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**“PAST AND PRESENT-DAY LUSTRATION:  
SIMILARITIES, DIFFERENCES, APPLICABLE STANDARDS”**

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**REPORT**

**“LUSTRATION IN THE CASE-LAW OF THE CONSTITUTIONAL  
COURTS OF CZECHOSLOVAKIA AND THE CZECH REPUBLIC”**

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The contribution deals with the Czech legal experience with lustration. It begins with a short introduction to the Czechoslovak and Czech constitutional case-law concerning the dealing with the communist past. The main part of the article focuses on two fundamental decisions of the Constitutional Court of the Czech and Slovak Federal Republic ("Czechoslovak Constitutional Court") and the Constitutional Court of the Czech Republic ("Czech Constitutional Court"), so called judgements Lustration I and Lustration II. After outlining the context of the cases before the Constitutional Courts (the Lustration Acts) a detailed delineation of the two decisions follows. The contribution finishes with a brief description of the current state of affairs regarding lustration in the Czech Republic, pointing out also several interesting observations from the Czech lustration practice.

1. Dealing with the communist past in the case-law of the Constitutional Court of the Czech and Slovak Federal Republic and the Constitutional Court of the Czech Republic

There are three main decision-making lines in the case-law of Czechoslovak and Czech constitutional courts regarding the dealing with the communist past. The first line of case law focuses on compensation for victims of the communist regime, in particular through rehabilitation and restitution, namely the cancellation of criminal-law judgments against the opponents of the regime and the return of property illegally seized. Especially the first Constitutional Court of the Czech Republic (from 1993 to 2003) was very active in this area. This is understandable because it was composed of the persons who were prior to 1989 among the opponents of the communist regime – they were imprisoned during the communist regime for political reasons, left their offices in 1968 or came back from emigration after 1989. By contrast, the composition of the ordinary courts changed only slowly after 1989 and, therefore, it was hardly acceptable in some cases to the judges of those courts to cancel their own judgments or completely abandon the ideology which they served for a number of years. In the first term of its existence, the Czech Constitutional Court often cancelled and corrected the conservative case-law of ordinary courts so as to compensate the victims of the communist regime.

The second line of the case-law deals with hypothetical punishment of the perpetrators. Given the non-violent social change in Czechoslovakia in 1989, perpetrators were not punished in great numbers. However, the Czech Constitutional Court pronounced at least one fundamental judgement in this line – at the very beginning of its operation it rendered the judgement approving the Act on Illegality of the Communist Regime which suspended the limitation periods for some criminal offences for the period of the existence of the communist regime (judgement dated 12 December 1993, file No. Pl. ÚS 19/93).

Finally, the third line of the case-law concerns the protection of a new regime against the representatives and proponents of the old regime, including, without limitation, the review of the constitutionality of the Lustration Acts (Act No. 451/1991 Coll. and Act No. 279/1992 Coll.).

2. The context of the cases before the Constitutional Courts

The first judgment reviewing one of the Lustration Acts (judgement Lustration I), delivered by the Czechoslovak Constitutional Court, also examined in detail the circumstances of the adoption of that act in Czechoslovakia. It was soon after November 1989 when numerous files maintained by the State Security Police were tampered with and shredded. Besides, staff of some authorities and institutions were screened and removed without it being regulated under the law in any way. There was a demand for rules which, on the one hand, would simply test the holders of important executive and security offices in terms of their loyalty to the new regime and democratic values and, on the other hand, would protect the

society against litigations and not sufficiently regulated accusations of collaboration with the former regime.

As early as before the breakup of Czechoslovakia, two Lustration Acts were passed – the Federal Parliament adopted the so-called Large Lustration Act which applied to certain positions in the state executive branch, the army, the Federal Security Information Service, the Academy of Sciences, public universities, public-law media, self-government authorities, and state-owned enterprise.<sup>1</sup> The Czech National Council, i.e. the Parliament of the Czech Republic as a part of the Czechoslovak federation, adopted in 1992 the so-called Small Lustration Act (No. 279/1992 Coll.) which applied to certain management positions within the police. Both Lustration Acts from 1991 and 1992 were originally adopted for a limited period of five years.

The Lustration Acts contain two lists of positions, with one being a list of positions for which a negative lustration certificate is required (hereinafter referred to as the “protected positions”), and the other being a list of positions the performance of which during the communist regime results in a positive lustration certificate of the individual concerned (hereinafter referred to as the “suspect positions”). In other words, the “suspect positions” list stipulates who is disqualified whereas the “protected positions” list specifies which positions a person with a positive lustration certificate is disqualified from. Holding any “suspect position” during the communist regime automatically prohibits holding any “protected position” in the post-revolutionary regime. The only exception was for those persons who held any of “suspect positions” between 1968 and 1969. The list of “suspect positions” is not too long and includes high positions within the administration and headquarters of the Communist Party, positions within the State Security Police (that means only that part of the police which was involved in the fight against the class enemy), including deliberate collaboration with that security police, studies in the Soviet elite schools, and membership of the People’s Militia and action committees that vetted people after 1968.

Since the very beginning of their existence, the Lustration Acts have been criticised by the Communist Party, non-Communist left-wing opposition, and a significant portion of dissidents who pointed out that the lustration is based on the presumption of collective guilt without taking into account the individual circumstances of the cases concerned. Note that even Václav Havel, when holding the office of the President of the Czech Republic, vetoed the legislation extending the force of the Lustration Acts in 1995 and 2000. The two petitions seeking the annulment of the Lustration Acts to be decided on the merits by the Constitutional Court were filed by the left-wing opposition, not by an ordinary court or an injured person within a specific review of regulations.

The Large Lustration Act was subject to the review of its constitutionality by the Czechoslovak Constitutional Court in 1992 (with that judgment being known as the judgment Lustration I); in 2001, the Czech Constitutional Court had to deal with lustration again – this time it reviewed amendments to both Lustration Acts which cancelled the time limits of their effectiveness (with that judgment being known as the judgment Lustration II).

### 3. Judgment of the Constitutional Court of the Czech and Slovak Federal Republic Lustration I, dated 1992

The first judgment concerning lustration, dated 26 November 1992, file No. Pl. ÚS 03/92, (judgement Lustration I) found the major part of that act to be constitutionally conforming and annulled only its most problematic parts.

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<sup>1</sup> The condition of having a negative lustration certificate was later set out in other laws as well (such as those applicable to the entry into the judiciary and the civil service).

First, those collaborators of the State Security Police who might not have known of their collaboration were removed from the list of “suspect positions” by this judgement. It was a group of the so-called confidants, candidates for secret collaboration, and secret collaborators with confidential contact who were only contacted by the members of the State Security Police but without an explicit agreement on collaboration. In particular, a written declaration that they knew and agreed with such collaboration, namely a binding act, was not executed. The decision on their final classification under those positively lustrated, which put them in a different position compared to other categories of collaborators, was taken by a commission at the Federal Ministry of the Interior, and the Constitutional Court did not find the independent nature of the ministerial commission to be sufficient for making a fair decision. It was a state authority and independence of its members and the manner of proceedings before the commission did not guarantee sufficiently the rights of the persons examined.

Further, the Constitutional Court cancelled the right of the Minister of the Interior or the Minister of Defence to pardon the failure to comply with the lustration conditions applicable to holding positions in the sectors of the Ministry of the Interior or Defence, as it would lead to arbitrary and unequal treatment. The Constitutional Court also annulled the provision according to which the persons who have been rehabilitated are to be considered as persons who meet the prerequisites for holding “protected positions” although they had held “suspect positions”. Even this would lead to arbitrary and unequal treatment. Further, the Constitutional Court also annulled the provisions distinguishing between the collaborators of the Czech State Security Police and the intelligence service and the collaborators of foreign intelligence services.

While the Czechoslovak Constitutional Court annulled several disputed provisions of the Lustration Act it approved the concept of lustration itself and found it constitutionally conforming after the cancellation of some categories of “suspect positions”. In its judgment, the Constitutional Court described in detail the vetting measures taken at the time of oppression by the Communist Party and the State Security Police, the result of which was that in 1989 all the crucial positions at all levels of government and management of the bodies and organisations of state and economic administration were filled in order to guarantee that the Communist Party is able to influence all that is happening in all areas of public and economic life through thus appointed persons. To maintain its power, the totalitarian regime relied primarily on the repressive measures taken to the crucial extent by the State Security Police and the network of confidential collaborators. The Constitutional Court also pointed out that in December 1989 a great amount of documents concerning the secret collaborators of the State Security Police were shredded and there was a dangerous source of destabilisation in the country which could endanger the emerging constitutional order. The reasoning of the Constitutional Court was based on the fact that the Lustration Act under consideration affected only a very limited group of persons, mainly those within the power base, administrative machinery, and economic management, and to a limited extent also those within licensed trades which might be the source of certain risks, in terms of either protecting the democratic society and its principles, national security or protection of state secrets, or those in positions at which they could either overtly or covertly influence the development of the society and the desired performance of offices within individual institutions and organisations. The possibility of demonstrating the collaboration of secret collaborators and the extent of such collaboration was in fact deliberately thwarted by the orders and procedures of the governing bodies of the State Security Police, namely by the intentional shredding of almost 90 % of the files. Last but not least, the Constitutional Court emphasized that this case does not constitute an impermissible retroactivity of penalties because the measure under consideration is not punishment but it is a measure defining the conditions for holding certain positions and its purpose is to protect the new democratic regime, national security, and public order.

The essence of reasoning applied by the Czechoslovak Constitutional Court when it found the Lustration Act to be in conformity with the Constitution, the Charter of Fundamental Rights and Freedoms, and the international commitments of Czechoslovakia was as follows:

*In contrast to the totalitarian system, which was founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria.*

[...]

*Each state or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime has the right to enthrone democratic leadership and to apply such legal measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.*

[...]

*As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt a criteria of formal-legal and material-legal continuity which is based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken."*

The newly established democratic regime must therefore defend itself against the proponents and representatives of the old regime and, at the same time, assure its citizens, with regard to the fundamental change of social order and values, of that their state is only governed by those people who are and also appear as loyal to that new regime.

#### 4. Judgment of the Constitutional Court of the Czech Republic Lustration II, dated 2001

In 2001, the issue of lustration came back before the Constitutional Court again, this time the Czech Constitutional Court. In its judgment dated 5 December 2001, file No. Pl. ÚS 09/01, (judgement Lustration II) the Constitutional Court complemented the reasoning of its predecessor by stating that the assessment of the Lustration Act should be based on the concept of "democracy capable of defending itself" (wehrhafte Demokratie, démocratie apte à se défendre), which has the right to demand loyalty towards the democratic regime.

*"The concept of loyalty covers the level of loyalty of each individual active in public services, and the level of loyalty of the public services as a whole. Here it is not only relevant whether the public services are actually loyal, but also whether they appear loyal to the public. For that it is necessary that doubts about their loyalty not arise. Such doubts undermine the public's trust in the public services and also in the democratic state which these services represent. Untrustworthy public services and state administration as a result endanger democracy, and a democratic state is entitled to defend itself against such danger by ensuring that the public services cannot appear untrustworthy to the public by eliminating reasons for doubts."*

The Lustration Act was found to be an adequate means of achieving the legitimate aim. *“The Constitutional Court of the CR, in agreement with its Czechoslovak predecessor, considers the closer connection of persons with the totalitarian regime and its repressive components to still be a relevant circumstance which can cast doubt on political loyalty and damage the trustworthiness of the public services of a democratic state and also threaten such a state and its establishment. At the present time, other newly democratic European states view this aspect of the past of their public representatives and bureaucrats analogously.”*

In 2001, the time aspects of lustration were in the centre of attention of the Constitutional Court. They were dealt with also by the Czechoslovak Constitutional Court in its judgment Lustration I, but not in that detail. Nevertheless, the Czechoslovak Constitutional Court stressed, besides the argument of substantive rule of law, also the temporary nature of the Lustration Act and, in this spirit, stated that the statutory conditions laid down for holding such positions are also limited to a relatively short period by the end of which it is foreseen that the process of democratisation will have been accomplished, namely by the end of 1996.

However, the Czech legislature at first extended and then repealed altogether the time limits under both Lustration Acts. The effectiveness of the Lustration Act in the Slovak part of the former federation has not been extended.

The petitioners challenging the cancellation of the time limitation of both Czech Lustration Acts in 2000 referred to that very part of the reasoning of the Czechoslovak Constitutional Court as given in the judgment Lustration I concerning the time scope of lustration and pointed out that the time limitation of the effectiveness of the Lustration Acts was finally cancelled which is contrary to the condition laid down in the judgment Lustration I, consisting in the fact that it is a measure for a “relatively short time period” or “for a transitional period”.<sup>2</sup> In other words, the petitioners argued that the Czech Lustration Acts no longer fulfil one of the conditions of their constitutionality after the cancellation of their short-term temporary nature. The petitioners stated that the reasons for the application of the Lustration Acts no longer exist because the process of democratisation had been completed and, therefore, the public interest that had to be protected by limiting human rights had ceased to exist.

The Constitutional Court acknowledged in its judgment Lustration II that *“the time factor plays a key role in reviewing the constitutionality of the Lustration Acts,”* but noted at the same time that the judgment Lustration I *“states other arguments”*, namely the idea of *“democracy capable of defending itself”* and the demand for the political loyalty of persons in state administration and military services.

The Constitutional Court further mentioned that the time restricted validity of the Act is merely stated in the judgment Lustration I and 1996 is identified *“for reference as the year in which the democratic process is expected to culminate”*. According to the judgment Lustration II, the Czechoslovak Federal Constitutional Court in its judgment Lustration I only took over *“a sort of working hypothesis about the tempo of the dynamics of the development of democracy in the CSFR”*. This clearly implies that the Czech Constitutional Court in 2001 did not intend to carry out a case-law departure from the judgment Lustration I, which was confirmed by its statement that *“the determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question”*. The Constitutional Court thus left it only up to the legislature to determine the

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<sup>2</sup> The time aspects of lustration in the Czech Republic were commented on by David Kosař in *Lustration and Lapse of Time: 'Dealing with the Past' in the Czech Republic*. *European Constitutional Law Review* 4, No. 3 (2008), p. 460–487.

moment when the democratic regime is finally established. At that time, the Czech Constitutional Court also relied on the fact that no international court decided on the non-compliance of Lustration Acts with international treaties. By that it meant to point out that it follows especially the case-law of the European Court of Human Rights which has not so far (until 2001) commented on the lustration legislation in a negative manner.<sup>3</sup>

At the same time, the Czech Constitutional Court annulled in the Small Lustration Act (which was submitted for review of its constitutionality for the first time) several disputed provisions, by analogy to the annulment of provisions of the Large Lustration Act by the Czechoslovak Constitutional Court.

Nevertheless, the debates among the judges of the Constitutional Court imply that they were not fully satisfied with an indefinite period of force of lustration and, therefore, the temporary nature of lustration was stressed in the judgment too. The judgment sets down that according to the Czech Constitution the Lustration Acts should be superseded by a Civil Service Act which would be fully compatible with the rule of law. The judgment also pointed out to the explanatory memorandum concerning the act repealing the limited period of effectiveness of the Lustration Acts, according to which the force of the Lustration Acts should be terminated upon the passing of the Civil Service Act. The Constitutional Court welcomed this promise under the explanatory memorandum, considering the *“approval of general prerequisites for access to public positions, in view of the temporary and subsidiary nature of the specific prerequisites set by the lustration laws, to be urgent”*.

Both the previous Czechoslovak Constitutional Court and the Czech Constitutional Court therefore unanimously concluded that the adoption of selective Lustration Acts in the early nineties was legitimate and justified (e.g. it put an end to the so-called wild lustration, diminished the political capital resulting from creating public scandals, and established more transparent conditions). Further, the Czech Constitutional Court approved an extension of the effectiveness of lustration in 2000. The only dissenting opinion was directed against the annulment verdict, while dismissing the petition and the protection of the concept of lustration were not contested, not even by one dissenting opinion.

The Czechoslovak Large Lustration Act later appeared also before the European Court of Human Rights that commented on it on the basis of the Slovak case *Turek v. Slovakia* (judgement dated 14 February 2006, application no. 57986/00). The Court did not dispute the very essence of lustration, either, and only found a violation of complainant's right to a fair trial (due to the excessive length of judicial proceedings) and a violation of his right to respect for private life (due to the lack of proceedings through which he could have obtained the effective protection of his right as he had no access to some evidence in the proceedings).

## 5. Current state of affairs

The petitioners seeking the annulment of the act extending the effectiveness of the Lustration Acts in 2001 included the current Prime Minister, President, and Minister of Foreign Affairs; that means the left-wing political minority that criticised the act and challenged it before the Constitutional Court is now part of the political majority, but the Lustration Acts are still in force. When adopting and extending the Lustration Acts, it was quite clearly declared that they constitute a regulation testing the loyalty of people in the civil

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<sup>3</sup> The international law aspects of the Czech Lustration Acts and their review are closely examined by Jiří Malenovský, who was the judge-rapporteur for the judgment *Lustration II*, in the article: Malenovský, J. *Les lois de 'lustration' en Europe centrale et orientale: Une "Mission Impossible"?* Revue québécoise de droit international, Numéro special Cinquantenaire de la Convention Européenne des Droits de l'Homme (2000), p. 187–218.

service during the transition to democracy and that they will not be necessary after the adoption of the Civil Service Act which would redefine the loyalty conditions for holding official posts in a democratic state. In the Czech Republic, the Civil Service Act was first adopted in 2002, however, without coming into effect then. For the second time, a new Civil Service Act was passed in 2014 and came into effect in 2015. Yet neither of the versions of the Civil Service Act repealed the Lustration Acts. At present, therefore, two Lustration Acts of 1992 and the new Civil Service Act of 2014 apply in parallel and both test the loyalty of civil servants from different perspectives. The President of the Czech Republic challenged the constitutionality of a number of provisions of the Civil Service Act before the Constitutional Court, however, leaving aside the issue of lustration. Since 2001, the Czech Constitutional Court has not received any new petition seeking the review of lustration in terms of the lapse of time.

As already mentioned above, the Constitutional Court only dealt with the Lustration Act based on a petition filed by a political minority. The undisputed rule mentioned above – if someone held in the past any “suspect position”, that person is not allowed to hold a “protected position” in the new regime – most likely led to that the holders of suspect positions in the past did not run for the protected positions; besides, they had enough opportunities to be engaged in business as their activity in the private sphere was not restricted in any way whatsoever. In addition, the Lustration Acts did not apply to the legislative branch and, therefore, the persons not able to obtain a negative lustration certificate are among the members of the Parliament. Indeed, the determination of the range of “suspect positions” in the Lustration Acts has been often criticised as unfair. In particular, it has been pointed out that the Lustration Acts have not affected in any manner whatsoever a number of prominent party members and members of the judiciary and the state administration who did not hold the proscribed positions in the party hierarchy and security forces but actively participated in the exercise of power and openly professed a totalitarian ideology. On the contrary, the members of opposition structures who acted publicly against the totalitarian regime have found themselves in the pillory because the State Security Police was interested in cooperation with them rather than with the members of silent majority who did not face the same pressure. The lustration thus could not lay out the real line between the guilty and innocent ones, but often branded a person whose guilt was negligible compared to the responsibility of zealous party officials and *nomenklatura* members. On the contrary, the later have not been punished or affected by the new regime at all and they continue to be active in the new regime without any restriction whatsoever as there has not been any strict and thoroughgoing criminal-law response to the crimes of the totalitarian regime and lustration remains the dominant tool of cleansing the society.<sup>4</sup>

The most problematic of the “suspect positions” turned out to be the group of people registered as collaborators of the State Security Police. As for that group, the Constitutional Court cancelled some subgroups of collaborators in the act because their deliberate collaboration with the State Security Police could not be proved.

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<sup>4</sup> See Kozák, J. *Recepce a reflexe „starého“ práva v demokratickém právním systému ČR (Reception and Reflection of the “Old” Law in the Democratic Legal System of the Czech Republic)*. Politologická revue: diskuse – zprávy – recenze 17, No. 2 (2011), p. 131. The same is discussed by Jiří Kozák also in *Právo na pomezí diktatury a demokracie: právní vyrovnání s totalitní minulostí v České republice po roce 1989 (Law on the Border between Dictatorship and Democracy: Legal Settlement with the Totalitarian Past in the Czech Republic after 1989)*. Prague: Auditorium, 2014, p. 167.



Already shortly after the passing of the Large Lustration Act and unexpectedly fast with respect to the then slowness of the judiciary of the Czech Republic, the ordinary courts gave guidance on how individuals could defend themselves before the courts against being registered as former collaborators of the State Security Police.<sup>5</sup> Such records were published and the affected individuals then usually did not seek removing a barrier to holding a position but the protection against being brought into disrepute. Given the shredding of files of the State Security Police, the state has not available enough evidence to prove deliberate collaboration (which is generally proved by the signature of the persons in the so-called binding acts which were shredded for the most part); the former State Security Police officers are not big fans of the lustration process either and, therefore, they do not remember when testifying before ordinary courts the collaborators or even they are sure that the person registered in the files in fact did not collaborate with the State Security Police. In the legal disputes concerning the legitimacy of the registration of a specific person in the files of the State Security Police, the Czech courts rely on the presumption of inaccuracy of the files. Only after that the binding act signed by the respective person has been found, the court may confirm the legitimacy of the registration of that person within the files. All this, however, happens only when the person concerned files an action; unless the collaboration is thus refuted through the courts, the person is registered in the list of collaborators and has a positive lustration certificate.

The Czech Supreme Court interprets the assumption of the commitment to collaborate as a legal fact without which any collaboration could not have been established, and it is therefore necessary to consider not only the existence of the commitment but also the circumstances of its establishment. The ordinary courts thus examine also the manifested volitional relation of the obtained person to the binding act (that means whether the consent has been limited or conditioned in any manner). Nevertheless, the courts cannot help such person who succumbed to coercion or fear and assumed the role of informer only formally or in order to save any member of his or her family. The specific content of collaboration and reasons for it cannot lead to the deletion of the record of collaboration; the courts do not inquire whether there was a factual collaboration but whether it was properly and demonstrably established in accordance with the regulations then in force, that means whether a binding act or other document to establish the collaboration – namely, at least one document and one signature – existed. In the disputes covered by the media, the courts usually require proper distinguishing whether the person is only registered as a collaborator of the State Security Police or whether the person concerned actually collaborated with the State Security Police. If a binding act with the signature of the person concerned has been shredded, it cannot be published in the media that the person collaborated with the State Security Police, but it may only be published that the person concerned is registered as a collaborator of the State Security Police. However, generally this is the subject-matter of only an insignificant number of disputes that are mostly unrelated to the purpose of the Lustration Acts regarding public offices, but only to the protection of moral rights (usually those of celebrities or politicians).

It will be interesting to see whether and on what basis the Czech Constitutional Court will face the parallel existence of the Lustration Acts and the Civil Service Act and the issue of the future lapse of time as for the Lustration Acts. Or will the Czech Lustration Acts be in force for good and always with their purpose being extinguished naturally by that nobody will care about them because there will be no person whom the acts would do any harm to?

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<sup>5</sup> Through the judgment of the High Court in Prague dated 19 March 1993, file No. 5 Co 42/92.

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