



CURRENT TOPICS AND THEORY OF PRIVATE LAW CODIFICATION

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ABSTRACT

Codification is a worldwide phenomenon in different fields of law; the common understanding is that it is a largely complete collection of rules. Private lawyers are confronted with civil codes, commercial codes, procedural codes, and even consumer codes. In order to understand the actual role of codification, history should provide some crucial hints.

Keywords: *philosophy of law, customary law, codification, civil law, Europe.*

1. HISTORICAL INTRODUCTION

To understand the substantial importance of codification within a legal system, above all, the terminological problems must be addressed. The word *Codex* was first used in relation to lawbooks in late Antiquity; it referred to a structured, mostly complete, collection of a certain category of laws. Originally the word *codex* was used in the modern sense to describe a bound book written on parchment, while the Latin *liber* was a papyrus-roll. It is a well-known fact that towards the end of the 3rd century, two eminent lawyers collected imperial constitutions and named these collections as *Codex Gregorianus* and *Hermogenianus*. These

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codes were private collections, extremely useful not only in teaching law but also in the courts. In 439 AD, Emperor Theodosius II ordered for such a collection of imperial constitutions since the reign of Constantine the Great (312–337 AD); thus, the *Codex Theodosianus* became a lawbook, composed by an official commission. Imperial constitutions were on the one hand decisions made by the emperor as supreme judge of the Roman Empire and on the other legal dispositions in different fields, including in private law. Both were recognised as having legal force and were called *leges* (laws). At the very beginning of his reign, Emperor Justinian (527–565 AD) entrusted his minister of justice, Tribonian, to revise the existing code. After a first attempt, the final code entered into force in 534 AD and was officially called *Codex* as we know from the constitution ‘*Cordi*’ by which it was enforced, enacted on 16 November 534 AD. The new code comprised more than 4.600 imperial constitutions from the reign of Hadrian (117–138 AD) to that of Justinian. About 400 constitutions were enacted during the first seven years of Justinian’s reign. Therefore, it is evident that more than 90% of the laws of the code had already been in force, and they had been assembled and elected to be the only applicable constitutions. Nevertheless, in these cases, we should speak of them as a compilation and not a codification, a concept that should be reserved for the assemblage of new laws. Justinian’s Code was divided into books and titles.

For many centuries thereafter, the word *codex* in the sense of a lawbook was exclusively used for the *Codex Iustinianus*. To underline the ‘imperial’ position of King Louis XIV, a part of his legislation regarding civil and criminal procedure was called by his contemporaries as ‘*Code Louis*’ in his honour, without it becoming an official name. Only in the year 1756 was a new lawbook in Europe named after Justinian’s Code as the ‘*Codex Maximilianeus Bavaricus Civilis*’, a comprehensive codification in the sense of the creation of a new legal text structured in four parts. These parts were divided into chapters (eight in the first part, eleven in the second, twelve in the third, and eighteen in the fourth part). Each chapter was further divided into paragraphs (§§).

2. PRIVATE LAW – CIVIL LAW

Private law and civil law codifications codify, ‘a Code’ (in English), ‘un Code’ (in French), ‘un Código’ (in Spanish), ‘un Codice’ (in Italian), and a ‘ein Gesetzbuch’ (in German): the modern understanding of code is a largely complete and structured legislation of a particular legal field, for example, civil law, criminal law, procedural law, commercial law, etc. It is unfortunate that there is no Code of private law when most of us assembled here are private lawyers. This leads us to a systematic and historical reflection about private law and civil law. As far as private law is concerned, the ancient Roman terminology of *ius privatum* may still be considered valid in the sense that all those legal dispositions created for regulating the personal and economic affairs of persons either as individuals or in a relationship with others may be related to the term private law. The Roman terminology of civil law on the contrary was used to refer to the sources of the law and not its content. *Ius civile* in republican times was only the law enacted by a legislative procedure through a law (*lex*). So why Civil Code? This could be because one of the most outstanding and interesting lawyers of postmedieval Europe Jean Domat (1625–1696), who, in his fundamental work ‘*Les lois civiles dans leur ordre naturel*’, gave a new order to the whole private law of the Roman Digest, a modern interpretation of its content in a modern language, and used the term ‘civil laws’ for the content of the private law he found in the famous Justinian lawbook.

3. FRANCE-AUSTRIA-GERMANY

The first modern constitution of France was established in 1791 at the end of its first title: Fundamental provisions guaranteed by the Constitution mentioned that ‘A code of civil laws common to all the kingdom shall be made’. It is well known that this project was finally entrusted to Jean Etienne Marie Portalis (1746–1807), a former practising lawyer of Aix en Provence in the summer of the year 1800, and some months later, he was able to achieve this goal. Portalis came from a part of France

where the Roman law was still in force in the form of the *lex Romana Visigothorum*, an important legislation of the Visigoth king Alarich II for the Roman population of his reign in the year 506 AD. At Aix University, the young Portalis had also been taught the Justinian lawbooks, above all, the Digest. Having actively participated in the French Revolution, Portalis was finally exiled by the directory in 1797, and he had to migrate to Germany, where he started intensively studying German philosophy, mostly Kant.¹ On finishing the first draft of his Code, Portalis explained his methodology of codification in a preliminary speech. The results and essential traits are as follows:

1. The so-called institutional system was to place, at the beginning of the code the law of persons, with the inclusion of family law, followed by real rights (rights in rem) with the inclusion of the law of successions, followed by a general part of the law of obligation with the inclusion of civil liability, followed by the special contracts, and ending with particular dispositions as prescription and usucapio.
2. Comprehensive wording: clear and simple.
3. A high level of abstraction.
4. The structure was ordered by books, titles, and articles from 1 to 2283.

The code started with very few general rules (arts. 1–6) followed by the first book:

1. book: right of persons.
2. book: On goods and the different modifications of ownership (arts. 516–710).
3. book: On the different ways to acquire ownership (arts. 711–2283), starting with succession (arts. 718–892) followed by the general part of obligations (arts. 1101–1369), quasi contracts and delicts (arts. 1370–1386), special contracts (arts. 1387–2203), expropriation (arts. 2204–2218), and prescription (arts. 2219–2283).

Most of the contents found in Domat's book on civil laws were expanded on by Portalis. He honoured his predecessor by mentioning him, the

1 Rainer, 2020, c. XXXV.

only lawyer, along with Montesquieu, in his famous preliminary speech. Thus, in March 1804, the code was enacted: the world became aware of a Civil Code with concrete content, a particular style, and a rejection of case law and judicial practice. Finally, I would like to emphasise that the author of the Code was solely responsible for thinking up the code, writing it down, and creating the ‘genre’ of the civil code. The other three members of the formally created codification commission, François Tronchet, Felix Bigot de Préameneu, and Jacques de Maleville made their contributions in the form of discussions with the team leader.

However, only a few years later, the substantial unity of private law in one code was abandoned with the enforcement of the commercial code in 1807.

As an Austrian lawyer, I should underline the fact that Portalis’s Code was not the first enacted code in a European country: in the Austrian state, in 1797, when first in the region of West Galicia, actually Krakov in Poland, and then some months later in East Galicia, actually Lwiw, Lemberg, an equally complete civil-law Book was enacted. However, it had not been given the name Civil Code (*Bürgerliches Gesetzbuch*) but was simply called Law Book (*Gesetzbuch*) although it had the same main traits as the later French Civil Code. In other words, it contained the whole private law of the Digest in the order of the Institutes of Justinian in comprehensive, simple terms and an abstract formulation of the single norms. The law book was immediately translated into the Polish language, revealing that the Austrian legislator had understood the importance of language for modernity. As in France some years later, the author was an eminent lawyer, professor, and a judge of the Supreme Court, Karl Anton von Martini (1726–1800). Franz von Zeiller (1751–1828), Martini’s successor as professor, judge, and member of the commission for legislation declared that Martini’s *Westgalizisches Gesetzbuch* should be enforced in the so-called German part of Austria (thus, not in Hungary) in 1811. Finally, in Austria too, the law book was enforced as a BGB, or as the Civil Code. It was called *Allgemeines Bürgerliches Gesetzbuch* (ABGB).² Both Martini and Zeiller were convinced that rules of interpretation should be an integral part of the code.

2 Rainer, 2020, c. XXXI–XXXII.

The ABGB is thus structured into one introduction: On the civil laws in general (§§ 1–14) and three parts: rights of persons (§§ 15–284)–rights of things (§§ 285–1341)–common provisions related to the rights of persons and rights of things (§§ 1342–1503).

The German BGB that came into force in 1900 was based on the legal science of Savigny and his followers, the historical School. This was a technical-scientific interpretation and elaboration of the content of the Roman Law sources, above all, the Digest. The results achieved by reinterpreting the Justinian lawbooks were therefore the basis for the huge manuals produced for legal education and equally for legal practice. Many professors published such manuals called *Pandektenlehrbücher*, but the most important one was by Bernhard Windscheid (1817–1892).³ Windscheid was one of the outstanding members of the first commission established by the German Bundesrat in 1874 to prepare a new German lawbook on civil law. The commission finished its work in 1887, but the publication of the draft drew a storm of criticism. A second commission had to be set up then with the inclusion of some practitioners, while the first commission had essentially comprised only theoreticians. Although they worked hard, the second draft was approved only in 1896, and finally enforced on 01 January 1900. With the new exposure of Roman law in the *Pandects* manuals, the order of the Code changed, and since the most outstanding characteristic of these books was the general part dedicated to the Legal Act (*Rechtsgeschäft*), which could be considered a huge and scholarly introduction, this very theoretical part became part of the Code that was structured into five books: 1. book: general part (§§ 1–240)/ 2. book: law of obligation (§§ 241–853) with a general part of the obligations at the beginning (§§ 241–432), followed by the special contracts (§§ 433–811), unjust enrichment (§§ 812–822), and civil responsibility-torts (§§ 823–853)/ 3. book: real rights (§§ 854–1296) starting with possession (§§ 854–872) followed by ownership (§§ 903–1011), easements (*servitutes*) (§§ 1018–1093), security rights (§§ 1113–1296)/ 4. book: family law (§§ 1297–1888)/ 5. book: succession (§§ 1922–2385). The wording became more technical and less comprehensive, but the formulation of the single paragraphs (§) is again a rejection

3 Rainer, 2020, c. XL.

of case law and judicial practice. Already, in 1897, a commercial code, HGB, had been enforced.

4. THE FOLLOWERS

Many countries worldwide had already enforced a Civil Code during the 19th century, mostly adopting the French one or adapting it. An outstanding example of one such country in Europe is Italy, which adopted a very 'French' code in 1865. Others followed during the first half of the 20th century while some others changed their Codes or rewrote them; however, the classical example remains Italy in 1942. The Italians not only recodified most of their former 'French Code', but also incorporated commercial law into the Civil Code. They did the same with the existing norms on labour law, thus creating a complete Private Law Code, but still calling it 'Codice Civile'.

Shortly after World War II, a famous Dutch lawyer Eduard Meijers convinced the government of the Netherlands to substitute the existing 'French Civil Code' with a new one based on German Pandectism. Meijers, one of the greatest lawyers of Europe of the first half of the 20th century, who had survived Nazi German imprisonment in Theresienstadt could not achieve his masterpiece, and after his death in 1954, work proceeded rather slowly.

5. A NEW ERA OF CODIFICATION

A new era in the history of codification had begun by the mid-20th century. New developments in society, economics, and technology led to a more sectorial legislation; further, an increasing number of laws in the classical field of civil laws were no longer inserted into the Codes, for example, the marriage law, in Austria. Thus, in 1979, Natalino Irti⁴ was able to write his famous book on decodification. However, European legislation soon delivered a mortal blow to codification. In general,

4 Irti, 1999.

European rules and directives remained as particular legislation, except for the Codes, and therefore the Codes no longer represented the entirety of the Private Law. However, things changed again, mostly with the fall of communism in central and eastern Europe. The option now was to reform the old-fashioned Civil Codes or create one where a civil code did not exist as an expression of national legal culture, as was the case in Hungary, the Czech Republic, Slovakia, Croatia, Estonia, Lithuania, and Slovenia. Further, an increasing number of lawyers insisted on reinserting European rules of private law into the existing civil codes. Without any compulsion, quite naturally, in Europe and elsewhere, a new wave of codifications started.

In this context, I distinguish between different models:

- 1) The Dutch Wetbook, a work balancing tradition and modernity
- 2) The renewal, an adaptation of existing Civil Codes and the creation of new ones in the former communist countries
- 3) Reform of the existing Codes
- 4) New Civil Codes of the 21st century

I shall focus on points 1, 3, and 4 as other chapters will explicitly deal with the former communist countries.

5.1. THE DUTCH CIVIL CODE ENACTED IN 1992⁵

Meijers' intent had been to change the existing French lasting civil code into a more German-Pandectist one, that is, one that is more a technical book. After a spate of discussions, finally, in 1992, a provisional draft was enacted comprising 10 books:

1. book: Natural persons and family law (arts. 1.1–1.462)
2. book: Legal persons (arts. 2.1–2. 455)
3. book: Property law in general (arts. 3.1–3.326)
4. book: Law of succession (arts. 4.1–4.233)
5. book: Real property rights (arts. 5.1–5.147)
6. book: Obligation and contracts (arts. 6.1–6.279)

5 van den Herik, Hondius, Voerman, 2022; Minke, 2021.

- 7. book: Particular contracts (civil and commercial) (arts. 7.1.–7.902)
- 7a. book not yet renewed
- 8. book: Transport law (arts. 8.1–8.1836)
- 9. book: intellectual property not yet codified
- 10. book: International Private Law (arts. 10.1–10.165)

The amazing order in the way the articles are counted within the books is an outstanding novelty that few have dared to follow. The technical aspects can be seen in many general parts and provisions; however, the most important aspects cannot be found at the beginning, as would have been useful, but only at the beginning of the third book. Finally, the code is full of cases, a true example of an exuberant case law, the most fascinating example being the single book on transports.

5.2. REFORMS OF EXISTING CODES: CODE CIVIL, CODICE CIVILE, BGB, ABGB

In all these cases, a major question was how to handle the so-called field of consumer protection with EU law. No unitarian solution had yet been found, although we do observe partial insertions either through the adaption of existing rules within or outside the codes or by the creation of a Consumer Code attached to the Civil Code (France) or not (Italy), the creation of a partial code (Konsumentenschutzgesetz in Austria), or the existence of many single laws. Partial reforms of the law of obligation have been accomplished in 2002 and 2022⁶ in Germany and in 2016 in France.⁷ The law of succession has also been the goal of various reforms, for example, in Austria in 2017.

Even if the assertion is heard often that without the reforms, the Codes would have suffered substantially, they endured due to their structure and content. The most important changes were the insertion of particular interpretations by the courts, which had become an authentic *Richterrecht*. The best example of this is the new wording of

6 Brönneke, Föhlisch, Tonner, 2021.

7 Babusiaux, Witz, 2017, pp. 496–507; Cartwright, Vogenauer, Whittaker, 2009.

an old issue, the cause, in the reform of the French law of obligation. The term 'cause' disappeared, but the presuppositions for the validity/voidness of contracts did not. So, we find in different articles terms to substitute the 'cause' terms that had been developed by the Cour de Cassation: In art. 1128 'contenu licite', in art. 1162 'but', in art. 1169 'contrepartie illusoire et dérisoire' in art. 1186 'éléments essentiels', and so on. Substituting a general concept by a fragmented terminology is bound to cause legal uncertainty and thus lead once again to new and more complex interpretations, and, therefore, not every 'reform' can be viewed as an improvement: they may also lead to a 'reformatio in peius'.⁸

Three new Codes reveal how deeply the traditions of the 19th century are still alive: Brazil 2002/3, Argentina 2014/15, China, 2021/22. I shall present here their fundamental structures.

5.3. BRAZIL (IN FORCE AS OF 2003)⁹

1. General Part: 3 books, persons, goods, legal Acts (arts. 1–232)
2. Special Part
 1. book: Law of obligation (arts. 233–965)
 - Title 1 general part (arts. 233–285)
 - Title 2 transmission of obligations (arts. 286–303)
 - Title 3 performance and extinction (arts. 304–388)
 - Title 4 non-performance, breach of contract (arts. 389–420)
 - Title 5 general part of contracts (arts. 421–480)
 - Title 6 special contracts starting with the sales contract and all the typical contracts of Roman Law and agency/transport/assurancy (arts. 481–853)
 - Title 7 negotiorum gestio / enrichment (arts. 854–886)
 - Title 8 credits (arts. 887–926)
 - Title 9 civil responsibility with a general clause art. 927 very close to the French Civil Code (arts. 927–954)

⁸ Th. Genicon, 2022, pp. 715–732.

⁹ Velasco, Filho, 2023, pp. 315–328.

Title 10 Pledge preferences and privileges (arts. 955–965)
 2. book: Company Law (arts. 966–1195)
 3. book: Real ‘things’, rights and possession (1196–1510)
 Title 1 possession (arts. 1196–1124)
 Title 2 general dispositions on real rights (arts. 1125–1127)
 Title 3 ownership (arts. 1128–1368)
 Title 4 superficies (arts. 1369–1377)
 Title 5 general dispositions on servitudes (arts. 1378–1389)
 Title 6 usufructus (arts. 1390–1411)
 Title 7 usus (Arts. 1412–1413)
 Title 8 habitatio (arts. 1414–1416)
 Title 9 right of promising purchaser (arts. 1417–1418)
 Title 10 pawn pledge (arts. 1419–1510)
 4. book: Family Law (arts. 1511–1783)
 5. book: Law of Succession (arts. 1784–2027)
 Complementary book final dispositions (arts. 2028–2046)

5.4. ARGENTINA (ENFORCED 2015)¹⁰

Titulo preliminar (arts. 1–18)
 1. book: General Part, Persons, and Legal Acts (arts. 19–400)
 2. book: Family Law (arts. 400–723)
 3. book: Obligations (arts. 724–1881)
 Title 1 general dispositions on obligations (arts. 724–956)
 Title 2 general dispositions on contracts (arts. 757–1091)
 Title 3 consumer contracts (arts. 1092–1122)
 Title 4 typical contracts and leasing, services, transports, banking contracts, assurances contracts (arts. 1123–1707)
 Title 5 other sources of obligation (arts. 1708–1881)
 4. book: Real rights (arts. 1882–2276)
 Title 1 general dispositions (arts. 1882–1907)
 Title 2 possession (arts. 1908–1940)
 Title 3 ownership (arts. 1941–1982)

¹⁰ Basset, 2018.

- Title 4 co-ownership (arts. 1983–2036)
- Title 5 horizontal ownership (arts. 2037–2072)
- Title 6 real estate complexes (arts. 2073–2113)
- Title 7 superficies (arts. 2114–2128)
- Title 8 usufructus (arts. 2129–2153)
- Title 9 usus (arts. 2154–2157)
- Title 10 habitatio (arts. 2158–2161)
- Title 11 servitudes in general (arts. 2162–2183)
- Title 12 real guaranties (arts. 2184–2237)
- Title 13 possession and ownership claims (arts. 2238–2276)
- 5. book: successions (arts. 2277–2531)
- 6. book: common dispositions between personal and real rights: pre-scription, international private law (arts. 2532–2671)

5.5. CHINA (IN FORCE AS OF 2021)¹¹

- 1. book: General part (arts. 1–204)
- 2. book: Real rights (arts. 205–462)
 - 1. part: general provisions (arts. 205–239)
 - 2. part: ownership (arts. 240–322)
 - 3. part: Ususfruct and servitudes (arts. 323–385)
 - 4. part: security interests (arts. 386–457)
 - 5. part: possession (arts. 458–462)
- 3. book: Contracts
 - 1. part: general provisions (arts. 463–594)
 - 2. part: typical contracts (arts. 495–978) starting with the sale (arts. 595–647) followed by supply and consumption of electricity, water, gas and heat, gifts, loans, suretyship, leasing, factoring, construction, transport, technological contracts, custody of property, warehousing, entrustment, property management services, brokerage, intermediary, and partnership (company).
 - 3. part: quasi contracts negotiorum gestio/unjust enrichment (arts. 979–988)

¹¹ Liu, 2023, pp. 203–222; Wang, 2023, pp. 341–364.

4. book: Personal rights including life, corporeal integrity, health, name, likeness, reputation and honour, privacy (arts. 989–1039)

5. book: Marriage and Family (arts. 1040–1118)

6. book: Succession (arts. 1119–1163)

7. book: tort liability including products, motor vehicles, medical malpractice, environment, buildings, animals, and ultra-hazardous activities (arts. 1164–1258).

A look at the three most recent codifications shows the perduring importance of codification. All the three are structured as proposed already by the French Civil Code and the German BGB. The style is more French than German, less technical, clearer, and more comprehensible. They are not a collection of case laws, and they remain abstract. They are related to the German BGB insofar as they have general parts, not as structured as the BGB, which means it is not within one compact book, but scattered in different parts. All three have adopted the German concept of Legal Act (*Rechtsgeschäft*). Finally, and I would add with some pride and astonishment, these codifications are in the central parts of patrimonial law, in the field of real rights, obligation, and succession and extremely similar to Roman Law.

Therefore, three very new and coherent Codes are rooted structurally and substantially deeply in our common legal traditions.

6. CONCLUSIONS

I am deeply convinced of the perennial importance and usefulness of codifications, and as the most recent examples have shown, they can also encompass consumer protection and commercial law, thus developing the idea for a complete codification of private law.

Creating a new code or adapting an existing one is a major intellectual exercise aimed at bringing forth a unitary book in wording, style, and structure. The importance of general parts – now often present in these codes, even those which did not initially have one – is evident in the recent codifications. Adopting, reforming, or renewing is essential in a determinate legal culture or legal system: legal science and jurisprudence must work steadily and permanently on a code to ensure that

the intellectual, economic, and social evolution of the state will be able to implement new laws based on tested experiences to produce useful and necessary changes. Legal science and internationally minded jurisprudence should be able to examine different experiences, thus starting a constant dialogue among different legal cultures. This is the enormous importance of comparative law and also a call for an in-depth study of different legal experiences, different models of codification, and the options regarding individual legislation. In a scientific way, this can be achieved only by studying languages. However, all the new or renewed codes have revealed an extraordinary bulk of legal institutes deriving from our common Roman Law heritage. In this sense, Domat was definitely right, and the evolution since the year 1700 proves convincingly that civil laws represent the *lois immuables*, or immutable laws, that need to be adopted and completed periodically but also should fundamentally remain the inexhaustible bases of the whole private law. This is also why, together with comparative law, a truly learned and scientifically operating lawyer should have the necessary knowledge of legal history, particularly of Roman law. Hence, a lifelong training in law and legal culture for judges seems the best guarantee for continuous dialogue with legal science and for keeping the codes updated. The codes as legal monoliths can be focus of primary interest of different kinds of lawyers and legal experts. This interest in the most important and all-embracing nature of all private laws will guarantee a permanent evolution of codes to serve ‘users’ in the best possible way. Many fields in the domain of civil law are interconnected, for example, family law and succession, ownership and contracts, etc. In this sense, codes play an important role in harmonising these laws with society. No single law or particular legislation can lead to such a collective interest in the entire legal system. Thus, codes are essential for social stability and human progress.

I believe that the abstract and comprehensible wording and style of the French legislation in the Code Civil, which can be found in the three recent codifications, is a true distinction of these codes and that no future codificator should insist on case laws.

My suggestion is that, in the future, a good civil code should contain

- 1) a general part or at least a general part of obligation.

- 2) the 'classical' fields real rights/obligation (consumer protection-contracts-torts-unjust enrichment) /succession/family law and an optional commercial law.
- 3) reform and adapt rules regarding interpretation essential to permit application of the codes and *à la longue* continuously through legal science and jurisprudence.
- 4) key words to permit a continuous interpretation and application of the whole in as good faith, reasonableness, and fairness (e.g., § 242/138 BGB) as may be. In this context, definitions may be helpful, but only if they are flexible enough to permit the term of exercise its functions: *omnis definitio in iure civili periculosa est* is mentioned by Modestinus in Digest 50,17,202.
- 5) a concrete and elaborate legal language appropriate to a nation's legal culture.

Finally, I am convinced that Codes are the deepest and most valuable expression of the legal cultures that rely on them. There does definitely exist more than one model within the concept 'Code' as I have demonstrated that a fruitful variety can coexist and be adapted to the exigencies of each legal system and society Civil Law or Private Law, European rules or not, abstract styling, or even cases. This variety adds an enormous richness, and each new codificatory effort is an inspiration for future reformers in other countries. Codes are the utmost and highest expression of the cooperation of legal science and legal practice, above all jurisprudence. Codes cannot exist without them and, vice versa, without a civil law science, there can be no civil code.

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