

FUNDAMENTAL SOCIAL RIGHTS IN EUROPE

Challenges and Opportunities

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Fundamental Social Rights in Europe. Challenges and Opportunities

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PREFACE

SOCIAL EUROPE: DEBATES AND BLOWS

The Paris summit (1972) was a turning point in the rough and tough economic concept of European integration as it was designed by and reflected in the foundational treaties. On that occasion, the then core of the founder countries' Heads of State or government of European Communities stated that 'the economic expansion is not an end in itself but should result in an improvement of the quality of life as well as of the standard of living'. It was emphasized that as much importance must be attached to 'vigorous actions in the social field as to the achievement of economic and monetary union.' On this basis, originally implemented through the approval of the first social programme in 1974, the European institutions have been adopting a complex broad set of measures of very different relevance and nature capable of being grouped together under a common denominator with one aim: their objective is to provide the social dimension of the European integration process with a substantive content. However, the emergency and maturing of the so-called European social model has not been an easy task. On the contrary, the establishment, development and defence of a social Europe has been a fragile and controversial political project, as much as a weak and much debated political experience.

I will not even superficially allude to the eventful vicissitudes that have marked the adoption of policies leading to the establishment of the social aspect of the European integration. Yet, I will not venture to assert that the last decade, commencing in 1998 with the Treaty of Amsterdam and finishing ten years later in the aftermath of the Irish referendum on the Treaty of Lisbon, accurately depicts an environment in which the European social model has been conceived and developed. This environment has been challenged by the acute tenseness between the definition of social objectives and their concrete implementation and above all, by the acute contradictions taking place in combining substantive and (temporarily) the achievement of the plurality of Community objectives.

At least from a formal point of view, the approval and entering into force of the Treaty of Amsterdam defines one of the main stages of the cycle of rising regulatory maturation of social Europe. It challenges the political criticism of European integration of being exclusively established through the application of principles and objectives of an economic nature. The inclusion in the Treaty of most of the clauses set out in the Agreement on Social Policy, among others, a

larger extension of the EU competences in the social-labour field, the recognition of the centrality of social dialogue or the conferring of the condition of a European social source of law to the collective negotiation, strengthens the social dimension of Europe. It is likewise strengthened by the dispersed provisions designed to firmly establish either directly (for instance, Article 13) or indirectly (for instance Article 136) the catalogue of fundamental rights to which the workers are entitled in the European sphere. Nevertheless, the incorporation of a set of powerful social objectives contributes to the structural strengthening of the social aspect. These objectives are mentioned both in the Treaty's general principles (Article 2: "a high level of employment and of social protection", "equality between men and women" or "social cohesion and solidarity among the Member States") and in the opening Article of Title XI, devoted, among others to the social policy:

Article 136: "The Community and the Member States (...) shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour <...>.

Under this renewed regulatory framing, the notion of European social model acquires, at least *avant la terre*, naturalization papers, and undergoes a process of institutional normalization. The European Social Agenda (ESA), approved at the Nice European Council of December 2000, provide us with a good example of this process. The ESA tackles the European social model in two of its sections incorporated into the introductory or general chapter; that is in the chapter aimed at laying down the 'policy guidelines'. On one hand, the Agenda identifies through examples some of the most outstanding traits of that model, including the establishment of "systems that offer a high level of social protection", "the importance of the social dialogue", and the implementation of "services of general interest covering activities vital for social cohesion" (p.1.11). However, when all is said and done, and according to the ESA, it is the establishment of "a common core of values" in the Member States' social system that better defines the European social model (o.1.11, *in fine*). On the other hand, the Agenda highlights – by the way, revealing a point of calculated exaggeration – that the European social model "developed over the last forty years through a substantial Community *acquis*" has been implemented and incorporates essential texts in numerous areas. These include free movement of workers, gender equality at work, health and safety of workers, working and employment conditions and the fight against all forms of discrimination (p 1.12).

Almost simultaneously, when the decision of providing the social aspect of European integration with the maximum visibility is taken, thus trying to put an end to the chronic asymmetry of the social and economic dimension, the European social model faces a critical situation that has been worsening over the last few

years. For a start, the depreciation of the ‘common values’, which until very recently had encouraged the European social aspect, is being carried out, for the first time, through the joint and concerted action of the European institutions and the Member States. Furthermore, the effect of that depreciation can be detected in numerous areas; at least in three of them. Firstly, and in the political-ideological field, it is quite easy to detect the open and persistent offensive in favour of the values that strictly derive from and are connected to a neoliberal concept of the market. In the legislative framework, it is not difficult to identify the movements of regulatory proposals aimed at facilitating the use of techniques capable of applying and implementing this concept, and hindering the fulfilment of the social objectives or, in short, restricting the exercise of social rights. In the judicial scene, in short, the European Court of Justice has embarked on a disturbing trend of defending the economic freedoms at all costs, which may end up undermining the soundest foundation of the social Community *acquis*; the *acquis* that has made it possible to provide the European social model with a substantive content. Today in Europe there are plural scenarios from which, measures intended to erode the fragile implementation of the European social citizenship, are designed, planned and adopted. This is revealed in a reading of the Commission’s Green Paper on ‘Modernising labour law’, the Council Directive 93/104 concerning certain aspects of the organization of working time, the so-called ‘Return’ Directive proposal, and the latest rulings of the European Court of Justice on rendering of services.

The European Labour Law historically and continues to prove a good barometer to gauge the evolution of the political project aimed at building a Europe linked to the idea of social citizenship. Of course, labour relations are not everything to the playing field of the European social model, which encompasses other aspects such as social protection, social responsibility of enterprises or social cohesion and solidarity among the Member States. However, the ties between the European social model and Labour Law are very strong. So strong are these ties that the European Labour Law has provided the European social model with most of the values on which it has been founded. Or in other words, concepts such as gender equality at work, the ban on discrimination of migrant workers by virtue of their nationality, the improved working conditions so as to facilitate harmonisation while improvement is being maintained, the social dialogue or the recognition and respect for the fundamental social rights (of special importance the workers organisations’ right to freely exercise collective action (rules and instruments), have become the foundations of the European Labour Law and by extension, of the European social model itself.

As discussed above, the establishment of a social EU identity has followed a path marked by setbacks in which, the achievement of objectives related to the strengthening of the national market have often ended up imposing strict

limitations on social measures with regard to its substantive content or pace of implementation. Hence, the constant demands voiced by numerous representatives of civil society, in favour of finding a new way to build Europe. In order to give a reasonable sense to this matter, the group of European labour supporters complained about the uneven balance between the economic and social aspects in Europe in their *Manifeste pour une Europe sociale* (1996). They emphasized that social rights and organisation of the labour market are necessary conditions and to some extent obstacles to the 'progress and modernization' of society.

In spite of the fact that danger signals concerning the fragility of social policies have been a constant travel companion for the European evolution most committed to equality and solidarity values, the European Labour Law, as a typical statement of the European social model, is currently undergoing a crisis. One reason for this is the chronic half-heartedness of policies regarding improved working conditions in order to achieve their harmonisation while improvement is being maintained. Constant obstacles have traditionally slowed the construction of social Europe over the last few years at a moment which paradoxically coincides with renewed momentum in the advancement of this process. Regardless however, recently activated and emergent policies are deeply transforming the morphology of European Labour Law, in the same way as it has been evolving and maturing within the European process of development. The reasons for this abrupt change are certainly numerous. But I do not consider it daring to assert that to a large extent such change has much to do with the enlargement process of the European Union towards Eastern Europe.

In essence, the currently open confrontation debates do not bring up a problem of limitation or reduction of the social dimension of the European integration; and they do not cause any problem concerning the pace of achievement of social objectives or the establishment of measures of such nature. With greater ambition, these debates and their translation into the field of concrete political decisions or judicial interpretations are putting the foundations of the European social model at risk. Or paraphrasing the expression used in the ESA, the reply field is focused on the validity itself both of the social objectives established by the TEU, and of the 'common values' upon which the European social model is founded. With due briefness, I will allude to a particularly important change concerning the European Union's exercise of its regulatory power in the area of labour relations.

The European Union has been established to a large extent as a legal Community with the aim of unifying and harmonizing the Member States' legal systems. To this end, the most traditional principles of these systems (direct effect, supremacy of Community law or agreed interpretation being among the most outstanding examples) have been used, albeit with appropriate adaptation. However, at present, the Community system, at least when it comes to its social aspect, is rejecting this way of conduct at a worrying cruising speed. The policies

aimed at building the social Europe are no longer, or rather, no longer *only* formulated through regulatory acts of a coherent nature and legally binding aimed at harmonising the systems through directives. Soft law formulas are becoming more frequently used. The White Paper on European Governance¹ of 2001 minutes the changes opting for the opening of new and different ways of integration. According to the White Paper, ‘Legislation is often only a part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.’

Certainly, soft law is not an unknown notion in Community Social Law; neither is the existence of instruments typical of soft law in the concrete experience of the EU legal system. Article 249 of the TR (ex 189) mentions two kinds of legal acts, those included in hard law (regulation, directive and decisions) and the ones belonging to soft law (recommendations and opinions). The novelty lies in the progressive abandonment of the objective with regard to the social harmonisation through rules of hard law.

This abandonment is being carried out in a double and combined way. The first one and probably the most useful, since it lacks an express formal rendering, is being implemented through a change in the material or substantive content of directives. The point of origin of this transformation, still cautious, is provided by the legislative corpus consisting of both the framework Council Directive 89/391 on Safety and Health at work and the constellation of development Directives. These rules which formally correspond to the traditional model of harmonisation of the social Community law are, nevertheless, the beginning of ‘a new station of light legislation of a promotional and non-regulative nature’² which moves away from the purpose to be achieved through the first-generation directives or the prescriptive contents established in them. From that moment on, nearly all the social directives dictated respond to this logic; a logic that rules out the search and achievement of harmonisation between the European Legal System, opting for the establishment of framework rules, linked to a large extent to labour policy options and whose objective gives up harmonisation of minimum conditions in order to accomplish mere coordination which sometimes conceals deregulatory missions. The Council Directive 97/81 on part-time work and Directive 99/70 on fixed-term work reveal these mutations, which are emphasized, until reaching a high degree of deregulation, through the recent proposal of amendment of the Council Directive 93/104 on organization of working time.

¹ European Governance. A White Paper, Brussels, 25 July 2001, COM(2001) 428 final.

² Cf. CARUSO, B., “L’Europa, il diritto alla salute e l’ambiente di lavoro”, in MONTUSCHI, L. (a cura di), *Ambiente, salute, sicurezza. Per una gestione integrata delle politiche del lavoro comunitarie*, Torino (Giappichelli), 1997, pp. 1.

The second abandonment of the harmonisation objective through a source of law techniques is being carried out through the Open Method of Coordination (OMC), prototypical statement of a new way of understanding the European integration process through the systematic resort to techniques typical of soft law. Since the Treaty of Amsterdam shaped it as the ideal instrument to promote the convergence of the Member States' employment policies (Article 125 and ss), the OMC has expanded its jurisdiction to new areas (immigrations or pensions, for instance) and has been consolidated as a key element of the new European governance which revolves around the logic of persuasion.³

The soft law techniques appreciable in the Community law are not only contributing, in some cases, to the denationalization of the Labour Law, but in other cases, to its de-europeanisation. The establishment of soft law formulas is quickening the identity crisis in which the Labour Law has been immersed for a long time. Thus it is important to highlight that this crisis has two faces closely related between them: redefinition of its functions and reformulation of its institutional relations with other fields of the Legal System.

A comparative reading of the works and essays of Labour Law before and after the nineties reveals changes in both content and labour law topics. An increasing incorporation is noted of concepts and rules whose centre of gravity is not the labour relations within the enterprise scene, but the regulation of the labour market. Notions such as 'flexibility', 'competitiveness', 'access to market', 'employability', 'distribution of employment', 'productivity' or 'professional performance', among other illustrative examples, are already part of the language of labour rules (either the national or the conventional one, it makes no difference) and have been naturally incorporated into the judicial reasoning, the trade-union action or the theoretical reflection of the jurists.

The Community law has not withdrawn from these tendencies; on the contrary, it has exacerbated them as a result of the amendments incorporated into the Treaty of Amsterdam and their application to the OMC's employment policies within the framework of the European Employment Strategy (EES). But both the Open Method of Coordination and the European Employment System do not limit themselves to take the minutes of the *vis atractiva* that employment policies exert on the labour law, with more or less visible or perceptible ties among the law (the worker as a subject of the legal relations), the economy (employment market as a meeting area of supply and demand of jobs) and society (citizens as subjects entitled to rights allowing them a certain level of economic earnings for their personal and social development through employment or substitutive mechanisms of social protection). The storehouse of soft law acts flooding the European Labour Law has led the most typical, canonical and traditional functions of this area of

³ MOREAU, M.A., *Normes sociales, droit du travail et mondialisation*, Paris (Dalloz) 2005, p. 156.

the Legal System to an acute crisis. The employment policy measures devised to implement the EES do not set forth a political will to use the Legal System with social purposes such as the rebalance of the contractual power's asymmetry between subjects who exchange salary for work, employers and employees, or the strengthening of the workers' policies of social protection. The loss of political control over the globalized economic order transforms the function of the Legal-labour System, currently perceived as a means to moderate and rule out the provisions restricting the role of the ordinary laws of the market. The assessment canon of the actions concerning work is not the tutelage of the work itself, but the market efficiency. Hence the fact that effectiveness replaces validity as a control parameter of those actions; and hence also that persuasion takes the place of exigency as a means to achieve them.

The 'reorganization' of the functions of the Labour law is not the only display of this identity crisis which is also shown through the increasing interdependence between the employment law and other areas of the Legal System, instrumented to a large extent through the soft law techniques. This interdependence could be explained, in principle, in code of unity of the Legal System; however, the latter is an excessively simplifying viewpoint that does not account for the relocation movements of the Labour law in the global economic order.

Since its origins, the Community social order has been 'permeated' by the free competition and the integration of markets.⁴ The constant appeals of the Community case law to the pre-eminence of the discipline of free competition and freedom of commercial exchanges contained in the TR are clear proof. This confirms the purpose of the different measures which have been incorporated into the European social programmes and the European Social Agenda or, in other words, the difficulty of finding an ideology of the social market provided with autonomy and substantivity of their own. Social harmonisation is far from being a convergence process of legal national systems in the best standards of the workers tutelage. The logic of social protection or 'cohesive' harmonisation has been matched by force with the logic of the market protection or 'functionalist'⁵ harmonisation. However, the outstanding changes that have been taking place in this area from the nineties on should not be overlooked. The purpose attributed to the functionalist harmonisation is no longer as engaged in fighting the eventual practices of social 'dumping' between the Member Estates as in ensuring the liberalization of the markets. The effect of this new concept of harmonisation does not mean the widening of minimum tutelages of work but the elimination of those labour norms establishing restrictions or limitations in the market.

⁴ LYON-CAEN, G., "L'infiltration du droit du travail par le droit de la concurrence", *Droit Ouvrier* 1992, p. 314.

⁵ D'ANTONA, M., "Diritto del lavoro di fine secolo: una crisi di identità?", in D'ANTONA, M., *Opere*, vol. I, Milán (Giuffrè), 2002, pp. 234.

Recently, the Court of Justice (ECJ) has introduced new worrying drifts in the deterioration process of the European social identity, thus flatly moving away from the functions it has been traditionally carrying out. These consisted of the establishment of workers' fundamental social rights, as one of the central axes upon which the entire political building of the European integration should rise and stand. The social activism of the European case law could be proved through numerous examples; but for now, it suffices to bring up just one of them, concerning the free movement of workers. In this sense, the merit of removing this economic freedom and in its place, having granted the Community migrant workers the right to enjoy a statute of social citizenship with neither restrictions nor limitations can be attributed to the ECJ.

In the exercise of its characteristic competencies, the ECJ has had the opportunity of stating its opinion on one topic which in some way can be described as novel and pioneering. On one hand, it is about establishing the connection between the fundamental social rights and economic freedoms of movement, pointing out the freedom to render services, with its corollary of the workers' freedom of movement; and on the other hand, it is about demarcating the borders of the Member States' action, and those of social groups linked, precisely, to those connexions or bonds. The Court has responded, so far, with three much-discussed and arguable judgments – *Viking*, *Laval* and *Ruffert* – which, despite thematic differences, share a common doctrine: they confer the freedoms of establishment. This is distinctly stated with respect to setting-up and management of enterprise (Article 43 TR), and rendering of services (Article 49 TR); a legal position of maximum prevalence, capable not only of restricting but sacrificing both the workers' fundamental social rights including strike rights or collective negotiation, and EU essential social objectives such as improved living and working conditions for harmonisation purposes while improvement is being maintained.

The wave of criticism as well as concern felt by numerous voices of public opinion in response to the doctrine established by the Court of Justice concerning these judgements is natural. Paying exclusive attention to the second response, concern, it can be asserted that among other negative consequences, this jurisprudential aspect gives rise to a particularly pernicious one; the 'fundamentalist' defence of the economic freedoms of movement and rendering of services institutionalises their configuration as a skilful instrument of legal engineering aimed not only at the achievement of economic integration but also at eluding social rights. In a moment such as the current one, tendencies and movements have been detected of non-European organizations in favour of implementing social clauses, or the generalization of the enterprises' social responsibility, both understood as means destined to safeguard certain social rights in the unstoppable process of economic globalization. The European Court, set up after the European Union enlargement, has agreed to encourage the most

primitive and coarse forms of social ‘dumping’; the very forms that have been battled against by European institutions including the Court, for forty years in the name of the closed defence of a limited but exclusive handful of values of which the ones with labour matrix have not had a collateral position. In short, the Court’s doctrine endangers the European social identity; or rather, undermines the project of Europe itself, which must incorporate all the values common to Europe; otherwise, due to the rejection by European citizens, it will be impossible to thrive.

From the foundational moments, labour studies has focused on the European Social Law; this fact has been steadily increasing as the conscience of the Social Europe has been developing. In any case, the European labour doctrine has not confine itself to act as the official source of the European social law exegesis, ordering, systematizing and interpreting the numerous and sometimes complex regulatory and jurisprudential material produced by the European institutions. With a greater ambition, this doctrine, or at least a significant part of it, has opened or accepted the offer of opening interactive dialogues with such institutions, influencing or trying to influence the sense and orientation of the political and judicial decisions. In this scenario, it is no surprise that literature on the European Labour Law although not very extensive, has reached a considerable quality in its different formats (manuals, collective works, monographic essays and review articles) standing out on its own in the European studies area.

Essentially, the work in the reader’s hands, which now I am honoured to introduce, certainly follows this path, being incorporated into the best tradition bequeathed by the first generation of labour supporters devoted to the European Labour law. It is only fair to mention contributors such as Federico Mancini, Tiziano Treu, Spiro Simitis, Manfred Weiss, Gerard and Antoine Lyon-Caen, Paul Davies and Bill Weddenburn – and pursued, by subsequent generations of Labour Lawyers. But the main feature of this work does not stem from making the European Social Law the prevailing and majority object of its authors’ reflection. Its singularity lies in the method followed both by its internal system dynamic and its topic approach.

For the moment, its internal structure is designed to develop a dialogue between jurists from the same nation, a dialogue between a pair focusing in five topics under a complementary principle. The work of each of the pair of members complements the other and the set of studies is considered as one entire work. In this sense, and using a literary resource, *Fundamental Social Rights in Europe: Challenges and Opportunities?*, ends up taking the structure of that priceless literature work of the XX century called the *Rayuela* by Julio Cortázar.

As far as it is feasible for the reader of this great novel from the Argentine writer, the reader of this work on the European Labour Law may approach it by using numerous paths. First of all, they may keep within the most traditional

canons in a progressive and well-organised fashion in accordance with its formal structure. But they may also alter this topographical order, selecting at will the reading and study order. In any case, what makes this work different from others of similar collective execution is that while in the latter, each chapter is usually a reflection universe bent on itself, in the other one all the parts are built as a whole, so that a comprehensive perspective is only achieved through a comprehensive analysis.

But the peculiarity of the method is not only appreciable for systematic reasons, but also for the treatment given to the selected topics. *Fundamental Social Rights in Europe: Challenges and Opportunities?* was conceived and, which is even more interesting, developed so as to allow, no, even compell its authors to open a constructive critical dialogue on some of the topical debates in European Labour Law: decreasing working conditions, flexicurity, industrial democracy and participation of workers and in short, conflicts between economic freedoms and fundamental social rights. These debates have widespread effect on Community Labour Law, and exceptionally on national labour law (France). In France, nevertheless, the topic concerning the reform of the trade union organizations' representation, has managed to go beyond the particular domestic regulatory solutions to end up forging a link with the still unresolved European problems.

After the integrated and integrationist reading of this work, the conclusion reached must be shared: the blows suffered by Social Europe from different and numerous sectors, all of them encouraged by strong neoliberal winds, demand a concerted response from the social powers and policies in favour of social process. The blows may be unnerving, but it must in some way neutralize or silence the voice of those who, in communion with the prevailing feeling of the European citizen, think, myself included, that a Europe devoid of its social dimension is bound to a medium-term complete failure. According to Mr. Monks, General Secretary of the European Trade Union Confederation, 'the concept of social progress is of fundamental importance for keeping the support of Europe's citizens and workers for the European project'. With the utmost modesty but strong conviction, this collective effort –and those of us who, in some way, take part in it – struggles to overcome suicidal decisions that are trying to build a Europe regardless of that prevailing feeling. Opting instead, with decision and commitment, to build Europe as a space in which democracy of quality can be exercised and social rights can coexist reciprocally and without exceptions as an expression of a solid unction between economic welfare and social progress.

Fernando Valdés Dal-Ré

SHORT HISTORY

SHORT HISTORY OF THE EUROPEAN WORKING GROUP OF LABOUR LAW

The group has been established in 1998. The objective of the founding members has been twofold: a cooperation of professors of Labour Law in teaching and research. Apart from an exchange of teachers in classes in one of the departments of labour law of the participating universities of Antwerp, Rome/Cassino, Hannover, Leicester, Strasbourg and Utrecht the yearly intensive student seminar on European labour law in one of the universities has been the core teaching activity. The subject of the seminars has been chosen out of the most actual developments in the EU and the member states represented in the group. The first seminar took place in 1999 in Strasbourg on 'worker's representation'. In 2005 Strasbourg was hosting the seminar for the second time. Since 1999 every year the seminars have been held alternatively in Antwerp (2002 and 2006), Hannover (2003 and 2009), Leicester (2008) Rome (2001) and Cassino (2007) and Utrecht (2000 and 2004).

Next to the teaching activities the group has set up as organiser or as co-organiser of several research projects. In 1999 a study on the European Works Council has been published: M. Rigaux – F. Dorsemont, *European Works Councils. A legal analysis of the European Works Council: towards a revision of the Directive (EC) No 94/45?*, Intersentia, Antwerpen/Groningen 1999. In 2003 a research project on restructuring of enterprises has been concluded by a publication: C. Sachs-Durand (ed.), *La place des salariés dans les restructurations en Europe Communautaire / The Situation of workers in restructuring in the European Union*, Strasbourg, 2004. The group was also involved in the project on cross-border collective action, resulted in a book: F. Dorsemont, T. Jaspers, A. van Hoek (eds.), *Cross-Border Collective Actions in Europe. A Legal Challenge*, Intersentia, Antwerp-Oxford, 2007. In 2002 the group organised jointly with the ILO a colloquy on 'citizenship in and of the enterprise'. In 2003 the university of Cassino in cooperation with the EWL held an international conference on discrimination law in employment. The Utrecht University organised in 2004 an expert meeting on the subject of *Collective bargaining between the life cycle and the business cycle*, in cooperation with the EWL, the European Trade Union Institute and the Institute of Labour Studies. Also in 2004 a conference, a joint project of the university of Ghent and EWL, was devoted on the 'Application of

ILO standards in national law. In 2005 a colloquy has been organised by the EWL and the university of Antwerp on the subject '*actual topics of dismissal law in a comparative perspective*'. The EWL participated with the European Platform on Social Dialogue and the Belgian Federal Ministry of Labour in a project on '*Social dialogue in Europe*' in which also several Eastern European Countries were involved. Marc Rigaux and Jan Rombouts (eds.), *The Essence of Social Dialogue in (South East) Europe*, Intersentia, Antwerp-Oxford 2006. Recently, a new project has started on safe and secure working conditions and the responsibility of the respective actors.

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