

# Impeaching Judges: Challenge or Achievement? The Ugandan Perspective

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## Abstract

The impeachment of judges in Uganda reflects both a safeguard for judicial integrity and potential threat to judicial independence. While intended to ensure accountability within the judiciary, the process is often marred by concerns over political influence and procedural fairness. The legal framework provides for impeachment under strict conditions, yet the practical implementation often reveals lack of transparency, limited public trust, and executive overreach. The existing case law though scanty illustrates the tension between enforcing ethical standards and safeguarding impartial adjudication. Ultimately, judicial impeachment in Uganda remains both a necessary tool for accountability and a test of democratic governance.

## 1.1 Introduction and general background

You shall appoint judges...to administer true justice to the people...you shall not distort justice; you must be impartial. You shall not take a bribe; for a bribe blinds the eyes of the wise and twists the words even of the just. Justice and justice alone, shall be your aim. (Deuteronomy 18:20).

*“A good judge must have an enormous concern for life, animate and inanimate, and a sense of its tempestuous and untamed streaming. Without such fire in one’s belly, as Holmes also called it, he would turn into a stuffed shirt the instant a robe is put around him...the first signs of judicial taxidermy are impatience with trivial matters...Worse than judicial error is to mishandle impatiently the small affairs of momentarily helpless people, and judges should be impeached for it.”<sup>1</sup>*

The impeachment of judges could serve as a powerful tool in addressing misconduct and upholding judicial integrity. However, the impeachment process is complex and raises significant questions regarding the balance between accountability and judicial independence. Impeachment may be defined as a constitutional remedy of removing a judicial

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<sup>1</sup> American Bar Association & The National Judicial College ‘The Judge’s book’ 2<sup>nd</sup> edition 1994 iii.

officer<sup>2</sup>from his or her office on the grounds of serious misconduct, incompetence or incapacity.<sup>3</sup>

The constitutional basis for impeachment can be derived from Article 144 (2), (3), (4), (5), (6) & (7). The Uganda Constitution grants the Judicial Service Commission (JSC) power to remove errant, incompetent or feeble judicial officers. This power emanates from the principle of checks and balances; to ensure that no single branch of government enjoys excessive powers.<sup>4</sup> The purpose of impeachment is not personal punishment; rather, its function is primarily to maintain constitutional governance.<sup>5</sup> Chief Justice Coke<sup>6</sup> on the role of impeachment stated that:

*For their protection the people should have a right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time.*

As Justice Coke put it, the very object of removal is to rid the community of a corrupt, incapable, or unworthy official and disqualification to hold any office of honor and trust under the state.

Nevertheless, in the exercise of removal, there is need to take heed of two principles: The first is the requirement for judges to be honest. The second is that they must be independent.<sup>7</sup> This is because judges engage in judicial review; by declaring executive and legislative acts unconstitutional, perhaps the greatest idea of constitutional government.<sup>8</sup> Courts speak with a voice of reason and moral authority that the political branches of government sometimes fail to hear, which has antidemocratic implications.<sup>9</sup> The constitution guarantees judicial independence in many ways.<sup>10</sup> Hence, protecting these men and women of integrity. Only a limited number of judicial officers from the lower bench have been

2 The Judicial Service (Complaints and Disciplinary Proceedings) Regulations, 2005 regulation 2(a), (b)& (c) thereof define a judicial officer to mean a judge or any person who presides over a court or tribunal howsoever described; the chief registrar or a registrar of the court; such other person holding any office connected with a court as may be prescribed by the law.

3 DC Steelman ‘Judicial tenure and politics of impeachment-comparing the United States and the Philippines’ (2018) International Journal for Court Administration 260.

4 Articles 146 and 147 of the Constitution of Republic of Uganda,1995.

5 Deschler Ch 14 App. Pp. 726–728.

6 In the case of *Ferguson v. Maddox* 114 Tex.85.

7 JH Garvey ‘Judicial discipline and impeachment’ (1988) 76 Kentucky Law Journal 633.

8 Ferguson v. Maddox (n 6).

9 Steelman (n 3).

10 Art 128; courts shall be independent and not subject to control or direction of any person or authority, immunity from suits, security of tenure, salaries charged on the consolidated fund and removal from office, only by impeachment only on ground of misconduct, incompetence or incapacity(art144(2).

interdicted<sup>11</sup> and subsequently impeached.<sup>12</sup> It is usually limited to grave ethical or criminal misconduct such as perjury, fraud, or conflict of interest. Impeachment of judges is rare, and removal is rarer still.<sup>13</sup> However, because impeachment power lies primarily in the hands of the ruling party, it is at times misused as a tool of political persecution.

Nevertheless, this does not deny the fact that judicial misbehavior remains an issue of public concern in Uganda. Yet, judges enjoy much power and decide all manner of cases from chicken theft to national budget, and presidential elections. It is therefore important that we prevent and punish unethical behaviour by judges. The Constitution explicitly provides for methods of doing this. The first line of defense is the scrutiny that judges undergo in the appointment process. The second is removal by impeachment and the third is prosecution which is not foreclosed by impeachment.<sup>14</sup>

However, whereas these are good measures in place to ensure the integrity of the judge, they can only predict but not control the behaviour of the judge on the bench. Hence, the need to have a suitable means to correct the venial sins of errant judges. Criminal prosecution is equally bedeviled by its difficulties, and, like impeachment, may not be a perfect match for the kinds of impropriety which wayward judges commit. Hence, the need for impeachment. However, due process must be adhered to if impeachment is to bear good results, and to avoid upsetting the balance. Judges are not 'demigods', justice Douglas went as far as to call them 'sovereigns'.<sup>15</sup> If the power enjoyed by judges is not subject to any form of intervention, it could have grave and undesirable repercussions to judicial integrity.

Judicial independence is an aspect of separation of powers. The tenure and compensation protect judges from the legislature and executive, because this is where the danger lies. But impeachment allows the judiciary to keep its own house clean. Yet, what is most feared about control of judicial ethics is the possibility of the political branches using it to weaken

11 See: *His Worship Aggrey Bwire v. Attorney General & Another Supreme Court Civil Appeal no.8 of 2010*, the appellant was a Magistrate Grade 1. The Chief registrar acting on the directive of the Judicial Service Commission, interdicted him. The appellant was interdicted on many counts. His appeal was dismissed for lack of merit.

12 *Uganda v. Moses Ndifuna Criminal Case no.004 of 2009*, the accused a Magistrate Grade II was indicted for soliciting for gratification contrary to section 2(a) punishable under section 6(1) of the prevention of corruption Act, and for corruptly receiving a gratification contrary to section 6(1) of the prevention of corruption Act. The accused solicited for UGX 200,000/- from Senkayi Murishid an accused person who was appearing before him for trial as an inducement for the accused to give, make, or pass an order allowing Senkayi Murishid to open his business premises that had been closed by the health inspector Kakoba Division-Mbarara Municipality. *Justice Katutsi* held that: 'The behaviour of the accused brought disrespect to the noble profession...the accused could not supplement his salary by corrupt ways. The conviction will cost him his job and therefore livelihood. He was sentenced for 2 years in prison and a warning to those with greed that this cannot be tolerated.'

13 *D Keith 'Impeachment and removal of judges: An explainer'* Available: <https://www.brennancenter.org>.

14 *Garvey* (n 7).

15 *Chandler v. Judicial Council of the Tenth Circuit* 398 US 74 136 (Douglas, J dissenting).

the independence of the judiciary and judicial review. On the other hand, judges already review one another's decisions, but reviewing another's ethics entails a real threat. The next segment examines the attributes of an ideal system for impeachment of judges.

## **1.2 Attributes of an ideal system for impeachment of judges**

According to Stolz, there are four attributes of an ideal system for impeachment of judges namely: (i) free from politics and partisanship (ii) confidentiality (iii) permanent staff for investigation and informal persuasion, and (iv) procedurally fair to the judge who is being investigated.<sup>16</sup>

Smit argues that it is a long-principle that judges should not serve at the pleasure of the executive, or be subject to loss of office as a result of changes of government or legal measures that are ostensibly intended to serve other objectives.<sup>17</sup> Most Commonwealth jurisdictions protect this principle implicitly by stating that their removal mechanisms are the only valid means by which a judge may be deprived of office, and some explicitly prohibit the abolition of the office of a judge while there is a substantive holder thereof.

Therefore, judicial discipline should be protected from political influence by placing this power in the hands of carefully selected group of people, primarily retired judges of the highest courts, who are relatively free of political concerns.<sup>18</sup> The judicial system should also be free from political interference. The men assigned to screen and to investigate alleged misconduct and incompetence of judges should do so independent of influence from the ruling party. The main purpose of this is to shield the power to impeach judges from being manipulated to purge men and women whose views are inconsistent with those of the ruling party. This danger can be avoided by using officials least subject to political pressure, the use of such men, results in a cautious, non-biased and conservative administration of discipline.<sup>19</sup>

The principles of judicial independence and immunity are not a privilege of the individual judicial officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially based on the law and the evidence, without external pressure or influence and without fear of interference from anyone.

The core of the principle of judicial independence is the complete liberty of the judicial officer to hear and decide the cases that come before the courts and no outsider be it government, individual or even another judicial officer should interfere, with the way in which

16 P Stolz 'Disputing federal judges: Is impeachment hopeless' (1969) 57 California Law Review 664.

17 JV Smit 'The appointment, tenure and removal of judges under Commonwealth principles: A compendium and analysis of best practice' (2010) Report by Bingham Centre for the Rule of Law 24.

18 Garvey (n 7).

19 Steelman (n 3).

a judicial officer makes decisions.<sup>20</sup> Independence and impartiality are separate distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office. Impartiality must exist both as a matter of fact and a matter of reasonable perception. There is absolute immunity once the foregoing is adhered to.<sup>21</sup> It has been said that; “The Court’s only armor is the cloak of public trust: it is the sole ammunition, the collective hopes of our society.”<sup>22</sup>

In addition, there is a requirement of an unusual degree of confidentiality of proceeding. The purpose for secrecy is to insulate judges undergoing investigation from unfounded charges and whose service will be prejudiced by public exposure to false charges. The judge will react constructively to criticism if confident that others will not know about it. This cannot be achieved if proceedings have been publicized.<sup>23</sup>

Also, there is a need to assign discipline of judges to full time personnel, who will be able to devote the requisite time to screening and investigating alleged misconduct and incompetence. The staff would be in a position to maintain regular and informal surveillance of judges. This equally protects the discipliners of judges from political influence.<sup>24</sup>

The proceedings must be fair. The independence of the judiciary from the executive and legislature, party politics and vested interests is ensured through security of tenure and other immunities. The need to remove corrupt, negligent and otherwise unsuitable judges can be met through a robust and politically impartial judicial disciplinary and removal process.<sup>25</sup>

The judge must be given notice of the charges and an opportunity to defend themselves. This involves the right to confront their accusers and the right to present evidence on his or her own behalf in a dignified proceeding. It is against these ideals that the impeachment system in Uganda should be measured.

### 1.3 Grounds for impeachment

The constitution does not explicitly define impeachable offences. However, a judicial officer may be removed from office only for; inability to perform the functions of his or her office arising from infirmity of body or mind; misbehavior or misconduct; or incompetence.<sup>26</sup>

Under the Commonwealth Latimer House Principles 2003, African Commission on Human and People’s Rights, UN Principles on the Independence of the Judiciary, judges are

20 *R v. Beauregard LRC (const)* 180 at 188 Chief Justice Dickson.

21 *His Worship Aggrey Bwire v. Attorney General & Another Court of Appeal Civil Appeal no.9 of 2009 per Justice Mpagi-Bahigeine (as she then was.).*

22 *IR Kaufman* USCA 2<sup>nd</sup> circuit.

23 *Kaufman* (n 22).

24 *Kaufman* (n 22).

25 *Kaufman* (n 22).

26 Art. 144 (2) (a), (b), & (c) of the Constitution of the Republic of Uganda, 1995.

subject to suspension or removal only for reasons of incapacity or misconduct that clearly renders them unfit to satisfy their duties, removal from office is a very serious concern and that is why Uganda has fewer cases for impeachment of judges as compared to other countries.

The UN Basic Principles on the Independence of the Judiciary provide for the independence of the judiciary to be guaranteed by the State and enshrined in the Constitution or the law of the country. It also provides that the Judiciary, like other citizens, are entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.<sup>27</sup>

With regard to discipline, suspension and removal, the principles require that a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure.<sup>28</sup> It further requires that disciplinary, suspension or removal proceedings against judicial officers shall be determined in accordance with established standards of judicial conduct.<sup>29</sup>

It is also important that the grounds on which judges may be removed from office should be clearly discernible from the legal or constitutional framework under which they serve. The Commonwealth Latimer House Principles require these to be restricted to misconduct or incapacity.<sup>30</sup> The Judicial Service Commission is established under Article 146 (1), (2) and (3), and article 147 lays down the functions of the Judicial Service Commission, which include disciplinary control over judicial officers as well as receiving people's complaints concerning judicial officers. The commission is a link between the people and the judiciary.

The exercise of judicial power in Uganda respect to removal is governed by a Constitutional framework under which the Judiciary is an independent organ of government entrusted with the responsibility of administering justice<sup>31</sup> and other international laws and policies. To that effect it was noted in the case of *Justice Anup Singh Choudry v. Attorney General*<sup>32</sup> that the appointment of judicial officers is as matter of great public importance, and therefore that JSC and the public at large, including the ULS, should ensure that the right people are appointed to the Bench at all levels and as well as paying close scrutiny to their background before and even after appointment.

27 In Dire Straits? The state of the judiciary report (2016) 24.

28 *H/W Aggrey Bwire v. Attorney General & Another [2011] (as above)*.

29 Aggrey Bwire v. Attorney General (n 28).

30 *JV Smit*, 'The appointment, tenure and removal of judges under Commonwealth principles: A compendium and analysis of best practice' (2015) Bingham Centre for the Rule of Law 10.

31 Art 144 (2) 1995 Constitution.

32 *Civil Appeal No. 0091 of 2012*.

In Uganda, the procedure for impeachment is laid down in the Judicial Service Commission Act<sup>33</sup> and the Judicial Service Commission Regulations.<sup>34</sup> The address for the removal of a judge, whether of the Supreme Court or a High Court, can be presented to the President only on the ground of 'proved misbehavior' or 'incapacity'.<sup>35</sup>

It is further observed that the functions of the JSC are set out in *Article 144 (2)*<sup>36</sup> which provides for the removal of judicial officers who include the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a Judge of the High Court. Under the same *sub-Article*, the JSC cannot exercise disciplinary control over the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a Judge of the High Court, and the Chief Registrar or registrar. Under *Article 144 (3)*<sup>37</sup> it is only the President that can remove such judicial officer after the question of his or her removal has been referred to a tribunal appointed *on the recommendation of the JSC or the Cabinet on any ground described in Article 144*<sup>38</sup>. In analysis, the JSC is clearly empowered by the *Constitution* to recommend to the President whether a tribunal should be set up to remove a judge on the grounds of inability to perform the functions of his or her office arising from infirmity of body or mind; misbehavior or misconduct; or incompetence. Before the JSC undertakes this exercise, it must make a preliminary determination on whether to make the recommendation or not. In other words, it should find out whether a *prima facie* case exists. It is required that the impeachment proceedings should in this regard be properly recorded and documented.

According to Regulation 5, 8 (a) and (b), 9 (1)<sup>39</sup> the complaint to the JSC may be in writing or oral. If it is oral, the Secretary of the JSC is obliged to reduce it into writing. It suffices to mention that, there is no particular format for a complaint specified by law. In the case of *Justice Anup Singh Choudry v. Attorney General*<sup>40</sup>, it was noted that the procedure for removal of a judge is a two stage process; the preliminary determination that must be made by the JSC regarding whether it should make a recommendation to the President that he sets up a tribunal to consider whether a judge should be removed; and the Tribunal stage that involves the hearing of the allegations against the judge and actual determination by the Tribunal of whether he/she should be removed from office.

As the Privy Council stated in *Re Chief Justice of Gibraltar*<sup>41</sup> removal 'can only be justified where the shortcomings of the judge are so serious as to destroy confidence in

33 Chapter 14 Law of Uganda 2000.

34 Statutory Instrument No 87 of 2005.

35 *Civil Appeal No. 0091 of 2012*.

36 1995 Constitution.

37 Art 144 (2) 1995 Constitution.

38 Art 144 (2) 1995 Constitution.

39 Judicial Service Complaints and Disciplinary Proceedings Regulations 2005 (SI 88 of 2005).

40 *Court of Appeal Civil Appeal No. 0091 of 2012*.

41 [2009] UKPC 43.

the judge's ability properly to perform the judicial function'. This shows that the bar for removal is set fairly high. The Privy Council also indicated that whereas the international standards set out in the Bangalore Principles of Judicial Conduct are equally relevant to evaluating the behavior of judges, conduct falling short of those standards does not automatically constitute grounds for removal. I now turn to the challenges of judicial impeachment.

#### **1.4 Challenges of judicial impeachment**

Impeaching a judge often faces resistance and the process is very challenging. These challenges include: the highly politicized nature of the process, vulnerability of judges to systematic factors, high burden of proof, and potential of public backlash. Leaving judges vulnerable to removal for errors which are not of their own making, but may be caused by systemic factors such as excessive caseloads or inadequate administrative support is a challenge. The same considerations apply in jurisdictions where judges are liable to be removed for breach of a judicial code of ethics.<sup>42</sup> While such codes provide helpful guidance to judges on the standards of conduct that is expected of them, both within and outside the courtroom, not every breach of a code will be sufficiently serious to warrant removing a judge from office.

The interference occasioned by the executive is also another serious challenge. It should be noted that unhealthy politics in the country have remarkably affected the judiciary. There is need for an ideal mechanism for removal of judges is necessary. However, the legal framework is inefficient and should be strengthened to ensure that the impeachment process is used to penalize or intimidate dissenting judges.

In March 2021, the JSC recommended to president Museveni to cause the removal of Justice Kisaakye from the Supreme Court,<sup>43</sup> following the delivery of her dissenting judgment in one of the 2021 presidential election petitions. In that case, main opposition leader Robert Kyagulanyi Sentamu filed a petition challenging the 2021 presidential election. He sought up leave of the Court to amend the main application. The Court refused to grant the leave, holding that the application was time barred. Justice Kisaakye argued that the applicant had been deprived of his right to prepare the main application given he had been placed under illegal house arrest. During the delivery of her judgment, the Chief Justice Alfonse Owiny-Dollo, attempted to obstruct her from handing down the dissenting judgment by ordering the confiscation of Justice Kisaakye's files.

Similarly, the payment of Justice Kisaakye's salary, housing, medical and other benefits had been stopped since July 2022 on allegations absenteeism without leave since September 2021. Justice Kisaakye filed a constitutional petition challenging the acts of the JSC

42 The Uganda Code of Judicial Conduct, 2008.

43 *A Wesaka and P Delilah* 'Judicial Commission recommends removal of Justice Kisaakye' Daily Monitor Monday February 2023.

among others.<sup>44</sup> The old “idiom of who will bell the cat”, the constitutional court dreaded to carry out the dangerously risky task, due to the likely backlash from the ruling party. To date, the embattled justice still faces the betrayal, by the same institution she sacrificed her fruitful years to serve.

Inversely, the United Nations Basic Principles on the Independence of the Judiciary, provides: “all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.”<sup>45</sup> The standards include the right of a judge to a fair hearing, as guaranteed for every person under article 28.<sup>46</sup> This is reiterated by the African Charter on Human and Peoples’ Rights<sup>47</sup>, the International Covenant on Civil and Political Rights<sup>48</sup> and the Judicial Service Act<sup>49</sup> of Uganda underscore their right to a fair hearing.<sup>50</sup>

Regulation 10(1)<sup>51</sup> provides procedures to be followed by the JSC upon receiving a complaint of misconduct; “The respondent shall be served the copy of the complaint and shall be required to file a reply within fourteen days from the date of service.” Furthermore, the United Nations Basic Principles on the Independence of the Judiciary<sup>52</sup>, states that: “The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.” Salaries and other benefits of judges must not be tampered with during their tenure as judges.

With the aforesaid mayhem, justice Kisaakye decided to retire seven years earlier.<sup>53</sup> Tested against the ideal attributes of judicial impeachment, the JSC fell short. Kisaakye’s case lays a bad precedent. By ‘persecuting’ the judge, it does not contribute to the evolution of jurisprudence in the area under study. It exposes the weakness of the commission; as being partisan and politically instigated. If judges cannot get justice in Uganda, the refuge of a common man in courts remains largely uncertain. The implications

44 *Justice Esther Kisaakye v. Justice Owinyi Dollo and 5 Others Constitutional Petition of 2022.*

45 Principle 19.

46 Constitution of Uganda.

47 Art 7.

48 Art 14.

49 Cap. 91 Section 11.

50 “In dealing with matters of discipline, and removal of a judicial officer, the Judicial Service Commission shall observe the rules of natural justice; the commission shall ensure that an officer against whom disciplinary or removal proceedings are being taken is (a) informed about the particulars of the case against him or her; (b) given the right to defend himself or herself and present his or her case at the meeting of the commission or at any inquiry set up by the commission for the purpose.”.

51 Judicial Service (Complaints and Disciplinary Proceedings) Regulations.

52 Principle 11.

53 *S Kafeero ‘Justice Kisaakye draws early curtain on career’, The Observer, Friday September 01, 2023.*

of impeachment extend beyond the person of the judge involved, potentially affecting public confidence in the judiciary and the legitimacy of its decisions.

As Kaufman put it: “A glance in the mirror of public opinion cannot be faulted as a mere indulgence of professional vanity, for the judiciary as an institution cannot function without the support of the people... and this public support, in turn depends upon the people’s confidence in the fairness and reasonableness of their judiciary.”<sup>54</sup> Yet, judges must not regard political consequences, however formidable they may be. If rebellion was the certain consequence, we are bound to say, let justice be done, though the sky falls.<sup>55</sup>

## 1.5 Conclusion

Considering the foregoing discussions, the process of impeachment of judges in Uganda lies beneath the checks and balances incorporated in the Constitution. Judicial power cannot be exercised in a vacuum. Thus, impeachment serves as a necessary check on judicial power. This is because impeachment ensures that judges uphold and perform their duties with due diligence and ingenuity. Also, impeachment of judges protects the independence of the judiciary by putting stringent removal process in place. Traditionally, sanctions can include private or public admonition, reprimand, censure suspension or removal from office. Therefore, the rare invocation of this process could signify the sanctity and deliberation associated with impeachment constitutional provision.

The protection of judges from arbitrary removal, together with other guarantees of judicial independence, remains an essential element of constitutional governance in many parts of the world and Uganda is not the exception. The absence or neglect of such legal guarantees occasion serious anomaly that puts the legitimacy and efficacy of the judiciary into disrepute. The removal from office by following the due process of law means that the judiciary is responsible for preserving the professional integrity and good conduct of its own members through enforcement of criminal and disciplinary laws. Thus, impeaching judges, when performed in line with constitutional provisions as opposed to being used as a tool of ‘political persecution’, is an achievement rather than a challenge.

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<sup>54</sup> Kaufman ‘The courts and the public: A problem in communications’ 54 ABA Journal 1192 (1986) in American Bar Association & The National Judicial College ‘The Judge’s book’(1994) 2<sup>nd</sup> edition 315.

<sup>55</sup> First earl of Mansfield, (from the case of William Murray, trial of John Wilkes.

DC Steelman 'Judicial tenure and politics of impeachment-comparing the United States and the Philippines' (2018)9 *International Journal for Court Administration* 2156–7964.

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