Italy

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A. General attitude in society toward sexual relations

The social attitudes of Italians toward sexual relations have been significantly changing recently. For many years, especially in certain areas of the country, the emphasis was primarily on rules of decency and morals, rather than on the recognition of women's sexual autonomy. In recent years, society's perceptions have changed, and more types of conduct are considered abusive and harmful to the free sexual self-determination of individuals. These new cultural impulses have been mirrored in many court decisions (see *infra*) and in some scholarly papers[1]. However, the new attitudes have only been partially implemented at the legislative level (see *infra*).

In this phase of change, old male stereotypes cyclically re-emerge, reproposing logics considered obsolete by the majority of the population. An implementation of sexual education on mutual respect and consensual sexual relations would be appropriate to eliminate some subcultural stereotypes still linked to old clichés. Some surveys show that numerous men are still convinced that rape is, in many cases, provoked by women (eg. if they dress provocatively, if they agree to go out, etc..) or that a married woman cannot refuse to have sex with her spouse[2].

Gender equality has been a central topic in Italian politics in recent years. Regrettably, it has often been enhanced only with symbolic initiatives. There is considerable attention to gender language and great social condemnation of sexist discourse. Unfortunately, this often results in a mere tendency towards linguistic "political correctness", whereas in fact there are still evident disparities, particularly in the workplace.

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1 The Italian association of criminal law professors has officially suggested a reform of rape law with a consent-based definition. See the document 'Reati contro la libertà e l'autodeterminazione sessuale' on www.aipdp.it.

2 See Virginia Piccolillo, 'Violenza sulle donne. Colpa di come vestono', in Corriere della Sera, 26.11.2019. In Italian criminal law scholarship, Luciana Goisis, 'La violenza sessuale: profili storici e criminologici', in Dir. Pen. Cont., 31.10.2012.

B. Background of criminal laws on sexual conduct

The current Italian legislation on sexual crimes was introduced in 1996 (with law no. 66 of February 15, 1996)[3].

The lynchpin of the reform is that the law now classifies sexual offences as "offences against personal freedom". Previously, under the 1930 Rocco Code, sexual autonomy had not been protected as an interest in itself, but rather as a part of the public good of "public morality and decency". This was an expression not only of the fascist ideology underpinning the code but also of the historical legacy of the Italian legal tradition, which conceptualized sexual activity as tied to legitimate procreation[4].

The change was charged with a strong cultural and symbolic meaning, especially by Italian feminist movements. The symbolic potential of law has been used to promote the value of the right to sexual autonomy: by defining sexual crimes in terms of "individual freedom" and no longer as public morality and decency, the intention was to reaffirm that protection in sexual crimes is directly centered on the person, whose sexual freedom is not protected as a projection of public interests such as public morality or family order and legitimate procreation[5].

On the other hand, as noted by several scholars, there have been few innovations in terms of the structural elements of the offence of sexual violence. The offence continues to be based upon coercion, as opposed to lack of consent, and predicated upon the traditional components of violence and threat[6]. Indeed, the main features of the reform were: the abolition of the distinction between penile penetration and other sexual acts; an increase in the minimum and maximum sentences; a list of aggravating circumstances which increase the sentence; some recognition of the sexual autonomy of minors and people with disabilities; and a special provision and harsher sentence for gang rape.

However, even the new systematic placement within the Italian Penal Code has raised doubts. Several scholars have pointed out that it would have been more appropriate to include the crimes among those against

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3 Marta Bertolino, 'La riforma dei reati di violenza sessuale', (1996) Studium Iuris, 401.

4 Tullio Padovani, 'Pre-Art. 609-bis c.p. Commento ad Art. 2 l. 15 febbraio 1996, n. 66', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 431. See also the chapter 'Coercion by violence and its changing meaning. The experience of Italy', in this volume.

5 Giuliano Balbi, 'Violenza sessuale' in: Enciclopedia Giuridica (1998), 1, 3.

6 Padovani (note 4); Bertolino (note 3).

"moral freedom", rather than against "individual freedom" (immediately after kidnapping)[7].

If until the 1990s, scholars and courts emphasized the role of the criminal law as an *extrema ratio* in the sexual sphere[8], recently more attention has been paid to the protection of the interests damaged by the conduct of sexual violence. This is particularly true for the jurisprudence of the Supreme Court ("Corte di Cassazione"), which in recent years has used a very broad interpretation of the concept of violence[9]. Scholars, on the other hand, have for several years been calling for a reform of sexual violence beyond the concepts of force and threat[10].

C. *Definition of sexual coercion offenses*

Under the original 1930 version of the Rocco Code, there was a division between the serious offence of "*congiunzione carnale*" (literally "joining of the flesh")[11], art. 519 of the Penal Code, constituted by vaginal, anal and oral penetration; and the less serious offence of "*atti di libidine*" (literally "acts of lust"[12] or "libidinal acts"), art. 521 of the Penal Code, defined simply as acts different from *congiunzione carnale*.

In 1996, the lawmaker unified the two crimes under a single offence provided for in Article 609-*bis* of the Penal Code, entitled "*violenza sessuale*" (sexual violence). It requires the performance of "sexual acts" (in Italian: "*atti sessuali*"), which includes both penetration and other sexually related conduct. This all-encompassing category remained undefined by the law and continues to create extensive problems of interpretation[13].

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7 David Brunelli, 'Bene giuridico e politica criminale nella riforma dei reati a sfondo sessuale', in: Franco Coppi (ed), 'I reati sessuali. I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali' (2nd edn. 2007), 37.

8 Giovanni Fiandaca, 'Violenza sessuale' in Enciclopedia del diritto (1993), 953.

9 See the chapter 'Coercion by violence and its changing meaning', in this volume.

10 See supra notes 1 and 6.

11 Translation by Rachel A. Fenton, 'Rape in Italian law: towards the recognition of sexual autonomy' in: Clare McGlynn and Vanessa E. Munro (eds), 'Rethinking Rape Law' (2010), 183.

12 Ibid.

13 Alberto Cadoppi, 'La violenza sessuale alla ricerca della tassatività perduta', (2016) Dir Pen Proc, 1469. The "unification" within article 609-bis of the two crimes made it necessary to provide for an attenuated form of sexual violence in order to punish less severely those cases in which the sexual acts were not so invasive and

The reasons for this original legislative solution were manifold, but two were central. Naively, it was expected that in trials it would no longer be necessary to ask invasive and embarrassing questions to the victim to establish whether there had been penile penetration. Furthermore, feminists believed that the distinction did not recognise that acts not involving penetration may be even more offensive and degrading to the victim.

The offence of sexual violence under art. 609-bis c.p. now reads:

> "*Whosoever, by violence or threat or by abuse of authority coerces another to commit or submit to sexual acts is punished by imprisonment of six to twelve years.*
> *The same punishment is applicable to him who induces another to commit or submit to sexual acts:*
> 1. *abusing the physical or psychological inferiority of the victim at the time of the offence;*
> 2. *deceiving the victim as to the identity of the perpetrator.*
>
> *In less serious cases the punishment is reduced by not more than two thirds*"[14].

The crime of sexual violence thus includes two types of actus reus: the so-called "coercive" violence (comma 1) and the violence so-called "by induction" (comma 2). Apart from violence "by induction" (see *infra*), despite the rhetoric of the reform, the Italian legislation has maintained a model based on coercion by force or threat. The criminal relevance of the conduct of sexual aggression does not lie in the fact that it is carried out in the absence of the consent or despite the dissent of the offended person, but in its perpetration through (a) violence, (b) threats, (c) abuse of authority. Coercion on the part of the perpetrator is necessary, at least on a literal level, and specifically – dwelling on case (a) – that this takes place with violence.

Despite the fact that the word "violence" obviously recalls the use of force, in case law – especially of the Supreme Court – the requirement of violence has been completely dematerialised. This issue is extensively addressed in the chapter "Coercion by violence and its changing meaning. The experience of Italy", hence this report only highlights the essential features of the process of dematerialisation.

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serious (see comma 3 of art. 609-bis c.p.). In fact, the crime includes extremely heterogeneous conduct, ranging, for example, from a kiss on the cheek to rape.

14 Translation by Fenton (note 11).

Initially, many decisions adopted an extremely broad definition of the concept of violence, which includes also the so-called "improper violence", defined as conduct that has a "coercive effect" *lato sensu*, regardless of the manner in which it is realized. This kind of interpretation was already widespread before the 1996 reform. For example, rapid and unexpected sexual acts (e.g., sudden touching, a stolen kiss) were considered "violent" acts because the victim is unable to defend herself or dissent explicitly[15].

The Supreme Court then went beyond the element of violence, focusing on the dissent of the victim, declaring that "the new law is aimed at a more modern concept of personal freedom, which in principle is equally offended by non-consensual relations as it is by violent relations" and that "the material element of the offence coincides with the committal of any sexual act without the consent of the partner".[16] In this perspective, the absence of consent is considered an implicit element of the offence.

D. General role of consent in criminal law

At a general level, in Italian criminal law consent can assume the role of:

(a) an element of the offence, as in art. 644 of the Penal Code (c.p.) (usury) or art. 573 c.p. (Consensual kidnapping of a child). The lack of consent, which can be expressed as a requirement of dissent ("no means no"), as in art. 614 c.p. (violation of home), where the entry into the home must take place against the express or tacit will of the holder of the *ius exludendi alios*) or as the absence of consent ("yes means yes"), as in the recent art. 612-ter c.p. ("Illegal dissemination of sexually explicit images or videos", where the law requires that the actus reus occurs in the absence of the consent of the person depicted[17]).
(b) a special element of a specific criminal offence that distinguishes it from another one that is characterized by a greater disvalue: for example, in the case of art. 579 c.p. ("Homicide of a consenting person"

15 See Alberto Cadoppi, 'Art. 609-bis c.p.', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 439, 501.

16 Cass. pen., Sez. III, 3.12.1999, n. 13829.

17 Gian Marco Caletti, 'Can affirmative consent save "revenge porn" laws? Lessons from the Italian criminalization of non-consensual pornography', (2021) Virginia Journal of Law and Technology 25, 112.

where consent means that the more serious offence of intentional homicide under (art. 575 c.p.) is not perpetrated);

(c) a cause of justification as per art. 50 p.c. In this case, the consent of the person who can validly dispose of the right that the agent has damaged or endangered leads to the lawfulness of the act.

In the context of sexual offences, although consent is not an element expressly required by the offence but nevertheless valued by the criminal courts, scholars usually consider it as an element of the offence and not a cause of justification. This is because consensual sexual intercourse is not to be considered an offence but a normal fact of private life which does not require a defence[18]. Much more debate has occurred, however, regarding informed consent in the medical field, long considered a cause of justification because life and physical integrity in the perspective of the Fascist Civil Code are classified as non-disposable assets.

There is no intention where the defendant makes a mistake as to consent. There is no formal requirement that any mistake be reasonable (the crime of sexual violence can be committed only with intention or recklessness), but the defendant must prove their honest mistake.

I. Requirements for valid consent to sexual acts

The 1996 reform introduced a new regime for non-coerced sexual acts with minors.

Art. 609-quater ("Sexual acts with minors") of the Penal Code provides the same punishment of art. 609-bis for a person who "*performs sexual acts with a person who, at the time of the act: 1) has not reached the age of fourteen years; 2) has not reached the age of sixteen years, if the perpetrator is the ascendant, the parent, even adoptive, or the cohabitant, the guardian, or another person to whom, for reasons of care, education, supervision or custody, the child is entrusted or who has, with the latter, a cohabitant relationship*".

In both cases described, there is no reference to the "coercion" that characterizes the crime of sexual violence, since the elements from which the criminal relevance of the fact can be deduced are based on the age of the offended person (comma 1) or on his age in combination with a relationship of "trust" that exists between the victim and the offender (comma 2).

18 Marco Pelissero, 'Bondage e sadomasochismo: i limiti della responsabilità penale tra fine di piacere e libero consenso', (2017) Cass. Pen., 350.

This legal regime has been accused of being predominantly paternalistic[19]. The law is not interested in determining whether a person under 14 years of age may have the emotional or sexual maturity to freely determine the expression of their sexuality. As ruled by the Court of Cassation, the legal interest here is not sexual autonomy but rather the protection of the psycho-physical integrity of the minor's sexual development[20].

However, some sexual autonomy is recognized for adolescents aged 13 or over who have consensual relations with another minor, as long as there is no more than a four-year age gap. In this case, art. 609-quater c.p. provides for an exemption from punishment (comma 4).

In any case, it should be specified that if a minor is forced into a sexual act according to the modalities of art. 609-bis c.p., the latter norm will be applied, which provides for a higher penalty than art. 609-quater. The sanction moreover is aggravated by the fact that the sexual violence is perpetrated against a minor according to art. 609-ter c.p. If the sexual intercourse is consensual, the defendant will be convicted under art. 609-quater c.p., otherwise the defendant will be convicted under art. 609-bis c.p., with an aggravated sentence because of art. 609-ter c.p.

Even with regard to consciousness, mental health, and lack of intoxication, Italian law is not particularly up to date[21]. The conditions of the victim are taken into consideration in the second paragraph of art. 609-bis p.c., in relation to violence by induction (see supra, § 3).

In this kind of sexual violence, the consent of the person induced to submit to or to perform sexual acts is flawed. However, the Supreme Court has emphasized that the notion of abuse of a person's condition of mental or physical inferiority (art. 609-bis, comma 2 c.p.) includes the case in which one takes advantage of a pathological state of the victim as well as the case in which the condition of (even partial) unconsciousness is the result of a state of intoxication by alcohol or drugs. The Courts have thus improperly relied on violence by induction to punish cases of sexual intercourse with persons unable to express any consent, for example, because they are unconscious due to alcohol.[22] This interpretation is highly problematic: the word "*induzione*" actually implies a suggestion,

19 Fenton (note 11), 192.

20 Cass. pen., Sez. III, 13.5.2004, Sonno.

21 Alain Maria Dell'Osso, 'Gli assensi artificiali: abuso di sostanze psicotrope e capacità di autodeterminazione nel prisma della violenza sessuale', (2021) Riv. it. med. leg., 409.

22 Very recent judgments have framed the case of the unconscious victim as an absence of consent, being relevant due to the existence of an affirmative consent

moral/psychological pressure, or persuasion. In cases where the victim is unconscious there is neither coercion nor induction into sex[23].

1. Ways of giving valid consent

Since the crime is formally based on forcible or threatening coercion, the answer to the question of how consent is given must be found in the law in action rather than in the law in the books.

The Supreme Court of Cassation has ruled that "a manifestation of dissent, which can also be non-explicit but based on conclusive facts clearly indicative of the contrary will and can intervene *in itinere*, excludes the lawfulness of the sexual act"[24].

This is the currently prevailing approach. There have also been striking episodes over the years in which the Supreme Court returned to requiring a strong resistance by the victim, falling into the pattern of *vis grata puellae*.[25] However, these were isolated judgments that have not occurred for many years, at least in the case law of the Supreme Court.

2. Grounds for negating validity of formal consent

As already explained, the offence of sexual violence is based on coercion and induction, which also negates the validity of consent in cases where it was formally given.

Furthermore, the Supreme Court has specified: "It is not required that the violence is such as to override the will of the passive subject, but that this will is coerced by the conduct of the agent, nor is it necessary that the use of violence or threat is concomitant with sexual intercourse for the entire time, from the beginning until the conjunction; it is sufficient that the unwanted intercourse is consumed even if only taking advantage of a state of prostration, distress, or decreased resistance to which the victim has been reduced"[26].

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paradigm. For further details and references, see Gian Marco Caletti, 'Coercion by force and its meaning', in this volume.

23 Cadoppi (note 15), 513–526.

24 Cass. pen., Sez. III, 20.11.2019, n.7590.

25 Cass. pen., Sez. III, 6.11.1998 (dep. 1999), Foro It, 1999, II 163.

26 Cass. pen, Sez. III, 24.1.2017, n.1660.

For example, consent was held invalid in the following case: After the end of a party, a woman on her way home was attacked by a stranger who threatened to force her to have sexual intercourse. The woman, after futile attempts to fight him off, offered her assailant a condom before the intercourse was performed in order to prevent at least an unwanted pregnancy or the transmission of serious infections[27].

Consent is also invalid if coercion occurs through abuse of authority. The possible presence of the victim's consent is irrelevant if it has been intrinsically vitiated by her state of "subjection", related to the "supremacy" of the agent. The authority can be public or private (teachers, parents, employers, healthcare workers, etc.)[28].

Fraud

Italian criminal law leaves little room for rape by fraud.

The case is regulated by comma 2 of art. 609-bis c.p.: "*The same punishment is applicable to those who induce another to commit or submit to sexual acts: […]; deceiving the victim as to the identity of the perpetrator*".

The law requires a real substitution for another subject: in fact, it aims at criminalizing the man who gets into the bed of a woman pretending to be her husband – a case that today is absolutely fanciful and unreal[29]. Nevertheless, sometimes courts use this statute to convict of sexual violence defendants who concealed the sexual nature of an act or made false statements about their personal circumstances or qualities. A typical case is that of a man who pretends to be a doctor in order to perform sexual acts with an unaware patient.

False promises, however, are not criminally relevant.

27 Trib. Genova, 26.6.2001, in Giur. merito, 2002, 508.

28 Cass. Pen., Sez. un., 16.7.2020, n. 27326.

29 The origin of the offence is in the case law, although Italy is not a common law country. The courts began to apply the offence of sexual violence in this case, so the legislature in 1930 incorporated the crime into the new Criminal Code. See Alberto Cadoppi, 'La genesi delle fattispecie penali. Una comparazione tra civil law e common law', in Giovanni Fiandaca (ed), 'Sistema penale in transizione e ruolo del diritto giurisprudenziale' (1997), 164.

II. Reach of consent

According to the case law, consent must be present continuously throughout the sexual encounter; consensual relations will become an offence if one party withdraws his or her consent at any time (and the partner does not interrupt the intercourse)[30]. Therefore, the so-called "rape by omission" (or "post-penetration rape") exists in Italian law[31].

Consider, for example, this decision from the Supreme Court: "In relationships between adults, the consent to sexual acts must continue throughout the relationship without interruption, with the result that the offence in art. 609-bis c.p. is committed by the continuation of intercourse if, subsequently to a consent originally given, a manifestation of dissent intervenes 'in itinere', even if it is not explicit but conclusive facts clearly indicate the contrary will"[32].

Consent thus has to be actual and has to last for the entire sexual relationship. It follows that consent is not irrevocable during the intercourse, nor can consent have a retroactive effect. Yet, even if in theory a retroactive consent does not prevent the offence from having taken place, on a practical level the prosecution of the offence requires a complaint by the victim. It is unlikely that the victim will file a complaint if he or she thinks that the sexual encounter took place consensually.

1. Scope of consent

It is not required that the dissent of the victim be manifested (without interruption) for the entire period of the sexual act. Therefore, the defendant will be convicted even if the dissent was manifested only once at the beginning of the act[33].

If the sexual relationship was initially consensual, the defendant will be charged under art. 609-bis, comma 1 c.p. if a manifestation of dissent occurred later and the perpetrator nevertheless continued with the sexual

30 Cass. Pen., Sez. III, 24.2.2004, Guzzardi, Cass. pen. 2005, 25.

31 Maria Chiara Parmiggiani, 'Rape by omission, ovvero lo "stupro omissivo": note a margine di un recente caso californiano', (2005) Ind. Pen., 311.

32 Cass. Pen., Sez. III, 11.12.2018, n. 15010.

33 Paolo Veneziani, 'Note in tema di violenza di gruppo ed "estrinsecazione iniziale" del dissenso della vittima' in Alberto Cadoppi (ed), 'La violenza sessuale a cinque anni dalla legge n. 66/96. Profili giuridici e criminologici' (2001), 167.

act. As has already been pointed out, consent to sexual acts must continue throughout the entire act without interruption.

The Supreme Court has stated that consent originally given is no longer valid if the modalities of the relationship change and are no longer agreed upon by the victim. Thus, even where there is consent to intercourse as such, ejaculation into the vagina without consent is sufficient to constitute the offence[34].

There are currently no indications of decisions that have dealt directly with so-called "stealthing". However, from what has been summarised so far, it can be argued that when there has been consent to a protected sexual relationship (with the use of a condom) and the partner removes it without the knowledge of the other person, the courts may consider that such change leads to the actor's responsibility for the crime of sexual violence (art. 609-bis c.p.).

Can a person actively perform a sexual act and still claim that s/he did not consent to this act?

The answer to this question under Italian criminal law is rather controversial. Clearly, if the victim decides to actively engage in the sexual act as a result of violence or a threat, this is considered sexual violence. However, there are also cases of an active sexual act where the defendant is convicted of sexual violence even though they did not use force or direct threats. These are cases where there are coercive circumstances (in the dark, in an isolated place, with no possibility of escape, a relationship of supremacy, etc.) which make the victim submit to the sexual act even without a direct threat or violence. It is called "costrizione ambientale" (literally "environmental coercion")[35].

Criminal responsibility is excluded in cases where a person performs sexual acts in order to obtain an advantage of any (public or private) kind. The courts negate coercion in these cases because the person is persuaded to perform the sexual act in view of an advantage. In some cases, this perspective risks being a little superficial. It is not clear in many cases whether the person performs the sexual act out of fear of being harmed or just to gain an advantage.

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34 Cass. Pen., Sez. III, 10–5–96, in Cass. Pen., 1997, 1739 ss.

35 Francesco Macrì, 'Costrizione "ambientale" agli atti sessuali: la tutela del dissenso tra legalità ed esigenze repressive in un raffronto tra codice penale italiano e StGB tedesco', (2007) Riv It Dir Proc Pen, 1492.

Finality of consent
If a person says "no", it is still possible for the other person to obtain his/her valid consent, but consent must be obtained without any form of coercion, not even "environmental" coercion (see above).

III. ***Intent as to lack of consent***

The offence of "*violenza sessuale*" must be committed intentionally. Although it is not, as stated many times, an element of the crime, according to the interpretation of the courts the lack of consent must be known by the perpetrator.

Are there offenses of reckless or negligent sexual coercion, dispensing with the requirement of intent?
To simplify, recklessness can be the *mens rea* of the crime. The reason is that *dolus eventualis* ("*dolo eventuale*") is a sufficient form of intent to commit the offence. However, it should be remembered that the notion of *dolus eventualis* is narrower than that of recklessness[36].

Some scholars advocate a provision in this direction *de iure condendo*, particularly with regard to (gross) negligence in not having realized that the victim was not consenting[37].

IV. Other particularities of Italian law on sexual coercion offenses

There is a form of strict liability in relation to the age of the victim (*error aetatis*) in cases where there is sexual intercourse with a person under the age of 14[38]. In fact, awareness of the true age of the child is not required, nor even a culpable error about the same to affirm criminal responsibility.

The 1996 law contains a new and autonomous provision for gang rape[39]. Art. 609-octies defines gang rape ("*violenza sessuale di gruppo*") as

36 Gian Marco Caletti, 'Recklessness' in Massimo Donini (ed), 'Il reato colposo', Enciclopedia del Diritto (2021) 1047.
37 Matteo L. Mattheudakis, 'L'imputazione colpevole differenziata. Interferenze tra dolo e colpa alla luce dei principi fondamentali in materia penale' (2020), 438.
38 Lucia Risicato, 'Error aetatis e principio di colpevolezza: un perseverare diabolicum?', (2000) Riv it dir proc pen, 584.
39 Massimo Donini, 'Art. 609 octies c.p.' in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn 2006), 718.

"*violenza sessuale*" by at least two persons acting together. The Supreme Court has clarified that little is expected in the way of dissent from a victim in these circumstances[40]. The sentence is more severe than for single offenders.

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40 Veneziani (note 30).

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