

Abrogation of the Constitution of Pakistan, 1973: A Trailing Overview in term of Pros and Cons

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Abstract

The 1973 constitution of Pakistan envisages a democratic setup based on parliamentary form of government. The role of the armed forces is also provided under articles 243, 244 and 245. These articles deal with the functions of the armed forces and gives a brief account of the military's domain. The interpretation of these articles and the ground reality with regard to the armed forces will be discussed at length later on in the assignment. The polity of Pakistan as we know has been overwhelmingly, dominated by the armed forces. The vacuum left in the politics is filled by the armed forces, in this regard former Pakistani General and Director General ISI (DG ISI), Mr. Assad Durrani says that "the military is reluctantly forced into the politics". If this is the case, then serious questions need to be asked with respect to the competency of the public representatives and the civilian authorities.

Key Words: Constitution of Pakistan 1973, Abrogation, Civilian Supremacy, Armed Forces Command, Military Oath, Instability

Introduction:

Abrogation of the Constitutions of Pakistan 1956:

The constitution of 1956 was the first constitution of Pakistan. The drafting of this constitution took relatively long time around 9 years. The military under it's the then chief, Ayub khan abrogated the constitution on 7 oct, 1958 (Jaffrelot, 2016).

Abrogation of the Constitutions of Pakistan 1962:

The constitution of 1962 was given by Ayub khan a military dictator in 1962. In this constitution a presidential form of government was envisaged. This constitution too was abrogated on 25 march, 1969 by another military chief, General Yahya khan (Jaffrelot, 2016).

Abrogation of the Constitution of Pakistan 1973:

The constitution of 1973 was given by the national assembly headed by ex-prime minister Mr. Zulfikar Ali Bhutto (Mahmood, 1973). This constitution too was abrogated by his chief of army staff, Zia ul Haq in 1977 and in 1999 by Musharaff (Afzal, 2018). However, ever since that the constitution has not been abrogated and even its articles haven't been held abeyance by the military.

Armed forces' Command

The command and control of the Pakistani Armed Forces is covered in Article 243 of the 1973 Constitution (Mahmood, 1973). The relationship between the President, the Supreme Command, and the Federal Government is described in this article. The purpose of this assignment is to explain and interpret each of the article's provisions, considering its importance and ramifications within the framework of Pakistan's constitution.

"Article 243"

This clause states that the Armed Forces shall be under the direction and authority of the Federal Government and Federal Government has final say and authority over Pakistan's armed forces (Mahmood, 1973). Pakistan's federal government is in-charge of all aspects of national governance, including matters of security and defense. Its central component is the elected government, which is composed of numerous agencies and departments. This clause emphasizes a crucial component of democratic governance: the military's deference to civilian authorities.

Because the federal government controls and commands the Armed Forces, the military is required to abide by the laws and regulations established by the civilian government. This idea, which is essential to democratic ideals, guarantees that civilian scrutiny and responsibility will be applied to military decisions and actions.

This clause also prohibits any military person or organization from acting alone or making decisions that could have an impact on foreign policy and national security. It reaffirms that the military's job is to protect the country and its constitution, not to impose its will on politics or have any influence over political choices.

The President will have ultimate command over the armed forces, subject to the generality of the aforementioned provision (Mahmood, 1973):

According to this clause, the President of Pakistan is the Supreme Commander even though the federal government as a whole controls and commands the Armed Forces. Accordingly, the President is the highest senior civilian official with command over the armed forces.

The phrase "Supreme Command" suggests that the President has the final say over the armed forces, but this is mostly a ceremonial position. When it comes to the use of military force, the President usually does not make tactical or operational decisions; instead, the military leadership has operational command.

As a check on the military's power, the President's position as Supreme Commander represents the idea that civilians should have authority over the armed forces. The civilian President upholds the people's will and makes sure the armed forces function within the bounds of democratic and constitutional government.

It is noteworthy that the President's authority in defense matters is, in reality, primarily used in conformity with the constitution and on recommendations from the federal government, particularly the Prime Minister.

Analysis and Consequences:

The 1973 Pakistani Constitution's Article 243 is essential to preserving the delicate balance that exists in a democratic country between the military and the civilian government. The following are some important readings and applications of each clause (Rizvi, 2005):

Civilian Control:

The clause emphasizes the idea that civilians should have command over the armed forces. This is essential to democratic administration because it prevents the military from acting on its own initiative or meddling in internal political matters (Rizvi, 2005).

Accountability:

The provision guarantees that military activities and decisions are subject to oversight and accountability through the federal government and its institutions by bringing the military under civilian authority (Rizvi, 2005). This protects against the use of force in political disputes.

Supreme Commander:

The President is vested with the title of Supreme Commander; however, this is essentially a symbolic position. Though operational choices are usually taken by military leadership and carried out in line with government policies, it acts as a reminder of civilian authority over the military (Rizvi, 2005).

Checks and Balances:

A system of checks and balances exists in the allocation of power among the President, the federal administration, and the military leadership. It encourages collaboration and coordination in defense and security-related subjects and inhibits the consolidation of authority within a single organization.

Constitutional Framework:

Article 243, which specifies the obligations of different players in the field of defense and security, is a crucial component of Pakistan's constitution (Mahmood, 1973). It preserves the values of the rule of law and democratic governance.

Without a doubt, I shall explain and interpret Articles 243(3) and 243(4) of the 1973 Pakistani Constitution. These articles discuss the President's military powers and his nomination of senior military officers (Mahmood, 1973). Note: Due to the length and complexity of the explanation, this explanation will be divided into two parts. However, there are significant aspects related to the role of the President in relation to the Armed Forces included in the 1973 Constitution as well, such as the President's function and authority to organize and maintain the Armed Forces, including the power to appoint senior military officials under Article 243(3) and 243(4). Each of the clauses will be considered in detail: Authorities concerning Armed Forces(Article 243(3)): The President will, in accordance with the law, be able to:

- a. To create and keep up the Air Force, the Naval Force and the Military Force of Pakistan and their Reserves;
- b) Commissions in these Forces to be granted.

Article 243(3):

The President of Pakistan is endowed with particular duties and responsibilities concerning the armed forces and military of the nation under Article 243(3). Each subsection is explained and interpreted as follows:

3(a) - To organize and sustain Pakistan's Air, Naval, and Military Forces as well as their Reserves:

Power to Raise and Maintain Armed Forces: The President of Pakistan is granted the power to create, arrange, and oversee the Army, Navy, and Air Force, the country's three military branches. It is the President's constitutionally mandated responsibility to guarantee these troops' operational capacity and preparedness.

Reserves of the Armed Forces: The President is in charge of keeping these forces' reserves in addition to the regular military branches. Although most members of the reserve are no longer actively serving in the military, they may be called upon in the event of a national emergency or when there is a greater need for soldiers. This authority assures flexibility in the management of the humans resources of the military.

To award commissions in these Forces, see 3(b):

Authority to Grant Commissions: The President may grant commissions to people who want to join the Pakistani Armed Forces under the terms of this subsection. Within the military, commissioned officers are in charge of giving orders and making decisions. This authority is usually used in accordance with established standards and protocols, and it is frequently used at the high command of the armed forces' advice.

Article 243(3): Interpretation and Implications

Article 243(3) provides special authority for the President of Pakistan to direct the procurement and maintenance of Pakistan's armed services, as well as to bestow commissions on those seeking to join the armed forces. As can be appreciated from the following salient features, the importance of this clause can be understood:

Civilian Supremacy:

Because the President is the head of state appointed by the Constitution and thus represents the highest level of civilian authority, this clause upholds the idea of civilian rule over the armed forces.

Legal Framework:

The President's use of these powers is governed by the law, which means that commissions must be granted and the military must be constituted and maintained in compliance with existing laws, rules, and regulations.

Flexible Resource Management:

The military's ability to effectively manage its resources, including reserves, ensures that the armed forces are able to adjust to shifting security and defense requirements.

Appointments to Leadership Positions:

The authority to issue commissions guarantees the appointment and selection of military personnel. In actuality, though, this power is frequently used in accordance with the guidelines and policies set forth by the military's high leadership.

Article 243(4):

On the Prime Minister's recommendation, the President will designate:

- a. The Joint Chiefs of Staff Committee Chairman;
- b. The Chief of Staff, Army;
- c. The Chief of Naval Staff; furthermore
- d. Their pay and benefits will be decided by the Chief of the Air Staff (Mahmood, 1973).

Article 243(4):

The procedure and requirements for the appointment of high-ranking military personnel in Pakistan, such as the Chiefs of the Army, Navy, and Air Force and the Chairman of the Joint Chiefs of Staff Committee, are outlined in Article 243(4). Each subsection is explained and interpreted in depth below:

The Joint Chiefs of Staff Committee Chairman:

Appointment on the Prime Minister's Advice:

The President and the Prime Minister receive their primary military advice from the Chairman of the Joint Chiefs of Staff Committee, a senior military official. On the Prime Minister's recommendation, the President names the Chairman. This indicates that the Prime Minister, speaking for the civilian government, has a major say in choosing the person to fill this important function.

The Chief of Staff of the Army: 4(b)

Appointment based on the Prime Minister's recommendation:

The Pakistan Army's highest-ranking military officer is the Chief of Army Staff. The Chief of the Army Staff is appointed by the President on the Prime Minister's recommendation, much as the Chairman of the Joint Chiefs of Staff Committee.

4(c): The Commander in Chief of the Navy:

Appointment based on the Prime Minister's recommendation:

In the Pakistan Navy, the Chief of the Naval Staff is the most senior military officer. The Prime Minister's recommendation is considered when the President selects the Chief of Naval Staff, as it is with other high-ranking military posts.

4.(d) - The Air Staff Chief:

Appointment based on the Prime Minister's recommendation:

The highest rank in the military's air domain is that of chief of air staff. The head of air staff, often known as the "Air marshal," is chosen by the president on the prime minister's recommendation.

Article 244: The Armed Forces Oath

Regarding the "Oath of Armed Forces," Article 244 of the Pakistani Constitution 1973 stipulates that each member of the Armed Forces in Pakistan must take an oath that is specified in the Third Schedule (Mahmood, 1973). The clause highlights the significance of this pledge because of the military's involvement and its commitment of safeguarding the country and its constitution. Article 244 will be analyzed in terms of its implications and importance.

Article 244: Oath of Armed Forces Interpretation:

Understanding Article 244 is crucial, as it's at the heart of Pakistan's constitutional structure, highlighting several key aspects:

1. All Pakistani Armed Forces personnel must take an oath stipulated in that article. This oath represents a profound commitment to values, including loyalty to the state, protection of the constitution, and patriotism.
2. Uniformity: Every member of the Armed Forces is required to take the same oath; this brings uniformity and consistency in the values and obligations of military personnel, as mentioned in the Third Schedule. This helps in maintaining discipline and unity within the army.
3. Third Schedule: The Third Schedule of the Constitution gives the exact wording of the oath. The content of the oath, including the terminology and phrasing necessary for those wishing to enlist in the armed forces to pronounce, is set out in this schedule.
4. Oath of Allegiance: The oath shows commitment towards the Constitution of Pakistan. As the Constitution is the law of the land, the Armed Forces members pledge to uphold and protect it. This highlights the essence of the rule of law and the supremacy of the constitution.
5. Loyalty towards the state: An oath is taken which declares loyalty towards the State of Pakistan. This promise underscores the critical importance of the military in the security, sovereignty and territorial integrity of the country.
6. Protection of People: Armed Forces members take an oath to defend the country and its citizens. That is ensuring the security and good health of Pakistani citizens.
7. Non-Political Role: The role of the Armed Forces is maintained as non-political. This implies that the military is to protect the institutions of the country and the state, and not to interfere in domestic affairs whatsoever.
8. Accountability: Taking an oath provides a formal basis for accountability in the military. a reminder of the duties and commitment armed forces personnel have to the country and the constitution.
9. Relationship between the Civil and Military: The oath reflects the ideas of civilian authority over the armed forces. It is intended to be understood that although the army plays an important role in protecting the country, it is subject to the framework of constitutional government and is under civilian management.
10. National Identity: Armed Forces' national identity and ethos are influenced by the oath. It emphasizes virtues such as national service, honour, discipline, and duty.

11. Article 244 of the - Legal Obligation: Previously, the oath was taken as a custom, which is now required by law. This legal obligation improves the enforceability and accountability of military members regarding their oath-taking commitments.
12. Tradition and legacy: Military oaths are a cherished tradition and a symbol of the military's ideals and legacy. This tradition has been institutionalized and codified in Article 244, which reflects its significance in the context of contemporary governance.

In conclusion, the importance of the Armed Forces oath is emphasized in Article 244 of the 1973 Constitution of Pakistan. This oath highlights the duties and responsibilities of soldiers in a country's constitutional system; it is not just a formality. It reasserts the military's role in Pakistan's defense and security and offers a platform for responsibility, discipline, and the continuation of the military's apolitical attitude. In the end, the oath represents the fundamental beliefs and ideals that direct the Armed Forces' behavior while they serve the country.

Article 245. The Armed Forces' Roles

This article states that:

1. The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so (Mahmood, 1973).
2. The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.
3. A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245:
4. Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power ("View from the courtroom," 2014.).
5. Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting.

We now examine each sentence in greater detail.

- (1) *The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.* (Siddiqua-Agha, 2017) (Article 245, Constitution of Pakistan, 1973)

The first phrase describes the two main duties that the Armed Forces of Pakistan play and is relevant to their functions (Military Inc. Book by Ayesha Siddiqua, Chapter 4):

1. Defending Pakistan Against External Aggression or the Threat of War: This fundamental duty of the Armed Forces is focused on preserving Pakistan's sovereignty and territorial integrity. The Armed Forces have a responsibility to defend the country against threats of war or external aggression. This means maintaining a strong defense posture, deter the enemy and be prepared to defend any military attacks from the outside.
2. Acting in Support of Civil Power: This duty entails the military's assistance to civilian authority in times of emergency or crisis at home. The Military may be requested by the civilian government to help the police and other civil services to maintain civil order, meet natural calamities, and settle security problems in the country. It is important to bear in mind that this aid is extended within the rule of law and each to their human rights, and subjected to the jurisdiction of the law.

Before getting into any more detail about these roles it's important to understand the context and contribution of each role:

Protecting Against War Threats or External Aggression:

- The defense of a nation's sovereignty and territorial integrity is the main goal of its armed forces.
- Pakistan's national security depends on this position because of its geostrategic location and the historical challenges in the region.
- To dissuade possible aggressors, the Armed Forces must invest in defense capabilities, keep themselves ready, and hold joint drills.
- International relations and diplomacy are equally important in maintaining peace and averting hostilities.

Serving the Interest of Civil Power:

- In order to respond to different crises and preserve internal stability, this function is crucial.
- When there are natural disasters like earthquakes, floods, or epidemics, the military can help by offering rescue, relief, and logistical support.

- The Armed Forces may be called upon to assist law enforcement in restoring order in cases of terrorism or civil disturbance.
- It is imperative to maintain democratic values and human rights by finding an appropriate equilibrium between military support and civilian power.

In both roles, the Federal Government offers guidance to the Armed Forces, ensuring civilian control over the Armed Forces and the rule of law is respected. In a democracy, one of the fundamental elements of governance is that civilians are superior to the military.

In conclusion, maintaining law and order and ensuring national security are fundamental to the roles played by Pakistan's armed forces. They are always operating within the laws of the land and under civilian control, defend the country's territorial integrity from external dangers and renders very important support during crisis situations at home.

On clause, move on to,

The validity of any direction given by the Federal Government under clause (1) shall not be challenged in any court.

The clause forms a crucial part of the system of the Federation and is a vital element in the Federal Government of Pakistan's powers and responsibilities in regard of the Armed Forces. This claim has important ramifications, and it can be understood and explained as follows:

Justification:

1. Authority of the Federal Government: As stated in clause (1) of the text, the Federal Government, as the highest executive authority in Pakistan, has the authority to give orders to the Armed Forces. These directives might have to do with protecting Pakistan from outside invasion or supporting civilian authority in times of need.
2. Non-Judicial Review: This section states unequivocally that no court may dispute or subject a Federal Government directive to judicial review. Stated differently, the Federal Government's determinations and instructions concerning the military's function in both internal and external defense are deemed final and immune to judicial contestation.

Interpretation:

1. Ensuring National Security: The purpose of the article is to guarantee that executive authorities will continue to have the final say on matters pertaining to national security, defense, and the use of the armed forces. It emphasizes how important it is to have a cohesive and strong command structure when it comes to defense and national security.
2. Civilian rule: This clause highlights the idea of civilian rule over the military by preventing judicial review. It guarantees that elected authorities answerable to the public make military decisions in accordance with directives from the federal government. It is a fundamental of government in the democratic form.
3. Rapid Decision-Making: Making decisions quickly and effectively is essential in emergency situations, especially when there are external dangers or home issues. Administratively the Armed Forces can react faster because of the lack of any legal challenges to the directives of the Federal Government which would otherwise have necessitated the delay that may occur in the courts.
4. Balance of Power: This clause gives more power to the federal government, but suggests a balance of power. However, the activities of the government must in no way go against the general framework of the laws and the constitution of the country. The definition of each of the powers and functions of the judicial, executive, and legislative branches is very important and an essential part of the separation of powers.
5. Controversy Avoidance: Potential disputes about military decisions can be the seeds for hostile litigation, which the provision can help to prevent. It is designed to ensure the security and stability of the country without entangling it in any sort of litigation which may affect national security.

Overall it is used to emphasize the effectiveness of decision making and the concept of the civilian supremacy, and to increase the power of the Federal Government over the Armed Forces in the services of Defense and internal aid. It helps to bring stability and security in the country, as it ensures that the government's directives in sensitive national security areas are final without the prospect of litigation.

Moving to next clause:

The jurisdiction of the respective High Courts under Article 199 shall not be exercised in a region where the Armed Forces of the Pakistan have, for the time being, vehicle in aid of civil power pursuant to Article 245:

Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.

With the caveat that this section will not be interpreted as impairing the High Court's jurisdiction over any case that is pending as of the day the Armed Forces begin supporting civil authority.

The passage outlines an important provision of law regarding jurisdiction of the High Courts in Pakistan over the actions of the Armed Forces while acting in aid of Civil power. The above provision is explained and interpreted as follows:

Justification:

1. High Court Jurisdiction: The Constitution of Pakistan is providing jurisdiction to the High Courts of Pakistan through Article 199. They have an opportunity to listen to issues concerning the application of basic rights in this jurisdiction, including issues of public interest or those involving significant legal or constitutional issues.
2. Limitation during Military Operations: No High Court shall have jurisdiction to utilize its Article 199 powers in the areas where Armed Forces of Pakistan are engaged in any activity to assist civil authority in accordance with Article 245 of the Constitution.
3. It does provide for Pending matters – but it provides a clause (proviso) to make sure that the High Court's jurisdiction is not curtailed where there was any matter pending before its involvement with the Armed Forces to aid civil authority. But in such event, the High Court may hear these pending cases.

Interpretation:

1. Balance of Powers: The real concern of this provision is the balance of powers in a democratic society. The high court's play an important role in ensuring rule of law and fundamental rights; at times, however, their competence is temporarily limited (as in serving civilians in the event of a military operation). This ensures that the response is happening at the same time in case of any emergency.
2. Protection of Ongoing lawsuits: It is crucial for the sake of protection of rights of aggrieved in pending Suits to have included this proviso. It facilitates rule of law and ensures no abrupt interruptions of court sessions.
3. Civil-Military Relations and National Security – The two concepts are interlinked with each other. It recognizes that during internal disturbances, whether natural or of security nature, a state by a valid exercise of its military force should help the civil power in their action without illegal interference.
4. Temporary: (It is to be noted that only some of the Armed Forces' assistance to civil authority is covered by the limitations on the jurisdiction of the High Court). The High Courts' usual jurisdiction is reinstated after these operations are finished.
5. Constitutional Compliance: This clause provides that all the government's elements, the military, the executive branch and the Judiciary are given well-defined roles and work within the broader frame of Pakistani Constitution.

In conclusion, this clause emphasizes how crucial it is to strike a balance between national security and the rule of law. It permits effective military support coordination in times of crisis while safeguarding the legal rights of those engaged in current judicial proceedings. It illustrates how complicated civil-military relations may be in a democracy.

Moving to next clause:

- (2) *Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting. (Article 245, Constitution of Pakistan, 1973)*

The chapter deals with the suspension of court cases in Pakistani High Courts where the military is supporting civil authority.

The following is an explanation and interpretation of this provision:

Justification:

1. Suspension of Legal Proceedings: The section discusses the suspension of lawsuits or other legal actions that have a direct bearing on regions in which Pakistan's Armed Forces actively support civil authorities in upholding law and order.
2. Timing of Suspension: Proceedings that were started on or after the day the Armed Forces started acting in support of civil power are subject to the suspension. It is a temporal limitation that aligns with the duration of military engagement.

Interpretation:

1. **Coordination Between Civil and Military administrations:** This clause gives a reflection of the complex interaction which exists in Pakistan between military administration and civil administration. As an Armed Forces support to civil authority, operations can be deployed to address more serious crisis and/or issues of domestic security. In such situations, the public safety and security will be considered and the legal process will be put on hold temporarily in certain cases.
2. **The suspension of court cases in the military-occupied areas** emphasizes the responsibility of government to maintain law and order and ensure people's safety and security. It's a measure that supplants the need for the need of ongoing litigation in the event that it caused disruption in military operations.
3. **Rights and Security:** This is important to bear in mind because this clause is a balance between the general requirements of security and the rights of the persons involved in these legal proceedings. However, cases put on hold are decided to be held in abeyance for a set period, while all the rights remain the same for all persons to seek legal rights. Such lawsuits can be maintained beyond the Armed Forces' involvement.
4. **Temporary Nature:** This suspension has direct repercussions on the time frame that the Armed Forces are actually engaged in supporting civil authority and is not indefinite. Once the Legal process is able to resume unhindered, and because they are no longer necessary to the civil authority's functioning, the rule of law resumes.
5. **Legal Clarity:** This clause gives legal clarity if a military action and legal issues intersect. It lists the grounds on which the court can adjourn proceedings and thus prevent going down the road.
6. **Constitutional framework –** The clause gives the military and executive the powers to deal with security issues while protecting the role of the Judicial system. It works within the limits laid down by the constitutional framework of Pakistan and the concept of separation of powers in the light of the teachings of Pakistan's Founder.

To sum up, this clause does reflect the nuances of civil-military relations in the face of security threats or instabilities in the country. In areas where the Armed Forces are deployed to assist civil administration in favour of civil safety and national security, stops time-outs of legal processes. Such court proceedings may resume once the situation is stabilized, ensuring the enforcement of the rule of law and finding a balance between individuals' rights and other, broader security interests.

Conclusion

The constitution Pakistan provides the domain of the armed forces. Under article 243 the constitution explicitly talks about the command of the armed forces. In article 244 the oath of the armed forces and military personal with regard to the protection of the state and its people is given. Article 244 also talks about the oath given to the armed forces with respect to the upholding of the constitution irrespective of any order from the brass of the military. The functions of the armed forces are given under article 245.

So far the constitution of 1973 relatively, has been the longest constitution which hasn't been substituted permanently unlike the previous two constitutions. The military however, does intervene in the political process which is a blatant violation of the constitution. The stance so provided is the lack of development or institutionalization of the civilian authorities but, this doesn't mean that one institution should be developed at the expense of other institutions. If this is allowed to happen then only one institution develops. This provides a hindrance of the democratization of other national institutions. The institutionalization takes a back step. The respect is an overall disparity and a lack of respect for the one institution so developed

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