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“LEGALITY” OF THE LEGAL ORDER IN POSTWAR SERBIA FROM 1944 TO 1946: ORGANIZATION AND WORK OF THE JUDICIARY

The judiciary in Serbia is heir to a long tradition of political influence, which was particularly visible during the communist regime after World War II. Violations of the presumption of innocence, retroactive sentencing and a denial of basic human rights are just some of the features of the work of the postwar “judiciary” in Serbia, between 1944 and 1946. This paper analyzes the implications of revolutionary legislative activity, the structure and organization of the Military Court and the Court of Honor, and examines to what extent the dominant political culture, implemented through the state coercive apparatus, influenced judicial adjudication. The paper elaborates on Radbruch’s idea of “statutory lawlessness”, Fuller’s notion of “procedural natural law” and “internal morality of law” and argues that the postwar law of communist Serbia did not exercise formal and procedural justice, and cannot be called a legal system in the full sense of the word.

Key words: *Communist Serbia. – Formal and procedural justice. – “Internal morality of law”. – Military courts. – Court of honor.*

“If one applauds the assassination of political opponents,
or orders the murder of people of another race,
all the while meting out the most cruel and degrading
punishment for the same acts committed against those of one’s own
persuasion, this is neither justice nor law.”

Gustav Radbruch

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1. INTRODUCTION

In order to institutionalize its power, each government must adopt a legal framework, establish a judiciary to adjudicate in accordance with positive regulations, and appoint law enforcement executive bodies. Despite the fact that some authorities manage to organize themselves in this way and gain a certain degree of legitimacy, from a legal point of view, their work and actions cannot be considered legal for this reason alone. An example of such a government can be found in Yugoslav history when, after World War II from 1944 to 1946, the communist regime created a normative system that did not exercise formal or procedural justice (Dajović 2017, 82). Using the judiciary for the implementation of these legal rules, the state succeeded in maintaining its (partisan) power in various areas of public and private social life. Although there are legal restrictions on such an extension of competencies, the specific social-historical context of postwar Serbia created a suitable opportunity for strengthening the executive branch, which was the embodiment of all three branches of government and enabled the application of “statutory lawlessness” (Radbruch 2006a, 1–11), based on which the government dealt with its ideological opponents.

One of the recurring themes in legal theory, which was acknowledged by the post-Nazi process of “legal overcoming of the past” in Germany, is the status of borderline, ephemeral cases of legal and political regimes, which in some significant aspects deviate from the “standard” case of minimal decent constitutional democracy. Referring to this as a “Nuremberg problem” or “the Hitler problem” (Jovanović 2013, 147), the actual dilemma is whether shortcomings of such systems were immoral to the extent that those moral deficiencies actually require that such an order is deprived of the qualification of “legal” and “legality”. This debate is still on the table, with natural law theorists approving these arguments by recognizing a bond between law and morality, and legal positivists generally still opposing this standpoint. This paper analyzes the legal and institutional framework of the postwar communist Serbia, paying special attention to the revolutionary legal rules, structure, organization and work of the judiciary, with one relevant difference: unlike the abovementioned theoretical confrontation, the paper does not question the “legality” of defeated, defective normative and institutional regime (e.g. Nazi system, fascist, or Apartheid), but rather the birth and institutionalization of the communist order in Serbia which would become solidified and present in a “different form” for the next 45 years.¹ By examining the consequences

¹ We deliberately use quotation marks saying “different form” referring to the theoretical and empirical researches showing that the communist elites in Serbia are still present, but in a different form. According to these findings, elites have converted their previous resources—specifically political and organizational capital—into economic and

of implementing revolutionary justice and judicial application of the regulations from this period, we will try to answer the following questions: in a revolutionary environment, can the judiciary do anything other than support “statutory lawlessness”? Or as Fuller once asked, in this type of social context who should “do the dirty work, the courts or the legislature”? (Fuller 1958, 649).

The paper is organized into three parts. In the first, theoretical part of the paper we critically analyze Lon Fuller’s idea of “procedural natural law” and the eight criteria for “internal morality of law”. We defend the standpoint that only law, created in compliance with these conditions, can guarantee the respect of human dignity and a correct legal procedure in accordance with the requirements of justice and morality. A similar approach could be seen in the works of Gustav Radbruch and Hanna Arendt, who warn that only legal orders that do not engage in “arbitrarily granting and withholding human rights” (Radbruch 2006b, 14), abuses and abolish democratic freedoms betraying “the will to justice” in this way, do not lack validity (Arendt 1999, 320). In the second part, we deal with the specific local social context characterized by the birth and strengthening of the totalitarian regime, during the period from 1944 to 1946, when the political structure opportunistically dealt with its ideological opponents, with the help of the courts and based on the law that did not exercise formal and procedural justice. The focal point of this paper is its third section, which encompasses the analysis of a) the normative activity of the Communist Party, through the critical assessment of the violations of the basic principles of criminal law and criminal procedure, and b) the repercussions of establishing the new, revolutionary Military Court and the Court of Honor, which ruled based on regulations that reflected the official totalitarian ideology.

2. THEORETICAL FRAMEWORK

The main characteristic of postwar Yugoslav society was its aspiration to radically abolish the existing and create a new, “righteous” social system. To this end, the public and largely private sphere (Mitrović 2005, 341–356)² were governed by an official (party-based), obligatory

political capital of a different type, which in the new capitalist order are crucial for maintaining an elite position (Lazić 2011; 2016, 57–80; Pafeto 2017, 20, 62).

² By eliminating the boundaries between the public and the private, everything that falls under individual action is subject to examination. So, the principle of *cogitationis poenam nemo patitur*—to punish a deed or a word and that no one will be punished for their opinion—was no longer relevant. There were also those who were punished for verbalizing their disagreement with some of the actions of the authorities (their thoughts) through songs, jokes and rhymes (Mitrović 2005, 341–356). See more on the “crimes of

ideology, disseminated on a massive scale by the party through the media, while the stern police organization fought against (in)visible enemies (Kuljić 1983, 154).³ Although these features meet the theoretical characteristics of Carl J. Friedrich's totalitarian dictatorship: the totalitarian regime in its developed form "did not arise from the efforts of those who created it, but from the political situation in which the anti-constitutional and anti-democratic movements and their leaders found themselves" (Kuljić 1983, 154). The postwar social context during the period from 1944 to 1946 created a political situation in which the "winners", in this case both in World War II and in the concurrent civil war, gained the support and trust of a broad section of society (the masses), which enabled them to overcome internal and external crises and establish themselves as the government (Arendt 1999, 314).

Due to the danger of "totalitarian movements using and abusing democratic freedoms in order to ultimately abolish them" (Arendt 1999, 320), legal philosopher Gustav Radbruch warned of the necessity of setting qualitative restrictions on the content of law. While witnessing the horrors of World War II, especially the crimes committed by the Nazi regime, Radbruch deviates from his initial idea – that for the sake of legal certainty bad laws should be given validity, and changes his initial idea that "everything that benefits the people is law" into "only what law is benefits the people" (Radbruch 2006b, 14). He adds that in a situation when the current regulations "deliberately betray the will to justice" or when there is arbitrariness in the (non)recognition of human rights, citizens and jurists are not required to act in accordance with such arbitrary, cruel laws and "must find the courage to deny them legal character" (Radbruch 2006b, 14; Haldemann 2005, 162–178; Jovanović 2013, 145–167; Stepanov 2012, 93–102).

Although history recalls various attempts to reduce human rights, through many historical and political struggles, they have become a part of positive modern legal systems and as such represent a criterion for establishing an (un)just society (Hasanbegović, 2016, 48–50). In other words, in liberal democracies human rights represent positivized natural

opinion" and verbal political torts, especially the judicial interpretation such as "hostile propaganda can also be carried out by singing songs (verdict of the Supreme Court of Croatia No. 1355/52); "...for public propaganda, the public is not needed. The perpetrator and another person are enough.", "...propaganda can also be carried out against one person" (Instruction of the Supreme Court of the SFRY, No. 208/52, obligatory for all courts); the crime or the possibility to committing a crime could be "known only to the prosecuting authorities" (Danilović 2002, 69, 63–72).

³ With this typology, Carl J. Friedrich tried to prove that fascist and communist totalitarian dictatorships are in fact the same. Due to the limited scope of this paper, we will not go into a detailed analysis of the differences between these two systems, but rather accept the basic typology and look for similarities with the postwar Yugoslav communist society during the period from 1944 to 1946 (Kuljić 1983, 154).

rights, self-evident legal values, supreme values, i.e. basic principles of humane society, while in an undemocratic system (authoritarian, totalitarian, etc.) the protection of these moral and political requirements is completely absent or simply proclaimed, but not implemented in the true sense of the word (Hasanbegović, 2016, 50–56; Uzelac 1992, 420–421). This purely nominal proclamation creates room for the general denial and violation of human rights as; although formally the courts are bound by such laws, *de facto* they are “tacitly” authorized to judge *contra legem* in situations where the letter of the law and political will collide.⁴

By reconciling the eternal antagonism between the school of *ius natural* and positive law, Lon Fuller takes a qualitatively different approach to analyzing the relationship between the law and morality. He believes that law is “the enterprise of subjecting human conduct to the governance of rules” and that the legal system is the product of this purposeful activity (Fuller 1969, 106). Therefore, the law—in order to be called law in the full sense of the word—cannot be completely immoral or perverted, but must contain a minimum of morality (Fuller 2011, 12). A correct legal order must respect the eight procedural and objective requirements of the “law’s internal morality” (Fuller 1969, 46–91), which are value-neutral according to the “substantive aims of the law” (Fuller 1969, 152).

Firstly, laws must be *sufficiently general*, i.e. rules must exist, and any resolution on a case-by-case basis—in order to create a general principle—would lead to legal uncertainty. Secondly, laws must be *publicly promulgated* i.e. known to the public so that citizens can a) know which rules to follow, b) criticize their content, and c) control whether the lawmakers act in accordance with them. Thirdly, laws must *not be enacted retroactively*, barring exceptional cases when some formal irregularity needs to be subsequently corrected, or in order to preserve legality. Even then, Fuller emphasizes that one should be especially careful, because the abuse or overuse of retroactivity can bring legal uncertainty.⁵ Fourthly,

⁴ Josip Broz Tito’s statement to certain judges, saying that “they should not stick to the law like a drunk sticks to the fence,” is generally well known (Uzelac 1992, 420–421).

⁵ It is important to emphasize that Fuller’s prohibition of retroactivity is initially referred to laws as a general legal acts, not to verdicts as individual legal acts. For the purpose of this paper, we do not consider that all of Fuller’s rules of internal morality apply strictly to legislation. For example, the majority of the verdicts from 1944 to 1946 were backdated, passed without any previous presentation of material evidence, and were verdicts in which the basic procedural equality of the parties was neglected. The government didn’t use a possibility of retroactivity in special cases as Fuller suggests (“as a curative measure” or “to cure irregularities of form”) (Fuller 1969, 53–54), rather to give a legal basis for sentences (mostly death) that have already been committed. In other words, there was no trial in the true sense of the word. Taking into account all of the above, this type of bringing verdicts will be treated as a *specific form of retroactivity*.

legal rules must be *clear*, written in intelligible language, but one should not at all costs strive to clarify the legal standards typical to the language of law. The fifth criterion is the consistency of the law, whereby Fuller appeals to the legislator that the adopted rules should be mutually *compatible* and free of contradictions. Sixthly, laws that require impossible (in)action from subjects are simply not feasible. Therefore, it must be *possible to obey* any given law. Seventhly, the law should be *relatively constant* and not be changed too frequently, as its consistency ensures a higher degree of legal certainty. Finally, legal rules remain mere words on paper if there is no *compatibility between the published rule and its official application*. In other words, in situations where the law is incomplete, courts have the task of eliminating this disagreement by applying the law in accordance with its obvious or apparent meaning, through the principles of interpretation and understanding of the original purpose of enactment (Fuller 1969, 33–41, 46–91).

Internal morality is a necessary, but insufficient condition for achieving legal order in the full sense of the word, i.e. procedural justice, is a precondition for the realization of material justice. As a confirmation of this idea, Fuller points out that it is difficult to find a historical example of a legislator who has abided by all eight rules of internal morality and passed a morally incorrect law that “brutal indifference to justice and human welfare” (Fuller 1969, 154). In other words, “if the basic principles of procedural justice are not realized, then the law is unjust... And an unjust law is not a law that performs the function it should have—the function to exercise justice” (Dajović 2017, 103). Therefore, in order for a law to be viewed as a typical legal system, and not as a “defective or perverted law” (Dajović 2017, 82), it must exercise formal and procedural justice.

3. SOCIO-HISTORICAL CONTEXT

In order to understand any social phenomenon, it is important to understand the time in which it was conceived and the historical circumstances that shaped it, since social phenomena are impossible to decontextualize (Flyvbjerg 2012, 61; Tamanaha 2017, 31). In the case of postwar Yugoslavia and Serbia, the local social context was closely linked to the world’s struggle against Nazism and fascism. This ideological connection conditioned the creation of people’s democracies in most communist societies, which did, in the first years of their constitution, intensively promote anti-fascism under the auspices of the fight against so-called enemies of the people and war criminals (Cvetković 2011, 33–36; Arendt 1999, 311–348).

Due to the suffering during World War II, the revolutionary communist movement in Serbia in the postwar period, starting from 1944, massively sanctioned those who (implicitly or passively) did not identify with the new official ideology (Božić 2017; Božić 2018). Upon examining all the available materials, historian Srdjan Cvetković concludes that, during the period from 1944 to 1946, the communist regime did not hesitate to hand down many death sentences (Cvetković 2006, 81–103) and that revolutionary justice (which would often grow into political violence (Heywood 2005, 219)) perpetrated through “wild cleansings” of political and class enemies of the revolution, which were carried out in strict secrecy, usually under cover of night and with no paper trail (Cvetković 2007, 74–105).

The punishment of those who “in one way or another cooperated with the occupier”⁶ initially had a non-institutional character: most trials were conducted in secrecy, usually under the control of the Department for the Protection of the People (OZNA). Verdicts were prepared in advance (unwritten, blank verdicts)⁷ or were passed retroactively in order to legalize the already committed executions of respectable citizens.⁸ The violations of basic human rights and restriction of civil and political freedoms reached their peak in the transitional period of the constitution of communist rule (so-called “liquidation of the enemies of the people 1944–1953” (Cvetković 2019)), when party leaders took over the foremost levers of power, actively participated in the direction of political trials (Danilović, 2002, 91–134), and handed down a number of death sentences without evidence or having held trials (Cvetković, Dević 2019, 57).⁹

⁶ Odluka o ustanovi suda za suđenje zločina i prestupa protiv srpske nacionalne časti [Decision on the establishment of a court for the trial of crimes and offenses against Serbian national honor]. Official Gazette of Serbia. 24 February 1945. <https://www.uzzpro.gov.rs/doc/biblioteka/bib-propisi/restitucija/5-odluka-o-ustanovi-suda.pdf>. (last visited 26 June 2020).

⁷ Unwritten “blank” verdicts of the Military Court of the Kosmaj Partisan Detachment from 1943, prepared in advance to be subsequently filled out after the execution (VA. NOVJ, k, 1642, doc. 6–1/12) and Report on sending fabricated verdicts of the Military Court of the Kosmaj Partisan Detachment, from 3 July 1944 (AC Ž, Đ-9. OKM) (Cvetković, Dević 2019, 338).

⁸ On the basis of such disorder, the “law” of postwar Yugoslavia started with the derogation of the entire legal system of the Kingdom of Yugoslavia, through the enactment of the Law on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation. With the adoption of this Law in October 1946, the representatives of the People’s Liberation War created an internal legal discontinuity between the monarchy and the Republic of Yugoslavia (Mišić 2017, 128).

⁹ This is supported by OZNA documents (Report of the Judicial Department in Croatia, from 17 January 1945), which clearly state that “The majority were liquidated without a court hearing. For some of the liquidated, our military courts were asked to make verdicts in order for them to be published, which was done...” (Cvetković, Dević 2019, 57).

Such actions were made possible through the establishment of a broad legal framework by which individuals could be labelled as “enemies of the people” and “war criminals”. This was done by expanding the jurisdictions of military courts, the OZNA and the police, by establishing the Court of Honor, which was presided over by lay people rather than trained judges, and generally by establishing functional dependency of the courts on the executive authority (Cvetković 2011, 38–39). Although “interpreters of history are children of their time” (Petranović 1988, IX), historical facts speak in favor of the thesis that this political repression had a class character and in most cases was directed towards the middle class, which consisted of entrepreneurs, intellectuals, merchants, wealthier peasants (so-called *kulaks*), priests, opposition politicians, etc. (Cvetković 2011, 36). What history has indicated—and modern historians confirmed with their findings—is that the work of the OZNA in cooperation with the courts was planned in advance and systematically carried out, and that most of the procedures conducted were “simply masking the committed crimes” (Vuković 2018, 155).

The justification and support for this treatment were consistently constructed through the cultural sphere, within which the government changed the public discourse and limited pluralism of opinions. In order to form a new and homogeneous collective identity, all official means of enforcement and propaganda (the education system, public culture, the media, national symbols), over which the state-party system largely had control during the period from 1944 to 1946, were used. The work of university teachers was carefully monitored up until the early 1950s, but also later, and their professional, ideological, political and moral characteristics were recorded in their personal files (Bondžić 2009, 200). Using the example of lawyers, even at university, students were educated in the spirit of the new ideology, whereas the transmitters of this knowledge were mainly Marxist professors who had been deemed as “suitable” (Vasiljević *et al.* 2019, 86).¹⁰ After graduating, law graduates who applied to become judges had to meet the criterion of “moral and political suitability”, while the state, i.e. the Communist Party, had the final word on their election (Zvekić 1983, 284, 366). This political instrumentalization of legal education, as well as the subsequent position and work of jurists in practice (Mavrenović 2006),¹¹ further deepened the

¹⁰ Here are some examples of descriptions used for professors of the Faculty of Law (1949) that best illustrate the spirit of this time: “Not to be considered for the position of a full professor.” “Good-intentioned and with his attitude he looks like a friend of the Party.” “He studies Marxism diligently.” “The party organization has recommended that he be removed from the faculty.” “The adoption of Marxism and Leninism is not visible.” “He can develop into a good lecturer.” (Vasiljević *et al.* 2019, 86)

¹¹ One of the documents that depicts the absurdity and hopelessness of the socio-political context of postwar Serbia is the Notice of the OZNA of the People’s Republic of Serbia, for February 1952, which analyzed the moral, professional and political suitability

difference between legal values *per se* and values interpreted in the new communist spirit.

This specific sociohistorical context contributed to the existence of an inconsistent legal order in postwar Yugoslavia, which was a consequence of the legal particularism of the Kingdom of Serbs, Croats and Slovenes, created on 1 December 1918 through the unification of states that previously had their own separate legal systems.¹² Despite intensive normative activities, by the end of World War II Yugoslav law was a mixture of new regulations and particular elements of the six original legal systems (Drakić 2008, 652–654). The first Constitution of the Federative People’s Republic of Yugoslavia (adopted in 1946 and modelled according to the Constitution of the Soviet Union, i.e. Stalin’s 1936 Constitution) abolished the separation of powers that had existed previously (Mišić 2017, 129). Although it was outlined that the courts judge independently and according to the law, judges of the Supreme, district and country courts were appointed and dismissed by the executive branch.¹³ Such an institutional arrangement was in fact only a formalization of the previously informal division of executive power during the period from 1944 to 1946.

4. NORMATIVE FRAMEWORK AND JUDICIAL PROCEEDINGS

4.1. Violations of the Basic Principles of Criminal Law and Criminal Procedure

In order to be called legal, a normative system must meet certain criteria. In particular, criminal law should not only guarantee criminal protection to the citizens, but should also protect citizens from the criminal law itself by prescribing punishable behaviors clearly and uncontraversially. This idea is embodied in the principle of legality *nullum crimen, nulla poena sine lege*, which has four components: *nulla poena sine lege*

of lawyers and concluded that they “represent one of the greatest problems of our legal service and especially the judiciary” and that it is necessary to make a great effort to raise “younger, socialist and party-loyal lawyers”. Their work was carefully monitored and described as follows: “387 lawyers are hostile in trials, or in some way harm and do not assist the court, and 245 are held loyal in trials [but most of these only take civil litigation, and avoid litigation of a political nature] and the other 146 occasionally or only formally practice law. 60 lawyers are characterized as active dissidents from the Party” (Mavrenović 2006).

¹² Specifically, in the territory of Serbia, the regulations of the former Kingdom of Serbia were valid (among other things, the Criminal Code of 1860, the Serbian Civil Code of 1844, etc.), until they were subsequently amended by the regulations of the Kingdom of Serbs, Croats and Slovenes (Drakić 2008, 645–646; Nikolić, 2004, 277–309).

¹³ The Constitution of the Federative People’s Republic of Yugoslavia, articles 116 and 121.

scripta—criminal offenses must be foreseen, precisely prescribed by the law, while unwritten law cannot be applied; *nulla poena sine lege certa*—criminal law provisions should be defined and precise in order to clearly distinguish between what is allowed and what is punishable; *nulla poena sine lege praevia*—retroactive application of the law is not allowed, barring exceptional cases when the new law is more lenient towards the perpetrator; and *nulla poena sine lege stricta*—the courts are not allowed to extend the application of the criminal law to similar cases by analogy (Kolaković-Bojović 2014, 240–242).¹⁴

It is widely known that each criminal proceeding is initiated with the aim of protecting social values, which inevitably leads to the restriction of certain human rights of the accused (Knežević 2004, 209). In order for this decision on the restriction of rights and freedoms to have legitimacy, it needs to be made in an optimal institutional environment in which the aspirations of the entire state apparatus for punishment, on the one hand, and the defense of the defendant on the other hand, are confronted before an independent judicial body. Hence, *the right to a fair trial* in a narrower sense means the creation of an equal procedural position of the opposing parties, while in a broader sense it means an independent and impartial judiciary (Knežević 2004, 210). This formal equality is of a procedural nature and as such is a requirement for resolving an impartial dispute (Dajović 2017, 103). It also implies compliance with the principle of *the presumption of innocence*, i.e. that everyone is presumed innocent until their guilt is determined by a final court decision, and that state and local self-government bodies, as well as the media, are required to not violate the rights of the accused in their public statements (Ilić 2012, 571).

For the purpose of protection the general public interest, the bodies of criminal procedure, i.e. the public prosecutor and the police, are required to objectively clarify the suspicion of the existence of a criminal offense, while the court is obliged to freely evaluate the presented evidence and establish all relevant facts concerning the criminal offense of which an individual is accused (Sijerčić-Čolić 2012, 171–172). By fulfilling the set of these requirements, the court will, in accordance with *the principle of material truth*, determine the factual situation, i.e. the “pure, extrajudicial reality” (Uzelac 1992, 420). It is evident that it is impossible for judges to be completely objective and neutral, because every “act of description by the one who describes it is also an act of evaluation” (Uzelac 1992, 424). This is especially evident in totalitarian

¹⁴ Derogation of the rule of law and vagueness of legal regulations were characteristics of the Nazi “law” in Germany, and the courts in postwar Yugoslavia also applied creative analogy (Criminal Code of 1947, Article 5, paragraph 3 “... an act which, although not explicitly specified by the law, according to the similarity of its characteristics, corresponds to a criminal act that is explicitly determined in the law ...”) (Vuković 2018, 147).

regimes where court proceedings usually have an *a priori* outcome and where the judge's task is to explain and justify a "predetermined truth" (which is actually a reflection of dominant interests and power relations (Hall 2001, 513)) (Uzelac 1992, 427).

In order to preserve its impartiality, the court, as a decision-making body, cannot be directly involved in discovering all relevant facts, i.e. it must not perform dual functions, because it would then be a witness within its own matter (Uzelac 1992, 423). This restriction is materialized through *the accusatory principle* which outlines that procedural functions are separate and should therefore be performed by different procedural subjects: the burden of proof and prosecution is on the prosecutor, the defendant is in charge of preparing their defense, while the court is in charge of adjudication. When the same person performs two functions at the same case (e.g. prosecuting and judging), the impartiality of the trial is violated (Majić 2010, 194–196). In addition to violation of the above referred legal principles, other essential legal principles such as, for example, *the right to judicial protection, the right to defense, the right to a public hearing, equal right of access to court, and equal treatment*, as well as *the right to a fair hearing* with respect to *the principle of adversarial proceedings* – are also seriously threatened under these circumstances.

In addition to the above, the postwar communist legislation abounded in vague normative formulations and "open concepts" that did not have a predetermined meaning, but were determined in each individual case by the bodies in charge (Uzelac 1992, 425). When the content of a norm is broadly and imprecisely formulated—which in legal circles is often referred to as the use of so-called "caoutchouc regulations" or "suspender paragraphs"—citizens can struggle to distinguish between illegal and permissible behavior. Apart from legal uncertainty, the consequence of such so-called *omnibus regulations* may also overlap with the components of related crimes, so the question justifiably arises as to whether in such situations one could apply the rule *ibi ius incertum, ibi ius nullum*, i.e. where the law is indefinite, it is null and void? (Kolaković – Bojović 2014, 241).

The question is whether and to what extent the postwar communist legislation, during the period from 1944 to 1946, conformed to the previously elaborated principles of legality. Although compliance with these principles helps "strengthen" and humanize the position of the defendant, the question is whether and to what extent, judges could decide impartially in the given socio-political context, taken into consideration that in most criminal proceedings the applicant was the state (that is *per se* stronger than the accused), while the role of investigative judge, who was often recruited from the ranks of former police officers in the

immediate postwar period (Majić 2010, 195), was played by an official from the state apparatus.

4.2. Military Court

In order to organize the work of the Military Court, the Supreme Headquarters of the People's Liberation Army of Yugoslavia (NOVJ) and the Partisan Detachments of Yugoslavia (POJ) passed the Decree on Military Courts on 24 May 1944.¹⁵ *Even though the authors of the Decree¹⁶ and the manner of its adoption¹⁷ were disregarded, the very content of the Decree in its key elements seriously violates the basic principles of the legal order. In addition to the criminal offenses of "soldiers, non-commissioned officers and junior officers", the jurisdiction of the Military Court was also extended to civilians. In other words, the Military Court was competent "for all acts of persons, in the territory in which war operations are carried out and where a faster court decision proves to be necessary" (Article 4). Article 5 further explains that the Military Court will also be competent "for all acts committed in occupied or temporarily abandoned territory".¹⁸ Such an extension of the jurisdiction of the Military Court was justified by the need for fast and efficient conduct of proceedings and the implementation of sanctions. The Decree further stipulates that the Military Court has the jurisdiction in proceedings for "war crimes, acts of enemies of the people and crimes of military personnel and prisoners of war" (Article 12). Such a provision seemingly befits the Military Court, i.e. it falls within its jurisdiction. However, the part that defines in detail *who falls under the definition of war criminal and enemy of the people* is described very broadly, with the exception of*

¹⁵ Uredba o vojnim sudovima NOVJ propisana 24. maja 1944. godine od vrhovnog komandanta NOV i POJ maršala Jugoslavije Josipa Broza Tita [Decree on Military Courts of the NOV of Yugoslavia prescribed on 24 May 1944 by the Supreme Commander of the NOV and the POJ, Marshal Josip Broz Tito of Yugoslavia]. Archive Signs – Database of the Second World War on the territory of Yugoslavia. 172. <http://znaci.net/arhiv/dokument/6484> (last visited 26 May 2020).

¹⁶ It is to be expected that such a serious part of the law as the prescription of incriminated behavior and the implementation of sanctions will be within the competence of the legislative power that would regulate this area within the form of laws, and not that the creator of this Decree is the executive authority.

¹⁷ The Supreme Headquarters of NOV was an entity that did not have (parliamentary) legitimacy in the sense that it was not elected in regular elections by the citizens but was formed on the initiative of its members. The first session of the Supreme Headquarters of NOV. Archive Signs – Database of the Second World War on the territory of Yugoslavia. <http://znaci.net/arhiv/odrednica/prvo-zasedanje-avnoj-a> (last visited 28 October 2020).

¹⁸ Decree on Military Courts of the NOV of Yugoslavia prescribed on 24 May 1944 by the Supreme Commander of the NOV and POJ, Marshal Josip Broz Tito of Yugoslavia.

active members of Ustaša, Chetnik and other armed units that were in the service of the enemy, it also includes “all those who betrayed the fight of the nation and were in collusion with the occupier; all those who revolt from the people’s government and act against it” (Articles 13 and 14).¹⁹

One more example of “statutory lawlessness” can be seen in Article 27, which outlines that “in establishing the truth about the actions and guilt of the accused, the court *shall not be formally bound by any means of evidence*, but makes its decision at its sole discretion.”²⁰ Although the latter part of the cited provision gives precedence to free judicial conviction as one of the elements of independent judiciary, in fact, the entire provision is in conflict with the right to a fair trial. The entire procedure is rounded up in Article 30, which prescribes the possibility of imposing the *death penalty* “by firing squad, and, in especially severe cases, by hanging,” but nowhere in the entire Decree is it exhaustively stated for which crimes and in which situations the death penalty could actually be imposed.²¹ This means that it was left to the judge’s discretion to impose the capital punishment when they deemed it justified. The repressive nature of this legislation is particularly evident in Article 17 of the Decree, which stipulates that a verdict imposing the death sentence also provides “the loss of military or civilian honor” as well as “confiscation of the convict’s property in favor of the People’s Liberation Fund”.²²

We note that the encroachment on, and the assuming of the competencies of regular courts by the Military Court, in the absence of a valid legal basis, raises reasonable doubts as to the legitimacy and real intentions of the author of the Decree (the ruling party). A broad and insufficiently precise definition of “war criminals and enemies of the people” can create room for abuse and arbitrary action, which has a direct impact on legal certainty, or the lack thereof. By taking into account that the judicial interpretation of “work against the people’s government” can be very subjective and extensive, the question arises as to why the provisions of criminal law, which by their nature restrict human rights and freedoms and require precise definition, are not defined precisely in this case. By releasing the judges from the obligation to act upon impartially presented evidence, the principle of material truth is derogated, and judges are released from all elementary legal restrictions on the passing of a judgment. The imperfection and limitation of language, the inherent vagueness of legal terms, the contextual nature of the meaning of terms and the fact that the law is often intentionally unfinished and

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

incomplete (Bovan 2014, 100–132) do not mean that judges can interpret the law outside certain legal principles (Fuller 2011: 94). This nominal support for judicial freedom can be interpreted as a euphemism for its overstepping and potential abuse.

Although it is superfluous to discuss the justification of the only sanction which, due to its irrevocable character, leaves no room for correcting possible procedural errors, annuls the right to life, and puts cruelty before humanity (Janković 1985, 12–31, 172–193), we do not rule out the possibility that the death sentence had a significant preventive effect in this transitional period, in terms of intimidating and educating the entire postwar society, which was regularly informed about occurring executions.²³ However, we believe that the absence of a precise definition of criminal offenses for which the death penalty can be imposed, as well as the nonexistence of the right to a legal remedy, is a serious violation of the principles of legality and legal security. As for the provision that allows for confiscation of property belonging to a death row inmate, the property of a convict can be legally confiscated only if it is proven in a clear and unambiguous manner, following a court proceeding, that such a property originated from a specific criminal offense. The mentioned provision is in fact *conditio sine qua non* for the abuse of criminal procedure and judicial power for political purposes, because in this way the “enemy of the people” and their family are completely deprived of material means of subsistence as well as political and civil rights. Finally, provisions that prescribe the confiscation of property, civil rights and freedoms, and even life—and thus legalize the annulment of people as legal entities—do not have the characteristics of legality (Zdravković 2018, 30, 40).

During the period between 1944 and 1946 most of these proceedings were conducted quickly, secretly, at night and according to lists prepared in advance by the OZNA. Most Military Court judgements were pre-prepared (“blank” verdicts) or written retroactively in order to create a legal basis for death penalties already carried out (Cvetković, Dević 2019, 57). “Blank verdicts” were the product of rather arbitrary and intuitive judicial decisions that were not based on clear, formal and promulgated rules. This khadi justice (*Kadijustiz*), as termed by Max Weber, was based on political postulates (Rabb 2015, 349–351; Swedberg 2005, 136–137) and contributed to the creation of a legal system that could not guarantee stability, ensure the generality of norms or provide predictability and

²³ This was also confirmed by the words of Marshal Josip Broz Tito, spoken at one of the meetings of the Central Committee in 1945: “Enough with those death sentences and killings! The death penalty has no effect anymore—no one is actually afraid of death anymore!” (Đilas, Milovan. 1990. *Revolucionarni rat*. 432–433 according to Terzić 2011). As well as “the guilty need to be found even though there are no guilty.” (Jakšić 1990, 322).

reliability in terms of human rights, because decisions were handed down *ad hoc* (Turner 2002, 48).²⁴ This “general and drastic deterioration in legality” (Fuller 1969, 40) has allowed courts to circumvent rules that should be equally relevant to those who pass them and to those to whom they apply. *Kadijustiz* and the unobstructed use of retroactivity (which Fuller allows and justifies in certain situations when it is in the general interest (“as a curative measure”) (Fuller 1969, 53–54)), which turned into its abuse, corresponded to the interests of the authorities who extended their own competencies by transferring unlimited powers to the courts.

4.3. Court of Honor

Simultaneously with the Military Court, which adjudicated for the most serious crimes, at the Great Anti-Fascist People’s Liberation Assembly of Serbia, held 9–12 November 1944, a decision was made to constitute the Court for the Trial of Crimes and Offenses against the Serbian National Honor committed in the territory of Serbia.²⁵ In line with this decision the Court of Honor was tasked with punishing “capitulators” and “rouges” who “either out of personal or social selfishness, or out of cowardice ... cooperated with the occupier, served his apparatus or rendered him services of various forms” and in that way “they betrayed their people and tarnished their national name and honor [and] caused damage and shame to the Serbian people.”²⁶ The court was organized as an independent body, based in Belgrade, with different departments throughout Serbia. This type of court (actually a lustration body) was not only characteristic for Serbia, but other countries also had them: first of all the Soviet Union, as well as France, Germany, Japan, etc. (Cvetković 2019, 358).

The Court of Honor was competent for all acts that could not be qualified as “high treason or assisting the occupier in committing war

²⁴ Although the *khadi* is a judge in the Islamic court, Max Weber uses this term very widely describing *khadi justice* as “the administration of justice which is oriented not toward fixed rules of a formally rational law but toward the ethical, religious, political, or otherwise expediential postulates of a substantively irrational law” (Bendix 1977, 400) and *khadi decisions* as “informal judgments rendered in terms of concrete ethical or other practical valuations” (Trubek 1972, 733). See more on the discrepancy between substantive-irrational (*khadi-justice*) and formal-rational justice where every judicial decision is based on the “application” of a general abstract legal rules to the concrete case (Marsh 2000, 281–285; Feldman 1991, 219).

²⁵ Decision on the establishment of the Court for the Trial of Crimes and Offenses against the Serbian National Honor.

²⁶ *Ibid.*

crimes.”²⁷ Any cooperation with the occupier and domestic treason that was of a political, propaganda, cultural, artistic, economic, administrative, legal or other character, was considered *a crime against the Serbian national honor*. To avoid difficulties in interpretation, this seemingly rather extensive provision is clarified in detail by listing possible forms of such cooperation: aiding, abetting and working in treacherous, military, political or economic organizations relevant to the occupier; ceding one’s own company to the occupier for use; all acts that gave legitimacy to the occupying power or aided their work, and undermined the people’s liberation struggle; maintaining close or friendly ties with the occupying army, “representing the interests of the occupiers before the courts; serving in the police and bureaucracy in a place especially important for the occupier”.²⁸

What is perhaps the most legally debatable is Article 2 paragraph 3, which sanctions “guilt according to the position of responsible persons from the state administration”, i.e. their “failure to make due efforts to avoid the shameful defeat and capitulation of Yugoslavia in 1941.”²⁹ What is not legally disputable is that a person can suffer sanction for both action and inaction (omission). However, what is highly controversial is the vague legal standard of “due effort” that the court would have individually assessed in each particular case. What exactly does “due effort” imply? Does effort count as every action, and is failure to make due effort more of a neutral or passive attitude? If not every action is effort, then what action counts as effort and at what point can it be considered “due effort”? As in most of the analyzed regulations, here we find a vagueness of the legal terminology (Bovan 2014, 100–132), but in this case, the lack of authentic clarification by the legislator allows for sanctions based on objective responsibility, without the defendant’s subjective guilt.

The special courts of honor were entitled to impose three types of punishment: a) a regular punishment of temporary or lifelong loss of national honor, which consisted of exclusion from public life, the prohibition of performing public functions, and loss of all civil rights, b) a punishment of light or heavy forced labor of up to 10 years, that was served in mines (Senjski Rudnik), prisons (in Sremska Mitrovica) and other similar institutions, and c) a full or partial confiscation of

²⁷ *Ibid.*

²⁸ Odluka o sudu za suđenje zločina i prestupa protiv srpske nacionalne časti [Decision on the Court for the Trial of Crimes and Offenses against the Serbian National Honor], Official Gazette of Serbia, Art. 2, para. 1 and 2). 24 February 1945. <https://www.uzzpro.gov.rs/doc/biblioteka/bib-propisi/restitucija/6-odluka-o-sudu-za-sudjenje-zlocina.pdf> (last visited 26 June 2020).

²⁹ *Ibid.*, Art. 2, para. 3.

property³⁰ Although the principles of modern criminal law require the determination of the individual responsibility of a person, consistent application of the penalty of confiscation of a defendant's property also affected their spouse, children, parents and other family members with whom they lived and who had a share in acquiring joint property. Therefore, Article 4 provides a mitigating circumstance, that during the confiscation, the "immediate family that had been left without necessary care" of the convicted person was taken into account.³¹ Consequently, a kind of collective responsibility is mitigated and responsibility for others is limited, but what legally completely derogates this provision is that confiscation of property does not refer to property acquired by a criminal offense, but to all of the convict's assets.

Furthermore, what is especially controversial is the *composition of the Court of Honor*. Of the initially appointed 27 members of the Court, only three members had legal training: one judge, one trainee judge, and one lawyer. The other members included ten farmers, two workers, two teachers and one professor, a student, a carpenter, a peasant, a colonel, a clerk, an engineer, the administrative head and two members whose occupation was not specified.³² Although it was the idea of the Presidency of the National Assembly that the presidents and secretaries of the judicial council in the districts should be professional judges, trained for this vocation, this condition was not always fulfilled. Thus, in addition to peasants, carpenters and students, this duty was entrusted to miners, housewives, bakers, tailors, blacksmiths, cobblers, etc. (Mitrović 2007, 27–28). Without any intention of going into the moral characteristics of these persons, the very nature of the vocations of the appointed members of the judicial councils disqualified them, and showed the lay character of this institution. If it is taken into account that the incompetent composition of the court violates the right to a fair trial, the question arises: what criteria were used when selecting the persons chosen for the first composition of the Court of Honor?

Unlike the Military Court, the trials and hearings of the Court of Honor were public, with the national newspaper *Politika* regularly reporting about the completed trials and convictions. Although it is sometimes difficult to distinguish between "vigorous exhortation and imposed duty" (Fuller 1969, 71), one could often hear the appeal of prosecutor Miloš Jovanović that citizens should report the enemy, because in doing so they perform their "duty and do a patriotic deed".³³ Such

³⁰ *Ibid.*, Art. 4.

³¹ *Ibid.*

³² *Ibid.*

³³ Dokumenti i knjige o Drugom svetskom ratu na teritoriji Jugoslavije i povezanim zbivanjima. *Beograd u ratu i revoluciji* (Vol. 2) – U slobodnom Beogradu do konačne

public statements by state officials aroused caution among citizens who, fearing their own denunciation and out of fear for the lives and property of their loved ones, avoided or reduced contacts with fellow citizens (Arendt 1999, 331). At the beginning the “cleansings”, and the subsequent trials of the defendants and all those who were “guilty of kinship” because they were family members or friends with the defendants, led to “atomization of the masses” which was only preparation for the creation of a classless society (Arendt 1999, 331).

Through various types of control (the University Committee, lower-level Party bodies at faculties, student organizations, the ministry in charge of higher education and science, the State Security Administration (SDB)), the Communist Party also exercised ideological and political control over university teachers and intensively worked on improving so-called ideological purity of teaching and re-education of hesitant individuals (Bondžić 2009, 204–205). Being aware of the social significance and role of the Serbian intelligentsia, the Party applied several strategies to “reshape” this social stratum: a) annihilation i.e. its repression, removal from the public sphere, b) integration of those who wanted to cooperate with the new government, c) creation of a new intelligentsia from the ranks of peasants and workers who would be in the service of the working people, and d) building a Party-loyal intelligentsia (Milićević 2007, 295–297, 304).

Therefore, along with the Court of Honor, special courts of honor were established at the University of Belgrade, the National Theater, the Military Museum, and other cultural associations and institutions. The Court of Honor at the University of Belgrade was established on 12 December 1944 with the aim of renewal of the faculty (Pantić 2015, 154–173) and more importantly to “break the fascist chains with which the occupier and traitors chained but did not stifle the University of Belgrade” (Mitrović 2009, 177). The court was chaired by the University Reconstruction Commission, which, upon its establishment, sent out a request to all professors for written statements about their own, as well as about the “work and behavior” of their colleagues (because denunciation is a “patriotic trait”?). The majority of professors (a total of 370 who passed the inspection of this lustration body) described their work and attitude during the occupation as honorable and said that they did not commit any “sin against their people or against the autonomy, tradition and interests of the University”. Despite the fact that they backed their claims with evidence, the court often acted repressively towards those who, in the opinion of the Court, were “remnants of fascism” (Aleksić 1998).

pobede. Karakteristike društveno – političkog života u oslobođenom gradu – Suđenja za zločine i prestupe protiv srpske nacionalne časti. http://znaci.net/00001/233_4.pdf (last visited 19 June 2020).

Professors who, in the opinion of the Court, lost the moral right to continue practicing as teachers, could be: a) removed from the faculty, while their case would finally be decided by the competent court outside the university, b) removed from the university, c) reprimanded and prevented from advancing for a certain period of time, or d) warned. During the period after 1945—1946, most of the convicted professors were tacitly rehabilitated, employed in other jobs or returned to teaching. However, professors who left the country and thus evaded the political persecution under the auspices of the “spiritual renewal” of the university did not receive such preferential treatment (Mitrović 2009, 177).

Although they were transitory in nature—in the sense that they existed for no more than eight months—the function of the courts of honor had an important political and educational repercussions. First of all, they discredited the bourgeoisie—mostly the “undesirable, reactionary, dishonest and unpopular” intelligentsia (Milićević 2007, 293)—who were most often the defendants. Second, they eliminated possible opposition, because the verdicts meant not only permanent or temporary loss of honor, but also a loss of all other civil rights, suffrage, right to work, pension, etc. These sanctions were accompanied by the confiscation of convicts’ property, which permanently passed into the hands of the state economy. Finally, the responsibility for criminal acts from this domain had no statute of limitations, there was no right to legal remedy and verdicts were enforceable upon passing (Mitrović 2007, 15–16). This is why it was difficult (often impossible) to preserve a minimum of human dignity, being something which “necessarily claims universal validity, applying to every human being” (Benda 2000, 452).

5. CONCLUDING REMARKS

Opinions differ significantly in regard to the 1944–1946 period in Yugoslav and Serbian history: some authors completely deny the existence of communist crimes, others “trade” with their dark numbers, some relativize them, and there are those who justify them. This revision of the past is still present, often taking the form of revisionism in terms of ideological and political “recorrecting” and changing the historical picture (Milošević 2013, 11–25), and bidding on the number of victims of the communist regime (Radanović 2013, 159). Leaving aside this hermeneutic pluralism, we may be able to agree on one issue: the critical confrontation of Serbian society with its past is the only way to overcome the remnants of this repressive heritage (Kuljić 2002, 21; Petrović 2017, 111–126; Molnar 2011, 247–261). However, previous research has shown that it is not as difficult to reconstruct historical facts (although a significant body of pertinent archival documentation is missing) as it is difficult to

reconstruct the social circumstances and ideological climate that have remained dominant to this day, in a way making it difficult to shed light on what is, in a way, a taboo topic. Therefore, this paper does not deal with the number of innocent victims—for whom we have the deepest respect—or those whom the hand of revolutionary justice “justly caught” because they cooperated with the occupier to the detriment of their people. Instead, this paper deals with a scientific, critical, objective and impartial analysis of the normative system and organization of courts, i.e. the structures and rules according to which judges made rulings in the postwar period from 1944 to 1946.

By defending Fuller’s position on “procedural natural law” and Radbruch’s notion that the meaning of the law is to serve the legal value, i.e. the idea of the law – justice, we conclude that the postwar legal framework of communist Serbia during the period from 1944 to 1946 collided with basic moral and social values that are supposed to be prevailing over any legal regulation. The ideological coloration of the revolutionary legislation, the establishment of government at the cost of eliminating (possible) political dissidents,³⁴ and a selective observation of human rights, which are the criteria for establishing an (un)just social system, indicates that the government did not give “the citizen(s) rules by which to shape their conduct, but to frighten (them) into impotence” (Fuller 1969: 40). The Party did not hesitate to exercise (and sometimes exceeded) the monopoly of physical force, while the adoption, application and implementation of “legal regulations” was also instrumentalized by it. The law was used as an *a priori* or *posteriori* means to legitimize arbitrary rule, the nominal proclamation of independent judiciary maintained the semblance of a separation of powers, and the entire judiciary and legal system served to maintain state (party) power in virtually all areas of public and private social life.

By analyzing the work of legislative and judicial entities during the period between 1944 and 1946, this paper concludes that these two types of legal institutions do not meet the formal or substantive criteria to be called laws or courts. By their nature these legal institutions have been “so unjust and so socially harmful that validity, indeed legal character itself, must be denied them” (Radbruch 2006b, 14). Judges interpreted the meaning of legal regulations quite extensively, uncritically and pragmatically (so-called “caoutchouc regulations”), and in the judicial application of these rules, the rights and freedoms of defendants were not only limited, but in most cases absolutely denied (so-called *kadijustiz*). The application of double moral requirements shows that it is not enough to nominally call something a law or a court in order for it to be one in practice, because “where equality, the

³⁴ It should be noted that “the delusion of every government, especially the totalitarian one, is that physical elimination reduces the number of enemies. In fact it produces more and more political opponents and dissidents” (Danilović 2002, 32).

core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law.” (Radbruch 2006a, 7).

Some may question the relevance of this topic or wonder why we focus on a relatively short period of revolutionary justice (that for some is long passed), considering that all the principles of minimal morality examined in the paper are nowadays positivized in the form of international human rights law. First of all, an aim of this paper is to emphasize that this type of debates between legal positivists and natural law theorists is still a hot topic to a certain extent. Furthermore, a case study like this helps us to hone our understandings of the concept of law and typical, standard cases of legality, simultaneously reminding legal positivists that borderline case deserve to be treated as special jurisprudential problems of “fidelity to law” (Fuller 1958, 630–672). Last, but not the least, it is our opinion that it is not a waste of time to reopen this dark chapter of Serbian law (or a lack thereof), but that in these difficult and unstable times for legal order, justice and human rights, such papers are more than desirable as a reminder that the law must meet a minimum of morality in order to be considered a legal order in the full sense of the word.

And, finally, having in mind that the communist regime in Serbia managed to, in a way, reshape and exist for more than 45 years, despite the fact that it was built on grounds of “statutory lawlessness”, certain important questions still seem to remain unanswered. In particular, given that the law is a specific area of social life in which the consequences of an “imperishable past” are perhaps felt the most (Molnar 2011, 250), to what extent has this—at the time revolutionary—judiciary influenced the character of today’s judiciary in Serbia? Bearing in mind that the judicial profession is inseparable from the personality of a judge, is it possible (and to what extent) for the holders of these functions to substantially change their beliefs—the very beliefs that some of them have acquired in the postwar communist education curriculum? After analyzing the legal framework, performance and organization of the judiciary in this short, but at the same time extremely relevant period, we cannot, regrettably, offer a comprehensive, scientifically sound answer. What we can do is ponder whether is it possible to rule out any possibility that this practice could be reincarnated in a similar form or under similar social circumstances. We have witnessed quite frequently that history is repeating itself, and this is why we cannot predict with absolute certainty that some future socio-political context will not rebirth old ghosts and create another (totalitarian) political system which, in its essence, will deeply negate the basic principles of law and morality, while simultaneously offering the illusion of impartial justice and separation of powers. In this respect, perhaps the words of Ernst Benda, former president of Federal Constitutional Court of Germany, could serve as a solid reminder that

“every country has to avoid being too overconfident that ‘it could not happen here’ or ‘it could not happen in our time’. One of the reasons why it did happen in Germany is that many of the population’s educated groups and classes (including a number of those who became victims because of their optimism and their confidence that it ‘could not happen here’) believed that the existing high standard of civilization and culture would prevent a totalitarian regime.” (Benda 2000, 447).

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