

Combating Poverty through Equality Law – Possibilities and Pitfalls

The last two years will be remembered for generations to come for the economic turmoil that has gripped the global economy. The world economic recession will inevitably hit the poor in every society and is likely to increase exclusion and, at worst, persecution of the most vulnerable groups within society. In the context of these processes, ERT talked with Sandra Fredman, Professor of Law at Oxford University, and Margarita Ilieva, Legal Director at the Bulgarian Helsinki Committee, about the relationship between poverty, equality and discrimination.

ERT: Recently, the UN Independent Expert on the question on human rights and extreme poverty noted that “there is a wide recognition that discrimination engenders poverty and poverty engenders discrimination”. What, in your view, does this mean in practice and do you think this is an accurate description of the relationship between discrimination and poverty?

Sandra Fredman: Yes, I agree that there is an important link between the two. Discrimination on grounds of race, gender, disability, etc. clearly leads to exclusion from social benefits such as good quality jobs, education, etc., and to social marginalisation, which in turn can lead to poverty. Therefore, it’s not surprising that socio-economic disadvantage is concentrated among women, blacks, ethnic minorities, disabled people, etc.

What I think is seldom fully articulated is the converse relationship – what the Independent Expert meant when she said that

“poverty engenders discrimination”. Discrimination is partly about socio-economic disadvantage but it also has other dimensions, one of which is stigma or misrecognition. Poverty very often attracts stigma.

Poor people are characterised as scroungers, as lazy, as fraudsters and this gets in the way of poverty alleviation and can worsen poverty, because it might make people in that position reluctant to take up benefits. There is good evidence that stigma can deter people from taking up their entitlements to social security benefits. I recently saw some research which showed that the uptake of free school meals can be reduced significantly when children feel stigmatised by doing so. That’s an important dimension of poverty which brings together socio-economic disadvantage and recognition issues. Poverty also leads to discrimination in the sense of exclusion from decision-making processes and from society more generally.

So I think that the connection between discrimination and socio-economic disadvantage needs to be recognised in both directions, i.e. the ways in which discrimination can engender poverty, and poverty can engender discrimination.





Margarita Ilieva: Taking the first part, it means that relative disadvantage results in fewer resources. Not just in terms of money – with all its effects – but also social links, access to recognition and inclusion, to legal and political means

of self defence and channels of influence. Those who are ostracised by discrimination become poorer because they are left out of the socio-economic circle. They are marginalised and they do not partake. As when the authorities subject Roma to discriminatory neglect in housing and fail to integrate them in urban planning and development. As a consequence, they experience dire deprivation in terms of living conditions, security, and social inclusion. Similarly, when employers reject Roma job-seekers, their families suffer economic exclusion, their children drop out of schools, adults may resort to problematic activities to secure subsistence, and the community experiences even further marginalisation. Indirect discrimination can result in poverty and isolation too – one example is when the government introduces fixed time limits for receipt of social assistance the Roma who disproportionately depend on welfare become even poorer.

On poverty engendering discrimination – the poor and isolated are easy targets for disadvantage. When the authorities seek to profit from municipal land they choose land occupied by informal Roma settlements rather than land “unlawfully” occupied by others like entrepreneurs. Authorities forcefully

evict the settlers and make their families homeless; uproot them from their social networks, and down a spiral of poverty they go. The poor are ostracised because they are generally not expected to be able to contribute anything, not just in terms of economy, but in every social way. There is also social competition for resources and the poor are ousted because they are weaker. I think on a primitive, not so conscious level, the poor are associated with want, therefore, they face mistrust by those who have more. There is stigma too as poverty is something that people associate with failure and ruin.

Generally, I think it’s a fair way to describe the relationship between the two. Of course it can obviously also be said that discrimination engenders more discrimination. It’s a cycle! The same I think is true for poverty. Poverty engenders more poverty. When you are in misery you lose your health, life expectancy chances, education chances, everything.

ERT: Should poverty alleviation be one of the primary objectives of the equality agenda? If so, in what way can the right to equality be used to address global poverty?

Margarita Ilieva: If we take poverty in a broader sense, as deprivation of social resources generally, including but not limited to material wealth, then to curb relative poverty is the primary objective of equality law in any case. Equality law is about preventing people getting less – less need satisfaction, less opportunity, less respect, less reward – because of identity reasons that are irrelevant to merit. So combating poverty in that sense should be considered an integral part of combating discrimination where poverty affects people because of their sex or race or health or other protected grounds.

It's another issue whether equality law should focus on combating the effect of poverty in terms of discrimination. That is whether discrimination resulting from poverty, unfair exclusion on grounds of poverty should be counted as analogous to discrimination on other protected grounds. The problem is that unlike other grounds, reasons relating to poverty are often a basis for legitimate or inevitable differentiation or disparate impact. This makes it hard to govern poverty in the same way as other grounds.

It is yet another question whether equality law should target poverty as such in absolute terms. I think that because equality law is about protecting dignity, which requires freedom from fear, want and dependence, equality law should tackle poverty because poverty means insecurity and helplessness and hence dependence and liability to abuse. Poverty makes living a dignified life very difficult and equality law should counter it as much as it can – but I think it is limited in what it can do.

As to how the right to equality should be used, I think equality law should focus on two categories of measures, reasonable accommodation on grounds of poverty and on positive action. I think poverty requires positive structural remedies to enable the poor to develop the capacity to move out of poverty and while poverty lasts for them, social situations and processes should be adapted to their needs. Much like what is done on grounds of disability.

Sandra Fredman: I don't quite see the relationship exactly in those terms – that poverty alleviation is a primary objective of the equality agenda. The way I see it is that poverty alleviation needs to be infused with equality concerns. In other words, equality issues need to be considered closely when poverty programmes are being established and de-

signed. This is because policies aimed at poverty can in fact reinforce discrimination. We know this from the experience of gender discrimination. Many poverty programmes link entitlements to households rather than individuals. Such programmes entirely ignore the imbalances in power between men and women within the household. This can certainly have the effect of reinforcing gender discrimination. This is one of the ways in which poverty measures should to be infused with equality.

This can be applied outside of the gender context. Poverty alleviation measures often regard recipients as passive beneficiaries of largesse, and are stigmatic and stultifying. Infusing such measures with equality means that poverty reduction should be designed so that people are regarded as equal in all respects. Once you do that, once your aim is equality, you can regard people as agents. The aim of both equality and poverty reduction is to facilitate the ability to participate fully, to pursue what Amartya Sen would call those choices which people have reason to value. In that sense, I think that poverty alleviation must be a way to open up a range of feasible options and needs to be infused with these basic equality concerns.

ERT: A number of challenges exist to combating poverty through anti-discrimination law. For some poverty as a ground of discrimination is too amorphous to be treated in an analogous way to race, sex, or disability. Others suggest that it is not “discrimination on grounds of poverty” that is the major concern; rather it is the fact that people are poor that is the heart of the issue. Drawing from such opposition, the first question is: Is poverty too amorphous a concept to be included in the list of prohibited grounds of discrimination covered by equality legislation?

Sandra Fredman: No, I don't think poverty is too amorphous and certainly it is already defined for a lot of purposes. It is defined for social security purposes, for international aid, for development. I don't think it is harder to define than disability or race or age or religion or belief. So defining poverty is not really a major barrier. This issue came up in the US Supreme Court in the case of *San Antonio Independent School District v. Rodriguez* (see box), which was about a challenge by children who lived in poorer local districts. The challenge was based on the fact that local property tax was used to fund local schools, which meant that poorer districts had poorer schools. The U.S. Supreme Court said that this was not a case of discrimination on grounds of poverty. One of the reasons given was that poverty is too amorphous a concept. I think that was an incorrect decision. It was quite clear that it was a case of discrimination on grounds of poverty. You could clearly see who the victims were and who had suffered from this policy and you could also clearly see that the public policy of distributing funds in this way was treating poor people less favourably because they were poor. This case demonstrates how crucial anti-discrimination law which covers the ground of poverty could be in providing solutions: if you have better schools then you begin to take people out of poverty.

Margarita Ilieva: Poverty is relative! It has no absolute meaning because there is no defined threshold below which someone is to

be considered poor. But I don't think that is necessarily a problem. In that sense, I think poverty is no more undefined or amorphous than race, for example. There are so many nuances of racial and ethnic difference and it's the same with religions. It is a matter of difference and diversity. Likewise with poverty it is a matter of comparative degree, of rela-

San Antonio Independent School District v. Rodriguez 411 U.S. 1 (1973)

Demetrio Rodriguez and other parents claimed that education was a fundamental right and that the system of school funding constituted wealth-based discrimination contrary to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Under Texas state law, the state provided funds to afford each child with a minimum education. This provision was complemented by local school districts with funds derived from local property taxes. School districts with wealthier residents were thus able to contribute more per child than poor areas such as Edgewood where the claimants resided. The US Supreme Court overturned the District Court decision, finding that the Constitution did not protect a right to education and that the state of Texas did not deprive a class related to poverty of an education for the reason that no wealth-based class existed. The Supreme Court held that this was evidenced, among other things, by the fact that some school children from poor families who resided in property-rich school districts benefited from the higher contributions to their education available to all children in those districts.

tive difference and in that sense this 'plasticity' is not a bad thing because it makes the ground more amenable to the specifics of a case.

To better reflect this relativity, a neutral term could be used instead of poverty. Like

property status or social status which is even broader and, therefore, more pliant. However, this pliancy/plasticity also has complications attached to it.

ERT: A question related to the previous one: what are the major challenges that law-makers would encounter in integrating poverty as a ground of discrimination and to what extent can/should, anti-discrimination policy alleviate poverty?

Sandra Fredman: I would not argue that poverty should be combated through anti-discrimination law alone. It needs to work in a complementary fashion. So in designing anti-poverty measures, you should consider the anti-discrimination dimension. In the same way, anti-discrimination law should be available to challenge general public policy like the policy in the *San Antonio* case which discriminates on grounds of poverty.

It would be dangerous to think of anti-discrimination law as a substitute for other measures. Anti-discrimination law needs to work together with socio-economic rights, state welfare and international aid, etc. to make sure that these equality issues are factored into anti-poverty measures, as well as the agency issues which I have talked about earlier.

Margarita Ilieva: Much depends on the scope of the prohibition. If the scope were to include goods and services, including healthcare and education and housing, a major challenge would be indirect discrimination. Prices put poor people at a particular disadvantage. If indirect discrimination on grounds of poverty is banned, providers would have to justify prices in court. To have courts analyse whether a particular price is justified for a good or service would be subversive. One other issue is that prices are only

likely to be justified on economic grounds. Accepting such a justification would corrupt the concept of legitimate aim which excludes monetary considerations. Under European Court of Justice case law, for instance, you cannot put women at a disadvantage because of the financial aims you have. And prices are all about economic considerations. To allow the test for a legitimate aim to be diluted by incorporating money as a goal, would be serious regressing of equality from the standpoint of other protected grounds.

One solution could be to have a separate regime for poverty that does not apply to other grounds. But this would mean that the law would be less coherent, more complex and ultimately less effective. It may also be seen as less fair because poverty as a ground of discrimination would be treated differently to other grounds of discrimination.

If we consider the example of prices further, litigants could even use direct discrimination claims to challenge prices for goods or services and one could not hold that inability to pay a price has nothing to do with poverty. In such cases there may be a risk the judges would try to deal with such claims by tarnishing the test for rebuttal of a causal link between treatment and the protected ground. Currently, respondents have to show that the treatment in question was in no way whatsoever on the basis of a protected ground. Furthermore, we also run the risk in situations of direct poverty claims, that courts would resort to a more lenient test and allow respondents to defend allegations by saying that the treatment was not because the person was poor, but because they were unable to pay. Excluding someone for not having paid a particular price is not the same as excluding them on grounds of poverty. Allowing such a formal construction of the concept of 'on grounds of' would again be regressive if it

applied to other grounds. And if it were only allowed to apply to poverty, the law would be inconsistent and hierarchical.

In terms of service provision if cases of direct discrimination were to be heard in courts respondents could argue that their relative neglect of poorer clients was dictated by strict economic considerations. Such an argument may have weight on the basis it was natural to invest in clients with more potential to generate further business – which in a world of scant human and other resources necessarily means less investment in poorer clients who are less likely to produce future demand.

Such arguments of inescapable economic necessity could also be used by service providers like banks, multiplexes, or restaurants for not servicing poorer areas, if residents of such areas were to allege direct discrimination on grounds of poverty. If poor area residents complained of less urban development, worse infrastructure or lower security and took the local authority to court, the local authority could respond, “it’s just economics, we cannot avoid it, resources are scarce, there’s nothing you can do.”

For equality law to deny or defy economic constraints would be rash I think. This makes it difficult to uphold a strict ban on direct poverty discrimination which means that a general justification test would have to be adopted. Again that would treat poverty differently from other grounds like race or sex which are currently absolutely protected under many national laws, with narrow exceptions only. Having such different standards would compromise the integrity of the equality law. Alternatively, the law would have to provide for a general justification test for direct discrimination for all grounds, just to keep the regime consistent. That would be

a huge step backwards for grounds like sex, race or sexual orientation.

Another challenge would be proving the ground of poverty. To avoid narrow or dogmatic construction by judges and equality bodies a specific definition under the law of what would be sufficient to prove in order to prove poverty would be necessary and this leads to the difficulty of pinning poverty down to a particular level.

Apart from this being difficult in itself, any fixed definition of poverty would probably not be satisfactory because many people suffer discrimination not because they are *poor* but because they are *poorer* than somebody else. So it is comparative poverty that matters not some absolute quantity. I think it is better to provide that actual poverty is irrelevant even where it is a fact. For protection under the law, it should be a perception of relative poverty that is sufficient.

ERT: Participation and ensuring that those who are vulnerable to discrimination are consulted and involved in developing laws is a fundamental aspect of implementing the right to equality. For many reasons people living in poverty are less likely to be involved in the development and implementation of equality law and policy. What steps should be taken to ensure that those who are marginalised and vulnerable in society due to poverty have a voice to express their experiences and effectively participate in implementing the right to equality?

Margarita Ilieva: That’s a difficult question! One suggestion might be the introduction of a statutory duty for legislation makers to consult a representative sample of social movement organisations, anti-poverty NGOs, and other organisations prior to adopting or

introducing draft legislation. Consultation obviously requires much more than website consultation. What is needed is outreach, visiting places and holding meetings in the manner in which politicians do during election campaigns.

Furthermore, any piece of secondary legislation that is not consulted in this way should be subject to automatic annulment in court, on the basis that it does not uphold this consultation procedure. Likewise any primary legislation – any draft law introduced in parliament – should not be admissible for voting by parliament if this procedure has not been followed. I think this might be one way that decision makers could be compelled to have contact with the poor and listen to them prior to making policy.

Sandra Fredman: This is one of those things which is either a vicious circle or a virtuous circle. Basic socio-economic rights, such as the right to education, the right to proper nutrition and proper health will give people the tools to participate more in society and become more involved in decision-making processes. That's one aspect. On the other hand, without a voice, poor people may not have the political strength to achieve these rights. Finding a way of facilitating the engagement of poor people is a must. This can be done through very conscious and very deliberate capacity-building initiatives such as training, funding, and forums whereby people are actively drawn into the process.

ERT: Many jurisdictions often make the distinction between fair and unfair discrimination, or lawful and unlawful discrimination. It seems that discrimination against the poor, or people in poverty, is often classified as lawful discrimination as it can be legitimately justified. Does the legal prohibition of discrimination on

grounds of poverty require a fundamental shift in the current social order and is anti-discrimination law and human rights law capable of meeting the challenge that such a shift may entail?

Margarita Ilieva: As I said a strict legal prohibition of poverty differentiation and disparate impact is problematic. I think it would seriously disrupt the socio-economic order. It would mean a wholesale revision of our economic organisation which is governed by scarcity and dictates saving and prioritising investment. It is very difficult to see political or social consensus to this and I'm not sure whether equality law can do this on its own. It's a matter far beyond the technicalities of how to govern such concepts. In addition to this, there are serious issues to tackle within the perimeter of those technicalities, as I mentioned earlier.

Sandra Fredman: I suppose those who oppose the idea of poverty as a ground of discrimination could argue that it challenges the whole capitalist system, requiring equal income regardless of the work you do. I think that we can all have different views about that but that's not necessarily a knock-down argument. For example, two kinds of challenging examples that someone might put forward might be (a) could a low paid worker argue that her low pay discriminated against her on grounds of poverty and (b) could a poor person argue that she was discriminated against because a bank refused to lend her money because she fell under the minimum income limit?

If we take the low pay first, we already have intervened in the field of pay through gender equality laws. We already say that if you are paid less for work of equal value because you are a woman rather than a man, then there is a case for intervention through anti-discrimi-

nation law. An analogy would be that if a poor person were paid less than the value of their work and you could in some way challenge the way that work should be valued then that could be a potential for intervention in the market. We could also challenge differentials which are disproportionately large relative to the difference in the value of the work. We haven't gone so far in equal pay law for men and women as to look at disproportionate differentials but other institutions such as collective bargaining have done this. So I think that if your pay is low because you are poor rather than because of the kind of work you're doing then that should be prohibited as discrimination. But this can't be the only solution. We also need other measures to address poverty, such as minimum pay laws, right to bargaining and so on. That's not to say that you shouldn't intervene but maybe not through discrimination law.

My opinion is the same for the bank loan scenario. You could argue that if the person cannot pay back the loan, that's a good reason for not giving her a loan in the first place and that there wouldn't be a legitimate claim under an anti-discrimination law provision. On the other hand, the discussion shouldn't rest here. Anti-discrimination law is often too bipolar, for example, by considering merely the bank and the person who needs a loan as the affected parties. We already know from poverty alleviation measures that extending credit facilities can effectively alleviate poverty if it is conducted in appropriate kinds of ways. Thus if you were just bringing an individual claim against a bank that might not be successful, but if you challenge public policy which doesn't facilitate credit and lending measures correctly, then anti-discrimination law might well be useful in such a challenge. Interestingly, the new British Equality Bill currently before Parliament includes a clause imposing a positive duty to consider the im-

pact of policies on socio-economic disadvantage. So I don't think that including poverty as a ground of discrimination would challenge the whole capitalist order; but there are certainly useful roles that anti-discrimination law can play in addressing poverty.

ERT: One interesting aspect within the discourse surrounding equality and poverty relates to positive action and the idea that programmes such as affirmative action can actually hurt the poor - through focusing on individual capability rather than social need. Do you have a standpoint on this debate and in your view can affirmative action really hurt the poor?

Sandra Fredman: It is important to consider what the aim of affirmative action is – is it to benefit those who are discriminated on grounds of their race, gender, disability or other status alone, or is it to benefit those who are socio-economically disadvantaged, possibly because of race or other discrimination. This raises the question about the extent to which status (that is race, gender, disability and so on) disadvantage coincides with socio-economic disadvantage. When status does not fully coincide with socio-economic disadvantage, members of the status group who are no longer socio-economically disadvantaged might gain a disproportionate benefit from affirmative action measures. In India where there is a very widespread policy of reservations (quotas), the concept of the “creamy layer” has been introduced to deal with this issue. The Indian system operates two kinds of reservations; some apply to Dalits – members of the so-called untouchable caste - and some measures apply to what the law calls “other backward classes”. For these “other backward classes”, the courts have said that you have to have a “creamy layer exclusion”. That is, those who are above a certain socio-economic threshold cannot benefit

from the reservation. This means that within the beneficiary group status and socio-economic disadvantage will coincide.

In the United States similar measures were introduced after the *Adarand Constructors v. Peña* decision (see box), which required strict scrutiny of all affirmative action measures. Programmes setting aside funding for minority contractors and women also now include a requirement of proof that recipients fall within a certain category of socio-economic disadvantage in addition to their disadvantaged status. So there are measures which you can take to mitigate the negative elements affirmative action programmes may have for the poor.

Adarand Constructors, Inc. v. Peña (93-1841), 515 U.S. 200 (1995)

The petitioners, Adarand Constructors, claimed that the US Federal Government's practice of awarding financial incentives to contractors for sub-contracting to companies that were operated by "socially and economically disadvantaged individuals" on government projects was unconstitutional. In particular, the petitioners complained that the government's use of race-based assumptions for identifying "socially and economically disadvantaged individuals" violated the equal protection provision of the Fifth Amendment's Due Process Clause in the Constitution. The Supreme Court held that such programmes would only be constitutional if they were "narrowly tailored" for a "compelling government issue."

In South Africa, the process of black economic empowerment is often criticised for having massively enriched a few black companies and black people and therefore hav-

ing increased the inequality between rich blacks and poor blacks. This is controversial because clearly the very fact of getting more black people into the business world is important for itself. So you could argue that black economic empowerment is not in itself necessarily a measure aimed at poverty alleviation. On the other hand, there is still justified criticism that it's not reaching the really poor people.

I would argue that there is a further problem with affirmative action programmes, which is that they leave out poor people who are not lower caste, or black, or women. If poverty was a prohibited ground of discrimination then of course you could make sure that those programmes benefitted the poor on the basis that they are poor and not because poverty coincided with gender or race.

In fact in the UK we have lots of access schemes which provide deprived children and deprived school kids with particular courses to give them more opportunities to get to university. Therefore, I don't think that it is out of the realm of possibility to actually have affirmative action in favour of poor people simply because they are poor.

Margarita Ilieva: I wouldn't say they *hurt* the poor. I don't think the poor are worse off because of such programmes. If they are not benefiting enough or at all from these programmes, the reason probably is that the programmes are not sufficiently targeted at the poor as such. So the

problem is not positive action *per se* but the grounds that positive action programmes are based on. If such programmes are on grounds of poverty specifically, i.e. they are

for the poor, taking account of the specific needs and limitations of the poor, then the poor should benefit.

ERT: Coming back to the issue of the amorphous nature of poverty. Some have suggested that it would be more beneficial to substitute poverty for more socially measurable and/or legally certain concepts such as socio-economic status or condition, or economic, educational, health or class status. Do you think that adopting an approach which combats the constituents of poverty rather than poverty itself is a better approach or would this merely disguise the central social problem?

Margarita Ilieva: I don't think that the concepts of social condition or economic status are more defined or more certain. I see them as being far broader than poverty and they could mean anything, and cover any sort of condition both vertically (degree of deprivation) and horizontally (particular version of possession or dispossession). If we substituted poverty for social status it would be possible for affluent people to challenge the treatment they receive because of their relative wealth. People could for example challenge tax laws that demand more from the rich or poverty alleviation measures that benefit the poor. This creates even more complexity for the law. So if one means to specifically protect the poor, rather than any sort of social class, one should define the protected ground accordingly.

On the other hand, for political legitimacy, it might be more advantageous to use a symmetrical approach – as with protecting sex rather than women and race rather than specific ethnic groups. Social status is a broader term, and contains more diverse manifestations. In that sense it could be more suited to respond to the particularities of individual cases.

Again, I have to say that I am not sure that poverty is difficult because it is undefined. If it is seen as a matter of difference, not in absolute terms, but within a particular context, then I would be poor in comparison to a lawyer living in London in one context and a child in rural Bulgaria would be poorer than I am in another context. Absolute quantity, therefore, shouldn't matter! It's a matter of comparison, of relative difference, of degree.

Sandra Fredman: I don't think that poverty is difficult to define so I don't see any particular reason for doing that. Neither do I think that these are mutually exclusive problems. Therefore, I would like to see equality and anti-discrimination law working together with socio-economic rights.

ERT: Beyond prohibiting discrimination on grounds of poverty, what other measures should a good equality law do to alleviate poverty?

Sandra Fredman: As I said, equality should work together with socio-economic rights, such as the right to education. Equality in education should be a major focus because education is such an accelerator. It is not enough just to give a right to education - you have to formulate the right with equality in mind. For example, education for girls needs to be formulated in many countries in a way which makes it genuinely possible for girls to access education. And that is a very important way towards eventually alleviating poverty: by providing opportunities. The same is true for equality in access to housing, to credit or to training, and to equality in access to and involvement in the decision making process. So I think equality should be a central input into poverty measures.

Margarita Ilieva: I have mentioned it already; positive action is essential – positive

action on grounds of poverty specifically! Poverty requires policies which require, above all, structural redress. Poverty and poverty discrimination are unlikely to be dealt with effectively by individual legal means. This is true for all grounds of discrimination, but it is particularly important for poverty. Moreover, positive measures should not be palliative like social assistance or giving money out. They should be structural remedies that create change and build people's capacity to exit poverty; like education and what is necessary in practice for it

(clothes, shoes, electricity within the home, etc.); like jobs (including job training); like information, advice and support on starting and maintaining a business.

Another important factor is reasonable accommodation on grounds of poverty. Service and goods provision should be adapted to the needs of the poor in order to avoid or at least limit the extent to which they are excluded from social exchange. For example, payment by instalments, as small as necessary, should be possible as a rule.

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