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RIGHT TO JUSTICE – CHALLENGES OF MODERN AGE

Zbornik radova 37. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović
Proceedings of the 37th Meeting of Kopaonik School of Natural Law – Slobodan Perović

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(UN)CONSTITUTIONALITY OF THE PROVISIONS ON ADMINISTRATIVE SILENCE IN THE LAW ON ADMINISTRATIVE DISPUTES OF THE REPUBLIC OF NORTH MACEDONIA

In May 2019, the Assembly of the Republic of North Macedonia passed a new Law on Administrative Disputes, marking the beginning of the third phase in the development of administrative dispute procedures in the country. This law took effect one year later, on May 25, 2020. The law introduced several significant changes to the administrative dispute system: the scope of administrative disputes was expanded; new guiding principles for administrative disputes were established; the administrative judiciary was tasked with ensuring consistency in its rulings (which can be seen as a move towards developing a case-law system); the judiciary was given the power to fine public authorities that fail to cooperate; and new mechanisms such as model-procedure and model-decision were introduced. In this sense, the 2019 Law on Administrative Disputes represents a positive reform, enhancing judicial oversight over public authorities. However, the Law on Administrative Disputes from 2019 also altered the rules for filing lawsuits in cases of "administrative silence" or "silence of the administration" – when the administration fails to issue a decision (individual administrative act) within the prescribed deadlines. The aim of this article is to explain how the new rules for filing lawsuits in response to administrative silence are unconstitutional and should, therefore, be repealed. In that sense, in

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the paper the authors shall pay attention to the Decision of the Constitutional Court of the Republic of North Macedonia, from July 2024, to initiate a procedure for evaluating the constitutionality of the respective provision of the Law on Administrative Disputes.

Key words: *administrative silence, deadline for submitting a lawsuit, Law on Administrative Disputes, North Macedonia, Constitutional Court*

INTRODUCTION

Traditionally, an administrative dispute is a legal mechanism that allows for judicial oversight of the administration. In other words, it is a dispute resolved through a specialized administrative-judicial procedure, providing judicial control over the legality of decisions made by public authorities and their officials. Certainly, the term "decision" should be understood as a specific legal act in which the authority determines a party's rights, obligations, or legal interests, not any type of decision made by the administration. In other words, administrative disputes are traditionally envisaged as a mechanism for judicial protection against unlawful individual administrative acts issued by administrative authorities. Today, administrative disputes can be initiated not only against decisions made by administrative authorities but also against individual legal acts issued by other public authorities or private entities with public powers that affect the party's rights and obligations. Examples include regulatory bodies, the State Commission for Prevention of Corruption, and professional chambers, such as the Doctor's Chambers. Moreover, an administrative dispute can be initiated not only in response to a specific administrative act but also when the administration remains inactive. This is known as "administrative silence", where a dispute can be initiated if the authority fails to issue a decision within the statutory deadlines after receiving a request or appeal. In such cases, the affected party can file a lawsuit to initiate an administrative dispute due to the administration's inaction.

Although the concept of administrative silence has been extensively discussed in legal literature, the 2019 Macedonian Law on Administrative Disputes[1] introduced changes to the traditional approach to regulating it. These changes, specifically the *introduction of a deadline for submitting a lawsuit in cases of administrative silence*, mark a departure from previous regulations. In addition, it is also argued that the new provisions are unconstitutional. If the parties have a deadline to submit a lawsuit in cases of administrative silence, their right to effective judicial protection against decisions of the administration is jepardized.

The aim of this article, therefore, is to examine the provisions of the 2019 Macedonian Law on Administrative Disputes which regulate the lawsuit in case of

[1] *Official Gazette of the Republic of North Macedonia*, No. 96/19.

administrative silence arguing that they are unconstitutional and are jeopardizing the citizens' right to effective judicial protection against all individual administrative acts.

SILENCE OF THE ADMINISTRATION

As already indicated in the introduction, the case of administrative silence is the case when the administration (or more broadly, the authority) fails to adopt, in a timely manner. In certain cases administrative silence may also exist if the authority fails to perform an administrative action upon a request by the party. Finally, administrative silence exists in those cases where second instance authorities fail to decide upon the party's appeal within the statutory deadlines.

Administrative silence is indeed devastating for citizens and/or legal entities striving to exercise their rights. As put in one of the most recent books dealing with administrative silence in European Administrative Law:[2] "[a]dministrative silence is an issue that lies at the intersection of legal and managerial aspects of public administration, a concept that is both reflecting and testing the principles of legal certainty, legality, good administration, legitimate expectations, and effectiveness."

Administrative silence generally means that the request of the party, or his/her appeal, has been denied. In other words, whenever the administration remains "silent" there is a legal fiction that the party has received a decision that his/her request/appeal has been denied. This is accepted in most jurisdictions. As pointed out by Bell and Lichère who write about the contemporary French Administrative Law: "[a]mong the important general principles of law of infra-constitutional status are that administrative silence is tantamount to a decision to reject a request from a citizen […]."[3] Similarly, Tomić points out that the failure to issue a first-instance decision within the deadline is a legal presumption for the declaration of appeal because of administrative silence. Therefore, as he puts it, the party has the right to appeal as if its request was rejected.[4] A resembling explanation is given by Milovanović as well. He states that according to the LGAP,[5] the administration's silence means that the parties' legal rights cannot be recognized, except in specific

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[2] Dacian C. Dragos, Polonca Kovač and Hanna D. Tolsma (ed.), *The sound of Silence in European Administrative Law*, Palgrave Macmillan, 2020.

[3] John Bell, François Lichère, *Contemporary French Administrative Law*, Cambridge University Press, Cambridge, 2022, 55.

[4] Zoran R. Tomić, *Opšte upravno pravo*, jedanaesto, prerađeno izdanje, Pravni fakultet Univerziteta u Beogradu, Beograd, 2018, 334.

[5] LGAP is an acronym for the Law on General Administrative Procedure. In the original paper the author used the acronym ZUP which, in Serbian, stands for Zakon o upravnom postupku.

areas when in certain situations it is considered that the failure to pass an administrative act after the stipulated deadline means approving the parties' requests. Milovanović also states that administrative silence leads to delays and potential damages for the parties, as well as violates the principle of legal certainty.[6]

To conclude, if the administration remains silent the party has the right to use legal remedies as if its request or appeal was denied. This means that, ultimately, the party shall be able to file a lawsuit due to administrative silence. The question here is *when* should the party file the said lawsuit, or what are the deadlines for filing such a lawsuit?

THE LOGIC BEHIND THE NON EXISTANCE OF A DEADLINE TO FILE A LAWSUIT IN CASES OF ADMINISTRATIVE SILENCE

There is a consensus, especially amongst the leading theoreticians within the region of Southeastern Europe, that in the cases administrative silence the lawsuit can only be premature, but never belated. What does this mean? The party can file a lawsuit against the administrative authority to which it has submitted a request prematurely – before the statutory deadline for issuing a decision has elapsed. For instance, if the authority has 30 days to decide whether it shall issue a certain license to the party, the party may not submit a lawsuit due to administrative silence before those 30 days have passed (e.g. on the 28th day). However, if the deadline of 30 days passes, the party may submit a lawsuit for administrative silence at any point in the future (the lawsuit cannot be belated). Also, the lawsuit may be premature if the party has submitted a lawsuit in cases where another, prior, legal remedy was available. In certain cases the party may submit not a lawsuit but an appeal to a second instance authority against the administrative silence of the first-instance authority. If the party does not submit an appeal but goes straight to submitting a lawsuit in such cases, its lawsuit shall be premature. Yet, if the statutory deadlines have passed i.e. administrative silence exists and if there are no other legal remedies the party should use, the lawsuit can be submitted anytime in the future.

The logic behind this position is that the party (individual or legal entity) is already in an unfavorable position due to the uncertainty whether he/she/it will be able to exercise his/her/its legally guaranteed rights. This is quite reasonable, as it is vivid that the administrative-judicial procedure (i.e. the administrative dispute) reflects the rule of law principle and serves as a protection mechanism for the citizens. Citizens should have broad legal grounds upon which they can initiate an administrative dispute.

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[6] Dobrosav Milovanović, "Ćutanje javne uprave", *Zbornik radova Kopaoničke škole prirodnog prava – Slobodan Perović*, tom III, Beograd, 2021, 64.

LAWSUIT AGAINST ADMINISTRATIVE SILENCE IN THE MACEDONIAN LEGISLATION FROM 1952 TO 2019

The first law which was applied to the judicial control over the administration in the predecessor's of today's North Macedonia was the Law on Administrative Disputes of the Federal People's Republic of Yugoslavia from 1952,[7] amended for the last time 1965.[8] Back then, the administrative disputes were resolved before the Supreme Court, as there was no specialized administrative judiciary. As per Art. 8 of the consolidated version of this act "[a]n administrative dispute may take place in the cases where the competent state organ has not issued any act, and this Law authorizes the party to proceed as if the request was denied (Article 26)". The referred Art. 26, on the other hand, regulated the deadline for submitting a lawsuit in cases of administrative silence. The provisions of Art. 26 read as follows:

> "(1) If the second instance state body fails to make a decision on the party's appeal against the first instance decision within 60 days, or within a shorter period specified by a special regulation, and also fails to decide within an additional seven days after a repeated request, the party may initiate an administrative dispute as if the appeal had been rejected.
>
> (2) The party may also take action in the manner outlined in paragraph 1 of this Article if, upon its request, the first instance organ has not issued a decision that cannot be appealed […]"

Vividly, as per the Law on Administrative Disputes from 1952 there was no deadline for submitting a lawsuit in cases of administrative silence, as long as two prerequisites are met: the deadline for issuing an individual administrative act has passed and there is no other legal remedy prior to the lawsuit. In other words, the lawsuit could be premature, but never belated.

The second Law on Administrative Disputes applied in what is today North Macedonia was the one from 1977.[9] This Law on Administrative Disputes had the very same provisions from the Law on Administrative Disputes from 1952. The lawsuit for silence of the administration could be premature – submitted before the constitutive elements for administrative silence are fulfilled – but not overdue. The party could submit a lawsuit at any point in the future, once it is certain that there is a case of administrative silence (the deadline for issuing an individual administrative act has passed and there is no legal remedy the party should use prior to utilizing the lawsuit for initiating an administrative dispute).

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[7] *Official Paper of the Federal People's Republic of Yugoslavia*, No. 23/52 and 15/53.

[8] *Official Paper of the Socialist Federal Republic of Yugoslavia*, No. 16/65.

[9] *Official Paper of the Socialist Federal Republic of Yugoslavia*, No. 4/1977.

The third Law on Administrative Disputes applied in Macedonia was the one from 2006.[10] Just as in the previous Laws on Administrative Disputes from Yugoslavia, the Law on Administrative Disputes from 2006 contained Art. 22 which stipulated that the lawsuit in cases of administrative silence cannot be belated, only premature. More specifically, according to the Law on Administrative Disputes from 2006:

1. The second instance authority was obliged to decide on the party's appeal against the first instance administrative act within 60 days or a shorter period specified by special laws. If it failed to do so, the party was obliged to ask the second instance authority to reach a decision within additional 7 days. If there was no decision in the additional seven days, the party was able to submit a lawsuit as if the appeal had been denied.

2. The party could also act in the same manner when the first instance authority did not make a decision on its request that cannot be appealed.

So, in cases when state authorities failed to issue a decision upon a request/appeal within the statutory deadlines, the parties were obliged to repeat the requests, therefore providing an additional deadline. If the repeated requests failed, the parties were able to submit a lawsuit for silence of the administration at any point in the future.

In that context, in accordance with the old Laws on Administrative Procedure (from 1952 to the one adopted in 2019 and applicable from 2020) the parties could never lose the right to seek judicial protection due to administrative silence. They could submit a premature lawsuit, but never a belated one.

LAWSUIT AGAINST ADMINISTRATIVE SILENCE IN THE MACEDONIAN LAW ON ADMINISTRATIVE DISPUTES FROM 2019

The Law on Administrative Disputes from 2019 differs significantly from the prior Laws on Administrative Disputes in light of the deadline for submitting a lawsuit in cases of silence of the administration. Namely, the principle that the lawsuit can be premature, but never belated was derogated, as Art. 26, para. 2 of the current Law on Administrative Disputes from 2019 reads as follows:

> "(2) When an administrative dispute is initiated due to non-adoption of a certain act within the prescribed deadline (silence of the administration), the lawsuit shall be submitted *within 30 days after the expiration of the legally determined deadline for adoption of the act*."

[10] *Official Gazette of the Republic of Macedonia*, No. 62/06 and 150/10.

What would this provision mean, precisely? Under the assumption that there is no legal ground for appeal (before a second instance administrative authority) the party which has requested the first instance authority for a decision would have to wait for the initial statutory deadline (30 up to 60 days) to pass before submitting a lawsuit for silence of the administration (so that the lawsuit is not premature). Once this deadline has passed, if the administrative act is still not delivered to it, the party has only 30 days to submit a lawsuit and initiate an administrative dispute. Accordingly, once the statutory deadline for issuing an administrative act has passed, parties enter, to put it simply, in a race against time. If they do not submit a lawsuit for silence of the administration within the next 30 days they would lose the right for judicial protection all together, i.e. they would remain without any legal remedy at their disposal. This brings individuals as well as legal entities in a quite unfavorable position.

Such an approach is not adequate in terms of the rule of law principle, and it imperils legal certainty.

First and foremost, even without statistical data to support the claim, it is certain that in most administrative procedures citizens and legal entities do not seek legal counsel. That way, it is highly likely that they would not assume they only have 30 days to submit a lawsuit for silence of the administration. Secondly, Art. 26, para. 2 of the Law on Administrative Disputes from 2019 does not follow the logic set out in the Law on General Administrative Procedure. Specifically, the Law on General Administrative Procedure (Art. 106 and 107) provides that the appeal in cases of silence of the administration cannot be belated, only premature. Since the Law on General Administrative Procedure and the Law on Administrative Disputes are organically inter-related, it is difficult to understand why such a difference perseveres (why should there be no deadline for filing an appeal in an administrative procedure, but one when speaking of filing a lawsuit for an administrative dispute). Thirdly, if the party does not submit a lawsuit against administrative silence "within 30 days after the expiration of the legally determined deadline for adoption of the act" it loses every possibility to seek judicial protection against the administrative silence.

In July 2024 the Constitutional Court of the Republic of North Macedonia decided that it shall review the constitutionality of the said provision from the Macedonian Law on Administrative Disputes from 2019 (Art. 26, para. 2, specifically in the part "within 30 days").[11] The Court shall interpret, in that respect, whether it

[11] Decision U.br.148/2024 of the Constitutional Court of the Republic of North Macedonia from 3. 7. 2024, *https://ustavensud.mk/%d0%bf%d0%be%d0%b4%d0%bd%d0%be%d1%81%d0%b8%d1%82%d0%b5%d0%bb/%d0%b3%d1%80%d0%b0%d1%93%d0%b0%d0%bd%d0%b8/%d0%a3-%d0%b1%d1%80-1482024/*, 9. 10. 2023.

is unconstitutional to limit the parties' right to submit a lawsuit in cases of administrative silence only within 30 days after the expiration of the legally determined deadline for adoption of the act.

THE CONSTITUTIONAL COURT'S DECISION TO REVIEW THE CONSTITUTIONALITY OF ART. 26, PARA. 2 OF THE MACEDONIAN LAW ON ADMINISTRATIVE DISPUTES

As already pointed out, the Macedonian Constitutional Court decided to review the constitutionality of Art. 26, para. 2 of the Law on Administrative Disputes. According to the Constitutional Court, the words "within 30 days" might be unconstitutional. While the Constitutional Court has not yet reached its final decision that Art. 26, para. 2 of the Law on Administrative Disputes from 2019 is unconstitutional, its reasoning in the existing Decision U.br.148/2024 from 3. 7. 2024,[12] makes it highly likely that such a final decision shall be reached.

According to the Constitutional Court, there is a reasonable ground to review whether the existing provision in Art. 26, para. 2 of the Law on Administrative Disputes of North Macedonia is contrary to the Constitution in the Republic of North Macedonia, specifically Amendment XXI and Art. 50, as well as the principle of access to justice which is an integral part of the right to fair trial from the European Convention of Human Rights (Art. 6). Specifically, the Constitutional Court of the Republic of North Macedonia considers that the parties' right to submit a lawsuit due to administrative silence should not be restricted within the deadline of 30 days after the expiration of the legally determined deadline for adoption of the act. As the Court points out:

> "Namely, this legal provision[13] does not distinguish the situation when the administrative act has been delivered to the plaintiff from the situation when the public authority has not yet adopted an administrative act within a legally established deadline. In this situation, the subject of the administrative dispute is not an administrative act, because there is no act at all, instead the administrative dispute is conducted precisely because the failure to adopt the act […]

[12] Available at: *https://ustavensud.mk/%d0%bf%d0%be%d0%b4%d0%bd%d0%be%d1%81%d0%b8%d1%82%d0%b5%d0%bb/%d0%b3%d1%80%d0%b0%d1%93%d0%b0%d0%bd%d0%b8/%d0%a3-%d0%b1%d1%80-1482024/*, 9. 10. 2024.

[13] The Constitutional Court refers to the provision where it is stipulated that the lawsuit in case of administrative silence may be submitted within 30 days after the expiration of the legally determined deadline for adoption of the act.

> According to the Court, there is a justified reason to review whether the provision[14] is contrary to the principle of rule of law and if it jeopardizes citizens' legal certainty since the lawsuit in case of administrative silence may only be premature, not belated […] but the party loses the right to address the court after the expiration of the deadline for filing the lawsuit due to the administrative silence (which, per the provision, is 30 days after the expiration of the legally established deadline for the adoption of the act) which violates Amendment XXI, which has replaced Art. 15 of the Constitution and Art. 50, para. 2 of the Constitution […]
>
> Namely, Amendment XXI of the Constitution and Art. 50 of the Constitution should be interpreted as a normative emanation of the fundamental value of our constitutional order, i.e. the respect for the basic freedoms and rights of all individuals and citizens recognized in international law and determined by the Constitution. In that sense, this kind of constitutional provision, which guarantees citizens judicial protection of the legality of individual acts of the state administration and other institutions exercising public powers, represents a guarantee that applies to all citizens equally. Everyone has the right to this constitutionally guaranteed right, i.e. protection of rights before the court."

Thus, the Constitutional Court of the Republic of North Macedonia interpreted that a citizen should not be deprived of the right to judicial protection against administrative silence due to the failure to submit a lawsuit within a certain deadline (30 days). The Court considers this to be a breach of the Constitution and the right to fair trial established in the European Convention on Human Rights.

> Additionally, the Constitutional Court provided that:
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> "The principle of rule of law contains the principle of legality in itself, which obliges the legislator to formulate precise, unambiguous and clear provision which would eliminate any possibility of confusion […] According to the Court, if the judicial protection of the citizens' rights against the administration's silence can only be requested in a certain period of time the public authorities shall have a broad opportunity to abuse the provision since they will be stimulated not to exercise their basic duties established by the Law on Organization and Operation of the State Administration Authorities (*Official Gazette of the Republic of Macedonia*, No. 58/00, 44/02, 82/08, 167/10,

[14] The Constitutional Court refers to the provision where it is stipulated that the lawsuit in case of administrative silence may be submitted within 30 days after the expiration of the legally determined deadline for adoption of the act.

51/11 and *Official Gazette of the Republic of North Macedonia*, No. 96/ 19), i.e. they will not issue decisions based on the requests of citizens and business entities, that is, they will not decide on their complaints."

Thus, the Constitutional Court of the Republic of North Macedonia decided to review the current Art. 26, para. 2 of the Law on Administrative Disputes (i.e. its words "within 30 days") due to the principles of rule of law and legal certainty, the Constitutional provisions, as well as the right to access to justice. Moreover, the Constitutional Court bridged the gap between the procedural and the substantive laws, indicating how a low-quality procedural provision may affect the overall operation of the administrative authorities and their compliance with their obligations from the substantive laws. In other words, the Constitutional Court drew a connection between the quality and the constitutionality of the provisions within the Law on Administrative Disputes and the administrative authorities' compliance with the Law on Organization and Operation of the State Administration Authorities.

In the upcoming period the Constitutional Court is expected to reach a final decision on the (un)constitutionality of Art. 26, para. 2 of the Law on Administrative Disputes of the Republic of North Macedonia (specifically in relation to the words "within 30 days").

CONCLUSIONS AND RECOMMENDATIONS

The Macedonian Law on Administrative Disputes from 2019, although a significant reform in the administrative dispute regime, has limited the possibility to file a lawsuit due to administrative silence. Namely, the widely accepted principle that in cases of administrative silence the lawsuit before the administrative judiciary can only be premature but never belated has been derogated, stipulating that the parties have only 30 days to seek judicial protection once the statutory deadlines for issuing an administrative act have passed. This provision in Art. 26, para. 2 of the Law on Administrative Disputes from 2019 puts the parties (individuals and legal persons) in an unfavorable position, one where they might lose their (constitutionally guaranteed) right to legal protection if they do not initiate an administrative dispute within the said deadline. Even though there are no statistical data to analyze – as the administrative judiciary does not keep track of all lawsuits submitted due to administrative silence, and of all the lawsuits which have been dismissed since the deadline in Art. 26, para. 2 has elapsed – it is indeed rational to assume that this legal regime will harm parties more than it shall aid them in exercising their rights. This is why the Constitutional Court of the Republic of North Macedonia decided to review the constitutionality of Art. 26, para. 2 (specifically in relation to the words "within 30 days"). It is reasonable

to expect that the Constitutional Court of the Republic of North Macedonia shall reach a decision that it is unconstitutional to limit the parties' right to submit a lawsuit for administrative silence within short deadlines. In other words, Art. 26, para. 2 of the Macedonian Law on Administrative Disputes from 2019 should read as follows:

> "When an administrative dispute is initiated due to failure to adopt a certain act within the prescribed deadline (silence of the administration), the lawsuit shall be submitted after the expiration of the legally determined deadline for adoption of the act."

Only in this case will the citizens of Macedonia be able to receive the legal protection guaranteed, i.e. only then will the principle of legal certainty be duly implemented when dealing with the administrative labyrinths.

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(NE)USTAVNOST ODREDABA O ĆUTANJU UPRAVE IZ ZAKONA O UPRAVNIM SPOROVIMA REPUBLIKE SEVERNE MAKEDONIJE

Rezime

U maju 2019. godine, Skupština Republike Severne Makedonije usvojila je novi Zakon o upravnim sporovima, čime je počela treća faza razvoja upravnog spora u zemlji. Ovaj zakon je stupio na snagu godinu dana kasnije, 25. maja 2020. godine. Zakon je uveo nekoliko značajnih izmena u sistem upravnih sporova: proširen je obim upravnog spora; utvrđena su nova načela upravnog spora; uvedena je obaveza upravnog sudstva da vodi računa o doslednosti, tj. konzistentnosti svojih presuda; upravno sudstvo ima ovlašćenje da kažnjava javne organe koji ne sarađuju u toku postupka i uvedeni su novi mehanizmi kao što su model-postupak i model-odluka. U tom smislu, Zakon o upravnim sporovima iz 2019. godine predstavlja pozitivnu reformu kojom se unapređuje sudski nadzor nad javnim organima. Međutim, Zakonom o upravnim sporovima iz 2019. godine izmenjena su i pravila za podnošenje tužbe u slučajevima "ćutanja uprave" – kada uprava ne donese rešenje (pojedinačni upravni akt) u propisanim rokovima. Cilj ovog članka je da se objasni kako su nova pravila za podnošenje tužbi zbog ćutanje uprave neustavna i zbog toga ih treba ukinuti. U tom smislu, u radu će autori skrenuti pažnju na Odluku Ustavnog suda Republike Severne Makedonije od jula 2024. godine, o pokretanju postupka za ocenu ustavnosti odnosne odredbe Zakona o upravnim sporovima.

Ključne reči: ćutanje uprave, rok za podnošenje tužbe, Zakon o upravnim sporovima, Severna Makedonija, Ustavni sud

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