

The principle of Human Dignity in the Brazilian Constitution

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Abstract This article presents parameters for the concept of human dignity according to the framework debated in the Bioethics realm, relating them to presumptions inherent to human rights. Next, this analytical milestone is compared to Constitutional dispositions targeting human dignity protection in different countries by considering, particularly, the norms that limit application of new genetic technologies. Additionally, it analyzes the application of these premises in the Brazilian Constitution showing, from paradigmatic example, its non-enforcement in some circumstances. It concludes by proposing broad dissemination of bioethics, considered as instrument capable to foster social awareness regarding fundamental guarantees for human beings.

Key words: Bioethics. Human rights. Legislation as topic. Right to die.

Currently, and more than ever, the development of technoscience deserves reflection since it threatens the existence of humanity and, therefore, what is defined as humanism. Given this fact, it's up to bioethics to consider the manifestations by the society against abuses by the scientific research in biomedicine (in the case of human beings) and in biotechnology (which intervenes in the environmental balance, with investigations in animals and plants), trying to find a solution to the deadlock reached between the need to promote scientific advances and protect human rights. This reflection requires an appropriate response by the law, the guardian of the agreed limits in society, so that rules can be established to ensure the necessary protection to individuals and the environment in the fundamental law ¹. In the secular contemporary societies all constitutions defend human rights, considering it consists social life. However, considering that often the states have no specific legislation to define the extent of advances of science and technology, it is established the opportunity to violate rules and laws aimed to implement and guarantee human rights, surpassing even the right to die

with dignity². It should be noted that the constitutions as the most important piece of law for social order of a country, should be guided so that the scientific contributions may not cause violation of human rights. For this it is necessary that the notion of human dignity and the assumptions of human rights are constantly reaffirmed as the principles inherent and inalienable rights of all individuals.

Human dignity: a fundamental concept

The conception from which human rights and *human dignity* are delineated, a notion that in the last decade has been deeply discussed by bioethics³⁻¹⁰. Such discussions derive from the fact that the idea of human dignity, as expressed in the Universal Declaration of Human Rights¹¹, *is necessarily a vague principle*, without making it, however, *inconsistent or useless*³. On the contrary, as acknowledged by Neri,¹² even being *very difficult to discursively articulate the content of that moral intuition* human dignity is a philosophical concept *capable of sustaining many concepts*, especially concerning the association between dignity and respect.

In fact, one can observe that the association between the concepts of dignity and respect provokes a multiplicity of interpretations related *the status of an entity which, given its intrinsic qualities or acquired merits is entitled to, and deserves respect*¹². And what can be inferred from the assertion of Anjos¹³ on the etymological meaning of the word *dignity* that derives from the Latin *dignitas* is expressed in a unique feature of the Roman elite, associated to self-determination and to decorum, and also to activities and attributes pertinent to nobility. In this sense, one cannot stop noticing, the term dignity is associated to the notions of power and superiority¹⁴.

However, the same Anjos¹³, as well as several other thinkers engaged in the construction of a Latin American bioethics of social interest¹⁵⁻¹⁸, advocates the idea that, today, the concept of dignity is directly associated with today's conceptions concerning human rights^{19,20}. Under their own terms, they consider, like Bergel, that *el desarrollo social y la promoción de la salud no constituyen sino dos caras de una misma moneda, por lo que pretender estudiar los problemas de salud pública desconectado de las contingencias económicas y sociales que afectan las poblaciones es – simplemente – desentenderse de la realidad*²¹.

This conception points to the fact that considering that the contemporary sensibility considers the association between ancestral dignity and respect must now extend to all human beings, as provided for in article 3 of the *Universal Declaration on Bioethics and Human Rights: human dignity, human rights and fundamental freedoms should be fully respected*²². Accordingly, it is worth remembering Tealdi's statements that the conjugation between bioethics and human rights represents *moral progress*²³ and that for a continent like Latin America the concept of dignity *no puede resultar trivial, sino que se constituye en punto de reflexión constitutivo para la construcción de la misma*²⁴ [dignidad].

Human dignity and reason: an historical pathway

The idea of *human dignity* has an ethical model the own perspective of the human person. Returning briefly the considerations about this historic path way of that idea, the Romans perceived it associated with social role of the person, the *mask* assigned to

those with a civil occupation. The term derives from the Greek *prosopon*, translated as *persona*. In this context, dignity refers to a prerogative specific of those who occupy positions of emphasis on the social scale.

Attributing to the term the same meaning, during the Middle Age Christian thinkers, clerics and lay people have developed the thesis of dualism between *persona personalis* and *persona Idealis* to distinguish the concept of person as substance and extraordinary superior condition of the political or ecclesiastical authority ²⁵. In contrast, in the present, plural and secular societies, human dignity is the most representative expression of a right of civilization nature, being therefore inalienable and unrestricted. This makes clear that the idea of human dignity also of human rights derived therefrom, may be related to the beginnings of human history and reveals a growing process of understanding of human beings on themselves and the principles that should govern life in society.

According to the scope of Kant's reflection, the this idea of human dignity is associated with moral perspective, being labeled as an attribute inherent to the rational being, which only by virtue of such capacity, is capable of making free and reflective decisions. It should be consider, however, that human action does not result only of pure rationality, as Kant tried to demonstrate, being also strongly influenced by emotions and feelings, what was already said by Freud and indicated by recent studies, that classified such ways of perceiving and interpreting reality as an emotional intelligence ²⁶.

According to such studies, the absence of emotion and feeling can affect rational decisions ²⁷. Thus, understanding human behavior means, necessarily, considering these two components – rational and emotional - that form the physiological basis of social action. From them it is developed a third one, which is expressed in morality and allows to a person an n decision in the concrete situations: to decide not only for the right attitude, but, above all, in decision considered at the moment, as that of beneficial character²⁸. The interaction of these three components of motivational acting stems from biological regulation, established between the cortical and sub cortical structures ²⁷.

The relationship between these components can be better understood from the distinction of three *worlds* developed by Popper and Eccles ²⁹. The *world I* and the set of things and material states, including the brain, *world II* are the subjective experiences, states of consciousness, processes of thinking; *world III* and the universe of *objective* knowledge, i.e., of culture, of cultural consensus created by man. World III and the world II product which, in turn, derives from the world I ²⁹. Evidently, the mental weighting of the conduct of human beings would require a particular neurological physiology , complex enough to establish the substrate to an idea / feeling inherent to all human beings and accustomed to the bioethical reflection ³⁰: the dignity of the human person. Seeking to stimulate and contribute to this continual reflection, this article will examine the concept of human dignity in some current constitutions of national states to then concentrate itself on the legal aspects of the Brazilian constitution. It should be considered at what extent its formulations are accompanied, in practice, with the respect to *humanism*, another category associated to the notion of human dignity.

In short, besides raising how the idea of human dignity fits into the normative referential, one will examine how the rights promised therein are exercised in the social practice³¹.

Bioethics, human dignity and constitutions

The trend of the legislation in force worldwide and the recognition of the human being as the center and end of law. This legal requirement originates, in large part, from the Universal Declaration of Human Rights, approved by the UN General Assembly on December 10, 1948, which extended the notion of intrinsic rights to all human beings without forgetting the respect to the inalienable and sacred natural rights of man. Previously, on August 26 1789, the idea of unrestricted and inalienable human rights, had already been outlined by French revolutionaries in the Declaration of Rights of Man and Citizen.

The quest to establish legal frameworks from the notion of human rights was strengthened after the traumatic violation of the respect for life and integrity of people, caused by the Nazi fascist barbarism and the totalitarian regimes that spread in various countries even after the second half of the twentieth century.

Currently, this assumption is shaped in the constitutions of secular and pluralistic countries, by adopting the concept of dignity of the human person, taken as a basic value the democratic rule of law. There are several expressions that seek to consolidate in the constitutions the concern with the respect to the person. Noble Junior³², in the work *O direito brasileiro e o princípio da dignidade da pessoa humana*, refers to such ways of naming the human person's dignity in the legislation of several countries that have them materialized in the form of legal principles. Pointing, especially to what concerns the themes that can be classified as relevant to the fields of bioethics and genetics. The author cites that in 1947 the Constitution of the Republic of Italy seemed to tend in this respect by stating in his art. 3, inserted in the space reserved for the fundamental principles, that *all citizens have the same social dignity and are equal before the Law*³². In the same article it refers to the pioneer initiative of the Basic Law of Bonn, of May 1949, responsible to solemnizing, in its art. 1.1., an incisive statement: *Man's dignity is intangible. Public powers are obliged to respect it and protect it*³².

In the same line of thought, according to Rospigliosi³³, the Portuguese Constitution, promulgated in 1976 as the result of the Carnation Revolution, emphasizes, in art. 1, inherent to the fundamental principles, that: *Portugal is a sovereign Republic, based, among other values, on dignity of the human person and the popular will and commitment in building a free, just and solidary society*³³.

Likewise, the Constitution of Spain, emerged after the overthrow Franco's regime, reads: *A person's dignity, the inviolable rights which are inherent to him, the free personality development, respect by law and by the rights of others are fundamentals of political order and social peace*³³. In France, despite its tradition in the protection individual rights, the principle is not found in the summary text of the 1958 Constitution. Nobile Junior³² mentions that after the fall of the Berlin Wall that principle was incorporated to the following constitutional texts:

Constitution of the Republic of Croatia of December 22, 1990 (art. 25), the preamble to the Bulgarian Constitution, of July 12, 1991; Constitution of Romania of December 8, 1991 (art. 1); Constitutional Law of the Republic of Latvia, of December 10, 1991 (art. 1), Constitution of the Slovenian Republic, of December 23, 1991 (Art. 21), Constitution of the Republic of Estonia, of June 28, 1992 (art. 10); Constitution of the Republic of Lithuania, of October 25, 1992 (art. 21), Constitution of the Slovak Republic, of September 1, 1992 (art. 12); preamble to the Constitution the Czech Republic, of December 16, 1992, Constitution of the Federation of Russia of December 12, 1993 (art. 21).

Regarding specifically the genetic experiments or manipulation that may undermine human dignity, there was an attempt to introduce this legal assumption in the Constitution of the Republic of Peru in 1993: *The commission of the constitution of Democratic Constitutional Congress approved an article that emphasized the protection of all kinds of experiments or genetic manipulations contrary to dignity. However, this text was not included in the constitution adopted by referendum, losing the opportunity to legislate on this subject*³³. On July 26, 2001 the commission charged with studying the constitutional reform in that country presented new *Basis for a Constitutional Reform* in which, either, it was considered the bioethical prospect in relation to the preservation of human dignity and the human rights versus the new technologies³³. It should be also considered that very protection to health requires a complete regulation in Peru. In this sense, one must pay attention to art. 3 of the *Convention on the Right of Man and Biomedicine*³⁴ that recognizes the right to health, even if there are economic constraints in the system³⁵. The genetic and medical law is committed to the establishment of special rules, which should arise from basic principles, already predicted and honored by the Constitution.

If, as seen, the assurances inherent in the so-called human rights of the first, second and third generation are not always explicitly incorporated into the text of the Constitution of different countries, will not be too much to suppose that when it comes to setting norms to protect individuals, populations and the environment from possible adverse effects of the new genetic technologies, difficulties to include such assumptions in the law grow exponentially. The great difficulties found in many countries of South America, Caribbean, Africa and the Middle East for elaboration of a constitution aimed at unrestrictedly protect human dignity of individuals, groups, segments and populations, and the environment, the one from to the understanding of the genetic manipulation techniques are added, as well as their repercussions on people and the environment. The conjugation of these factors provides the creation and maintenance of regulatory vacuums that reveal the protection of human dignity and human rights in the laws of each country. But it is exactly the result of this difficulty that it becomes urgent to establish bioethical parameters on the genetic manipulation, taking advantage of the fact that the charter fully protects the individual.

Notwithstanding these difficulties, there are examples of inclusion of guarantees for human dignity and human rights versus the new genetic technologies in the constitutional law in various states that, in general, deal with following topics³³: i) Parameters to limit the use of genetic manipulation techniques that violate the essence of humanity and identity of the individual, ii) Parameters for the protection of research subjects, iii) Preservation of integrity of the country's genetic assets; iv) Special protection to human reproduction, v) Promotion of the right of investigation on

paternity; vi) Promotion of traditional medicine and regulation of medical practices , and vii) Respect for future generations.

Promotion of traditional medicine and regulation of the medical practice

The promotion of traditional medicine according with bioethical principles is part of Venezuela's legal system. The regulation of medical practice is systematized in the laws of Washington, home of the U.S. government. On this point it is important to note that the ancient medicine, historically forged in the very cultural development of many countries, should be recognized and encouraged by governments. The cultural background of the groups and societies is a key element in the decision-making about their health for most people, especially those who live in contexts different from those of the market society. In these cases, folkloric medicine based on ancestral beliefs and preferred for being inserted in the symbolic system of society. Therefore, the importance of traditional medicine should be recognized and approved by the medical practice and by the governments in designing public policies.

Respect for future generations

The respect for future generations is inserted in the laws of the capital of Argentina (Buenos Aires) and in the province of Santa Cruz (Bolivia) as well as in Brazil, Japan and Norway. The habitat must be taken care to allow new generations to enjoy a genetically clean world and be brought to the world with no manipulations of any kind. The assumption that guides these legal guidelines flees from the anthropocentric perspective when it considers that priority must be given to the community and not to the individual; the habitat is not just the man. Furthermore, the human profile that emerges from human delineation of diffuse rights draws a new subject of rights, favoring the approximations between the ideal and legal dimensions of humanity, for all people, even the future generations, deserve legal and constitutional protection.

These aspects inherent to protection of human dignity and human rights, specifically approached in these different legal frameworks, are already systematically sorted by the Swiss Confederation since 1992. This nation-state was a pioneer in the constitutional regulation of new genetic technologies and other issues regarding the field of bioethics discussion, establishing an example that deserves to be imitated in the whole world. The current constitution of the Suisse Confederation, which dates from 1999, protects man and his habitat against abuse of the reproduction and genetic manipulation techniques, based on the following principles:

- Right to the use of reproductive medicine and genetic engineering in the human environment and protection against its abuse;
- It is allowed the use of breeding techniques to prevent infertility or avoid the transmission of diseases;
- It is not admitted the donation of embryos or surrogate motherhood;
- The human germ heritage and embryos are not commercial products;
- The human genetic heritage may be analyzed, recorded and revealed only with the consent of the person;
- Everyone has the right to access his genetic information;
- Legal recognition of cells transplantation;
- Protection to the use of genetic engineering in a human environment.

The principle of human dignity and the Brazilian Constitution

The respect for human dignity underlies the national law, based on the chapter on *Fundamental Principles* of the Constitution of the Federative Republic of Brazil. Thus, contemplated in the foundations of the constitution, the concept of dignity inherent to the human person is reflected on the bioethical reflection developed in the country, even because its insertion in the fundamental Brazilian law places it above the infraconstitutional laws. Therefore, the principle of human dignity shall be respected by the whole Brazilian society, thus consolidating the national bioethics.

As in other democratic countries, in Brazil the principle of human dignity is not restricted only to the protection of human life, but it is extensive to environmental life and the ecological balance of nature. The respect for human dignity is manifested in the preservation of human life with *quality of life*, which is only possible through the preservation and conservation of the environment. Protecting the environment is protecting human life of the of present and future generations, ensuring the environmental quality of life and a balanced and sustainable environment.

The Brazilian legal system has established protective to human dignity through the protection of diffuse rights and the environmental right, typified in constitutional provisions out of the catalog of fundamental rights. By stipulating that *everyone* has the right to an ecologically balanced environment - Art. 225 - the Constitution makes the second and third generation rights equivalent to the principle of human dignity, by matching them with the Rights and Fundamental Guarantees (Articles 5 to 17). If the right to a balanced environment is equivalent to the contents of human dignity, it must, therefore, be respected by all and any person, whether an individual or a corporation. That is, both the individual and the community must respect diffuse rights (from the third generation) the same way that supposedly must respect the fundamental rights and assurances, since by extending them to all the citizens the Federal Constitution has hierarchically equated them. Soon, they are above any other considerations in the legal system of the Brazilian democratic state of law³⁶.

As seen, the statute of human dignity is embodied in various international discourses and practices of human rights, which are universal rights of human beings, no matter the nationality, time or deadline for their effectiveness and efficiency³⁷. However, since they are rights provided for in international instruments as declarations, conventions, resolutions, policies, norms, agreements and treaties signed by national states, their approval by the National Congress and ratification by the President do not ensure the effective transposition of mandatory instruments within each nation, as occurs in Brazil. All these factors make it indispensable the inspection of the civil society about the effective application of the commitments made by countries of such instruments of international law. These are people, often acting through NGOs that can mobilize public opinion, influencing the media and pressing the government to make such ratifications predicted in these recommendations to become, Indeed, laws and public policies.

Accordingly, it is important to note that art. 5, § 2 of the Constitution (CF/88), prescribes that *the rights and guarantees established in this Constitution shall not exclude others deriving from the regime and the principles adopted by it, or*

*international treaties to which the Federative Republic of Brazil is a party*³⁸. And its first paragraph recommends that *the rules defining the fundamental rights and guarantees are applicable immediately*³⁸. Regarding the application of international instruments on human rights in the Brazilian state, and specifically the Universal Declaration on Bioethics and Human Rights, Barbosa affirms that *the involvement of the judiciary power in the question is another effort to be carried out in Brazil; after all, there is a strong convergence between the principles contained in the Declaration and the democratic state of law that is being improved and deepened in the country*³⁹.

The principle of human dignity is inherent to the democratic state of law and its application consolidates commitments made in international treaties to which Brazil is a signatory. Therefore, this and other principles, that are equivalent in essence, have the necessary applicability in the domestic sphere⁴⁰. Likewise, one can claim that other principles inherent to the reflection and discussion in the field of bioethics (which are equivalent to human dignity regarding the spirit of humanism and in respect of their constitutional application) also have the character of fundamental rights. Thus, even when expressed only in international instruments, they must have the power of mandatory enforceability in the national legal system.

It can be seen that the predicted bioethical principles, for example, in the Declaration of Helsinki⁴¹, when they are equivalent to the principle of human dignity and in documents signed by Brazil, can be immediately applied as if they were an internal norm, which does not require ratification. Among them is one of the pillars of bioethics: the principle of *autonomy of will* of the patient participating in clinical research.

Individual freedom that today is the core of the notion of rights was being conquered since 1776, with the independence of the 13 British colonies and the creation of the United States of America (USA), strengthened in 1789 on the ideals of the French Revolution. The ideals of these movements stimulated in the whole world the notion of rights in general and individual freedom as the focal point of these collective rights. Consequently, bioethics, in our times, in the U.S., follows the individualistic school that prioritizes the individual will over the will of the community. The individual with full civil capacity of self-determination also has the capacity to decide on his life and the availability and integrity of his body. Although his protection is one end of the social state of law, when the principle of autonomy prioritizes the will of such citizen in deciding what is best for his life, his health, his happiness, he is giving priority to human dignity of that person, protecting his right to choose whether or not having a life with quality. However, this equivalence is not, in Brazil, absolute, since it will depend on the case *in concreto* to be immediately and widely applied⁴².

Although there is a constitutional equivalence to the fundamental rights in the national legal system, there is no full and immediate application of this principle in questions related to genetics of the thematic ones related to bioethics. We can cite the question related to orthonasia. Recently, the Federal Council of Medicine (CFM) passed a resolution allowing the physician, in cases of patients in an irreversible clinical terminal situation, to suspend proceedings considered extraordinary or useless therapeutic efforts, upon request and approval of the patient or of those responsible for him. Currently, this resolution is suspended by order of Justice. In our view, orthothanasia is not unlawful or immoral, because it would allow that terminal patients could reach death with dignity, avoiding dysthanasia the process of dying in pain.

In Brazil, the legal system does not open yet the possibility for the patient to die with quality, medical care, especially in the National Health System (SUS). This circumstance illustrates on a paradigmatic way, the gap established between the guarantees relating to human dignity and human rights, legally guaranteed, and the legal and moral obstacles intended to prevent the full exercise of that same principle. Although the principle of human dignity is provided in Art. 1, sub section III of CF/88, and based on the bioethical principle of autonomy of will, which, in turn, is structured in the principle of individual freedom, a pillar of the democratic state of law of the Federative Republic of Brazil its widespread application is not yet a reality, either in the aspects related to clinical practice and with regard to social equity.

In parallel, if this will of the terminal patient is equivalent to the fundamental constitutional principle of human dignity, it is beyond the individual rights of first generation, also relating to the rights of third generation, associated with solidarity. It may also ask for the anticipation of guardianship based on the precautionary principle in injunction, to restrain the searches that bring irreversible damage to society and / or the environment given the absence of scientific evidence on the imminent risk of environmental life and human life and its dignity, the dignity of living with quality of life.

For clarity, it should be repeated that the principle of precaution will be manifested through informed consent. Bioethical criterion based on the principle of autonomy of will and that will be expressed, in a final analysis, in the Brazilian fundamental constitutional principle of human dignity. Therefore, this guarantee to the protection of individual and collective life of participants in researches, diagnosis and treatments unknown to the science, for equivalence, in the apex of the pyramid of the Brazilian legal system.

Final considerations

At the end of these general reflections, it can be realized that the Brazilian Constitution provided for the respect for human dignity as a basis for legal system of the Federative Republic of Brazil as a democratic state of law, recognizing that the individual shall be the main objective of the legal order. The principle reflects the constitutional rejection of practices, attributable to public or private powers, aimed at exposing the human being to the unequal position before the others, to disregarding him as a person, reducing it to the condition of a thing, or even to deprive him of the means necessary for his maintenance.

In relation to fundamental rights and their objectivity, it is expressed in the values of community in its entirety. Fundamental rights in the case of scientific research, in addition to defending the rights of the subject of research and limit the rights of researchers and of the researching institution, impose to the State an abstention in the intervention of the individual sphere. It also imposes its intervention when values, customs and principles of community are violated, as, for example, the physical integrity of environmental life and physical, psychic and moral integrity of the research subject.

In case of conflict between fundamental rights, included or not in the list of the catalog of Title II of CF/88, besides the obligation of observing all constitutional norms, one has to aspire to the principle of human dignity as well as biomedicine must respect the Brazilian infraconstitutional principles and standards, so that we may have security in the ethical procedure of researchers and institutions. The environmental education through the Interdisciplinary practice of bioethics can and should be an instrument of political awareness of society. It may have the objective of clarifying to the population that there are social movements that value life, and that they intend to mobilize society to not be inert regarding the abuses committed by researchers on behalf of scientific evolution

In short, it is to the scholars to bioethics the responsibility for promoting in the general public the knowledge of the basic principles of bioethics and its basic instruments of reflection, so that we can act in relation to the violations of human rights. Likewise, it would be appropriate that all Law and Medicine courses had in their curricula the course of environmental education *latu sensu*, or bioethics *strictu sensu*, with the scope directed to raise awareness of the professionals on those areas on the validity, scope and importance of their principles.

Article elaborated from the monograph prepared for the third module of the doctoral course in Bioethics of the College of Medicine, University of Porto, Portugal.

Resumo

O princípio da dignidade humana na Constituição brasileira

Este artigo apresenta parâmetros do conceito de dignidade humana segundo o arcabouço discutido no campo da Bioética, relacionando-os aos pressupostos inerentes aos direitos humanos. A seguir, esse marco analítico é comparado aos dispositivos constitucionais voltados à proteção da dignidade humana de diferentes países, considerando, especialmente, as normas que delimitam a aplicação de novas tecnologias genéticas. Analisa, também, a aplicação desses pressupostos na Constituição brasileira, demonstrando, a partir de exemplo paradigmático, sua inobservância em algumas circunstâncias. Conclui propugnando pela ampla disseminação da bioética, considerada instrumento capaz de estimular a consciência social a respeito das garantias fundamentais para os seres humanos.

Palavras-chave: Bioética. Direitos humanos. Legislação como assunto. Direito a morrer.

Resumen

El principio de la dignidad humana en la Constitución brasileña

Este artículo presenta parámetros del concepto de dignidad humana según la estructura discutida en el campo de la Bioética, relacionándolos a los presupuestos inherentes a los derechos humanos. A seguir, ese marco analítico es comparado a los dispositivos constitucionales dirigidos a la protección de la dignidad humana de diferentes países, considerando, especialmente, las normas que delimitan la aplicación de nuevas tecnologías genéticas. Analiza, también, la aplicación de esos presupuestos en la Constitución brasileña, demostrando, a partir de ejemplo paradigmático, su inobservancia en algunas circunstancias. Concluye propugnando por la amplia

diseminación de la bioética, considerada instrumento capaz de estimular la consciencia social a respecto de las garantías fundamentales para los seres humanos.

Palabras-clave: Bioética. Derechos Humanos. Legislación como asunto. Derecho a morir.

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