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Making law work for the poor

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To many, law – the systems of binding rules governing human relations – seems remote from the reality of daily struggle in poor and marginalised communities around the world. Yet, directly or indirectly, legal rules shape the way we behave in our everyday life, and contribute to organise social and economic relations (from commercial codes to EC 'freedom-of-movement' treaty provisions to welfare state legislation). Since the 1960s, development agencies have supported law reform processes in developing countries. Interest in law reform was recently revived by the recognition of the importance of institutional frameworks for social change ('New Institutional Economics'), and by the attention paid by several development agencies to concepts like good governance and the rule of law. Earlier emphasis on 'legal transplants' and naive assumptions about the way the law operates have given way to a better understanding of the complex nature of processes of legal and socio-economic change.

Drawing on three examples, this paper explores the extent to which legal tools can contribute to improve the lives of poorer groups in both developing and developed countries; the conditions under which this is possible; and the constraints that such tools face in the pursuit of this aim. The paper aims to spark reflection and debate on these issues – not to come up with definitive answers. It is likely to be of interest for development lawyers, development practitioners working at a macro-planning level, and researchers. As for development practitioners, the paper sets out the case for taking law seriously as a tool for positive change. As for development lawyers, it argues that designing and implementing legal interventions that deliver that positive change is function not only of sound legal thinking, but also of a solid understanding of power relations and other social, cultural, political and economic factors that affect the way the law operates in practice.

Legal change and socio-economic change

The relationship between legal change and socio-economic change is a very complex one. It involves linkages in two main directions – although in practice the borderline between the two is blurred. On the one hand, legal change follows and reflects change in the economy and society. For a start, the law evolves as a result of changes in socio-cultural attitudes – as evidenced by the changes in the legal status of unmarried couples in many European countries.[1] Socio-economic changes may create new needs, which the law addresses through the emergence of new rules or the adaptation of existing ones. This process is not linear – different social groups may have different needs, and it is the more powerful that are likely to prevail. For instance, norms on the limited responsibility of companies developed in Western Europe with the growth of a capitalist economy, when entrepreneurs needed to limit the risk associated with their economic activity. While the 'corporate veil' addresses a real need and enables the prevailing economic system to function properly, it may also shelter powerful groups from social and environmental responsibility

1. See e.g. judgement 404/1988 of the Italian Constitutional Court and the British case *Fitzpatrick v Sterling Housing Association Ltd* (1999) 3 WLR 1113, both concerning the succession of unmarried partners in tenancy agreements.

KEY CHALLENGES:

- **Legal processes can help improve the lives of the poor in developing countries – for instance through establishing fair rules on international trade and securing land access in rural Africa. They can also help tackle social exclusion in the North.**
- **For this to happen, poorer actors – whether individuals or states – must have equitable access to the legal system. This includes a fair say in law-making processes, and access to effective enforcement institutions.**
- **Development agencies should take law seriously as a tool for positive change. They should support local, national and international processes that improve legal access and make law work for the poor – including law reform, litigation, training, legal assistance and advocacy.**

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through Chinese-box-style systems of holdings and subsidiaries – although in some cases courts have been prepared to lift the veil. Where legal rules reflect the interests of wealthier and more powerful groups, they may exacerbate income and power imbalances. There are countless examples of how the rich and powerful can manipulate the rules to the detriment of the weaker. In 17th century Scotland, for example, the legal system – through devices such as land registration, rules of prescription and use of Latin – served to legitimise the grabbing of common lands by local elites (Wightman, 1996). These dynamics resonate with the scramble for common lands currently underway in many African countries.

On the other hand, legal change can itself influence the nature and direction of social and economic change, through norms deemed as 'desirable' on the basis of political choices, economic analysis, ethical values or other considerations. Such legal change can happen through treaties, legislation or case law – as in the much-quoted US Supreme Court judgement in *Brown v Board of Education*,[2] which abolished racial segregation in schools; and in the Tanzanian case *Ephrahim v Pastory and Another*,[3] in which the High Court invalidated gender-discriminatory norms on constitutional grounds. Such proactive legal change can only go as far as society is prepared to accept at a given point in time. Enacting very progressive norms of little relevance to the reality on the ground would only create a hiatus between law and society, making such norms very difficult to implement.

In this context, law can contribute to improving the lives of the poor in two main ways. First, it can create an enabling environment for economic growth, including through developing regulatory frameworks that promote investment and an efficient allocation of resources (property rights and contract law, antitrust legislation, and so on) – though empirical evidence of this is thin, and several Asian countries developed without much rule of law (Posner, 1998). Secondly, by defining rights and duties and by creating legal institutions and processes, law contributes to shape the distribution of power, wealth and income within society, either reinforcing or reducing existing inequalities. These two aspects are in fact often intertwined: for instance, establishing secure property rights may have implications for both economic efficiency and asset distribution. While not ignoring the former aspect, this paper focuses on the latter.

In order to highlight the scope for law to benefit poorer and more marginalised groups, and to discuss the issues that need to be tackled for it to do so effectively, the paper draws on three different areas of law:

- International trade law – to highlight how international rules can directly affect livelihoods on the ground;
- Land rights in Africa – to explore the challenges facing legislators in developing countries; and
- Asylum law in the UK – to show that the challenge of 'making law work for the poor' concerns not only poorer groups in developing countries, but also marginalised (if not necessarily resource poor) groups in the North.

2. 347 US 483 (1954).
3. 1990 LRC (Const).

Towards a fairer deal on agricultural trade?

Developing countries have plenty to gain from international trade rules ensuring fair access to the markets of their richer counterparts.[4] Unfortunately, despite norms on trade preferences and 'special and differential' treatment for developing countries, the international trade system is largely biased in favour of developed countries. For instance, the Uruguay Round (the last completed round of international trade negotiations) broadened liberalisation to trade in services – but only in those sectors where developed countries are stronger (e.g. financial services), not those where developing countries are competitive (e.g. construction and maritime services; Stiglitz, 2002). While agricultural trade is particularly important for many developing countries (where agriculture contributes a major share of the national economy and of people's livelihoods), it is also the privileged arena of richer countries' protectionist instincts, which are translated into an array of tariffs, domestic support measures and export subsidies. Recent legal challenges have inflicted blows to some of these devices and provided encouraging signs that the wind may be starting to change.

In 2004, the World Trade Organization (WTO) ruled that a range of domestic and export subsidies granted by the US to its cotton farmers were illegal under WTO rules.[5] The complaint was brought by Brazil, the fifth-largest cotton producer in the world, in what was the first challenge to richer countries' agricultural subsidies from a developing country. The WTO dispute settlement panel ruled that the complex system of US subsidies, both explicit and hidden (e.g. export credit guarantee schemes), damaged Brazilian farmers by depressing world cotton prices, and violated several provisions of the WTO Agreement on Agriculture and of the WTO Agreement on Subsidies and Countervailing Measures. Following an appeal by the US, the panel's ruling was essentially upheld by the WTO Appellate Body, and adopted by the Dispute Settlement Body – the highest institution in the WTO dispute settlement system.

Besides potentially benefiting Brazilian farmers, these rulings are also very good news for cotton farmers elsewhere, including in West Africa. The cotton case may also pave the way for other complaints from developing countries that are negatively affected by the protectionist measures of richer countries. Brazil recently won another landmark case, this time on the EU's sugar export subsidies.[6] Brazil successfully claimed that the EU had subsidised sugar exports in excess of its WTO commitment levels, thus violating articles 3.3 and 8 of the Agreement on Agriculture. These cases may strengthen the bargaining power of those developing countries seeking the elimination of agricultural subsidies in the ongoing round of WTO trade negotiations (e.g. the 'Cotton Initiative'). A 'framework' agreed in August 2004 provides for the elimination of export subsidies on agricultural products, although (crucially) without an agreed timeframe.

4. Issues concerning the distribution of these gains within countries are not addressed here.
5. United States – Subsidies on Upland Cotton, Report of the Panel, 8 September 2004, WT/DS267/R; Report of the Appellate Body, 3 March 2005, WT/DS267/AB/R; Action of the Dispute Settlement Body, 24 March 2005, WT/DS267/20.
6. European Communities – Export Subsidies on Sugar, Report of the Panel, 15 October 2004, WT/DS266/R; Report of the Appellate Body, 28 April 2005, WT/DS266/AB/R; Action of the Dispute Settlement Body, 25 May 2005, WT/DS266/29. The complaint was also brought by Thailand and Australia.

While the liberalisation of agricultural trade is likely to benefit food-exporting developing countries, the sugar case shows how these countries, far from constituting a monolithic bloc, may have different trade interests. Part of the illegal EU sugar subsidies concerned the re-exportation of sugar produced by African, Caribbean and Pacific countries (ACP) and by India, and imported to the EU at a guaranteed price under preferential trade agreements (e.g. the Cotonou Agreement). Although the preferential import regime for ACP sugar was not challenged as such, the finding that the EU had exceeded its commitment levels hinged on the fact that subsidised re-exports of ACP sugar were counted against the EU's WTO commitment levels. Conflicting trade interests among developing countries also emerged in the 'banana war', a trade dispute that has long opposed the US and the EU. This dispute concerned the preferential treatment that the EU granted to some developing countries (the ACP states) compared to others (particularly Latin American countries, where US companies mainly produced bananas).

Land matters: getting the rights right

As African farmers depend on land for their livelihoods, enjoying secure access to such resources is very important to them. Farmers need secure property rights in order to be willing and able to invest in the land – which is key to agricultural development. In most African countries, land legislation is based on European legal concepts that have little relevance to land relations on the ground, where land is usually held by clans or families and used through complex systems of multiple rights. The national legal system is usually not geared towards protecting the assets and interests of the rural poor (de Soto, 2000). On the other hand, local ('customary' but continuously evolving) land tenure systems are commonly applied even where inconsistent with legislation, as they are more accessible to rural people. As a result, several legal systems – statutory, customary and combinations of both – coexist over the same territory, resulting in overlapping rights, contradictory rules and competing authorities ('legal pluralism'). This situation creates confusion and tenure insecurity, which in turn foster conflict, discourage agricultural investment and enable elites to grab common lands. Legal interventions to secure the land rights of rural populations can help address these issues.

For decades, most African governments have sought to replace local systems with a 'modern' system of land tenure, based on land titling and registration. Individual titles, it was argued, would increase the willingness and ability of landholders to invest, by removing disincentives (as landholders would not invest in the land unless they can be reasonably confident that they will not be deprived of it) and by improving access to credit (as titles can be used as collateral). However, where titling and registration have been implemented, greater agricultural investment has not necessarily materialised. High monetary, transaction and other costs discouraged registration of land transfers, thus making land registers outdated and undermining their ability to secure land rights. On the other hand, registration had negative distributive effects, as those with more contacts, information and resources were able to register land in their names, to the detriment of poorer claimants (for example, in Kenya's long-standing registration programme).

It is now generally recognised that the national legal system must build on local concepts and practice, rather than 'importing' one-size-fits-all models. This entails, among other things, legally recognising local land rights, which are the entitlements through which most people gain access to rural land. There is increasing evidence that whether legislative interventions in land relations work for the poor depends on a complex set of factors such as the design of the land registration process (geographical proximity of land institutions, monetary and other costs, duration, language, and so on), and the performance and accountability of land management and dispute settlement institutions. Finally, in order to improve the security of land rights it is necessary to address issues beyond land legislation. For instance, in securing women's land rights, a new land law providing for gender equality would achieve little without a reform of discriminatory family and succession laws, particularly in contexts where inheritance is the main form of land transfer.

Asylum support in the UK

Asylum seekers are among the most vulnerable groups in Western societies – they have fled their country in fear of persecution, and find themselves in a foreign country where they often have no relations, no accommodation, no access to basic services, and where they may not speak the local language. In addition, legislation commonly prohibits them from working while their asylum claims are being processed. To address their needs, legislation usually provides for some basic support while government authorities determine their claims (after which, if successful, they are entitled under international law to welfare benefits under the same conditions as nationals). However, over the past few years, European governments have tightened these measures, due to fiscal constraints and to pressures from vocal sections of the public. Courts have sometimes proved willing to protect asylum seekers' rights. This section provides an example from the United Kingdom.

The Nationality, Immigration and Asylum Act 2002, as amended in 2004, removes support from asylum seekers who did not claim asylum 'as soon as reasonably practicable' after entering the UK (section 55(1)). However, section 55(5) of the same Act enables the government to take action to prevent violations of human rights recognised under the European Convention on Human Rights (ECHR), which was incorporated into British law through the Human Rights Act 1998. In practice section 55(1) meant that many asylum seekers who did not claim asylum immediately after their arrival – due to ignorance, fear or ill advice – were deprived of support and put on the street.

In *R (Q and Others) v Secretary of State for the Home Department*,[7] six asylum seekers claimed that this regime constituted 'degrading treatment' and as such violated article 3 of the ECHR. The Court of Appeal sided with the asylum seekers, stating that a regime preventing them from working and at the same time denying them support can constitute degrading treatment under specific circumstances, e.g. where it can cause or exacerbate physical or mental illness. In these cases, the Court stated, the government is enabled under

7. [2003] EWCA Civ 364.

asylum legislation (section 55(5)), and obliged under the Human Rights Act, to provide support.

This landmark case opened the way to a flurry of other cases where asylum seekers deprived of support under section 55(1) claimed human rights violations. First-instance judges responded with widely differing opinions as to the level of destitution that must be reached in individual cases before the government is legally obliged to provide support. In *R (Limbuela and Others) v Secretary of State for the Home Department*,[8] the Court of Appeal refused to issue a one-size-fits-all definition of the threshold, noting that factual circumstances are extremely variable. It did however provide criteria for case-by-case assessments, such as access to charitable support, and availability of help from family and friends. Following these cases, the government instructed officials not to deny support where asylum seekers had no alternative source of support. However, it also appealed to the UK's highest court, the House of Lords, which may reverse the ruling of the Court of Appeal.

All you need is law?

These legal interventions – to define and enforce the terms and conditions for international trade, to secure property rights over land, and to provide support to asylum seekers – show how law can be used to further the interests and improve the lives of poorer groups. This should not lead to simplistic conclusions about the social outcomes of law reform. Ultimately, whether law works for the poor depends both on its content – e.g. whose land rights it protects – and on its implementation. A vast literature from a range of disciplines (legal anthropology, sociology of law, etc) shows that both formulation and implementation are affected by social, economic, political and other factors; that law must come to terms with power relations in the local, national or international society; and that this affects the way the law operates in practice and limits its effectiveness in producing desired social outcomes.

As for formulation, the design and adoption of legal interventions – far from being a technical matter – is a highly political issue, as it may affect the distribution of income, wealth and power within society. Therefore, reforms are ultimately the result of political processes – their adoption may pursue political ends, and depends on the strength of the social groups promoting them. For instance, Kenya's above-mentioned land registration programme was conceived in the 1950s in the wake of the Mau Mau rebellion, and aimed at creating a class of small landowners that would ensure political and social stability in the countryside. As for design, beyond the directives stemming from economic analysis, ethical values or other relevant factors, the content of legal interventions is the outcome of a negotiation process between different stakeholders, ranging from government officials to parliamentarians, from affected social groups to campaigning institutions, from donors to legal experts (Lavigne Delville, 2003). This process is characterised by strong power imbalances – including between the government and civil society groups, and between different civil society groups. In the process, the more powerful often work hard to bend the proposed legal intervention to their advantage, or at least to neutralise or limit its potentially adverse effect on their interests. This may result in departures from the original aims of the legal intervention, in woolly language allowing easy manipulation during implementation, and in dysfunctional differences of treatment. Similarly, at the international level, rules negotiated within institutions like the WTO are ultimately determined by the bargaining power of different states or groups of states.

The world is full of laws that only exist on paper, particularly in developing countries. Implementation is particularly difficult where law is directed towards social change and reordering existing power relations, rather than accommodating existing social needs. In these cases, at least in the short term, a gap exists between the law and society. Take the case of gender equality in land relations. National constitutions and legislation may provide for equal rights of men and women. But the implementation of these norms is often hindered by entrenched socio-cultural attitudes, particularly in rural areas. These attitudes change only very slowly. Indeed, 'while the formal rules can be changed overnight, the informal norms change only gradually' (North, 1995).

Strong political will to implement legislation, and access for the poor to enforcement institutions are key. Political will is a function of the degree of local 'ownership' of adopted reforms, particularly in developing countries where these are passed under pressure from and/or with the support of international development agencies. Access to enforcement institutions raises issues such as economic, geographical and linguistic access to courts and other institutions; availability of judicial review for adverse government decisions (e.g. the denial of support to asylum seekers); availability of legal aid in non-criminal cases; and the possibility for NGOs to file lawsuits on behalf of poorer groups, and to intervene in legal proceedings as 'amicus curiae' (e.g. as the NGO Shelter did in the above-mentioned Limbuela case). In some cases, lack of financial resources may constrain the establishment of the institutions responsible for implementing legislation – as evidenced by the experience of Uganda's Land Act 1998. More generally, getting rules and institutions to work in practice calls not only for good laws but also for informed citizens who are able to seize the opportunities offered by the legal system.

Access to justice and land tenure security in Africa

Access for the poor to courts and other dispute settlement institutions is key to securing their land rights – within communities, and between local communities and outsiders such as urban elites and foreign investors. Some communities have successfully challenged the granting of logging concessions on indigenous lands without local consultation (e.g., outside the African context, the case Mayagna Community v Nicaragua, decided by the Inter-American Court of Human Rights on 31 August 2001). Within communities, access to justice may help secure women's land rights – as evidenced by several cases across Africa where courts have declared discriminatory customary norms either unconstitutional (e.g. the Pastory case in Tanzania, 1990; the Bhe case in South Africa, 2004) or inapplicable (e.g. the Samaké case in Mali, 2002)[9]. However, access to courts is in the great majority of cases seriously constrained by geographical distance, language barriers, long and cumbersome processes, and other socio-cultural factors. In many contexts, customary dispute settlement institutions may be more effective and accessible to rural people. But these may discriminate against some community members (e.g. women); and have no teeth vis-à-vis outsiders.

8. [2004] EWCA Civ 540.

9. *Bhe v Magistrate, Khayelitsha and Others*, Constitutional Court, 15 October 2004, CCT49/03; *Samaké v Samaké*, Tribunal of Ouélésébougou, 26 December 2002; for the Pastory case, see above, footnote 3.

Enforcement and implementation may also be an issue at the international level. Although the past few years have witnessed greater use of WTO dispute settlement procedures by developing countries, this usually concerns emerging economies like Brazil rather than least developed countries. This is due to a variety of factors, including the high level of skills required to bring a case before the WTO and, more importantly, the fact that enforcement ultimately depends on the country's capacity to impose WTO-authorised trade sanctions against non-complying succumbing parties and, therefore, on its economic power.

Unintended consequences

Besides limiting the extent to which law reform can produce social outcomes, factors affecting formulation and implementation also influence the nature and direction of those outcomes, sometimes resulting in consequences that may differ from those sought by legislators ('unintended consequences'). First, reality often moves faster than legislators and judges. Experience with land tenure in Africa shows that even when a law is not yet passed or not in force yet, well-informed actors on the ground position themselves to make the most of it once it enters into force (Lund, 1998). These 'anticipation' strategies may distort the operation and/or the effects of the law once it is applied. Secondly, legal systems are not monolithic entities – their practical operation is characterised by internal tensions between different rules and/or authorities (legislative, executive and judiciary), and in some cases courts may take norms in directions not originally envisaged by those who drafted them (see e.g. above, the UK asylum support cases). Thirdly, the operation of law is shaped by existing social patterns. As a result, the same law would operate differently and yield different outcomes in different social contexts – which entails a need for caution with 'legal transplants'. Finally, research from several African countries shows that the impacts of legal interventions are affected by the way in which they are interpreted and manipulated by local actors – each typically trying to pull the rules to their advantage (Lavigne Delville, 2003).

As a result of these factors, the social outcomes of legal interventions can differ considerably from those hoped for by the legislator. For instance, experience with land titling and registration programmes in several African countries shows that, although one of the aims pursued by such programmes is to reduce land disputes, ill-conceived reform programmes can in fact exacerbate disputes, at least in the short term. Indeed, research shows that latent disputes can flare up when local actors realise that registration will bring about final adjudication of land rights; and that local elites can manipulate the process to grab land before registration (so as to be well placed when implementation starts) or to register common lands in their own names (Lund, 1998).

Conclusion

There are countless examples of how law serves the rich and powerful. However, under appropriate circumstances, legal tools (law reform, legal training, litigation or other) can be used to further the interests and improve the lives of the poor and marginalised. These tools range from defining/enforcing the terms and conditions for international trade to securing property rights over land, to providing welfare support. They may involve operationalising strategic policy choices (e.g. promoting land tenure security as a means to agricultural development) or challenging them (as in the asylum support cases). They may help the poor and marginalised by promoting economic growth (for instance, through more secure property rights that encourage investment) and by directly supporting them (e.g. through the asylum support system).

In analysing the diverse livelihood strategies of households in developing countries, the influential 'sustainable livelihoods' literature (e.g. Chambers and Conway, 1992) identifies five broad types of capital assets on which households base their livelihoods – financial capital (e.g. income), human capital (e.g. skills), natural capital (e.g. land), physical capital (e.g. equipment) and social capital (networks of social relations). To these, we would add 'legal capital' – a bundle of legal entitlements and access to institutions to enforce them. Legal capital may be used to improve access to other types of capital – for instance, to secure access to land. In this sense, there is a degree of overlap between legal capital and other assets. But entitlements like access to justice also have much broader implications – they contribute to 'empowerment'. While law must come to terms with existing power relations, legally defined rights are themselves a source of power, whether at a household or an international level. Even if not fully enforced, they may improve the bargaining position of right holders in their day-to-day negotiations with others, and possibly affect the outcome of those negotiations.

A range of social, economic, cultural and political factors affect the way the law is designed and implemented, and its social outcomes. These factors may be hard to circumvent, as they are entrenched in existing power relations and social structures. Very often, laws that look good on paper, legal interventions aimed at benefiting the poor, end up legitimising the claims of elites. This is a reality that must be properly taken into account by those struggling to make law work for the poor. Their action must be based not only on sound legal thinking, but also on an analysis of the extra-legal factors that are likely to affect the nature and outcome of proposed legal interventions.

Law is a socially embedded framework of rules governing social relations between different actors. Such a framework can be 'biased' in favour of the rich and powerful or in favour of the poor. But for pro-poor biases to be effective, they must be accompanied by action to redress the social imbalances affecting the way law operates. Ultimately, the key is the extent to which the poor have 'access' to the legal system, a fair say in the formulation process and are in a condition to benefit from implementation. Below are some of the key challenges to make law work for the poor:

- Working for a pro-poor legal framework at the global level is key. This may involve for instance reforming WTO rules, as advocated by many; but also using those rules to challenge richer countries' protectionist measures, as shown by the two WTO cases referred to in this paper. For development agencies, this may entail contributing advocacy work to change the rules and capacity building efforts to help developing countries to use them.
- In developing countries, development agencies should support government efforts to reform the national legal

system. For instance, development agencies may support work to generate knowledge on local resource tenure issues; support the facilitation of participatory policy debates; and provide legal training and technical assistance for legislative drafting. Given the great diversity of social contexts in which legal tools operate, this support requires not only excellent legal expertise, but also a solid understanding of a range of extra-legal factors. Rather than importing expert solutions, development agencies should accompany local processes to design and implement context-specific solutions.

- In developing countries as in the North, measures should be taken to improve access to the legal system for the poor. Provision of adequate legal aid in non-criminal matters may improve access to courts for the poor, while flexible rules on standing (the ability to demonstrate sufficient connection to a matter to bring legal action) may enable NGOs to act on their behalf. In developing countries, a vibrant movement of legal and para-legal NGOs is key to improving access to the legal system through training and awareness raising; counselling and legal assistance; individual and public interest litigation; and representation and advocacy.
- Finally, there is a need better to understand the complex relations between law reform and social change, drawing on disciplines as diverse as economics, anthropology, sociology and others; to develop tools and indicators to monitor the social outcomes of legal interventions, in the North as in the South; and to document and share best practice and experience.

The stark contrast between the high aspirations enshrined in many treaties and laws and their operation in practice has led many to be sceptical about the usefulness of legal tools. This partly originates from the frustration of excessive expectations – the illusion that merely adopting a treaty or law can change society with a pen stroke. Instead, social change is inevitably a complex and slow process. But even when a constitution, a law or other legal instruments are not fully implemented, their adoption is not in vain. The very fact that norms are discussed and adopted, and that certain principles and values are enshrined in the 'social contract' governing society may contribute to the long-term process of social change.

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