

COMPLETION OF THE CRIME OF TRAFFIC THROUGH PENAL MEDIATION IN AN ATTEMPT TO STOP PENAL THE INVESTIGATIONS (STUDY IN TRAFFIC UNIT MEDAN)

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ABSTRACT

Today in its development that the concept of judicial procedures and the handling of a criminal case has been moving towards restorative justice. One form of restorative justice is a penal mediation which is part of the criminal justice system. Mediation is previously known in civil law, has been used in some countries to resolve cases-criminal cases. Penal mediation is almost the same as those in the know with discretion owned Indonesian criminal justice system's institutions.

Keywords : Completion, Mediation and Investigations.

Introduction

Criminal law enforcement carried out in a system called criminal justice system / SPP (*Criminal Justice System / CJS*). In the criminal justice system, there is support institutions, namely the police, prosecutors, courts, and the Community Institutions (Agus Rahardjo: 2011). The criminal justice system in Indonesia is regulated in the Code of Criminal Procedure (Criminal Procedure Code), which is identical to the enforcement of criminal law which is a system of power / authority to enforce criminal laws. According to the Criminal Procedure Code enforcement system of criminal law carried out by four (4) sub-systems, namely: Powers of investigation by the police institution, Power prosecution by the Institute of Public Prosecutions or the prosecutor, Power prosecute by entities Justice or Judge, Powers of execution by the implementing agency execution (prosecutors and agencies correctional).

The fourth subsystem is an integrated system that is integral to criminal enforcement or often referred to as integrated criminal justice system or the criminal justice system integration. Given *the integrated criminal justice system* is regulated in the Criminal Procedure Code, the fourth component of the law enforcement police, prosecutors, courts and the Penitentiary must consistently keep the system running in an integrated manner. The way is to carry out the duties and authorities of each as mandated by the Act. Systems *Civil Law* that has been adopted, specifying the law is a source of supreme law, because there (in the Criminal Procedure Code) has set the rights and obligations of each law enforcement in the subsystem of criminal justice integrated as well as the rights and obligations of the suspect / defendant. The criminal justice process is a process of working of organizations, especially police, prosecutors, Courts and Prisons, using the concept of the implementation and administration of justice in accordance with a system known as a system which is handling systemic approach to the administration of justice.

Roles and responsibilities among the respective organizations should be firm, and this is necessary for a common vision among law enforcement officials is a unity in the criminal justice system. It is intended to expressly avoid any overlap due to have their roles and responsibilities are clear, that is to say, based on such things should be confirmed roles and responsibilities among law enforcement officers in institutional, where the Criminal Procedure Code was laying a principle of purification and modification of functions and authority between each law enforcement agency (Syaiful Bakhri, 2013).

While the system is regulated in the Criminal Code can be broadly divided into three stages. **First**, the stage before the trial or pre-adjudication (*pre-adjudication*). **Second**, the trial stage or stages of adjudication (adjudication). **Third**, stage after stage after the court or tribunal or full-adjudication phase (*post adjudication*). Adjudication phase is the dominant phase. It is based on the Criminal Procedure Code states that either in acquittal, or conviction, it must be based on facts and circumstances as well as the tools of evidence obtained from the examination in the trial.

In the adjudication stage are fully guarantee the rights of both parties. Prosecutors are claiming rights and the rights of the accused is defending himself against the allegations. Full assurance must be given by the court and in fact can only happen when always believe in the impartiality and independence of judges. A fair legal process in which there is belief in the existence of an independent judiciary is very important for the safety of society, no less important than efforts to tackle crime (Agus Rahardjo: 2011)

Although Indonesia does not recognize the existence of mediation in the criminal justice system, but in practice many criminal cases resolved through mediation mechanism, which was initiated by law enforcement as part of the settlement. Thus, in reality the actual mediation can be run in the Criminal Justice System. Mediation is called as the Penal mediation. Penal mediation become a necessity driven by the desire for justice for law makers to achieve restorative justice or that are often heard to *justice*. That to implement penal mediation should be an umbrella / framework law (*mediation within the framework of criminal law*) are

integrated in the material criminal law (Criminal Code) or a formal criminal law (Criminal Code). Referred to *mediation within the framework of criminal law* is the placement of mediation in product legislation.

Constructed penal mediation as an alternative dispute settlement instrument (*alternative dispute resolution*) in respect of criminal matters of dispute concerning criminal cases through the criminal justice system (*criminal justice system*), organized by state. Nonetheless, some are constructing penal mediation as part of the settlement of criminal cases through the criminal justice system

Completion of criminal cases through mediation can not be removed from the ideals of law based on the foundation of the philosophy of law, legal principles, and processes for settling disputes which refers to sources of written law and unwritten law source. The formulation of the rule of law for the settlement of criminal cases conducted through the mediation derived from the ideals of law and legal principles. Therefore pattern applied mediation should be based on the values of equity, the value of legal certainty and expediency. While the legal norms applied must consider the philosophical foundation, juridical, and sociological.

Article 18 of Law No. 2 of 2002 on the Police actually gives a foothold to the judicial police investigators to apply the Penal mediation in criminal cases including Case Management Traffic. In This settlement Mediation Penal Against the Crime of Traffic Police as investigators and law enforcement agents served as the arbiter of each party and if each party has been no agreement on reimbursement of costs if before dying victim must first be hospitalized, bear the funeral costs, salvation until finished and giving some money as condolence money and after that to make a statement that shows the completion of the case and no prosecutions back on each side, then the case by the police declared finished. But most people do not know what the penal mediation in Traffic Offence.

Discussion

1. Draft Penal Mediation as an Alternative Solution In Criminal Case

Mediation (*penal mediation*) often called by various terms, including "*mediation in criminal cases*" or mediation in penal matters "is the Dutch term called straf bemiddeling, in German called "*der AuBergerichtliche Tataos-gleich*" and in French is called "*de mediation penale*". Because mediation penal especially brings the perpetrators of criminal acts with the victim, penal mediation is often called the term "*victim-Offender Mediasion*" (Barda Nawawi : 2012)

Martin Wright defines mediation penal as a process in which the victim (victims), and the perpetrator (perpetrators) communicates with the help of the third impartial, well run private direct (face to face) or indirectly through third parties, enable / allow victim (victims express) their needs and their feelings and actor (actors) to receive and act upon their responsibilities (Salman Luthan; 2013)

Stuart M. Widman formulating penal mediation as a process in which a mediator facilitates communication and negotiation between the parties to assist them in reaching a voluntary agreement regarding their dispute (Stuart M. Widman; 2006), while according to Mark William Baker penal mediation is the process of bringing victims and actors together to reach a mutual agreement with the restitution as a foothold norm. (Mark William:1994)

Mediasi penal by *European Forum For Victim Service* described as process which involves contact between the victim and the offender, either directly or through the mediator. The process of mediation is generally regarded as part of the broader issue of *restoratif justice*.¹

Penal mediation is a form of alternative dispute resolution outside the court (commonly known as ADR or "*Alternative Dispute Resolution*"; others call it "*Aproprate Dispute Resolution*".² ADR is generally used in the civil cases, not criminal cases. Based on the legislation in force in Indonesia today (positive law) is in principle a criminal case can not be settled out of court, although in certain cases, there can be a criminal case out of court settlement.

The trend in the development of criminal law and criminal prosecution as well as criminal justice reform both in theory and practice, a more developed form of reconciliation or mediation in the settlement of the criminal case. It reminds ethical, this trend rests on the principle of individual responsibility, in substantive criminal law, with reference to making the perpetrators of the criminal sanction, the legal implementation of sanctions. Alternative methods of resolution of this deal also gives greater interests of the victims and make room for rational conflict management. Given the view of ethics is also a reaction to a criminal offense is a crime in itself, but it is not necessary losses or new injuries against perpetrators of criminal acts (Dieter Rossner : 2011)

The idea underlying the mediation penal is to unite the parties who want to reconstruct a model of criminal justice is very long with the model resolution, which will strengthen the position of victims and looking for an alternative punishment, as well as finding ways to reduce losses and heavy burden on the criminal justice system given the system's more effective and efficient.³

¹ *Statement On The Position of The Victim Within The Process of Mediation, the Executive Committee of the European Forum for Victim Services, November 2003.*

² *New York State Dispute Resolution, Inc, Alternatif Dispute Resolution in New York State, An Overview, sbr internet.*

³ *Recommendation No.R(99)19.(The Committe of Ministers of the Council of Europe) 15 September 1999.)*

Penal mediation developed by starting from the idea and principle of work (working principles) as follows : (Stefanie Trankle: 2015)

1. Handling conflict (*Conflict Handling/ konflikt bearbeitung*): The task of the mediator is to make the parties to forget the legal framework and encourage those involved in the communication process. It is based on the idea that a crime has provoked interpersonal conflict. Conflict that is intended by the mediation process.
2. Oriented process (*Process Orientation: Prozessorientierung*): Penal mediation is more oriented to the quality of the process rather than results, namely: Sensitize perpetrators of criminal acts of his guilt, the needs of the conflict resolved, serenity victim of fear and so on.
3. The process of informal (*informal Proceeding-informality*): Penal Mediation is an informal process, not bureaucratic, avoid strict legal procedures.
4. There is an active and autonomous participation of the parties (*Active and autonomous participation-Parteiautonomie/ Subjektivierung*): The parties (*perpetrator and victim*) is not seen as an object of criminal law procedure but rather as a subject who has a personal responsibility and ability to act. They are expected to do on his own.

Meanwhile *European Forum For Victim Service* provides the Guiding Principles in mediation as follows;⁴

1. *Mediation requires the involvement of the victim and it is therefore important that their interests are considered fully;*
2. *Mediation processes should only be used with free and informed consent of the parties and the parties should be able to withdraw consent at any time;*
3. *Victim/offender mediation in criminal cases is different from similar processes of mediation in other areas of life-life mediation process must include the offender accepting responsibility for his act and the acknowledgement of the adverse consequences of the crime for the victim;*
4. *It is vital that the mediator and everyone involved in the mediation process has received appropriate training on the special issues concerning victims of crime which will be relevant to the mediation process.*

The "*Explanatory memorandum*" of the Council of Europe Recommendation No. R. (99) 19 on "*Mediation in Penal Matters*", stated penal mediation model as follows:⁵

- a. Model "*informal mediation*"
 - The model is carried out by criminal justice personnel (criminal justice personnel) in their normal duties, which can be done by the Prosecution to invite the parties for informal resolution with the intention of not continuing prosecution if an agreement is reached. In this model can be done by a social worker or supervising official (probation officer), by a police officer or by a judge
 - The type of informal intervention is not commonplace in all legal systems.
- b. Model "*Traditional village or tribal moots*"
 - According to this model, the whole community met to resolve conflicts between citizens and the crimes contained in some less developed countries and in rural areas / hinterland.
 - Principle, this model of western legal precedence and has inspired many modern mediation programs. Modern mediation programs often try to introduce the benefits of meeting the tribe (*tribal moots*) in a form adapted to the structure of modern society and the rights of individuals admitted under the law.
- c. Model "*Victim-Offender mediation*"
 - According to this model, the mediation between the victim and the perpetrator is the model most often present in people's minds.
 - The model involves various parties meet in the presence of a mediator appointed. Many variations of this model. The mediator may come from formal official, independent mediator, or a combination.
 - Mediation can be held at any stage of the process, both at the stage of police policy, the prosecution stage, the stage of sentencing or after sentencing.
 - This model there is applied to all types of criminal, nothing is for certain types of criminal offenses (eg penguntalan, robbery and violence). There are mainly aimed at the child offender, the offender beginners, but there are also fatherly heavy offenses and even for recidivist.
- d. Model "*Reparation negotiation programmers*"
 - This model solely to estimate or assess compensation or repairs to be paid by the offender to the victim, usually at the time of examination in court.
 - The program is related to reconciliation between the parties, but only with regard to the material improvement plan.
 - In this model, the offender may be subject to a work program in order to save money to pay damages / compensation.
- e. Model "*Community panels of courts*"

⁴Statement On The Position of The Victim Within The Process of Mediation, the Executive Committee of The European Forum for Victim Services, November 2003.

⁵ Sfm.jura.uni-sb.de/archives/images/mediation-en%5B1%5D.doc,

- This model is a program for diverting criminal cases from the prosecution or the judiciary in society procedure more flexible and informal and often involve an element of mediation or negotiation.

f. Model "*Family and community group conferences*"

- This model has been developed in Australia and New Zealand, which involves community participation in the SPP (criminal justice system). Not only involves victims and perpetrators of criminal acts, but also the perpetrator's family and other community members, elected officials (such as police and judges child) and supporters of the victim.
- Actors and their families are expected to produce a comprehensive deal and satisfy the victim and can help to keep the offender out of trouble / next problem.

2. Legal Basis Penal Mediation

Acceptability penal mediation as an alternative to the settlement of criminal cases outside the criminal justice mechanism or be part of the mechanism of criminal justice in Indonesia have a pretty good foundation and significant based on several considerations , among others :

- a. Penal mediation has been recommended by the United Nations as an alternative dispute resolution outside the court to address the negative impacts of the operation of criminal justice . In the supporting documents of the United Nations congresses 9/1995 relating to the management of criminal justice (ie document A / CONF . 169/6) expressed the need for a country considering " *privatizing some law enforcement and justice function*" and " *alternative dispute resolution / ADR* " (Form mediation, conciliation , restitution and compensation) in the criminal justice system.(Salman Luthan:2013)
- b. Penal mediation has become a system of rules of criminal law and criminal law enforcement culture in many countries as an instrument of alternative settlement of disputes or criminal cases . The formulation of penal mediation in criminal legislation in some European countries can be described in the following description . In Belgium in 1994 enacted legislation penal mediation (*the Act On Penal Mediation*) is also accompanied by the guidelines (*the Guidelines on Penal Mediation*). The main purpose the holding of " *Penal Mediation*" is to improve the material and moral losses incurred because of offense . However , mediation can also be done so that the offender perform a therapeutic or doing social work (*community service*).(Barda Nawawi Arief :2012).

Given this provision, prosecutors were given greater freedom to prioritize the interests of victims If the offender promised to give compensation or gave compensation to the victim , so the case can not be forwarded kepenuntutan . At first, the prosecution authorities not to proceed with prosecution for their payment of compensation only for the offense punishable up to 5 years in prison , but with the recent provisions , it can be used also for the offense which carries a maximum of two years in prison. Procedural law provisions included in article 216 *of the criminal procedure code*:

- a. The idea of penal mediation as an alternative dispute resolution has its roots in the culture of the nation , especially in customary law various regions in Indonesia such as Aceh, West Sumatra, Lampung, Southern Sulawesi, and other areas. Penal mediation roots in customary law appears in creation reconciliation between perpetrators and victims by giving retribution to victims and implementing customs obligations.
- b. Mediation penal practiced by law enforcement officials (investigators, prosecutors, and judges) in the completion of a specific criminal case although mediation penal lack a legal basis in Indonesian positive law a criminal case that many resolved through mediation mechanism penal is the case of traffic offenses due to negligence resulting in other people were wounded and died (Trisno Rahardjo; 2011). In addition to the case because of negligence causing other people were injured and died , penal mediation is also practiced in cases of domestic violence practiced in court by the judge .
- c. The idea of penal mediation increasingly popular in the community that is characterized by the various activities of the scientific work on the campuses and law enforcement institutions, publication of scientific papers, and his chosen topic penal mediation in the final task master and doctoral education. In addition, the discourse of thinking about the urgency of restorative justice as an instrument of a criminal dispute resolution are also increasingly widespread and increasingly accepted among academics and legal practitioners .

The idea of the idea of entering the penal mediation as an alternative to the settlement of the criminal case outside the court as part of a system of rules of criminal law, in particular in the renewal of *the Criminal Procedure Code* and *the Criminal Code* or as part of the criminal justice system, especially in the newness of *the Criminal Procedure Code* and *the Criminal Code* requires a political commitment from the government and Parliament. Without the political will of the government and Parliament as holder of legislative power, the idea of penal mediation will only stay as a single idea. Therefore, academics and legal practitioners and activities engaged in law enforcement must encourage governments in realizing the enforcement authority and the rules of a rule of law.

There are three (3) things that become the reason of the mediation penal or criminal mediation entered in the criminal justice system is : (Larysa Simms:2007)

- a. **First**, criminal mediation has enormous potential impact in reducing and controlling the build up of criminal cases, to handle trivial crimes and to provide alternatives to the traditional criminal prosecution to establish its first branch in criminal mediation model. Mediation quickly resolve disputes and often result in the perpetrator avoid criminal indictments, and the victims receive restitution in accordance with an agreement in mediation. Mediation minor crimes prosecution to reduce the workload and the burden of low-impact crime cases in court are quite serious for State intervention, thus saving time, resources and payment of the tax court. In addition, mediations low-impact crime

- memberikan compensation and psychological satisfaction to the victim resulting from the victim actively involved in the process, while the actors learn to take responsibility for the mistakes they did.
- b. **Second**, mediate to do (*plea cases*) is converted into a traditional plea bargaining, thus forming a criminal mediation model prong second plea bargaining done as a means of alternative solutions to reduce the case load of the criminal justice system. Entering criminal mediation into the process of "*plea bargaining*" is very important but the problems it will improve the criminal justice system. The prosecutor and the accused can achieve a fairer deal in some cases that can be converted into traditional arrangements using independent and neutral mediator. One important drawback is that the criminal mediation is not suitable for cases where traditional plea negotiations are not appropriate ; This mediation was never suited to mediate cases where the accused was clean hard innocence. Despite the shortcomings , the criminal mediation remains a step forward in the criminal justice system.
 - c. **Thirdly**, victim offender mediation facilitates interaction after errors determined by adjudication. Victim offender mediation in several circumstances is the right choice for the party after guilty plea or verdict entered, thereby allowing third parties stream of other criminal issues that are not restricted by the statement or the determination of guilt. Model justice to be achieved through penal mediation is the restorative justice system oriented main objectives, namely:
 - a. As a centralized model for victims, restorative justice focuses on the involvement of victims, and ensure that victims receive the justice that is personal and satisfying. By involving the victims in this process , they have the opportunity to meet directly with the perpetrator and express their anger and frustration, and explain the impact of the perpetrator's actions on the victim 's life. Thus, this process gives the victim a vehicle to communicate their needs to the ways in which their needs can be met (Salman Luthan: 2013)
 - b. Retroactive justice regime recognizes rending "*community fabric*" posed by deviant behavior, and aims to incorporate the interests of the community in the management of the judiciary. Usually after such a crime, many members of the community feel uncomfortable. Then the judicial system need to empower people to directly recover the problem of evil. When people participate in programs restroaktif justice, community play an active role in solving problems in the community in terms of community involvement in restorative justice process to strengthen the bonds between the community and create security of every individual in a social clump.

3. Practice Penal Mediation in Progress Article Traffic Police Traffic Unit Resort Medan :

The practice of mediation penal in solving criminal cases, whether committed by some members of the public by way of peace between the perpetrator and the victim, which ended with the payment of compensation to the victim (*Penal mediation out court*) or in the completion of the criminal case on the stages of the criminal justice process agreements and payments replace the loss of the perpetrator to the victim only as a mitigating consideration of criminal prosecution and criminal punishment (*Penal mediation within court*).

At this stage of the investigation, particularly in the matter of traffic in a traffic accident, when only cause harm small or small lesions usually resolved by mediation between the offender and the victim, and the police as a witness to the agreement reached, the matter did not proceed on the basis of mutual agreement between the perpetrator and the victim. However, if an accident due to negligence has caused a great loss like life then mediation is not possible, as for the payment of compensation in the form of hospital fees and burial of the victims only as one of the considerations that will be used by the judge in the verdict to the defendant. Thus indemnify agreement does not eliminate the crime, because the perpetrators are still being investigated and processed in the criminal justice system.

Based on the results of direct observation in *the Traffic Police Medan* mediation penal conducted between two parties who litigants, by making peace with how to provide feedback to the parties litigants to sit together to resolve an issue in order to obtain a decision that could be accepted by litigants "*between reporter and reported*". If an agreement is reached between the reporter and the reported party then the arrangement is set forth in a deed of peace, it is becoming grip accident investigators that the case has been resolved and no need be continued to further levels.

Meanwhile at the prosecution stage, made possible penal mediation does before prosecution. In this mediation the victim may request compensation to the actors, however, if there is an agreement on the part of the victim and the offender to indemnify, the agreement does not eliminate the prosecution, so that the judicial process is still running as it should, and deal damages merely as consideration prosecutor in holding prosecution, the decision remains in the hands of judges. Mediation penal here are only softening demand, because there are no laws governing the conduct of mediation along with legal force of a deed of agreement results penal mediation. Thus, the offender shall be punished but the criminal remains commuted.

Experience the practice of mediation penal judge is never done, because there are no regulations normative set, usually matters concerning the agreement of the offender and the victim is on the level of investigation and prosecution, the judge only gave the decision to consider issues raised in the letter charges that one of the agreements reached through mediation before the case transferred to the court.

Penal mediation has actually been known in the completion of customs offenses in several tribal regions in Indonesia. *Bill Criminal Code in 2015* to accommodate the legal validity of a living by pouring in *Article 1*, paragraph 3. In criminal law customary criminal conflict settlement based on local wisdom, which are familial, and therefore a criminal act is not regarded as a matter of individual to individual, but as a matter of inter-tribal perpetrators and victims, so the solution was pursued in a way that does not destroy the harmony of the relationship between tribes, among others is done by "mediation" to produce an

agreement on the dispute.

By looking at the practice has many penal mediation in resolving the criminal cases of traffic accidents with institutionalized mechanisms such as the traditional justice or who are not institutionalized, point to the need of society for their penal mediation as an alternative in resolving criminal cases to avoid difficulties in the criminal justice process.

4. Determination of the Crime Policy That Could be Mediated.

Policies to establish mediation penal as an alternative to the settlement of the criminal case, which is part of the criminal justice process is needed, so that the mediation penal could be a means of settlement of criminal cases that are legitimate and the results of the agreement are binding on law enforcement officers, and the public so that criminal offenses were resolved through mediation penal remove the right to sue.

Applicability of penal mediation as the reason for the abolishment of the authority to prosecute in the future are in line with the concept of the Criminal Code in 2015 on the fall or the abolition of the authorities demanding a criminal offense, as stated in Article 145 letter d, e, and f that determines that void if the prosecution authority; (d) The settlement outside the process. (e) The maximum penalty is paid voluntarily for a criminal offense committed only punishable by a maximum fine of category II. (f) The maximum penalty is paid voluntarily for a criminal offense punishable by imprisonment for a period of 1 (one) year or a maximum fine of category III. Meanwhile as the reason abolish the authority running the punishment for offenders who have been sentenced to the judge's decision in the form of imprisonment, mediation penal in the stage of execution is in line with Article 57 of *Criminal Code draft 2015* concerning changes or adjustments criminal, which can be either the removal or disabling residual or criminal actions and replacement kind of criminal or other action.

He determination of the policy can be mediated offenses are based on the following criteria;

- a. The Threat of Criminal Law.
Offenses mediated should be a criminal offense which is only punishable by a penalty of a fine or imprisonment of a maximum of one (1) year and a criminal offense with imprisonment of a maximum of 5 years for certain crimes such as *Article 359 of The Criminal Code* (negligence resulting in death of man other) and *Article 360 The Criminal Code* (negligence resulting in another person seriously injured).
- b. The level of losses incurred
Offenses in criminal acts to mediate should cause small losses, such as the offenses and minor crimes. Example; the crime of theft mild, mild persecution, fraud and embezzlement mild light.
- c. The offenses committed by negligence Criminal offenses committed due to negligence can be mediated, this involves the inner attitude of the offender. In the criminal acts and omissions that result is not due to the will of the perpetrator, but due to lack of careful attention.
- d. The offenses are complaint-based offense both in absolute and relative.
The criminal acts can mediate complaints for prosecution based on the presence or absence of a complaint, and the opportunity for the victim or the complainant to withdraw the complaint so as not to continue the process of criminal justice. Example; zina offense, humiliation and others.
- e. The offenses involving family members as perpetrators/victims
This is in line with one of the goals penal mediation is to integrate and unite or strengthen the relationship between the offender and the victim. Thus, if the criminal act involving family members it is possible to do penal mediation.
- f. Crime in which the perpetrators of minors.
Against minors who commit criminal offenses contained special provisions, so that the criminal justice process he underwent not cause prolonged trauma that will disturb psikhis development, so that opened great possibilities for a settlement with the mediation process penal.

Conclusion

The concept of penal mediation in traffic criminal offenses have been applied by the public and law enforcement agencies in solving the crime of traffic. Penal mediation should be considered for alternative penyelesaian criminal cases that are mild to overcome his full prison. But the practice of penal mediation does not remove the right of prosecution and punishment for the perpetrators carry out certain crimes.

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