penal Trials Law that deals with unfit to stand trial accused does not specify treatment, as it states "If it turns out that the accused, having referred to a forensic doctor, is mentally ill or cognitively impaired or suffers from any abnormal mental condition that impairs his ability to defend himself, the court, or the investigator in the preliminary investigation, must suspend the proceedings until the accused is returned to his senses and can defend himself...", which again creates a challenge for the treating team if the patient refuses treatment, as there is nothing in the law nor any other local legislation that permit the treating team to force treatment. Therefore, one can wonder how would an unfit to

stand trial mentally ill accused become fit if he refuses treatment and there is no legislation that permits involuntary treatment.

Is It Time We Have Swain in Kuwait?

In 1983 Owen Swain was arrested and charged with aggravated assault after attacking his wife and children in bizarre fashion in the province of Ontario, Canada. He was found to be psychotic and diagnosed with schizophreniform disorder. He quickly improved with antipsychotic medications and went back to live in the community until the date of his trial in 1985, when the court found Swain not guilty by reason of insanity and subsequently ordered him to be held in custody until the Lieutenant Governor of the Province decides to release him, as per the Criminal Code of Canada at the time. Swain immediately appealed the decision and the matter reached the Supreme Court of Canada in the famous case *R v Swain*, (1991) 1 S.C.R. 933, which became a leading constitutional decision of the Supreme Court of Canada on certain rights of the mentally ill in their criminal defence [24]. The interesting thing about the Swain case and why the authors believe that Kuwait is in need for such thing is that the amendments to the Criminal Code of Canada and the additions made are what the Criminal Act of Kuwait is in desperate need for to protect the rights of the mentally ill.

The changes that followed with Swain case was that the Parliament of Canada created a new legislative scheme in 1992 after the Supreme Court of Canada had struck down the scheme then set out in the Criminal Code for dealing with persons found not guilty by reason of insanity in that it violated the accused rights as defined by the Charter of Rights and Freedoms [24]. The new legislative scheme known as Bill C-30 added important points that provide protection to the rights of the mentally ill and guarantee protection to the society. Of the significant changes added was the removal of the Lieutenant Governor's involvement and the automatic indefinite detention "until the pleasure of the Lieutenant Governor is known." Instead, the Code mandated the creation of independent adjudicative provincial review boards that act as the final decision-makers for disposition of mentally ill offenders [25]. Other important changes made was the addition of three dispositions available for the accused who has been found not-criminally responsible due to mental disorder (NCR) and two options for the unfit accused. The three dispositions for the NCR include detention, conditional discharge, and absolute discharge.

The disposition decision should take in consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused respectively in order of importance [26]. Those changes are important as they serve a balance between protecting the public and at the same time protecting the rights of the mentally ill and to quickly reintegrate them into the society as soon as possible [27]. The tests for discharge became also very clear being the dangerousness factor and not cure of the illness because most of mental disorders are chronic in nature that most have treatment for but no cure.

Therefore, with the changes, Part XX.1 of the Canadian Criminal Code states that an accused who has been found NCR can only be granted an absolute discharge by the Review Board after it is satisfied that “the accused is not a significant threat to the safety of the public”[24].

Other important change that was done was the issue with treatment. With the new changes, it is now clear that the Review Board has no power to order that the accused submit to treatment over his objection [28]. However, the Review Board can order the treatment only in one condition which is when the accused is found to be unfit to stand trial where treatment is necessary for the accused who suffers from mental illness be treated in order for him to become fit to stand trial [26]. Finally, one other important change that was done was granting the right of appeal from a Review Board’s disposition directly to the Court of Appeal which is required to hear such an appeal “as soon as practicable,”[29-31]. a step that guarantees more protection for the rights of the mentally ill [25]. We can conclude therefore that the changes that were added with Bill C-30 as a result of the case of Swain redirected the path of the Criminal Code of Canada in respect of the mentally ill accused in providing a better balance between the protection of their rights and protection of the society. A similar path, the authors strongly believe, the legislatures and stake holders in Kuwait should follow with the Criminal Act of Kuwait.

Conclusion

The foundation of mental health in Kuwait started in the late 1950’s when Kuwait Center for Mental Health (KCMH) was established. KCMH remains the only mental health facility in the country. Over the decades, mental health has grown in Kuwait rather slowly. The practice of psychiatry and the field of mental health are reshaping with new local psychiatrists coming back from their education and training from Canada, USA, and European countries. The country however continues to be encrusted in a thick conservative shell that will take time to soften and stigma towards mental illness is undeniably high. The field of mental health is in desperate need for a mental health law that safeguards the admission and treatment process of the mentally ill seen at the Centre and the community. Despite the many efforts done by mental health professionals and policy makers, the process to approve the mental health draft, or the several drafts over the years, have failed for many political reasons. Additionally, the field of forensic psychiatry continues to be in its infancy. Most of the assessments and management for the mentally ill accused in the Forensic Psychiatry Unit over the years did not follow any international guidelines. The Criminal Act of Kuwait, which governs the mentally ill offenders detained in the Forensic Psychiatry Unit, is outdated and the country desperately needs a fair amendment that would safeguard the rights of the mentally ill detained and at the same time protect the public. We hope that this article would help for more mental health studies to be done in Kuwait and the region to encourage policy makers to adopt the highly needed changes and increase awareness about mental health.

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