

The Role of the Administrative Judge in the Creation of Legal Norms

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Abstract:

The administrative judge is pivotal in shaping administrative law by establishing foundational principles and theories. These principles govern administrative functions across diverse sectors, addressing ambiguities or incomplete provisions in existing legal frameworks. Administrative law's flexibility and distinctive features facilitate this dynamic role, enabling administrative judges to resolve disputes between individuals and public administrations effectively. This research delves into the methodologies employed by administrative judges in formulating legal norms and explores the motivations for their involvement in legal norm creation.

Keywords: Administrative Judge; Administrative Law; Discretion; Legal Development; Norms; Public Administration.

I. INTRODUCTION

Administrative law is a critical branch of public law that regulates the organization and functioning of public administration. This area of law is distinct from private law, characterized by exceptional rules designed to meet the specific needs of public administration. These legal rules help ensure a balance between the administrative authorities' powers, exercised in pursuit of the public interest, and the rights and freedoms of individuals.

The oversight of administrative bodies by the law reflects the evolution of modern civilization, ensuring protection from arbitrary state actions. Without legal constraints, administrative actions could become unchecked, disrupting the equilibrium between the state's interests and citizens' rights. Consequently, creating legal norms is essential for safeguarding individual freedoms and promoting the efficient functioning of administrative bodies.

The administrative judge plays a fundamental role in establishing and developing these legal norms. The concept of administrative law is closely linked to the emergence of administrative courts, distinct from regular courts, tasked with resolving disputes involving administrative authorities. Over time, the administrative judiciary has evolved as an independent body capable of making judgments that shape the trajectory of administrative law.

The function of the administrative judge is to monitor administrative actions with a high degree of procedural rigor, ensuring fairness and impartiality. Administrative judges often innovate and create new legal interpretations and principles in response to gaps, ambiguities, and evolving circumstances within administrative law. Their role includes interpreting the law, analyzing facts, and establishing precedents that help shape legal norms and practices.

The French Conseil d'État is a prime example of an institution where administrative law has been continuously developed and refined through judicial decisions. By addressing the cases brought before it, this body has shaped legal principles adapted to the changing social, political, and economic contexts of the time.

As such, the ongoing work of the administrative judge is essential for balancing the protection of public interest with individual rights. This balance is vital for the legitimacy and effectiveness of administrative law. To understand the pivotal role of administrative judges in shaping administrative law, we explore the following question:

How does the administrative judge contribute to the creation of administrative law norms, and what are the justifications for this role?

This research addresses the question by examining two main aspects. The first aspect explores the reasons and justifications for the administrative judge's role in creating legal norms, focusing on the unique characteristics of administrative law and the judge's functions. The second aspect examines the contributions of administrative judges in developing key principles and theories of administrative law and their role in adapting law to societal needs.

1. First Headline

Since 1872, judicial authority was granted to the French Council of State, and administrative justice has been crucial in shaping and establishing administrative law rules. This has been especially significant in the absence of specific legislation. Utilizing the evolving nature of administrative law, the administrative judge has expanded their role to develop and address gaps in legislative texts to meet public interest needs. This proactive and dynamic approach in resolving disputes has been integral to establishing administrative law principles and continues to be vital today.

1.1. First Subtitle: Justifications Imposed by the Nature of Administrative Law Rules

Administrative rules need to cover all relevant aspects of the subjects they regulate while balancing public interest with individual understanding and application. This requirement is shaped by the prevailing social, economic, and political conditions, as well as the clarity of legislative drafting. The administrative judge has played a crucial role in this process, with the evolution of administrative law largely attributed to their efforts. As a result, administrative law has developed into a distinct branch of public law, separate from private law.

a. The Specificity of Administrative Law Rules

A legal rule is essentially a preconceived notion aimed at achieving specific objectives (Al-Saoui, 2003, p5) within the state, serving as a means to realize these goals while encompassing the realities of life, with all its complexities and changes, to meet the needs and interests of individuals. This rule is then formulated into legislative provisions. (Mahrous, 2017, p503). Furthermore, a legal rule embodies an idea that, when collectively considered, forms a body of law reflecting political choices and societal demands. The more a legal rule is based on a comprehensive understanding of various factors, requirements, and intellectual trends, the more it is characterized by realism and flexibility in its application, particularly in administrative law, which draws its sources from multiple branches of public law (Al-Shawi, 2011, p206-208).

Legal rules, in general, are constantly evolving, as they are fundamentally social constructs, reflecting the reality of ever-changing circumstances and requirements. This is especially true for administrative law rules, which are more dynamic and adaptable than those in other branches of law (Al-Saireh, 2012, p23), giving them a distinct specificity that sets them apart from other legal frameworks. This also underscores the crucial and inevitable role of the judge in the creation of these rules. The existence of administrative law has been closely tied to administrative justice since the emergence of the French Council of State as a judicial body in 1872 (Bi Ali, 2013, p24). Key principles of administrative law were established and codified during this time, and the Council's decisions became binding on the administration. Additionally, the advent of judicial dualism led to the emergence of legal dualism, as the administrative judge was faced with the evolving challenges of governance and individual rights amidst the shifting political and economic landscape (Hussein, 2013, p 12) following the French Revolution.

b. The Impact of Legislative Drafting

Effective legislative drafting plays a crucial role in the vitality and efficacy of legal rules. Good drafting is characterized by clarity and comprehensibility, ensuring that all those subject to the law, across all social strata, can easily understand and apply it (Al-Shawi, 2011, p207).

The clearer and more precise a legislative rule or regulation is, the more it protects individual rights and freedoms and effectively meets societal aspirations (Mahrous, 2017, p496).

In most cases, the administrative judge is faced with a complex set of legal texts that are often ambiguous and lacking in clarity. Despite these challenges, the judge is obligated to resolve the disputes brought before them, without the option of refusing to rule due to the absence of explicit legal provisions. This situation compels the judge to exercise creativity and judicial reasoning to formulate a judgment and provide a solution to the dispute at hand. (Khaledi, 2017–2018, p297-200)

1.2. Second Subtitle: Practical Justifications Imposed by the Administrative Judge's Function

The administration, endowed with the privileges of public authority that enable it to achieve the public interest through the administrative functions it exercises, always occupies a superior and higher position compared to individuals who seek to achieve private interests. Consequently, the administrative judge constantly strives to establish a balance and assess the consequences of the administration's use of its privileges (Hussein, 2018–2019, p213). The judge monitors the actions of the administration, guiding them to adhere to the principle of legality and to protect the rights and freedoms of individuals. In this capacity, the judge serves as an effective guarantee and a restriction on administrative actions. This role is facilitated by the judge's understanding and awareness of the administrative work's requirements, which has led to the establishment of several principles that limit the authority of the administration, whether in the field of administrative police, discretionary power, or public services (Marwa, 2022–2023, p86).

a. The Role of the Administrative Judge in Balancing Individual Rights and Public Interest:

Administrative judges must balance protecting individual freedoms against the needs of public administration, ensuring that the application of the law aligns with both legal principles and public policy considerations.

b. The Administrative Judge as the General Jurisdiction Authority in Dispute Resolution:

Administrative justice originated in France and later spread to other countries. This development was driven by historical reasons linked to the French Revolution of 1789 and the ideas it propagated. The first decision taken during the revolution was the abolition of the old regime's courts, known as parliaments. Additionally, the Judicial Organization Act of August 16-24, 1790, established the separation between administrative and judicial bodies. On February 12, 1799, under Napoleon's rule, the French Council of State was established, marking the first significant step in the development of French administrative justice. Initially, its role was merely advisory, but it later evolved into a fully-fledged judicial body. Nevertheless, the administration retained general jurisdiction over administrative disputes until December 13, 1889, when the Council of State, in the Cadot case, ruled that it would accept direct claims. This decision positioned the Council as the general adjudicator of administrative disputes (Othman, 2010, p61). Since then, administrative justice has enjoyed significant independence and specificity, aligning with its function of resolving administrative disputes and establishing rules of administrative law distinct from private law (Al-Saraireh, 2012, p22).

In Algeria, the judicial system has been characterized by a lack of clarity, oscillating between unity and duality. After the issuance of Ordinance 65/278 on November 16, 1965, which introduced judicial reforms, a hybrid system was adopted. This system featured unified courts with a separation of jurisdictions for different types of disputes *unité de juridiction avec separation des contentieux* (Boudiaf, 2008, p6). However, the 1996 constitutional amendment formally established a dual judicial system, as enshrined in Article 152, leading to the creation of the Council of State as a body that oversees the administrative judicial bodies. The Council's organization was further defined by Organic Law No. 98/01, dated May 30, 1989, alongside the administrative courts, which were grounded in Law No. 98/02 of the same date (Presidential Decree No. 96-438, 1996).

As a result, the administrative judge became the authority with general jurisdiction over administrative disputes. This was reaffirmed by Article 800 of the Code of Civil and Administrative Procedure, which stipulates that administrative courts have jurisdiction over cases involving the state, the province, the municipality, or any public institution of an administrative nature (Law No. 08-09, 2008).

Since its inception, administrative justice has been vested with general jurisdiction in administrative disputes, handling all types of administrative cases and claims. It has thus become the legitimate legal means for individuals to assert their rights against the administration (Jamal El-Din, 2012, p01-12).

The diversity and specialization of administrative justice in overseeing the actions of the administration are among the key factors contributing to its strength and effectiveness (Aouabdi, 1419 AH, p 204-205). It specializes in overseeing the legality of administrative decisions, financial and tax disputes, electoral disputes, annulment oversight, compensation oversight, and comprehensive monitoring of administrative contracts. This specialization has led administrative judges, particularly in France, to reject the application of private law and instead offer alternatives more aligned with the nature of administrative activities, powers, and objectives. The decisions they have issued collectively form the body of administrative law (Boudiaf, 2007, p87). The administrative judge has played a significant role in the development of these laws, often surpassing the role of the legislator. The judge traditionally formulates and prepares legal principles that are later codified by the legislator after they have been judicially established (Basyoni, n.d, p161). Even with the enactment of various laws relating to administrative activities and disputes, the administrative judge continues to play a crucial role in establishing administrative law principles, drawing on the expertise gained from the numerous complex issues that come before them and which have not been addressed by legislation (Boudiaf, 2007, p88).

2. Second Headline: The Administrative Judge's Methods in Establishing the Legal Rule

The administrative judiciary is crucial in developing legal principles and administrative law. By establishing general principles and interpreting legal rules, administrative judges shape the law and address gaps in legislation. Their rulings often guide legislative drafting, resulting in more effective and precise laws (Khaledi, 2017–2018, p60). Judicially influenced rules are generally more dynamic and applicable than those solely created by legislators, who may lack

specialized expertise (Khaledi, 2017–2018,p63) As Gustave Le Bon noted, "A just judge's ruling can correct what is unjust in the law."(Melleray, 2005,p13).

2.1. First Subtitle: Judicial Interpretation as a Method for the Administrative Judge in Creating Administrative Law

Judicial interpretation is a key tool for administrative judges in shaping the development of administrative law. Through their interpretations, judges can create precedents and clarify ambiguous rules, which contributes to the evolution of administrative law.

2.1.1. Definition of Judicial Interpretation

embodying the rule of law on the facts at hand. It is an organized mental process, using specific scientific methods and approaches, aimed at extracting and clarifying the correct meaning of a legal act or rule or correcting it clearly and soundly. This process involves deriving legal principles from ambiguous rulings and applying them appropriately.

2.1.2. The Role of Judicial Interpretation in Shaping Administrative Law

Judicial interpretation refines legislative texts to address flaws or deficiencies, as judges implement legislation practically. Since legislative texts cannot account for all real-world scenarios, judicial interpretation supplements legislation, especially in administrative law, making it more adaptive, effective, and realistic. It enables judges to clarify ambiguities, define broad scopes, and create solutions, which are essential in addressing gaps and adapting to social, economic, political, and scientific conditions. This process fosters creativity, innovation, and flexibility in applying laws.

2.2. Second Subtitle: Types and Stages of the Interpretation Process

2.2.1. Stages of Interpretation

In the process of interpretation within administrative law, the administrative judge follows several sequential and interconnected stages, which are:

- 1. The Stage of Researching the Relevant Legal Text:** This involves identifying the legal text in question and gathering all sources of the legal system related to the act under interpretation.
- 2. The Stage of Literal or Verbal Interpretation:** This involves interpreting the legal act or text literally, based on the text's explicit wording.
- 3. The Stage of Investigating the True Intent of the Source:** This stage involves exploring the true intent behind the legal text or act that is being interpreted.
- 4. The Stage of Seeking the Meaning of the Ambiguous or Vague Text:** This involves clarifying the meaning of a text or legal act that is ambiguous or unclear (Khaledi, 2017–2018, p228)

The interpretation process may involve all these stages or may halt at a particular stage whether the first, second, or third depending on which stage provides a clear understanding of the ambiguous or unclear text or act. (Aouabdi, 1419 AH, p08).

2.2.2. Types of Interpretation

In interpreting administrative law texts, the administrative judge employs two main methods: narrow interpretation and broad interpretation.

- Narrow Interpretation:

1. Interpretation of Principles of General Law: Legal provisions contained within general principles must be interpreted narrowly and technically. This includes principles such as the non-retroactivity of administrative laws, the *res judicata* principle, and the principle of the adaptability of public utilities to changing circumstances⁵⁸. (Fath Al-Bab, 2012, p361).

2. Narrow Interpretation of Exceptions: Exceptions to general rules should not be interpreted expansively or applied analogically. Any extension of an exception should be treated as an additional exception; thus, the interpretation of exceptions must be narrow.

3. Narrow Interpretation in the Presence of another Legal Text: This is done to protect rights and freedoms from administrative authority encroachments. If there is a text setting limits on legal acts, narrow interpretation ensures that these limits are respected. (Aouabdi, 1419 AH, p213).

- Broad Interpretation in Administrative Law:

When legal texts are general and do not include specific and mandatory details about the legal act and its circumstances, the administrative judge resorts to broad interpretation. This approach goes beyond the literal wording of the text, delving into the spirit and implications of the text by employing legislative wisdom and logic. Broad interpretation is applied in the following areas:

1. Interpretation of Legal and Administrative Acts: Judges may interpret laws to ensure they align with administrative practices and public policy.

2. Interpretation of Provisions Granting Regulatory Authority: Judges might expand the scope of regulations to ensure effective governance.

3. Interpretation of Powers and Privileges of Public Administration: Judges define the extent of government powers in specific contexts.

2.3. Judicial Precedent as a Source of Administrative Law

The administrative judge applies legal rules and texts to the cases before them. Given that administrative law is uncodified, evolving, flexible, and modern, the administrative judge often derives solutions and seeks connections in the absence of written texts or binding customs⁶¹. (Al-Tamawi, 1989, p17). This is necessary for resolving disputes, as the judge is obligated to decide them. Consequently, the judge develops and innovates legal principles that fit each case. As a result, the administrative judge has become an important source of administrative law. (Bi Ali, 2013, p24) in many countries. For instance, the French Council of State since 1872 and the Tribunal of Conflicts have played a significant role in creating many legal principles and theories related to public administration, especially in the absence of legislative rules, due to their authority and freedom to derive rulings (Shihah, 2006, p56).

The Legislator may intervene to amend existing legal texts or create new ones based on the legal principles and theories developed or revealed by the administrative judge through the cases they handle. Even if the legislator does not enact a text embodying these principles,

the repeated application of these principles by the administrative judge makes their violation difficult, even for the legislator (Al-Aqoun, 2020, p375).

2.3.1. Definition of Judicial Precedent

The term "judicial precedent" in French is "jurisprudence," derived from Greek. It consists of "juris," meaning law, and "prudencia," meaning knowledge or wisdom.

In Arabic, the term "اجتهاد قضائي" (judicial precedent) comprises two words: "اجتهاد" (ijtihad) and "قضاء" (qada'). "اجتهاد" refers to exerting effort and diligently considering legal matters, evidence, and documents to derive solutions. "قضاء" denotes adjudication and resolution, signifying the authoritative and expert judgment of a specialized judicial body (Khaldi, 2017-2018, p30).

Judicial precedent can be defined as the judge's effort to the fullest extent to derive judicial solutions and rulings, applying them to the facts of the dispute before them in the absence of explicit legal texts. The precedent is binding on the parties involved in the dispute.

Scholars have defined it as the exertion of effort to understand legal rulings (EL Aqoun, 2020).

On the other hand, legal practitioners define it as the consistency of court rulings on a particular matter in a specific manner (Bakhaled, 2024, p827).

Judicial precedent carries two meanings: a general meaning and a specific meaning. The general meaning refers to the collection of solutions reached by the judge while adjudicating disputes before them. The specific meaning pertains to the administrative judge's efforts to derive and find legal solutions and rulings applicable to the dispute, using unconventional or ambiguous rules from private law or non-existent ones, while balancing public and private interests. (Khaldi, 2017-2018, p30)

Regarding legislation, there is no specific definition for judicial precedent. However, Article 179 of the current 2020 Constitution states that the Supreme Court and the Council of State are authorized to unify judicial precedents across the country (Decree 442-20, 2020). Additionally, Article 2 of Organic Law No. 98-01 of May 30, 1998, stipulates that the Council of State is responsible for ensuring the unification of judicial precedents in administrative matters (Law No 98-01, 1998).

2.3.2. Judicial Precedent as a Means to Address Legislative Gaps

Judicial precedents can help resolve legislative gaps by offering interpretations and solutions based on previous cases. This method ensures that the law remains adaptable and responsive to emerging issues.

2.3.3. General Principles of Law

- Definition of General Principles of Law: General principles of law are fundamental rules derived by judges from the general spirit of the law within society. Alongside statutory laws and regulations, there exists an unwritten source of law derived from general principles, which administrative judges extract and apply. These principles become binding on the administration, ensuring adherence to the principle of legality. Administrative judges, being responsible for interpreting and applying laws to disputes before them, derive these principles from the core principles of the state's economic and social system, as well as constitutional

and legal principles. This approach maintains alignment with the general spirit of legislation and the collective will of society (Shatnawi, 2008, p54) .

The general principles of law recognized by administrative jurisprudence have several characteristics:

- They are unwritten sources of legality and are not codified.
- They are characterized by permanence and stability, applying without being limited by time, as they are fundamental and essential rules, not ordinary rules.
- They constitute a comprehensive legal framework, with the French Council of State referring to them in the plural form. Each interested party has the right to appeal for annulment based on these principles as a legal framework (Aman, 2007, p39).

- Legal Value of General Principles of Law:

The debate surrounding the status of general principles of law involves differing opinions on their legal hierarchy. Some French legal scholars argue that these principles possess the same authority as codified laws or legislation. Others assert that they rank above ordinary laws but below constitutional law. A third perspective considers general principles of law to have a higher legal value, similar to constitutional norms. This view is supported by the French Constitutional Council, which has recognized principles like the continuity of public services and the right to strike as having constitutional significance.

« La continuité du service public qui tout comme le droit de grève a le caractère d'un principe de valeur constitutionnelle » (Aouabdi, 2000, p70).

A fourth view from Egyptian scholars suggests that general principles of law vary in rank based on their source. If a legal principle originates from general constitutional principles, it is considered at the level of the constitution, thus higher than ordinary law, and similarly for other legal ranks (Kanaan, 1993, p67-68).

Despite these differences, general principles of law hold the same legal force as statutory rules in terms of affecting legal positions, including their establishment, amendment, and abrogation. They are recognized as sources of administrative law due to their general, abstract, and binding nature, agreed upon by both scholars and the judiciary (Chapus, 2001, p99).

Among the significant principles established by the French Council of State is the principle of equality, including its various applications such as equal access to public office, equality before public services, and equality in burdens and costs, illustrated by judgments in cases such as **Mme Trompier-Gravier** on May 5, 1944, and the **Société des Concerts du Conservatoire** on March 9, 1951 (Kanaan, 1993, p69).

Another fundamental principle is the prohibition of retroactive laws, which is recognized as crucial in administrative law and finds its legitimacy in the jurisprudence of the Council of State, illustrated by the ruling in the case of **Journal L'Aurore** on June 25, 1948. Additionally, the principle of the regular, consistent, and uninterrupted operation of public services, as demonstrated in the **Dehaene** case on July 7, 1950, is another key principle among the many principles established by the Council of State in over 100 rulings, which have been emphasized as important sources of administrative law (Kannan 1993, p70).

The Algerian legislator has enshrined several principles established by French jurisprudence, such as the principle of equality before the law as stated in Article 37 of the

2020 Constitution, equality in access to public jobs as per Article 67 of the Constitution, and the continuity of public services as outlined in Article 27 of the Constitution (Decree N0 20-442, 2020).

The Algerian Council of State also recognizes general principles of law as sources of legality through various decisions, such as the decision of July 27, 1998, which emphasized the principle of equality and considered judges as state employees entitled to constitutionally guaranteed rights, with the administrative judge responsible for ensuring these guarantees are upheld (Decision N0 994-172, 1998).

2.3.4. Impact of Judicial Precedent on Administrative Law Rules

Administrative judges play a significant role in shaping an effective legal system through their precedents in various fields. This role strengthens their position in the legal system and contributes to creating legal rules that adapt to social, economic, and political changes, while enhancing administrative work by addressing new areas not covered by the legislator.

Judicial precedents are characterized by high legal quality due to the expertise of specialized judges, unlike rules created by legislators who may lack similar expertise in administrative matters (Melleray, 2005, p70).

The prominence of judicial interpretation is evident in fields such as administrative liability, where principles have been developed through judicial decisions. Notable examples include the **Blanco** case, which established the framework for administrative liability concerning damages caused by public services, and the ruling of April 10, 1992, in the **Epouxv. AIOUFI** case, which altered the requirement of gross negligence for medical liability (Aouabdi, 2007, p69).

The administrative judge has anticipated legislative action by establishing principles such as liability for professional risks, illustrated by the *Came* case on June 2, 1895. This was followed by legislative measures, including the 1890 law on worker protection and subsequent laws addressing aviation risks, state liability based on industrial activity, and automobile accidents (El Sharkawy, 1972, 178).

Algerian administrative jurisprudence has adopted and expanded these principles, defining concepts like personal and institutional fault through rulings influenced by French case law. These principles are embedded in various legal texts, such as the Municipalities Law No. 10-11 and the Public Service Law No. 06-03. (Law No 10-11, 2011)

The Council of State's role extends beyond administrative liability to several other areas of administrative law. For instance, the Council introduced the theory of balancing benefits and damages in the ruling of May 28, 1971, in the **Nouvelle Ville Est** case. The Council of State balanced the advantages of expropriation for public utility against the financial damages and the impact on individual property rights. This principle was later enshrined in Algerian law through Ministerial Decision No. 07 of May 11, 1994, concerning expropriation for public utility (Dahmani, 2023, p70-73).

Additionally, the Council contributed to the development of the theory of exceptional circumstances, which allows authorities to exercise extraordinary powers to maintain public order and the functioning of public institutions. This was established in the French Council of State decision of June 28, 1918, in the **Heyries** case (CE, No 63412, 1918), and is reflected in the Algerian Constitution under Article 97, which empowers the President of the Republic to

take measures to maintain public order during exceptional circumstances (Decree No 442-20, 2020).

Furthermore, the Council of State mandated that administrative decisions must be justified, as established in the Barrel case ruling of May 28, 1954, and codified in Law 587-79 of July 1, 1979. This principle was confirmed in Article 11 of Law No. 06-01 on combating corruption, requiring transparency in administrative decisions (Jaber,2021-2022, p221-148).

Regarding independent administrative authorities, the French Council of State's 2001 report affirmed their specific roles and needs. Similarly, the Algerian Council of State recognized the administrative nature of certain independent authorities, such as the Banking Commission case, in its decision of May 8, 2000, in the Union Bank case (Jaber,2021-2022, p295).

II. Conclusion:

At the end of this research, it is evident that the administrative judge has been crucial in shaping administrative law by resolving disputes involving administrative parties. This role has been significant due to the legal gaps created by the rapid evolution of administrative activities and state intervention across various sectors. Administrative judges have innovatively addressed these gaps by creating new rules in private law and balancing public and private interests. Their contributions include interpreting ambiguous texts and developing solutions that were later codified into legislation. Additionally, they have established principles that are recognized as sources of legitimacy.

The ongoing role of administrative judges in shaping administrative law is influenced by technological advancements and evolving social, economic, and political conditions. To enhance judicial interpretation in Algeria, several key areas should be addressed:

- **Revitalizing Judicial Interpretation:** Supporting administrative judges with mechanisms to foster creativity and utilizing administrative appellate courts to reduce the burden on the Council of State.
- **Specialization and Training:** Providing specialized training and organizing seminars to stay updated on developments in administrative justice.
- **Uniformity of Judicial Interpretation:** Ensuring consistency in legal positions, as outlined in Article 179 of the 2020 Constitution.

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