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PRESCRIPTION: TYPES, PRESCRIPTION DEADLINE AND THE LEGAL CONSEQUENCES OF PRESCRIPTION

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ABSTRACT

Prescription as an institution of law throughout the history of its development from the Roman era to the present day has reflected the development of economic relations in society, thus serving the security and clarity of legal-civil relations.

If the legal relations of the civil circulation due to the inaction of the holders of subjective rights would remain in a state of uncertainty or a prolonged wait, this would cause negative consequences for third parties if it were not for the prescription institute. Given that this institute expresses the important principle that legal-civil conflicts must come to an end and their resolution avoids the difficulty in the judicial process due to the passage of a long time from the time of committing the violation of the right object of the conflict, the question logically arises: Can an institute that deprives the owner of the right only because another person has possessed it for a long time be legally justifiable?

In the Albanian legislation, which is based on the Italian and French legislations, there are shortcomings in terms of this institution, where it is presented as the least analyzed by the doctrine in terms of the justification of the reason for its existence and creation, as well as the terms of execution.

Keywords: Meaning of prescription, types of prescription, deadlines of prescription, legal consequences of prescription, difference between prescription and decadence.

INTRODUCTION

The first source of the birth of the institution of prescription is Roman law, where initially according to this legislation all lawsuits stemming from Ius Civile could be brought at any time. With the development of economic and social relations, the praetor for new indictments, which did not derive from the ius civile, set a deadline within which they should be presented (Capello, 2011, p. 9).

The term prescription is derived from the Latin word *praescriptio* which basically defines that a right was violated long ago and during all this time the subject of the right has not taken the necessary actions for its protection, the law calls this relationship as outdated and does not allow this right to be realized in a compulsory manner. So this passage of time during which the subject of the right has not acted to ensure its protection, based on the law, substantially affects the subjective rights and obligations of this legal relationship (Capello, La prescrizione civile, penale e tribunaria, 2011, p. 10). In the old Roman law, it was emphasized that when these indictments were filed after the deadline, the defendant had the right to exercise rescission, otherwise known as praescriptio temporalis, which was later replaced by *praescriptio longi temporis*. Long prescription in Roman law was another way of protecting property rights, which aimed to protect people who worked for a long time on land that was owned by others. This type of prescription was established by the Roman emperors in order to prevent arable land from being abandoned.

If we refer to Albanian customary law, we see that in the Canon of Lekë Dukagjini, land, private property, was considered very important and if a person moved from his land and moved to another territory, even if he did not use his home, it would still it remained his property and no one can gain ownership over it. So, the property right is not extinguished over time, however the Lekë Dukagjini Canon recognizes that in some provinces the prescription of the right of private ownership over the apartment is recognized, which with the passage of time is extinguished and then the first person who enters the dwelling will be called the owner.

During the rule of the Ottoman Empire in Albania, the Ottoman civil law was widely applied, where based on the principle of the Sharia which sanctions that the right of a Muslim is never extinguished, the doctrine of Muslim law, namely the Shafi schools, did not recognize the institution of prescription. According to them, the acceptance of this institute brought

instability in property relations as well as inhibition in the development of these relations. Then, with the Albanian Civil Code of 1929, it provided for the institution of prescription in detailed provisions in contrast to the Ottoman legislation, which, although it dealt with the institution of prescription, did not mention it explicitly. However, the institution of prescription is based on the deadline set by law, we understand that the holder of a subjective material right, in case he does not exercise his legitimate rights within a period of time set by law, loses the right to realize these subjective rights by means of coercive force of the state. In another aspect, we see that the implementation of this institute means that the physic or legal person, who, contrary to the law or the contract, has not fulfilled an obligation towards a subjective right holder or who has denied or violated this right, not only that is not forced to fulfill these legal obligations, but this factual situation of illegality is legislated. This represents an important contradiction regarding the legal consequences in practice that this institute has, where on the one hand it is accepted that the holder of the subjective right continues to remain its holder and when it is legally proven that he has not exercised it within the term of determined by law and on the other hand we have the fact that the right holder does not actually realize this right that belongs to him legally, since this right of the holder will continue to be enjoyed, used free of any burden or obligation from a another person who is not and does not legally become the owner of this subjective material right.

The institution of prescription, having a general character in civil law, it is an institute that limits in time the realization of a right, so it defines in time the realization of the protection of the subjective right by the coercive force of the court or other competent institute. Different legal systems apply several ways to solve a practical problem such as the case of prescription, which is an extreme case if we look at it from two sides of the coin, where in a way it harms the parties more severely if applied but also encourages the parties to be careful when conducting transactions.

So the owner is damaged because at the end of the prescription period loses the object without having the right to be compensated and on the other hand the possessor is damaged because if the object is taken from him before the prescription period ends, the improvements he made on the land will be taken from him, and the owner can request compensation for use.

The meaning of the prescription and the scope of its application

The institute of prescription is defined in Article 112 of the Civil Code, which emphasizes**:** (Publishing O. C., drejtesia.gov.al, 2014, p. 27)*"The right to sue that has not been*

exercised within the deadline set by law, is extinguished and can no longer be realized through the court or other competent institute". Therefore, the fact that the passing of a certain time due to which the right to sue is lost. Over time, evidence for the existence of a certain right, documents, witnesses, etc. is lost and in the case of a judicial dispute, the issue of proof presents difficulties, not only for the plaintiff but also for the defendant in relation to his defense. What conditions the prescription of this institute is the fact that existing relationships should not be uncertain for a long time, as in this case we may have the risk of breaking the balance of legal-civil relationships. Through this institution, law gives time the power to make a real situation that exists legally valid.

From what the above-mentioned article presents, we can say that the basic tool for the protection of alleged violated subjective rights is the (Publishing, 2014, p. 28) *indictment,* which in this case is treated in the material sense, by the claim arising from by virtue of a subjective right. The right to sue in the material sense is enjoyed by the holder of the subjective right to, in case of violation or denial of this right, to restore it, addressing to the court. Prescription by its legal nature is not a deadline related to a certain legal action but is a legal fact with consequences that lead to its extinction, where the content of this legal fact is the inaction of the holder of the violated subjective civil right to demand during the time determined by the law, the reset of this right by the court. Based on this fact, we can say that inaction during the legal term causes the right not to be realized.

The application of the institute of prescription is important as it creates the need for security in legal-civil relations, when the subjective right is not pursue by the subject of the right to other persons, the conviction is created that it does not exist or its holder has no interest and need for realization of the extinction right.

Prescription (Kondili, 2007, p. 267) applies to most of the property relations that constitute the object of the legal regulation of civil law, such as the right of ownership, inheritance, etc. Indictments related to property relations that the law has defined as non-prescriptive are excluded from this category (Publishing O. C., 2014, p. 30). The protection of civil rights is realized not only by the indictment but also by the rescission, which is the legal means of defense of the defendant against the plaintiff and as such is realized only when the lawsuit is filed. It is up to the plaintiff and not the defendant to file an indictment. Therefore, in these circumstances, it would be pointless to accept the institute of prescription as it would prevent the development of a fair judicial process.

In order to achieve these goals, the institute of prescription makes the subjects commit to the protection of their subjective rights by setting the court in motion and also eliminates the situation of legal uncertainty. With this situation is understood the situation in which it is not known with certainty to whom a right belongs, so a situation that can be a source of disagreement.

Types of prescription

The definition that the Civil Code makes of the institute of prescription as the loss of the subject's right to file an indictment after the subject has not filed the indictment within the term set by law is known as the extinguishing *prescription*, which is based on two elements:

1) Inaction of the holder of the right to file an indictment;
2) Expiration of the time prescribed by law.

The science of civil law also recognizes *the winning prescription*, which is one of the original ways of acquiring ownership. If we analyze both, we notice that with the extinguishing prescription we have the loss of a right, in this case the right to sue, while with the winning prescription we have the birth and gain of a right, that of ownership. The winning prescription (Mandro, 2007, p. 266)has its origins in antiquity, which was called *usus*, which was considered as a way of acquiring *quirite* property by those persons who pursue power over things that were not their property. In ancient law, all Roman citizens *sui iuris* could acquire y prescription winning who had continuously possessed the movable property for one year and the immovable property for two years. The law of the "XII Tables" determined that this prescription did not apply to objects stolen or abducted by force (Mandro, E drejta Romake, 2007, p. 267)

(Center, 2014, p. 35) The winning prescription is defined and described in articles 168-171 of the Civil Code, where the appropriate regulation is made for this institution, where it is noted that through this method the transfer of ownership is made in both immovable and movable objects. The provisions of the Civil Code (Meçani, 2004, p. 100) are also valid for agricultural property. In order for an agricultural property to be acquired by prescription, it is necessary to have the conditions required by law current and proven, conditions which are mainly related to the passing of a certain period for the non-owner to have the property in possession as well as the real owner has not shown an interest in the land, has not performed actions through which he seeks to preserve the thing that has been held by someone else for years and therefore may lose it.

(Dode, 2008, p. 5) The winning prescription is considered a very efficient institute, especially in the case of countries that have gone through conflicts, where the land registration system has been quite insecure. There are opinions that the winning prescription contradicts the articles of the Constitution of a country or the European Convention that recognize the right of ownership, but despite this fact for some authors the winning prescription cannot be contrary to the right of ownership as otherwise the possession would have no value.

The winning prescription has two sub-divisions which differ in terms of the conditions that must be met:

1) The winning prescription entitled;
2) Untitled Winning Prescription

In order to be in front of the winning prescription (Adrian nuni, 2010, p. 109) with the title, some conditions must be met, as follows:

First: Current or existence of an object capable of being acquired by winning prescription;

We can say that all items that are free in civil circulation are capable of being acquired by prescription, and it does not matter if the item is movable or immovable, but it is enough that the item has an effective opportunity to be possessed and be free in civil circulation.

Second: There must be a legal action related between the subjects, that is, there must be a title.

Referring to the second point, we are dealing with two moments, that of legal action, i.e. the transfer of the right of ownership from one person to another, such as: the legal action of sale and the legal action that is not prohibited by law. Legal actions prohibited by law are those actions that are prohibited by prohibitive provisions such as: the mandatory norm that prohibits the sale of agricultural property to foreigners.

Legal action (Kondili, E drejta Civile II-Pjesa e posacme , 2008, p. 90) as a legal fact has a broader meaning, which includes all the legal actions of a person that can lead to the acquisition of ownership as a legal consequence. These actions do not bring the desired consequences due to the invalidity that can be ascertained, but their performance is not prohibited by law. So even though the wills of the parties who have entered into a legal action aimed at the transfer of ownership match, it is the form of carrying out these legal actions that makes them vulnerable and at the same time puts the parties before the winning prescription.

Third: Possession of the item must exist.

Possession, being a real right independent of the right of ownership and being considered as the person's effective or real rule over the thing in the case of prescription, must be continuous, that is, when the person possesses the item continuously under his power. The actual or effective exercise over the item continuously does not mean that the person must possess the item physically under his power at any time, but this exercise of power must refer to the legal and not physical state of possession of the item. (Mandro, E drejta Romake, 2007, p. 267)According to Roman law and the following, for prescription to be considered regular, *bona fides* or good faith was required on the part of the winner of the item, where the winner was considered to have acted in good faith when, at the time of establishing possession, the method of acquisition contained defects due to which could not become the owner of the item (Mandro, E drejta Romake, 2007, p. 269).

Through these conditions, the institution of *usucapio* presents the possibility of acquiring ownership through possession by the non-owner, provided that the final result is the acquisition of the right of ownership. This situation brings ambiguity in the legal solution where the property of the former owner and that of the newly made owner through the winning prescription are not equally protected, since the former owner is completely stripped of the title of ownership and prosperity and consequently is not compensated. The legislator does not recognize the subjective right of the former owner to be compensated for the loss of property with the equivalence of its value, where according to the interpretations of the courts this contradicts Article 18 of the Constitution of the Republic of Albania, which enshrines the principle of equality before the law and non-discrimination.

However, this situation has brought a series of problems and legal issues to the Constitutional Court, which interpreted this clause (Court of the judicial district of vlora and The Ministry of justice, 2016).

(Center O. P., 2014, p. 36) The winning prescription without title is defined in Article 169 of the Civil Code, which defines " *The person who has quietly and without interruption, acting as the owner for twenty years in an immovable property, becomes its owner* ".

From the very content of this article, it follows that ownership is acquired only over immovable objects and not movable ones, only immovable objects are public property which are excluded from civil circulation and therefore their ownership is not acquired by prescription without title. Even in this way, the acquisition of ownership is related to the fulfillment of certain conditions in order to be ahead of the acquisition of ownership.

Firstly: The item must be immovable, so the item must meet the condition of being free in civil circulation (Ardian Nuni, 2010, p. 113).

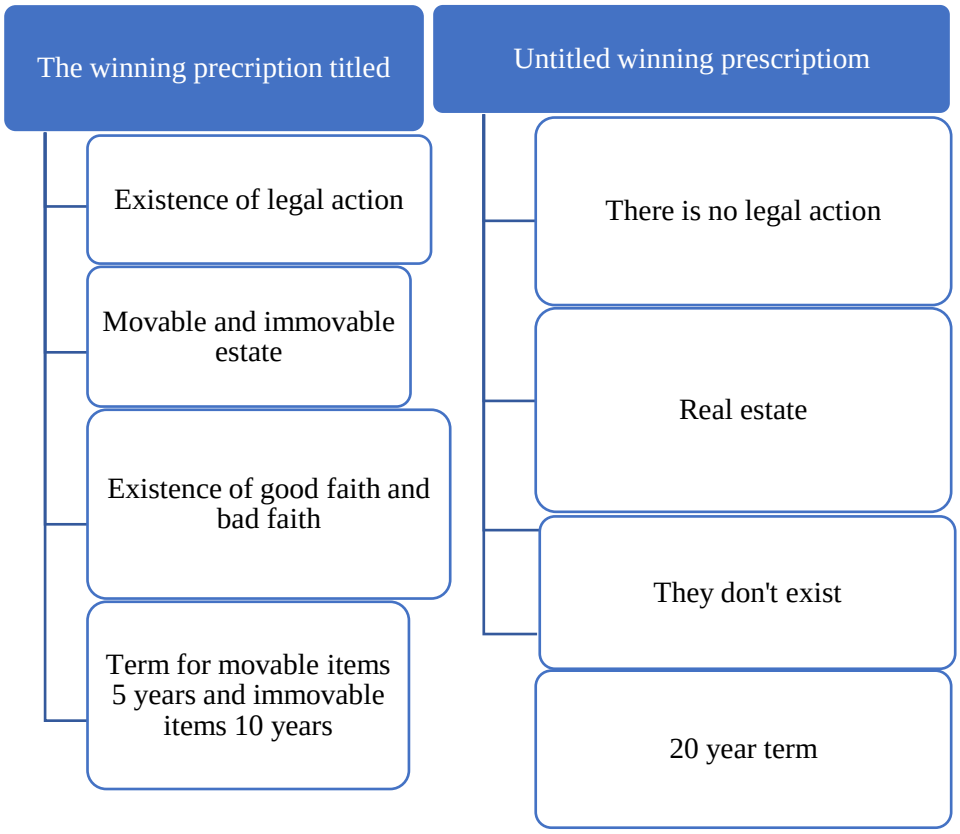
Secondly: Possession of a thing which must be continuous, uninterrupted and quiet. Possession is considered peaceful when the possessor possesses the thing undisturbed by the intervention of third parties, where the latter can be factual, with actual possession being taken by third parties or in the factual obstruction of the possessor by third parties in peaceful possession of the item.

Thirdly: The behavior of the possessor as the owner of the item, which is presented on the objective and subjective side.

From the objective side, the doctrine of civil science determines that it has to do with the possessor's behavior in the outside world and it is mandatory that the possession be public *(nec clam),* thus creating the belief in third parties that he is the real owner of the item. While the subjective side provides that the possessor must have the spirit of the owner (animus domini) in the possession of the thing, that is, have the inner conviction.

Fourthly: Pass the time specified in the law, which in this case is 20 years.

Differences between a titled and untitled winning prescription



Through the winning prescription with title or without title, the transfer of ownership takes place from where the civil law has treated them as the only way of acquiring ownership.

Prescription periods, their start and end

The deadline is a constituent element of this institution and is considered as the time set by the law within which the interested party must seek through a lawsuit the protection of the subjective right that has been violated or denied.

Albanian legislation presents two categories of deadline:

- general deadlines;

- special deadlines.

Article 114 of the Civil Code provides for the general term which is 10 years and applies when the law does not provide otherwise, so it extinguishes the right to sue for all those lawsuits for which the law has not provided a special term. General prescription applies to all types of disputes or conflicts. One of the most popular indictments in theory and in practice is the indictment for the search of the object or otherwise known as the sue claim.

The provision of the Civil Code in article 296 clearly defines that the owner has the right to file an indictment to claim his property from any possessor or holder. It is clear from the content of this provision that the law has not expressly defined a deadline for this indictment. Albanian judicial practice has accepted that the claim for the search of the object is subject to the general deadline as long as the law has not provided for a special period for it. However, it should be mentioned that this indictment is not included in the indictment provided for by Article 113 of the Civil Code, which are not subject to prescription and referring to this, the Supreme Court in unifying decision no. 05 dated 31.05.2011 (Hysaj and Hysa, 2011)concludes that this indictment is not prescribed as long as it is related to the right of ownership, an absolute and permanent right.

Article 114 of the Civil Code provides for the general term which is 10 years and is applied when the law does not provide otherwise, so it extinguishes the right to sue. *The special terms* which are regulated in Article 115 of the Civil Code are those terms which are set and apply only to certain specific categories of conflicts, expressly provided by law. As a rule, these deadlines are shorter than the general deadlines due to the very nature of some special categories of legal relations from which the conflict arose and from which the right can be

restored more quickly (center, 2014, p. 27). In determining the terms in the Civil Code, letter "a" can be said to be the only case where no distinction is made between when it will be called an evaluative criminal condition and when it will be called a penal condition. It must be said that the penal condition is one of the means to ensure the execution of obligations, both in the case where the debtor has non-execution or complete non-fulfillment of the obligation. As well as when the execution of the obligations provided for in the contract is not performed in the right way.

(Center O. P., drejtesia.gov.al, 2014, p. 317) When the penal condition is set for the execution of the obligation not in the right way, the creditor has the right to simultaneously demand the execution of the obligation and the payment of the penal condition as well as the compensation of part of the damage, that is, the penal condition which represents the payment of a sum of money or the performance of another obligation in cases where the debtor has not executed the obligation to the creditor and when the debtor has not executed the obligation in the right way, (Area and Council of Ministers, 2017) so the penal condition is a condition imposed by the parties and a penal condition when the parties have determined it for the cases when the debtor fulfills the obligation not in the right way. The importance of this difference determines the limitation period.

So it must be said that the general deadlines are the rule, being applied to all requests that are subject to prescription, while the special deadlines are the exception, and their characteristic is that they are shorter than the general deadlines.

The importance of the deadline of prescription appears in the determination of the moment when the prescription begins, and this general rule is defined by Article 117 of the Civil Code according to which " *the prescription begins from the day when the subject has the right to sue*". Determining this moment is of particular importance since only when the right to action arises can one talk about the inaction of its holder and deadline begins to run.

The deadline can be set in weeks, months or years and ends when the deadline is fulfilled, whereby fulfilling the latter, it causes the deadline of the indictment as well.

Effects of termination and suspension of prescription

One of the characteristics of the deadline is the possibility of suspension, which means that as long as the deadline is suspended, the deadline period does not run, and the parties can

invest the court with the relevant sue. The suspension being a reason that justifies the inaction makes possible the inaction of the prescription.

The causes of limitation are impeding circumstances that according to the law cause the deadline to not run, *ipso lege causes* provided for in the Civil Code, (Center O. P., drejtesia.gov.al, 2014, p. 29) specified as follows:

- Relationships with spouses;
- Relationships between parents and children;
- Custody relationships;
- Relations of persons with the administrators of their assets, etc.

Interruption, like suspension, is a circumstance that prevents the deadline from running, but unlike suspension, the time elapsed before the interruption is not counted and the new deadline period starts from the interruption. (Center O. P., 2014, p. 30) The causes of termination are defined in the Civil Code and refer in any case to the exercise of recognition of the right related to any action of the natural and juridical person obliged. The application of the interruption of the prescription is related to the filing of the indictment, counterclaim or rescission (Mandro, E drejta Romake, 2007, p. 268).

The difference between prescription and decadence

In the domestic and international legal literature, there have been and are many discussions regarding the definition of the meaning of preclusion (decadence) as well as its difference with the institution of prescription. This is because decadence (preclusion) as well as prescription, is the extinction of a right as a result of not exercising it to protect it or to realize its protection through the decision of the court or another competent institute, within a time determined by law. However, from a practical point of view, for Albanian civil law, this issue has been resolved, since in the Civil Code in force for the first time, preclusion (decadence) is provided as an institution independent of the statute of limitations. In the previous, repealed Civil Code, as well as in the civil legislation before it, preclusion is provided as an integral part of the institution of the prescription.

Decadence, as well as prescription, (Kondili, E drejta Civile II-Pjesa e posacme, 2008, p. 277) is the extinction of a right as a result of the lack of its exercise within a certain period of time. Both of these institutes differ for the specific function they have on the one hand, prescription is related to the right to sue, while decadence is related to the subjective right.

The reason for which certain rights are subject to decadence lies only in the legislative assessment to limit, in some cases for a rather short time, the uncertainty of the legal situation without allowing either interruptions or suspensions.

In contrast to the prescription that is regulated by law, decadence can also be regulated by agreement between the parties, this is specified by article 138 of the Civil Code, where it is clear from the content of this provision that the prescriptive periods when they put one of the parties in difficulty for the exercise of the right, the law considers them invalid, making it possible to exclude them according to specific cases.

Also, what distinguishes both of these institutes is the deadline, where in decadence all deadlines are irrefutable and the parties cannot change the legal orders that regulate decadence, nor can they waive the preclusive deadline. The preclusion period is taken into account by the court on its own initiative and without being requested by the interested party.

Legal consequences of the prescription

The institution of prescription, in addition to the importance it carries in itself and the legal consequences, where, in addition to the factual basis, it also presents a moral basis. Prescription being a sanction imposed on the creditor who has not exercised his right within the time limits, that is, the law takes into account the moral aspect in some cases but rejects it in other cases by defining a term which punishes an innocent creditor of who did not act simply because he was not aware of the existence of his right.

We can also say that the statute of limitations silently allows the expiration of the right by the owner of the right, (Parashkrimi fitues i te drejtave reale ne Republiken e shqiperise, nje institut antik nen nje kendveshtrim aktual, 2008, p. 28) violation or taking of his right by someone else. In this case we can say that having a right means at the same time taking any legal action to protect it.

If the owner does not protect his rights for a long time, its loss or the taking of the property by a possessor is fully justified.

Legal security in civil circulation also constitutes a legal consequence, as we can mention the evidence in a judicial process which serves important purposes where the more time passes, the more the possibility of loss or destruction of evidence to prove the claims in the judicial process increases, i.e. in the case of winning the prescription, as an original way of gaining

ownership, proof that the one who owns the thing has acquired it by winning prescription is sufficient and there is no need for it to become " *probatio diabolica* ".

Another legal consequence is the strengthening of the direct relationship between the right and its concrete and real possessor. This issue is related to the fact that who values his right more, the one who is its formal holder or the one who enjoys and uses the right, or the thing related to it. The lack of interest or neglect to enjoy the right and its fruits leads to a type of legal sanction that, through the statute of limitations, leads to the deprivation of this right or its loss with the expiration of the protective period.

So, we can say that prescription is an opportunity to end a dispute between *de iure* law *and de facto* law.

CONCLUSIONS

The institution of rescission as a general institution of law is a legal fact with extinguishing consequences for the right of action in the material sense. Extinction of this right causes the holder of the subjective material right, the extinguishment of only the right to realize it through the coercive force of the state, to realize it through the court or other competent body. In this case we can say that the statute of limitations aims to stabilize the consolidation of factual situations that have lasted a certain period of time and by stabilizing the existing situations for some time, the statute of limitations helps to ensure social peace.

The prescription cannot be considered a sanction that the state imposes on the holder of the subjective material right, due to his failure to exercise the right to file an indictment within a period specified by law, refusing him for this reason its protection through judicial activity or other competent body. We can say that the application of the statute of limitations should not be considered as a violation of due process, referring to Article 6 (1) of the European Convention on Human Rights. These provisions guarantee legal and social security, prevent obsolete conflicts for legal relations, for which their holders, for a relatively long time, have not shown any interest, and on the other hand serve the benefit of the public interest to speed up circulation civil rights and material goods.

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