



# Legal Implication of Assisted Reproductive Technology on the Reproductive Rights of Women in Nigeria

Mabel Otivbo Izzi<sup>1</sup> and Obraori Nmabunwa Peters Adiola<sup>2</sup>

<sup>1</sup>Associate Professor of Law, Former Head, Department of Public Law and Department of Private & Property Law, Rivers State University, Port Harcourt, Nigeria.

E-mail: [izzi.mabel@ust.edu.ng](mailto:izzi.mabel@ust.edu.ng).

<sup>2</sup>Associate Professor of Law, Department of Jurisprudence and International Law, Rivers State University, Port Harcourt, Nigeria. E-mail: [adiela.obraori01@ust.edu.ng](mailto:adiela.obraori01@ust.edu.ng)

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**Abstract:** In recent times, some couples have faced the challenge of procreation through natural conception, which is a vital component of the marriage institution, considering the high premium Nigerians place on children. Such couples in a bid to fill this void have had to seek help outside the conventional means by resorting to the Assisted Reproductive Technology (ART) which is a relatively new process whereby conception is achieved through technological intervention. Although it is a welcomed innovation, it has drawbacks with regards to ethical as well as socio-legal issues. This paper seeks to identify the challenges associated with assisted reproductive rights. It establishes that ART has introduced a new dimension to conception that could affect the reproductive rights of intending parents. It recommends the need for legislative intervention to effectively regulate the activities of medical practitioners in this specialized area of medicine, and to protect the reproductive rights of intending parents.

**Keywords:** Assisted reproductive technology, human rights, infertility, reproductive rights, women.

## 1. Introduction

In the traditional African setting, not much importance was attached to child bearing; it was regarded as a direct role assigned to women (Izzi, 2019). The society did not pay much attention to how they achieve conception nor child birth. The bringing forth of a child was seen as a woman's problem. It was a feeling every woman wishes to have to attain motherhood (Emiri, 2012).

From the biblical perspective, it is obvious that one of the reasons God ordained the institution of marriage is for the purpose of procreation. Similarly in Nigeria, the child occupies a very significant place within the family and the community. Children represent so many things to the average Nigerian; they secure conjugal ties, confer social status, secure rights to property, offer social security, assist with household chores and also serve as labour for agricultural purposes. It is for these and many other reasons that the birth of a child in a typical traditional African family is received with so much joy and celebrations. Roxbuburg in 2022 had argued that children are more valued in Africa than in the western world, where people take conscious steps not to have children, they prefer to have pets in their place.

In the midst of all the reverence given to children in Africa, some couples unfortunately are faced with the challenge of the inability to conceive naturally having been in a marriage for over one year. Medically, a couple is deemed to be infertile if they are unable to achieve conception after one year of having carefully timed, and unprotected sexual intercourse (WHO, 2022) The socio-cultural impact of infertility can only be imagined considering the importance attached to children in the African society. Most infertile couples in order to avoid the humiliation and with the fear that their families may go into extinction, resort to other means of child bearing which may include polygamy, woman to woman marriage, child adoption and in extreme cases “baby-buying” from baby factories. The issue of infertility and the undue pressure it puts on most infertile couples has made some of them so desperate in their bid to have children (Araoye, 2003).

In the face of the sundry problems associated with infertility, the intervention of medicine through Assisted Reproductive Technology (ART) presents childless couples with a wide range of procedures aimed at addressing many of the causes of infertility and achieve conception (Kamel, 2013). As a follow up to this novel medical intervention there is the problem of lack of legal regulatory framework as well as the protection of the reproductive rights of the women who play a very dominant role in the process. There is also the need to protect other participants in ART matters such as the sperm donors, the assisted couple or parent, et cetera. As innovative as ART is in resolving issues of infertility it also has legal implications which, if not properly managed may create more legal problems for all stakeholders as well as the larger society. It is these challenges and the need for appropriate regulatory mechanism that this paper intends to address.

## **2. Conceptualization of Terms**

To provide proper perspective to this paper, there is the need to conceptualize some relevant terms used in this paper. Such words are women, infertility, assisted

reproductive technology, reproductive health, reproductive rights and participants in assisted reproductive technology.

### *Woman*

The term refers to a distinctive feminine nature; or a person of the female gender and includes a girl, lady, mother, grand-mother, great-grand-mother, sister, daughter, aunty, and the like. She is seen as that human with a womb. Her name is derived from ‘womb’ and ‘man’. A woman is a specie of humans with a womb and capable of procreating. She is the type of human biologically created to bear and nurture life. This means that she is the specie of humankind with a womb. Thus, an integral aspect of a woman is her capacity and capability to have and nurture life (Adiela, 2019). It is important to note that nature is the source of her gender and role. This definition does not accommodate those who elect to become women later on in their lives, or transition from being a woman to becoming a man: it does not cover transgender persons.

### *Infertility*

This may be referred to the impairment which affects ones’ ability to reproduce or procreate. Where a couple live together for a considerable period of time and have unprotected sexual intercourse, without achieving conception, they are said to suffer from infertility. Infertility, as defined by the Royal College of Obstetricians and Gynaecologists United Kingdom, is the ‘failure to conceive after regular or frequent sexual intercourse for two years in couples within the reproductive age or in the absence of any medical reproductive pathology’ (National Guidelines Clearinghouse, 2018)<sup>1</sup>.

In African society, it is perceived that only a woman can be the cause of infertility between couples, even though in reality, either the male or female partner or both partners could be the cause of infertility. Women are usually blamed for infertility because she is seen and known as the human with a womb (Adiela, 2019). According to Araoye (2003),<sup>2</sup> the main cause of infertility in Nigeria could be attributed to infection such as sexually transmitted diseases and post-abortal and *puerperal sepsis*. He noted however, that these problems are not restricted to women.

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1. National Guideline Clearinghouse, ‘Fertility: assessment and treatment for people with fertility problems’ Available at <<http://www.rcog.org.uk/women-health/clinical-guidance/fertility-assessment-and-treatment-people-fertility-problems>> accessed 1 April 2018.
  2. O M Araoye, ‘Epidemiology of Infertility: Social Problems of the Infertile Couples’ (2003) 23(2) *West Afr J Med* 190-196.

There are several causes of infertility in men. These include low sperm count, low sperm mobility, abnormal sperm shape, abnormal semen which may not be able to carry the sperm effectively, genetic factors, mental stress, radiation therapy, obesity, excess alcohol consumption, age, some medications and other disease. Other possible contributory factors include environmental factors such as diet and toxic materials, socio-cultural behaviours, infections and hormones (Akinloye & Truter, 2011).<sup>3</sup> Infertility in women may be caused by problems with cervix, damage to uterus or fallopian tube or tubes, age, problems with ovulation due to hormonal imbalance, tumor, alcohol or drug use, obesity or stress.

### *Assisted reproductive technology*

Assisted reproductive technology is the technology adopted or used to attempt to achieve conception other than the natural or conventional process. It establishes the fact that human life can be created not only by natural means but also through ART. Since infertility has continued to be on the increase globally, Nigeria inclusive, the services of ART have been in high demand to a large extent.

Assisted Reproductive Technology has proved to be an effective solution to the challenges of infertility. ART has put smiles on the faces of many childless couples and given them hope; since the birth of the first test-tube baby in 1978. The first baby to be conceived through in vitro fertilization (IVF) was Louise Brown. She was born on the 25<sup>th</sup> July, 1978 in Royal Oldham Hospital, Oldham, London United Kingdom. Nigeria also had her first IVF baby in 1989. The delivery of the first IVF baby was performed by Prof. Osato Giwa-Osagie at the Lagos University Teaching Hospital, Lagos. The success rate of the technology has given more zeal to practitioners to continue in their quest for an answer to the problem of infertility and also its eradication or attaining to bring it to the barest minimum.

Assisted Reproductive Technology achieve conception through the following methods for women: in vitro fertilization (IVF); gestational surrogacy; artificial insemination by husband (AIH) or donor (AID); oocyte (egg) donation; intracytoplasmic sperm injection (ICSI); intrauterine insemination (IUI); assisted hatching; and gamete / zygote intrafallopian transfer GIFT / ZIFT). While men could have the following procedures: sperm donation; sperm extraction; varicocele repair; microsurgical epididymal sperm aspiration; and intracytoplasmic sperm injection (ICSI).

3. O Akinloye & E J Truter, 'A Review of Management of Infertility in Nigeria: Framing the Ethics of a National Health Policy', August 2011 *Int'l Journal of Women's Health* <<https://www.researchgate.net/publication/51618721>> assessed 2 April 2018.

### ***Reproductive health***

This refers to the physical, emotional and social well-being of individuals in relation to their reproductive system and sexual health. It encompasses access to quality healthcare services for pregnancy, childbirth and postpartum care; family planning and contraception; prevention and treatment of sexually transmitted infections; safe and healthy abortion services; infertility diagnosis and treatment; menstrual health and hygiene; and sexual health education and counseling. Reproductive health is an offshoot of the division of healthcare relating to human reproduction and self-determination. Reproductive health is a collection of methods, techniques and services that contribute to reproductive health and well-being. It also prevents and solves reproductive health challenges (Aniekwu, 2011).

### ***Reproductive rights***

These are human rights that guarantee individuals the freedom to make decisions about their reproductive health, free from coercion, discrimination, or violence. These rights include: right to access safe and affordable reproductive healthcare; right to make informed decisions about family planning and contraception; right to choose whether or when to become pregnant; right to education and information about reproductive health; right to protection from sexual violence and coercion; right to equality and non-discrimination in reproductive healthcare. Reproductive rights encompass two broad principles – the right to reproductive health care and the right to reproductive self-determination. Reproductive health is entrenched in constitutions of the world and international convention (United Nation, 1994) as reproductive rights.

### ***Participants in assisted reproductive technology***

There are several participants in assisted reproductive technology. There are the primary participants, the medical professionals, the support staff and the third-party providers. The primary participants include the intending parents, egg donors, sperm donor, surrogate carriers (surrogate mothers), and the recipients of the donated eggs or sperm or embryos. Medical professional involved in ART include fertility specialists, Obstetricians / Gynecologists, embryologists, andrologists, nurses and coordinators. While support staff include counselors / therapists, social workers, patient advocates and medical assistants. Third-party providers include fertility clinics, surrogacy agencies, egg donation agencies and sperm banks.

## *Rights*

Rights are claims of a citizen which the society recognizes to be necessary for his upliftment and the welfare of all and is enforced by the power of the State. Rights are legal, social or ethical principles of freedom or entitlements. They are claims or entitlement which individuals have against the others or against the society as a whole. Rights that are essential for human dignity and well-being and apply to all humans simply by virtue of their humanity are called human rights.

### **3. Theoretical Foundation**

This thrust of this paper is hinged on basically two fundamental theories of law. These are the positivist theory of law and the sociological theory of law. The positivist theory of law views laws as normative and lays down rules of conduct that must be obeyed. According to John Austin, one of the proponents of this theory, law is a command of a political sovereign to a political inferior, which is backed by sanctions for disobedience. To him, law, properly so called must emanate from a political superior to political inferiors as a command, which attracts sanctions if disobeyed. In the Nigerian experience, the political superior refers to the National Assembly and the President's assent into a law any bill prepared by the National Assembly. As at present, there is no law regulating ART in Nigeria. It is the clamour of this paper suggesting that a law be enacted to regulate this aspect of human life; and that such law must contain sanctions for violations against its provisions.

Secondly, the sociological theory of law advances the need for a sociological approach to the study of law. To Dean Roscoe Pound, one of the proponents of this school, the aim of law is for social engineering. Law should involve a process of social control aimed at fair distribution of duties and benefits so as to satisfy the maximum of wants with the minimum of friction. To achieve this, the competing interests and their relative importance are assessed by reference to the needs of the society and the prevailing values in that community. This is particularly relevant since ART is aspect in our society. There is the need to regulate and control the activities of all the participants of ART so as to protect the reproductive health and reproductive rights of all primary participants in ART while safeguarding them from exploitation of any sort. Hence, the need for regulation of the sector.

### **4. Legal Framework**

Although there are no laws regulating ART in Nigeria, there are several laws in Nigeria that attempt to regulate reproductive rights and reproductive health. These laws shall be discussed, and the lacuna on ART will be pointed out.

The Constitution of the Federal Republic of Nigeria (CFRN) (1999) provides for fundamental rights of her citizens. Section 17(3) of the CFRN 1999 provides for the government will direct its policy towards ensuring that there is adequate medical and health facilities for all including reproductive health. Section 34(1) provides for the right to dignity including freedom from inhuman or degrading treatment such as harmful medical exploitations capable of wrecking or jeopardizing ones' reproductive health.

The Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (200five) which was adopted at the Conference of Heads of States and Government at Maputo, Mozambique with the aim of ensuring that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights. Article 3 of the Protocol provides that every woman shall have the right to dignity inherent in a human being, and that States shall prohibit any form of exploitation or degradation of women. Article 4(1)(h) in its bid to guarantee the protection of life and security of the person, prohibits all medical or scientific experiments on women without their informed consent. Thus, the practice of procuring the eggs of young girls without their informed consent is prohibited.

The Convention on the Elimination of All Forms of Discrimination Against Women (1981) which was adopted as a United Nations General Assembly Resolution, aims to eliminate discrimination against women. Article 12 mandates State Parties to take appropriate measures to eliminate discrimination against women in the field of health care, so as to grant equal access to health care services, including family planning services.

It may be observed that these legislative provisions relate to the reproductive health and rights of individuals, and to the right to human dignity of the women and all individuals. However, none of these legal instruments specifically regulate the practice of assisted reproductive technologies as they affect the primary participants. Hence, this paper identifies that lacuna, highlights the need for such legislative interventions and recommends same.

## **5. Relationship Between Reproductive Health / Right and Assisted Reproductive Technology**

In the course of achieving conception through technology the issue of the reproductive health / rights of the primary participants (most often women) may be compromised. The concept of reproductive health and rights are a relatively new discourses and have been down played in some countries due to their religious and cultural beliefs. The concept of reproductive health / rights began to emerge and gain recognition in the middle of the 1960s (between 1960 – 1970).

According to Freedom and Stephen (1993), reproductive rights began to develop as a subset of human rights at the United Nation's International Conference on Human Rights in 1968, which led to the proclamation of the first non-binding international document that freely and responsibly give couples the right to numbering and spacing their children (Proclamation of Teheran, 1968). It was at this point that reproductive rights began to be viewed as the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information and the means to do so. They are also entitled to the highest standard of sexual right and the right to make decisions concerning reproduction free from discrimination, coercion and violence. The world after that conference recognized the need to use human rights as a tool for the advancement of women's reproductive health. In furtherance to this, the right featured in the International Conference on Population and Development in Cairo in 1994 where a right based approach was adopted as a global policy. This marked the major turning point as reproductive rights were embraced into already existing international documents and national laws (Cook and Mahmud, 1996).

The fourth conference on women which was held in Beijing in 1995 also reiterated in its non-binding declaration and platform for action where they framed women's reproductive rights as indivisible, universal and inalienable human rights (Bunch and Fried, 1996). According to Agomo (2006), reproductive rights are

... a broad concept, which seeks to pull other different concepts, different ideas and different rights into one big umbrella. Problems are bound to rise and with the problems come the challenges as to how to overcome them. This is why we are here.

Recent developments in reproductive medical health through the use of technology indicate that technological developments in the area is turning aspects of life once considered to be "fate" to a matter of choice and the law is expected to rise up to the occasion by providing some level of equilibrium in balancing emerging issues as an instrument of social change. Reproductive health and assisted reproductive technology are novel areas with new challenges and responsibilities. With the increase in the role played by technology in assisting conception, the vital questions relating to the right to life, reproductive health, parental responsibility, reproductive technology, family life, status of the child, surrogacy and other emerging issues must be addressed by law. Assisted Reproductive Technology can be regarded as part of the right to reproductive health.

## 6. Nature of Assisted Reproductive Technology

ART has the advantage of proffering solution for infertility among intending parents or couples. However, some of its activities have also thrown up debates about women's right (Solomon, 1995); same-sex parenting; as well as cultural and social conflicts (Kindregen and McBrien, 2006) regarding who is a parent. This calls for response through law particularly in a situation where Nigeria currently has no law which expressly regulate the activities and participants of ART.

In the course of subjecting patients to these procedures the intending parents are sometimes exposed to the risk of being exploited or violated because there is no legislation or regulatory body monitoring the practice to ensure the safety of the persons involved nor the fate of the embryo (Fayokun, 2008) harvested for the purpose. For example, recently the social media was flooded with the case of a woman who approached a fertility doctor for treatment for infertility. The doctor achieved pregnancy but never disclose that she was expecting twins. It is alleged that he must have stolen one of the babies who only recently reconnected miraculously with her birth family after 21 years. According to Emeri (2012), these techniques throw up issues relating to parental rights and responsibilities, the upbringing, and control of children born through biological technology and the appropriate guidelines in overseeing the boundaries of technology.

## 7. Legal Implications of Assisted Reproductive Technology

Before the inception of ART, couples who could not achieve natural conception or who had infertility issues, used existing legal mechanisms such as adoption or foster care to become parents. In law, parenthood could be attained through nature or law (either by birth or adoption). However, with the advent of ART, there is not only a social broadening in the traditional understanding of who a parent is but there are also ethical and legal implications. Due to this development, the concept of family has been reconstructed raising public policy considerations and morality issues. The various forms of ART present different legal issues which will be examined in this segment of the discourse.

In the case of a lesbian couple seeking to create a two-parent family, they resort to artificial insemination which raises the issue of the role the biological father should play in the life of the child and by extension that family. What are the limits of his involvement? As Dalton and Bielby (2000) rightly observed, relying on an anonymous donor circumscribes the contribution of the male and eliminates the social role of the father in the family. There is need for the law within the Nigerian context to prohibit this type of family which not only distorts the concept of the family but also violates the

right of child to family life. This sort of family is not the same as that which is envisaged by the Marriage Act 2004 and the Same Sex Marriage (Prohibition) Act 2013. Whose family will such a child belong to?

In the case of surrogacy which usually introduces a neutral third party into the relationship. Surrogacy raises morality issues particularly where a man other than the husband donates sperm to a woman who is not his spouse. Will that not amount to adultery in the eyes of the moralists? What if the surrogate mother decides to have an abortion for reasons best known to her or refuses to release the baby to the intending parents? What are the legal steps that the intending parents can take to stop her from discontinuing with the pregnancy which technically belongs to the intending couple particularly where the sperm and egg belongs to them? What happens where the intending parents die or decide not to continue with the procedure? If the child is born with a disability, will the intending parents still accept the child? The solution will be to provide protection for all the parties involved in the transaction. They must also have access to enforcement of these rights. There is also the problem of commodification of human life and reproductive organs, which must be guided effectively. Recently the story was all over the social media of how two teenage girls were lured by an adult to sell their eggs and ovaries for a paltry sum of ₦100,000 to a fertility doctor in Abeokuta, leaving the girls with severe medical challenges in clear violation of their reproductive rights.

There is the difficulty of determining who the legal mother of a child born by a surrogate is. Most times the carriers have a genetic link with the contracting intending parents because motherhood is ascribed to the fact that the uterine environment plays an important role in fetal development. This is due to the fact that the gestational period of bonding is believed to play a permanent and significant role for both the gestational mother and the child. A surrogate may be regarded as the mother of any child born by her whether or not she is genetically related to the child. This was the position taken by the court in the *Matter of Baby* (1998) in that the women of the commissioning couple will not be the mother even when her eggs were used for the in vitro fertilization (IVF) procedure. The judgement failed to take into consideration what will be in the best interest of the child. Contractually, the surrogate usually undertakes to be inseminated with the contracting husband's semen, carry the baby through the gestational period and upon delivery hand the baby over to the intending parents. At this point, she relinquishes all parental rights in respect of the child and the intending parents legally become the parents of the child. The position does not change even when the surrogate mother donates her eggs for the procedure. Surrogacy is a very complex procedure

that should have guidelines to regulate it. The law should deal with the interest of all the parties to the transaction and also provide medical after care for them particularly the surrogate mother who has to live with the trauma of giving up “her baby” after the gestational period. It is a very debasing and exploitative practice that should be regulated so that it is not done solely for financial gains.

The in vitro fertilization (IVF) method used by medical practitioners to achieve conception has also faced a lot of criticism on moral / religious (Bingel, 2012) as well as cultural basis; particularly when the intending parents have to use donor eggs and semen. What is the legal status of such a child in the family? Particularly in Nigeria where parenthood is determined by genetic and biological links. The law is not clear as to whether a child from a frozen embryo is capable of inheriting from a parent in death. However, the court in *Rose v Secretary of State for Health* (2002) ruled that a donor offspring could obtain information about their genetic parents despite previously established anonymity (Burr, 2010).

Another issue that could emerge from the procedure is what will be status of the child where the intending mother uses donor sperm without the consent of her husband? Can such a child be said to belong to her husband? Can the child inherit from his social father or rather from his biological father? Unlike the adopted child who is treated as the legal child of his adoptive parent, the status of the child conceived through ART particularly using donor semen remains uncertain. The solution to the problem can be found in section 42(2) of the Nigerian Constitution which clearly states that no individual can suffer from any form of disadvantage or discrimination by reason of the circumstances of his birth. The Child’s Right Act also throws more light on this problem by stating that in matters concerning the welfare of the child, the best interest of the child be paramount or given primary consideration (Child’s Right Act, 2003).

There is also the need to address the issue of the egg-donors to regulate how the procedure is done and the number of eggs that can be harvested from a donor without jeopardizing her health. Although they donate voluntarily, there must be limits to what can be harvested without violating her reproductive health. There are instances where the medical practitioners, in an unethical manner harvest more than is necessary and without disclosing such to the donors. Young girls are also enticed with little money to sell off their eggs - a practice that could be detrimental to the reproductive health of these young girls. The law must rise up to the situation by enacting laws to protect these donors. In some cases, the intending mother’s eggs are harvested and in the excitement of achieving conception does not enquire about what happens to the unused eggs. Such eggs could be stored and sold to other intending couples without the knowledge or

consent of the mother, who has no intention of selling or donating her eggs to another family. These practices violate the reproductive rights of participants and should be curbed by enacting regulations to guide ART in Nigeria.

## 8. Matters Arising

There is no gainsaying that ART has made tremendous progress in recent times in addressing infertility among intending parents, thereby changing the narrative and achieving conception. However, the practice has raised some problems particularly with the non-existence of any law to regulate the practitioners and also provide protection for all the persons involved in the procedure.

Although the Association of Fertility and Reproductive Health in Nigeria which is the umbrella body of IVF practitioners in Nigeria has tried to address the concern of the public and practitioners by coming up with ethical guidelines for the practice of ART in Nigeria. Be that as it may, there is the dire need for Nigeria to have a legislation to regulate practitioners and a specific and dedicated body to monitor their activities.

The need for legislative intervention cannot be over emphasized considering how practitioners harvest eggs / sperm from donors without informing them of the effect on their reproductive health. There must also be a limit to the number of eggs or number of times a donor can donate; issues such as the evaluation of the surrogate, and the post-natal care of the surrogate must be addressed.

Government must legislate on egg, embryo and semen donation matters and the status of the child. For all intents and purposes, the intending parents should be presumed to be the parents of the child not the donors. There must be regulations to check quackery, human trafficking and the use of such facilities for baby factories. Recently there is the sad case of two teenagers who were tricked into selling their ovaries and eggs to a medical practitioner who runs a fertility clinic in clear violation of their reproductive rights. A situation that could have been averted if there was proper monitoring of the activities of these fertility clinics by appropriate regulatory bodies set up by the government; it will also help to eliminate quackery. There is therefore the need to enact relevant legal and institutional framework to regulate and enforce compliance.

## 9. Conclusion

Notwithstanding the high cost of ART in Nigeria, there is a steady growth in the number of ART centres all over the country. Currently, there are over 70 registered ART centres providing fertility services in Nigeria. There are also an unknown number of unregistered practitioners in Nigeria which is very dangerous (Oberabor &

Fatunde, 2014). ART has changed the dynamics of conception and pregnancy. It must be accorded that relevance in the society by effective regulation of the sector through regulations and monitoring schemes. The Nigerian policy makers must act speedily to fill the lacuna created by the lack of legislation in this area to regulate the practice in Nigeria. Nigeria can borrow a leaf from the United Kingdom which has an elaborate legislation on reproductive health particularly ART. They are very comprehensive and have helped to put ART in the proper perspective for the benefit of all interested parties as well as practitioners.

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