"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

The Silver Jubilee of the Special Powers Act

A National Shame

By A H Monjurul Kabir

This is particularly true of regimes which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order. But for a democratically elected government Special Powers Act can not be a tool to govern the state. This black law must go. There is no other alternative if we have any belief in the rule of law, the ultimate destination for any democracy.

THE rule of law is a basic feature of the Constitution of Bangladesh. To affirm this fundamental aim of the state, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the state must justify his action with reference to law (Arts. 7 and 26). 'Law' does not mean anything that parliament may pass. Arts 27 and 31 have taken care of the qualitative aspects of law. Art 27 forbids discrimination in law or in state actions, while Art 31 imports the concept of due process, both substantive and procedural, and thus prohibits arbitrary or unreasonable law or state action [West Pakistan v Begum Shorish Kashmiri 21 DLR (AD) 1, 12]. The Constitution further guarantees in Part III certain rights to ensure respect for the supreme value of human dignity.

The most significant features of the original Constitution of Bangladesh enacted in 1972 was the absence of any provisions relating to special powers of the president like preventive detention and proclamation of emergency and suspension of fundamental rights and the right of protection from arrest and detention (Article 31 and 32 of the Constitution of Bangladesh) was guaranteed without the provision for preventive detention although it has been the common practice in the Constitution making of the subcontinent to include such provisions in the Constitution not only to handle a situation of war or threat of external aggression but also to combat internal disturbances. Keeping in view the extreme bitter experience of such provisions in Pakistan, the framers of Bangladesh Constitution considered such authoritarian power as contrary to the concept of nourishing a living democracy. Article 33 as originally adopted, did not leave any scope for preventive detention. By the Constitution (second amendment) Act 1973, the old Article 33 was replaced by the present one providing that the above rights will not be available in the case of persons arrested or detained under any law providing for preventive detention. The laws relating to preventive detention were enacted subsequent to the amendment of Article 33 of the Constitution. The Special Powers Act, 1974 which came into force on February 9, 1974 had incorporated the requirements laid down in this article [Clause (3) or Art 33 specifically lays down that these safeguards as to arrest and detention mentioned in Clause (1) and (2) will not be applicable in cases of persons who are for the time being enemy aliens or who are arrested and detained under any law providing for preventive detention].

The Special Powers Act was adopted essentially keeping line with the Maintenance of Indian Security Act (MISA) 1971, and the East Pakistan Public Safety Act, 1958. But the provisions of the Special Powers Act were made more draconian than those of these two laws.

The Black or White Debate: Down the Memory Lane

The post-independence grim and grave situation inspired the government to promulgate Scheduled Offences Special Tribunal Order P.O. 50 in May 1972. But due to serious lapses in the application of such laws (including P.O. 8) innocent people were harassed and victimised routinely. Misapplication of PS 50 of 1972 caused severe public criticism and this law together with the Security Act 1952 and Public Safety Ordinance 1958 was repealed on 9 February 1974 by the Special Powers Act 1974 which reenacted in modified from the provisions of the repealed laws (!). In the preamble of the Act it is stated: "An Act to provide for special measures for the prevention of certain prejudicial activities, for more speedy trial and effective punishment of certain grave offences and for matters connected therewith."

It is not out of place to mention here that it was the Awami League which placed a bill on 20th September, 1958 to repeal the tyrannical black law of the British era, the Public Safety Act [Awami League suffered immensely under such various security laws]. But while discussing on the Special Powers Bill in the Parliament in 1974, ruling party MP Mr Serajul Huq termed the proposed law (Special Powers Act) as "..... the whitest law that we are bringing against the blackest background." The then Law Minister Mr Monoranjan Dhar also assured the House that the law would be used only to prevent massive smuggling, hoarding black-marketing, killing, arson etc. prevailing at that time. But in fact the law has been used widely over the years by all successive governments to oppress the political opponents of the ruling party, and in 1996 several influential leaders including some of the cabinet members of the present Awami League government were detained under the Special Powers Act. Before the last parliamentary election (held in 12th June '96), the present ruling party committed to repeal all black laws including its own creation, Special Powers Act. Ironically, after assuming the power the ruling party has shifted its stand drastically and now is defending the same law which was abused against them (AL) severely and which they had committed to repeal.

On 11th March '97 Prime Minister Sheikh Hasina ruled out the possibility of scrapping the Special Powers Act, saying the Act had been identified by the previous governments as an essential law to run the state. Replying to a question of Gazi Mohammad Shahjahan of BNP, who called the Act a "jungle law" framed by the previous Awami League government in 1974, the Prime Minister pointed out that no successive governments had repealed the law.

The SPA at a Glance

The Special Powers Act (SPA) provides for the detention by the government of any person without trial to prevent him/her from committing any "prejudicial act." But the crucial term "prejudicial act" is not defined precisely. Prejudicial acts are widely defined as acts prejudicial to the sovereignty or defence of the country, to the maintenance of friendly relations with foreign states, to security, public safety, Public order or which create or excite enmity, hatred, fear or alarm between different classes or communities or sections of the people or incite interference with the maintenance of law and order and acts prejudicial to the maintenance of supplies and services or the economic and financial interests of the state. Such prolonged and vague definition of 'prejudicial acts' creates scope for gross abuse of the law.

The Act provides for indefinite periods of detentions subject to certain limited but virtually ineffective safeguards. Such arbitrary discretion of the government is against the very notion of rule of law.

Government can issue the order of arrest and detention. The Ministry of Home Affairs plays the pivotal role in this regard. District Magistrate and Additional District Magistrate can also issue order of detention for 30 days. However, it would further continue if government approves the detention within 30 days. It is submitted that District Magistrate's power to issue detention orders widens the scope for gross abuse of the law.

Grounds of detention are to be communicated within 15 days. Detenu is not required to be produced before any court.

This denies the constitutional safeguard of an arrested and detained person to be produced before the nearest magistrate within a period of twenty-four hours of such arrest. It (the Act) also denies the constitutional safeguard as to right to consult and be defended by a legal practitioner of his choice.

According to the Act detenu is required to be produced before an Advisory Board comprising of three members — two persons qualified to be appointed as Supreme Court judges and one senior government officer within 120 days. It is the first statutory safeguard for detenu, no doubt a too lengthy procedural safeguard for an innocent detenu.

The detenu has no right to legal representation before the Advisory Board. In fact the detenu becomes helpless without having any right to visit by lawyers or relatives. Detenu may only submit a representation in writing against the detention to the Board.

As per the letter of the law, subject to the satisfaction of the Advisory Board, detenu may be kept inside the prison for years without any specific allegation of offence. In fact the Act ensures detention without trial, without any court proceeding. The Act does not provide any compensation in favour of the detenu even for the grossly wrongful detention.

The Draconian Law: A Necessary Evil?

This year Bangladesh celebrates the Silver Jubilee of this draconian enactment! And during this period of prolonged 25 years, no actual attempt has ever been made by any of the successive governments (except the so-called claim of scrapping the Special Powers Act through ordinance by the former dictator-cum-President H M Ershad at the tag end of his 9-year long dictatorship, perhaps fearing that he might be one of the victims of the said Act in future!) from the inception of this black law in 1974.

The party which initiated this law to meet a contingency of post-liberation period and promised to use only to curb massive smuggling, hoarding, black-marketing, killing, arson, now treats the law as a necessary tool to run the state.

All the past governments had grossly abused the law.

The attitude of the government in applying the law remains the same. Detention law is still applied for harassing the political opponents of the ruling party, for suppressing the anti-government democratic movement. This is the greatest instance of mutual-distrust of the political parties.

The power in the law to issue order of detention is so arbitrary that it is used indiscriminately without minimum care for civil rights. More than 80,000 people were detained under this law in the past 25 years. And the worst sufferers of this law are the general people of the country who carried forward democratic movements during different regimes. In more than 95 per cent cases the court found detention order invalid.

The common grounds of such findings of the Supreme Judiciary are:

— the grounds of detention in most cases are vague, indefinite and lacking in material particulars

— failure to inform the detenu of his right to representation

— failure to serve the ground of detention within 15 days

— lack of nexus between the order of detention and grounds of detention

— failure to produce the detenu before the Advisory Board within a certain time

— retrospective issuance of orders.

In many cases, detenues released by the order of the High Court Division are sometimes re-arrested and detained under a new order. Although detention orders can be challenged before the High Court Division, poor detenues can not afford the costly and time consuming process. The safeguards provided by the Act e.g. provision for production of detenues before an Advisory Board, are not properly followed, rather violated indiscriminately. Almost all the present top ranking political leaders suffered under this law.

Save during a period of real public emergency threatening the life of the nation, no person of sound mind should be deprived of liberty except upon a charge of specific criminal case and preventive detention without trial is contrary to the rule of law, because indiscriminate use of power, vague suspicion by the police and callous disregard of the detenu are the chronic and common causes of such detention.

From the foregoing discussion, it is aptly clear that the notion of the rule of law can not exist (let alone be flourished) in presence of such black law. Unfortunately there exists colonial tendency of every government to regard the challenge to their authority, as a threat to "the life of the nation. Of course, they do it very purposefully.

This is particularly true of regimes which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order. But for a democratically elected government Special Powers Act can not be a tool to govern the state. This black law must go. There is no other alternative if we have any belief in the rule of law — the ultimate destination for any democracy.

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Case Studies

BEFORE the Special Powers Act was enacted the government resorted to Presidents Order 50 (PO 50 of 1972). The first reported case on preventive detention in Bangladesh is that of Habibur Rahman V Bangladesh. Habibur Rahman was arrested under Section 54 CrPC read with PO 50 of 1972. On 3.9.73 a detention order for 30 days was served against him under Section 41 of the Public Safety Ordinance, 1958. The detention was challenged by way of writ of habeas corpus. The court held that if a person is arrested by police on reasonable suspicion or he is ordered to be detained on the satisfaction of the detaining authority, the materials which led the police to entertain reasonable suspicion against him or the materials upon which the detaining authority was satisfied regarding his involvement in any prejudicial act must be placed before the court to justify that the suspicion entertained by the police was reasonable or that the satisfaction on the part of the detaining authority was reasonable. If the action of the police or of the detaining authority is challenged as malafide, the non-existence of reasonable suspicion on the part of the police or of reasonable satisfaction on the part of the detaining authority would be sufficient to prove that the order of detention is malafide and there for, illegal. The Appellate Division observed.

"We have accordingly no doubt that the framers of the constitution intended to empower the High Court Division to pass appropriate order in the case of illegal or improper deprivation of liberty of person and the power to do so is not at all fettered because of the absence of nomenclature of the nature of writ in the constitution. .... Under Part III of the Constitution, certain fundamental rights have been guaranteed. Clause 1 of article 44 which also occurs under Part III lays down that the right to move the Supreme Court in accordance with clause I of article 102 for the enforcement of the rights conferred by this part, is guaranteed. It is, therefore, evident that the enforcement of the fundamental rights and this remedial right is itself made a fundamental right by being included in part III of the constitution. The Supreme Court is thus constituted, by the constitution, the protector and guarantor of fundamental rights and so long as the fundamental rights specified under part III remain in force, it is the constitutional responsibility of the Supreme Court to protect them when the right conferred under clause 1 of article 44 of the constitution is invoked."

In another writ of Mohsin Sharif V. State it is found that Shahjahan, a young body of 18 was arrested on 18.12.73 by Armed Personnel of Dhaka Cantonment, Artillery Headquarters. He was taken to Ramna Police Station and a GD entry was made showing his arrest under section 54 CrPC Soon thereafter, the officer-in-charge of Ramna PS was asked by the Rakkhi Bahini authority to hand over Shahjahan to the Headquarter of the Rakkhi Bahini. Shahjahan was handed over to the Rakkhi Bahini. It was alleged in this case by Mohsin Sharif, the brother of Shahjahan that Shahjahan had been inhumanly tortured by Rakkhi Bahini and he was last seen by his brother at the Headquarter of the Rakkhi Bahini on 02.01.74. Since then there was no trace of Shahjahan. Mohsin Sharif then field a Habeas Corpus writ petition for the production of his brother before the court. The High Court Division ordered that Shahjahan should be produced before it. But the Rakkhi Bahini could not produce Shahjahan before the court; actually he was killed by the Rakkhi Bahini. The court directed that an Inquiry Commission should be set up by the government to ascertain the true state of things as to the whereabouts of Shahjahan. But it was not done. To quote Justice Badrul Haider Chowdhury," the court found that Rakkhi Bahini was functioning illegally. Shahjahan was never found again; just vanished in the air." This was the blackest chapter in the history of preventive detention law in Bangladesh.

In Madan Mohan V. Government (writ petition No 879 of 1977) Madan Mohan was arrested on 5.7.77. The HCD declared detention illegal and ordered his release. Madan Mohan was released but at the Jail gate he was again arrested by serving a fresh order of detention. This was done just to frustrate the High Court Division's order.

In Farzana Haq V. Bangladesh (writ petition No 271 of 1990) Sanaul Haq Niru was arrested and detained first on 13.9.87 under the Special Powers Act. His detention was challenged in writ petition no 187 of 1988 and the court declared the detention illegal and directed the release of detenu on 10.5.1988. But Niru was not released. Another fresh order of detention was served against him on 29.9.1988. Niru was not placed before the Advisory Board within the statutory period of 120 days. The High Court Division again declared the detention illegal and directed his release. But Niru was not released; rather another fresh detention order (third time) was served and it was challenged by another writ petition (writ petition no 989 of 1989). Again the court declared the detention illegal and directed the detenu's release. But even this time Niru was not released; rather another fresh detention order was served. The matter came up before a Division Bench of the High Court Division in writ petition no 270 of 1990. The Court said:

"The least can be said is that the detaining authority is paying little regard to the order of the court. It is unfortunate that the authority which is obligated under article 32 of the constitution to protect the liberty of the citizens and further required under article 112 thereof to act in aid of the courts order should flout the laws by resorting to authoritarian acts .... we are satisfied that the detention is illegal and the detenu shall be set at liberty forthwith."

This time, of course, Niru was released.

Source: Constitution, Constitutional Law And Politics: Bangladesh Perspective (1998)

Year basis number of detenus under the Special Powers Act, 1974

Year	Total Number of Detenus	Number of Released Persons Through Writ of Habeas Corpus
1974	513	13
1975	1114	31
1976	1498	46
1977	1057	25
1978	753	30
1979	960	31
1980	710	41
1981	1759	29
1982	1548	54
1983	872	44
1984	643	36
1985	862	48
1986	2194	94
1987	4585	327
1988	4907	741
1989	4482	871
1990	4615	1099
1991	5302	1710
1992	6497	1594
1993	3669	1066
1994	2968	630
1995	4173	1705
1996	5413	3376
1997	4016	Not available
1998	6740	Not available
1999 Up to June	6650	Not available

Source: Ministry of Home Affairs

law watch

Some Reflections on Combing Operation

A Report from ODHIKAR

COMBING Operation, the joint effort of police, Ansar and BDR has been initiated by the Ministry of Home Affairs at the moment when the people became frustrated due to the deteriorating law and order situation of the country specially, in the south west part of the country. The combing operation was declared several times earlier in the last few years. But that operation could not be successful. However, at last, the latest combing operation started on April 23, 1999 after which ninety thousand (approx) persons have been arrested and 2,500 (approx) arms have been recovered (up to July 18, 1999). A total 733 have been surrendered (Report from different daily newspapers).

The result of this combing operation in fact amounts to futile exercise as most of the arrestees are being released on bail. Here, a relevant question arises i. e. whether the arrestees who are granted bail are actually terrorists or whether they are relatives or family members of the terrorists. This question becomes even more significant when one daily newspaper reported on June 25, 1999 that police had burnt the furniture, documents and other valuable goods of the terrorist's relative's house at Jhenidah district for not finding the culprit. On the same day, another daily reported that a 4-year old boy had been enlisted as a terrorist and that his father had to take him to the police station for surrender who then had to be granted bail from the court. The newspapers have also reported that allegedly during the operation the police have tortured the family members and relatives.

Of course, the interim period of surrendering i.e. from April 23 to July 30 (as the Home Minister has declared the last date of surrender is July 30, 1999) is a very peaceful time for the people of the south-west region of the country. Now some of the giant terrorists have surrendered in Jhenidah, Jessore, Satkhira and Khulna but they have not surrendered their special arms. They have just surrendered the normal arms. People are afraid that this type of surrender will only lead to further deteriorating situation in the future as more lethal arms are not recovered and would remain in the hands of the miscreants.

The other peculiar thing of the region is that no one from a particular political group, which believes in armed politics and revolutionary movements, has so far been surrendered. This is a potentially dangerous situation as after the combing operation this political group may again capture the area easily without any resistance.

To ensure a successful combing operation a total number of 150 police camps have been established in the 10 districts of the south-west part. In every police camp there are 22 police personnel out of whom one Sub-Inspector and one Assistant Sub-Inspector. Besides, 16 platoon BDR are there in the 10 districts. This step has restored some local confidence in the 'operation.'

The prison condition in the south-west part of the country specially in the declared ten districts are miserable. Those who surrendered arms are staying in the local police camps which have been specially declared jail and also in the regular jails. As a result of these arrests, the prisons have become overcrowded. To make space for the new arrestees and surrendered people, the convicted prisoners are shifted to Dhaka, Barisal and other jails of the country.

The government has decided to rehabilitate those who surrendered into law enforcing agency i.e. Ansar Bahini. But without initiating any effective process of reform, such direct recruitment into law enforcing agency may backfire the very objective of rehabilitation. The government should rethink its decision and take a rigorous reform scheme for the surrendered outlaws many of whom are hardened criminals.

ODHIKAR is a coalition for human rights.

Lifting the Veil: The Rajasthan Way

THE right to information is not something which concerns the literate or the Urban. The story of Rajasthan's Mazdoor Kissan Shakti Sangathan says so too.

The MKSS is an organisation working with villagers for more than a decade. The villagers of Rajsamahd district had been working on various issues such as minimum wages, establishment of co-operative stores, and corruption. In the course of their work, they heard that various development schemes were being implemented in the villages. One look at the villages, however, revealed that no development work had taken place there. The question suggested itself: where had the money gone? It took little further thinking for the horrific revelation that the total of development funds siphoned off by government officials from the top down would put some of the major scams to shame. Moreover, this was money meant for the poorest of the poor. The villagers realised that corruption was not a distant issue — it was an issue which was to do with them and theirs. This started the campaign for the right to information: the people of Rajasthan wanted to know: If people were given employment, could they see the muster rolls, please? If roads were said to have been built, they wanted to be shown the exact location. How much money was received for the work executed, how much was spent? An important revelation was that as in matters relating to land, if people had copies of the information sought, they could use the information to confront government with the obvious fact of corruption.

The struggle of the MKSS picked up and the government was forced to concede the right of the people to have information on various development schemes. The government brought out a notification under the Panchayat Act saying that people could have photocopies of documents relating to development work. While this was a big achievement, it was a limited one. The struggle is on to get a wider, more basic right.

The people of Rajasthan spoke up Government had to listen.

Source: Commonwealth Human Rights Initiative (CHRI)

Why we need law on the Right to Information

THE Right to Information in Bangladesh is severely restricted by two things:

• A colonial culture of secrecy under which public bodies are still run as though they are masters and people are subjects. Although our country became free of colonial rule more than five decades ago we continue to use their colonial and feudal structures of governance of which secrecy is a part and parcel. These structures must be replaced with truly democratic ones if we want to revive our polity in every way.

• Outdated laws like the official Secrets Act and certain provisions in other enactments such as the Indian Evidence Act, The Civil Servants Code of Conduct Rules, etc.

A law is therefore needed on the subject for:

Clarity

Although a Right to Information is a Fundamental Right, most of us cannot access it, due to lack of clarity on the issue. As with everything else, this right also has to function within reasonable limits. Since those limits are not defined anywhere, there is confusion resulting in blanket refusal to give information for fear of violating the law. We need a law to clearly define what information can be refused.

Without a law on the subject, each time we want to enforce our right, we will have to move the Supreme Court to get it. This is not possible for most of the people who need access to information.

Easy access

There are no set procedures or systems for getting information. So we need a law which lays down procedures which enable both the government functionaries to discharge their duty to give information easily and smoothly, as well as enable the citizens to get information without running from pillar to post in every situation.

Negating the effect of outdated laws

A Right to information law is necessary for overriding the effect of secrecy provisions in various outdated laws, amending all of whom will be a slow and long process.

Power to legislate is with Parliament

The legislative competence to legislate on the subject is within the purview of Parliament.

Source: Commonwealth Human Rights Initiative (CHRI)

"What looks indecent to others may, in fact, be constitutionally permissible"

By Dr Shahdeen Malik

"A member of Parliament is entitled to privileges as the Parliament may determine.. The import of a car or jeep free from duty etc. may offend the sense of decency and dignity of a section of the people outside of the Parliament.. outsiders may bemoan the lack of sense of decency on the part of Parliament to enact such a legislation, but it certainly cannot be said that it is unconstitutional."

THIS sharp observation is the last sentence of the judgement, written by Justice Mustafa Kamal (as he then was), of the Appellate Division in the case Dr. Ahmed Hossain vs Ministry of Law, as reported in 51 DLR (AD) (1999) 75. Though the judgement was reported in the May 1999 issue of the DLR, it was delivered in June, 1998. Nevertheless, it seems particularly relevant now and hence a few comments.

In these times of widely reported un-parliamentary behaviours, comments and expressions used by our parliamentarians and when the Speaker is more busy 'expunging' words uttered by parliamentarians and enduring endless walk-outs then directing meaningful debates, it was interesting to read the above judgement and the quoted observation.

This was a case filed by a senior advocate, Dr Ahmed Hossain, against certain privileges of MPs. Dr Hossain challenged the constitutionality of section 3C of the Members of Parliament (Salaries and Allowances) (Second Amendment) Act, 1987 under which, as most of us know, a member of parliament is allowed to import a car or a jeep "free of customs duty, sales tax, development surcharge and import permit fee." Clearly custom duty, sales tax, development surcharge and import permit fee, it is implied by the section, are for ordinary mortals like non-MP citizens of the country.

The inserted section 3c amended the Presidential Order 28 of 1973 which was titled "Members of Parliament (Remuneration and Allowances) Order," Dr. Hossain contended that this 1973 Presidential Order provides for as the title of the Order indicates, remuneration and allowances only. Therefore, by inserting section 3C to provide for 'duty-free' cars and jeeps the legislator has acted beyond the scope of the Presidential Order 28 as these duty free vehicles are neither remuneration nor allowance.

Dr Hossain further contended that import of such duty free vehicle is a 'bounty' and more so when parliamentarians are already entitled to (free) rail, air, steamer or launch journey at the highest class and also receive travelling allowances.

But Dr. Hossain's arguments were defeated, as pointed out by the judgement, by Article 68 of the Constitution. Article 68 provides that "Members of Parliament shall be entitled to such remuneration, allowances and privileges as may be determined by Act of Parliament.." Hence, the judgement held that:

"A member of Parliament is entitled to privileges as the Parliament may determine.. The import of a car or jeep free from duty etc. may offend the sense of decency and dignity of a section of the people outside of the Parliament.. outsiders may bemoan the lack of sense of decency on the part of Parliament to enact such a legislation, but it certainly cannot be said that it is unconstitutional."

Evidently, the lack of decency notwithstanding, parliamentarians can legislate themselves to any privileges they want to and they seem to want a whole lot. The long list of Ministers and MPs (although most from one political party but members of other parties had not been totally ignored) in the now cancelled allotment of plots in the posh areas of Dhaka is a rather good example of their rather long list of wants. And why not, because most of them have spent much more than the legally permissible limit of Taka 300,000 for parliamentary election, although none of them has failed to file sworn returns stating that they have not spent a paisa more than the permissible limit of Taka 300,000/- Since they have spent a hell lot of money getting elected and evidently (note the PM's resent retort in announcing the cancellation of plots that Awami leaguers in the past did not get any plots and others did) want privileges, shouldn't our parliamentarians just add another amendment to the above law regarding their remuneration and allowances to include allotment of plots in posh residential areas as well. It would, at least, save embarrassments, however indecent such an amendment may seem.

erable Ronobi's cartoon

Hence, they might as well enact a 'plot allotment privilege' for them in the next session of the parliament. At least we would know that they are 'going by the book' in getting the plots.

After all, constitutional permissibility and indecency can go hand in hand, at least for our parliamentarians.

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