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THE CONCEPT OF JUSTICE AND EQUITY AND THEIR RELATION TO THE LAW

Abstract

The article aims at analyzing the concept of justice and equity as fundamental principles of law in general and the civil law in particular, respectively, the law of obligations. The basic idea of this research is to emphasize the role and importance of justice as a special value principle and equity as corrector of the law and its source material. By referring to the function of equity, as a corrective option, namely, the fulfillment of the law, the article tries to prove that equity is an individual case law, because by enabling the judge to implement in any concrete case a form of free and individual trial based on justice it serves to improve what is legally right.
Referring to the provisions of the Law on Obligations of the Republic of Macedonia (2001), which promotes the principle of equity and at the same time flexibility in justice, the article attempts to analyze the cases and conditions under which may be acted according to the principle of the equity, depending on the legislator's conviction.

In an effort to incorporate the dimensions of the principle of justice and equity and to build the frameworks upon which these concepts arise, the research will be extended on the time and spatial plan, bringing theoretical and legislative references from comparative theories and legislation.

Keywords: law, justice, equity, legislation, court, principle

INTRODUCTION

Justice is a particular value principle that refers to an ideal state of social interaction in which there is a reasonable, unbiased, and equitable balance of interests and the distribution of goods and opportunities between individuals or participating groups (Höffe 2004: 27), while equity is the value that makes the rule of justice possible.

The concept of justice and equity, as well as the concept of law and legislation, are considered as basic concepts of the philosophy of law and jurisprudence. Justice and equity are values that appear as fellows of the law in general, and in this context of civil law in particular. However, it would be wrong to treat the concept of justice only in the context of the concept of law because justice in terms of the law is only one kind of justice, while it can exist in other normative systems such as morality and religion. Therefore, as the justice of the law is only one of the several types of justice, it has its own features that set it apart (Лукић 2007: 276). Unlike moral justice, the justice of the law aspires that within a given community the valid norms (laws) become mandatory. A mere arbitrary deviation from the mandatory norms within a legal system, no matter how it can be configured, constitutes a basic fact of justice which, as such, is guaranteed by a positive law, because, precisely from the legal system itself stems the freedom and legal security for individuals as subjects of the law. On the other hand, injustice is a violation of justice, while, in the sense of the category of injustice, the failure to perform any action that we have been obliged to perform is also included. Nevertheless, it remains indisputable that one of the main reasons for injustice is arbitrariness, in which case the principle of impartiality is violated (Tugendhat 1997 : 6).

The principle of justice and equity is addressed in time and space by various authors and from different angles. The oldest position that dominates in the legal doctrine is the attitude that justice is the constitutive principle of the law and a criterion for determining the legal nature of social relations and the norms by which these relations are regulated. This, practically means that legal-positive norms, by the fact that their legal power derives from justice, are legally valid and binding only if they are in conformity with justice (Галев 2004:117). On the other hand, quite different views are presented by other authors, who exclude any kind of influence of the principle of justice on the norms of positive law. As far as equity is concerned, it is considered as a form of free and individual judgment based on justice.

The concepts of justice and equity, understood either as a category of natural law or simply as a material value principle, have a great and important influence on what needs to be the content of the juridical-normative order, the part of it related

to civil law, namely to the part related to the law of obligations. Justice as a value criterion is a guide on how to regulate relationships between certain entities within a society, while equity enables the realization of this aspiration.

Expressions used in different languages and at different timeframes to identify the category of law, justice and equity have not influenced their concept. Thus, Latin used these expressions: *ius*, *iusticia* and *equitas*; Croatian language used the following: *pravo*, *pravednost*, *pravičnost*; in English, the terms *law*, *justice* and *equity* are used; in German, the terms: *recht*, *gerechtigkeit*, *billigkeit*, etc.

HISTORICAL PERSPECTIVE ON JUSTICE AND EQUITY

Justice and equity, as genetic and psychological phenomena are born along with man, as a socially conscious being. The roots of these phenomena are also encountered in the oldest cultures of humankind, for example: in the myth of the righteous ruler, the righteous king, etc. But in terms of the definition, systematization and clear designation of the notion of justice and equity, respectively, the concept of indivisibility between the notion of law, justice and equity, we will refer to Roman law and the ancient Greek law, and of course, the new legal theories that have dealt with these phenomena.

The principle of justice and equity is found to be applied in the classical and post-classical period of Roman law when the fierce formalism, characteristic of the old law, increasingly started to give space to informalism. An evidence of this is the fact that in the post-classical period of Roman law the maxim according to which: "It is determined that in all things, justice and equity, not rigorous law, will be considered" was applied (Aristotel 1970: 139).

Justice and equity have been well known in ancient Greek law (c. V BC) and have been dealt with by many thinkers. Socrates was a proven legalist and regarded the law as a guardian of the society, while justice as its watchdog. He believed that the highest human virtue is "goodness". Plato, Socrates' student, borrowed the notion of "goodness" as the highest goal of humankind, further cultivated it in his work "The state" and called it "justice". According to Plato, justice means giving everyone what belongs to him/her, and to enable him/her to do the job that he/she is capable of, but that should be good (Platon 443d). Such a definition of justice will be found later in other works of the Greek scholars, but also Roman, as is the case with the famous definition of Ulpianus, in which he considers that: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi "(justice is the everlasting and constant will to give everyone the right that belongs to them).

Aristotle, by further cultivating the thoughts of his teacher Plato in his work "Nicomachean Ethics" considers justice as equality and divides it into two types: general justice, which means acting in accordance with the law, and special justice, which is part of general justice but refers to concrete situations. He then divides special justice into distributive justice, which defines the principle of distributing the rights of citizens according to geometric ratio in public law, where everyone wins according to merit. Whereas, the other type, the corrective or equalizing justice relates to justice in a private relationship, which may be created on the basis of the will of the participants (sale) or against the will of the participants (theft, violent actions ex.bodily injuries). The essence of commutative justice is the arithmetical proportion, that enables the achievement of equity, which means that everyone earns the same (in a sale the seller earns as much as the buyer, of course through the price, in theft the thief should return what he has stolen or pay its value. Therefore, justice represents the fundamental equality of the elements that exist in the report that it regulates (It is the duty of a judge to find the points of connection between commutative and distributive justice when applying the general norm in the particular case, primarily because distributive justice is dependent on space and time, taking into consideration that every legal system has its own criteria on which social values should be protected and to what extent). Based on this aspect, justice implies equality while injustice implies inequality.

Regarding the principle of equity, like *Ius aequum*, it stands alongside the law like *Ius strictum*. When defining the notion of equity Aristotle in his work "Nicomachean Ethics" moved away from the teachings of Plato, which is reflected in the further development of his concept of equity. Aristotle perceives equity as a distinct legal form of the concept of justice. What matters is that he treats them as two essentially different values, but in no case does he want them to be understood as different attitudes. According to Aristotle, equity is what is considered a law outside the written law (Dieterich 1804:26). Namely, where the legislator has not foreseen a solution for a concrete case equity intervenes and resolves the case; same was as the legislator would act if the case had existed at the moment of adoption of the law. He emphasizes that the law because of being a general act is incomplete, or limited, and that there should be a possibility of correction, namely, its amendment. By alluding to such an opportunity, Aristotle refers to equity, to define it as a correctional tool of positive law.

In the XII century AD Roman law had already been received as a legal-positive order and became the foundation of all rights in European space, surviving until the new century. The Roman law had managed to successfully penetrate into the English system, by then the immune "common law", whereby the principle of justice will be seen as "justice", and equity will be found in "equity law". In this

context, we can refer to a very important document of the world legal culture, the great charter of liberties (Magna carta liberatum), where the principle of justice will find place in the expression "To no one will we sell, to no one will we refuse or delay, right or justice" (Article 40, The Magna Carta).

In later centuries, we can encounter Aristotle's stances contained in the work "Nicomachean Ethics" discussed by various authors. Among others, his attitudes are also accepted by Thomas Aquinas, who as a proponent of Aristotle's thought would say that justice implies the relationship with the other and the will (Akvinski 2005: 579-580). Referring to the positive law and taking into consideration the shortcomings, that the law of humans (lex humana) brings with itself, he develops the doctrine "lex iniusta non est lex - unjust law is not law" because, always according to him, the positive law must not be in contradiction with the natural law, since otherwise, if it happens, then the positive law is not a law, but only a kind of violence (Metelko 1999:326). The philosopher Thomas Hobbes, in order to build his own theory, starts from another dimension: he considers that someone is just if he has not violated the agreement and someone else is unfair if he has infringed upon the same. In his view, the divine is neither just nor unjust, because he has not entered into an agreement with anyone. Such an attitude can not be taken into account in all cases because justice as such may take different meanings in certain life situations. Thus, in a real life situation, when the party being obliged by the principle "*Pacta sunt servanda*" (The principle "*Pacta sunt servanda*" says that "participants in the binding relationship are obliged to fulfill their obligation and are responsible for noncompliance," see the Article 10, paragraph 1, Law on Obligations) must fulfill the contractual obligation, while, under the positive law in force, the contract to be fulfilled is invalid because it is unjust, the principle of equity comes into play, which as a correction of the positive law creates the possibility for the party not to fulfill the obligation deriving from the invalid contract, thus violating the principle "*Pacta sunt servanda*" and at the same time not to be considered unjust. Based on the fact that the party will not be considered unjust, even though it did not respect the contract, the conclusion is that the observance of the contract is not the only relevant criterion to judge whether one is just or not (Hobbes 1996:147). Therefore, the theory of Hobbes associated with being just or unjust based only on the respect or disrespect of the contract is not sustainable, because the idea of law can not be anything but justice.

Justice, as a special legal value, is an unwritten law, which includes what the law has failed to include, or which, when abolishing the general norm or law, should be circumvented so that the norm contains only the elementary specifics of several similar cases in order to be applicable. In this regard, the author Hans Kelsen, strongly believing that justice derives power from the law, brings a completely

authentic stance that does not reject justice as a value criterion, but states that "the notion of justice can only penetrate legal science in the sense of legitimacy" (Hans 1959: 27). This attitude served Fuller as the basis for building the "known rule" category, which alludes to the legitimacy of the law. In other words, he believes that laws are just only when citizens are allowed to judge whether a law is just or not (Fuller 1964: 57).

Justice and equity, as special values will be further passed on in history and will become the motto of the French Declaration on Human Rights and the American Declaration of Independence (Kurtović 1999: 54-58). Montenegro's General Property Code (1888) will make an even more important step towards the promotion of these values. In the provisions of the Code we will find an aristotelian approach, where, justice and equity will be considered as formal sources of law: If there are no rules for any legal work or any particular case, neither in law nor in customs, it is necessary to act by analogy and according to other similar rules, or the case should be resolved according to the general principles of justice and equity. Thus, according to the Code, in the absence of legal and customary norms, but also in case applying the rules of analogy is impossible, justice and equity appear to the judge as a direct source, from which he should issue the rule for implementation (Галев 2004:113). Nearly two decades later, a faithful promotion of Aristotle's idea regarding the justice institute as a corrective to positive law is found in the Swiss Civil Code - SCC. In Article 1, paragraph 2, of the SCC, the legislator authorizes the court, if it finds that there is a legal gap, to supplement the same in customary law, and to establish the norm in cases where customary law is not sufficient, which it would create if it were a legislatior (Art.1, paragraph.2 Schweizerisches Zivilgesetzbuch).

Justice as commutative justice, respectively, as a value that determines the exchange of equivalent values in the law of obligations, namely, in private law, at the same time represents the ideal of contemporary law. This concept is embodied today in contemporary legislation, which can be ascertained by some provisions of the Law on Obligations in the Republic of Macedonia (2001), as for example in the case of the principle of compensation for damage, according to which: one who causes harm to another is obliged to compensate him if he fails to prove that the damage was caused without his fault (Article 141, paragraph 1, Law on Obligations) therefore, the party that caused the harm must restore the property that existed before the damage was caused (*restitutio in integrum*); to the principle of the equivalence of the loans, which states that: in the establishment of the obligatory relations the participants start from the principle of equal values of mutual loans, what is given should have a value comparatively equal to the one what is received (Article 8, paragraph 1, Law on Obligations) ; or the institute of

enrichment without legal basis, under which that person is enriched without legal basis is obliged to return what he has gained as a result of this report (Article 199, Paragraph 1, Law on Obligations). The commutative justice is also encountered in some other legal solutions in the area of the law of obligations. For example, such are the rules governing the return modalities of what is given in the case of invalidity (Article 96, Paragraph 1, 2, Law on Obligations) or termination of the contract (Article 113, Paragraph 1, Law on Obligations) rules on legal liability in cases of physical or legal flaws of the item, namely the object of the obligation, (for example, in a sales, lease contract etc.) (Article 466, Paragraph 1,2 and Article 496, Paragraph 1) or the rules of liability for the malfunction of the item in these contracts (Article 489, Paragraph 1, Law on Obligations).

Since equity is oriented to the concrete case, namely, to the social content of the case, the body authorized to decide, applies the legal norm by adapting it to the concrete case and placing the same in direct relation to the dominant concept of justice. This is accomplished based on the necessary factual material, which includes: the material condition of the subjects of the relationship, their social status, the existence or absence of guilt on them, their honesty and conscience and the like. Thus, for example, we find in paragraph 1 of Article 156 of the Law on Obligations a concrete provision in which the legislator instructs the court to hold an account for the material situation of the subjects of the relationship, which states that: "Where damage is caused by a person not liable for it, and compensation cannot be obtained from the person responsible to supervise the damaging person, a court, taking into consideration the financial state of the damaged and the damaging party, may, when the principle of equity indicates so, decide on partial or full compensation by the damaging party". The court decides according to equity even when deciding to terminate the contract, namely for its change due to the change of circumstances (*Clausula rebus sic stantibus*). In this case, it is guided by the principle of equity in circulation, taking into account the purpose of the contract, the normal risk to the contract, the interest of the parties and the general public interest. Provisions that authorize the court to take into account the material condition of the subjects of the relationship during the decision-making process are also found in the Law on inheritance of the Republic of Macedonia. The provision of Article 27 of this law states: "When a spouse who does not have the necessary means of subsistence has been called into inheritance with second-generation heirs, the court may, upon the request of the spouse, decide that the spouse inherits a portion of the share of the inheritance to be inherited by other heirs, while it may decide that the spouse inherits the entire heredity, if it is so small that by its sharing the spouse would remain in misery. During the decision, the court will consider all the circumstances of the case, in particular the property status and the husband's ability to economize,

the status of the property of the other heirs and the value of the hereditary measure". According to the provisions of Article 28 of this law, the same right and under the same conditions are treated also the parents of the decedent to the decedent's spouse (Article 27, 28, Law on Inheritance).

THE RELATIONSHIP BETWEEN JUSTICE AND EQUITY

Justice and equity can not be seen and treated separately because there is a permanent and inevitable connection between them. The principle of justice is the aim of every legislator on the occasion of the creation of the law. With the help of the principle of justice, the legislator creates the law, while, with the help of the principle of equity, it creates the possibility of its interpretation.

If we consider that from the past to the present day the law was intended to regulate only standardized relations, then it becomes clear to us that the principle of justice has not even been able to be incorporated in any other form , apart from the generalization level, namely, the average of the adjusted relationships.

It happens that justice embodied in the law, carried in a concrete case, which may be specific and by many elements deviate from the general and the standard, creates a situation when what on principle and abstract level is considered as just, in the concrete case to be presented as unjust. In this regard, the question is how can justice be achieved in the case of inclusion of subjects in concrete legal relationship? (Галев и Дабовиќ-Анастасовска 2009 :100). Since justice is an abstract and generalized value, if it can not produce the expected result when passed on in concrete cases where the subjects of the law are involved, the intervention of equity becomes inalienable. In this way, what is presented as justice in general plan is transformed into equity in a concrete plan, which means that these categories are not exclusive, but rather complement each other. Equity is a form of free and individual judgment according to justice, respectively, the method of enforcing the law through direct mediation between the dominant concept of justice and the concrete case (Esser 1949:20).

In some cases, justice can be achieved through interpretation, as a way of enforcing the law, or by the guideline that the provision itself determines, most often, the law. Such cases contained in the provisions of the Law on Obligations are the cases when the court in order to achieve justice is authorized to interpret the contract taking into account categories such as: "honesty and conscience", "common", "the purpose of the contract", "the common purpose of the contracting parties" and many other similar categories (Article 91, Paragraph 2; Article 124, 125; Article 463, Paragraph 1, Law on Obligations) . In some

situations, the norm is complemented by other elements of social rules, which are governed by the provision itself, and the case is settled by equity as a value category in the field of law. This can be illustrated by the content of the legal provision under which: when deciding to terminate the contract, respectively, for its amendment, the court is guided by the principle of equity in circulation, with particular regard to the purpose of the contract, the normal risk of the respective contract type, the general interest and interests of both parties (Article 124, Law on Obligations).

Equity is a special way of enforcing the law. During the process of applying the norm, though it departs from the norm itself, it abandons the same and seeks the answer related to the way that the norm will be applied in the concrete case outside of that field. This field represents an interaction relationship between the dominant incorporated concept of justice into the relevant legal system and order, reduced to the level of concrete legal norms on the one hand and concrete controversial case for which solution is sought through equity (Гале 2004:127).

Given the fact that the principle of justice is closely related to the principle of equity, while it is considered that equity precedes justice, or more precisely, is its source, the essential difference between these two concepts lies precisely in their method, namely in their approach on realization of the idea of equality. The word justice has a double character; it has the meaning of the principle, but also of the integrity of equity within a given society. While, its abstract level is a feature of the principle of justice, equity is oriented to the concrete case, respectively, to the social content of this case, and at the same time it is in direct correspondence with the dominant concept of justice.

As noted above, it can be concluded that equity is a tool for adapting the facts to the idea of justice. Thus, the concept of the principle of equity implies a certain ability of an individual or organization to decide or act in the just way in concrete cases, i.e. to use the principle of justice in real terms and to implement the idea of creating a just society, just decision, just procedure, etc..

In his work "*Nicomachean Ethics*", Aristotle has articulated his stance on the relationship between justice and equity as a complement to the law, claiming that justice is the queen of all values and that equity is a kind of justice but, for sure better than justice. In this context, he considers that equity is justice because it serves to improve what is legally right. Proclaiming equity as a way to correct the law, Aristotle was the first to promote flexibility in justice. The idea of both, justice and equity is equality, but they are distinguished by their method. As far as justice goes from the general to the individual, towards the individual case, equity starts from the individual case and its nature (Metelko 1999:178-182). With his attitude, Aristotle claims to prove that the law is the same as justice, but always if we

correctly interpret the will of the legislator. On the other hand, he considers equity as a "tool and material" with which we build justice, which means that without equity, justice would not be complete, because equity ultimately precedes justice, respectively is the source of justice (Miličić 2008:79).

The work of Aristotle "*Nicomachean Ethics*" was analyzed also by the German lawyer Gustav Radbruch. In his work, "*The Philosophy of Law*", Radbruch has highlighted Aristotle's standpoint on the relationship between equity and justice expressed in that work. According to Radbruch, Aristotle declares that equity can not be something that counters the justice, but rather is only one of its types. He has also found a solution according to which he considers that justice and equity are not different values, but are different ways to reach a single value, because equity as well as justice in the last instance have a generalized character. Otherwise, Radbruch defines justice as correctness in its focus toward the law. According to him, justice is the correct way of building the notion of the "law" and at the same time "truthfulness, intended to serve justice, whereas equity is the justice of the individual case" (Radbruch 2003:34).

The notion of the law can not be freed from the idea of justice and equity, as between these notions there is an inevitable intricacy, in the legal-political thought and in the daily talk alike, and this blend corresponds to the ideological commitment that the positive law should be promoted as a law ruled by justice and equity (Бајалџиев 1999:389).

EQUALITY AS AN ATTRIBUTE OF JUSTICE AND EQUITY

Justice means being equal, ie., it means the permanent and constant will to give everyone what belongs to them, while the same is achieved through equality. Under the idea of equality, we enumerate both justice and equity. But, while justice begins from the general principle toward the particular case, the begining point of equity is the individual case and the circumstances surrounding it.

Although justice is closely related to equality and equality is its main and most important criterion, however, justice as equality opposes justice as inequality. However, it is not justice to act equally with the unequal. Therefore, at least in some situations, justice is presented as proportionality, as a verification of relevant differences among people, and afterwards as a proportional determination of the good or bad consequences that should be related to the verified differences (Pusić 1989:217).

In order to avoid possible uncertainties regarding inequality between people (individuals) and the determination of the equality principle, it should be noted

that equality principle implies equality of all subjects as individuals, regarding: conditions of realization of subsistence, realization of opportunities and aspirations, thereby equality in "authorizations" includes the equality of people in "loads", respectively, equality in "rewards" includes equality in "punishments".

The principle of equality, understood as equality of all people in the undeniable need for life, is absolute equality, whereas the equality of people with regard to the possibilities of realizing the subsistence, which according to the nature of the issue of individuality are unequally realized in individual cases, represents relative equality. The fact that each human represents a particular individual, it ensues that in reality people are not equal but unequal. Their inequality stems from the many and varied criteria of their social, individual, biosocial, and time-spatial position (Milćić 2008:37).

For the law it is important that the justice of law (Moral and religious justice evade from the principle of equality. In some situations they create the impression of injustice, because often for the performed obligation nothing is gained except for the blessing) is closely related to the balance, equality. If this equality can not be measured accurately, different measurement methods are applied. Thus, ie. if we talk about the measurement of a delinquency punishment, according to the principle of equity to ensure equality, the value of the delinquency and the value of the punishment must be measured. In old laws, as it is known, there was the rule "an eye for an eye, a tooth for a tooth", wich was implemented easily. In contemporary law, this rule mainly has been abandoned, so physical and moral injuries have been replaced by property punishments or deprivation of liberty. But in some countries the death penalty is still being applied according to the principle "an eye for an eye, a tooth for a tooth".

A possible kind, but, by its controversial nature of equality, is the formal principle of "equality before the law", respectively, formal equality, expressed through legal rules. There is no doubt that equality before the law, as a fundamental right, is one of the key foundations of legal efforts for justice (Zippelius 1989:7). It is considered as the foundation of the rule of law and is integral part of most constitutions around the world, including the Constitution of the Republic of Macedonia, article 9, paragraph 2, which states that: "The citizens of the Republic of Macedonia are equal before the Constitution and the laws" (Article 9, paragraph 1, Constitution of the Republic of Macedonia). Theoretically, by all means it can be conceived the possibility that formal equality (established in the rule of law in a dogmatic way and with the will of power) approximates or even clashes with the equality, but even such a theoretical possibility clash of dogmatically formed equality, is just an important step that should be followed by other more important steps, such as: real guarantees of equality realization (Milćić 2008:38-39).

The principle of equality is strongly articulated in the United Nations Universal Declaration of Human Rights of 1948, which states: "All human beings are born free and equal in dignity and rights and each enjoys all the rights and liberties set out in this Declaration, without any restriction on race, color, gender, language, religion, political or other opinion, national or social origin, wealth, birth or other (Article 1, 2, The General Declaration on Human Rights). The principle of equality also constitutes the main appeal of the Convention for Protection of Human Rights and Fundamental Freedoms (2000). The introductory part of the Convention begins with the guarantee of equality of all subjects before the law: "Given the fundamental principle according to which all persons are equal before the law and are entitled to equal protection from the law" (Protocol No.12 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

The principle of equality, as the most important criterion of justice and as the eternal will to ensure equality in the world, can be found also in all contemporary, national and international legal acts and instruments.

CONCLUSION

With the progressive development of human thought and research, the terms justice and equity were accepted as compatible in the social reality and in historic retrospectives in the form of doctrine they were mounted on the foundations of some positive rights, to subsequently included a large number of them.

Historically there have been dilemmas about the concept, source, and goals of justice and equity. For a time, different authors have failed to agree on the sources of the principle of justice and equity, most of them have agreed with the goal that is to be achieved through these principles, and this obviously is the equality.

The right, justice and equity are phenomena that can be treated and defined separately, but none of them can be implemented separately and to yield the expected result. They represent relatively complex phenomena, which are in a exclusive, intricate and indivisible links. Therefore, the judge who will act according to them should not have only the necessary professional preparation, but also the pronounced intellectual and moral courage.

We can conclude that, as Kelsen claimed, the ideal justice and equity in reality does not exist because there is no perfect tolerance, general agreement or general good in the world. The aspiration for justice and equity seems to be eternal, only to change the subjects and the composition of the interests, for which equality is sought with others. However, justice and equity had, has, and will have, a very important place within the law, or more broadly within the legal system and order, has had, has and will have an essential impact on the category of right in general.

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