

# Constitutional and Administrative Aspects of Foreigners' Status in Spain

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## Abstract

Spain, like all of Europe, is struggling with a migration crisis in the 21st century. Although Spanish law regulates the legal and administrative situation of foreigners in quite detail, some of the norms no longer match the current geopolitical situation. The article mainly discusses the legal status of a foreigner through the prism of his fundamental rights contained in the Constitution and the Law on Foreigners, as well as problems related to the bureaucracy of the Spanish public administration system in the field of subjective rights of foreigners.

*Keywords: foreigner; Spain; migration; fundamental laws; NIE*

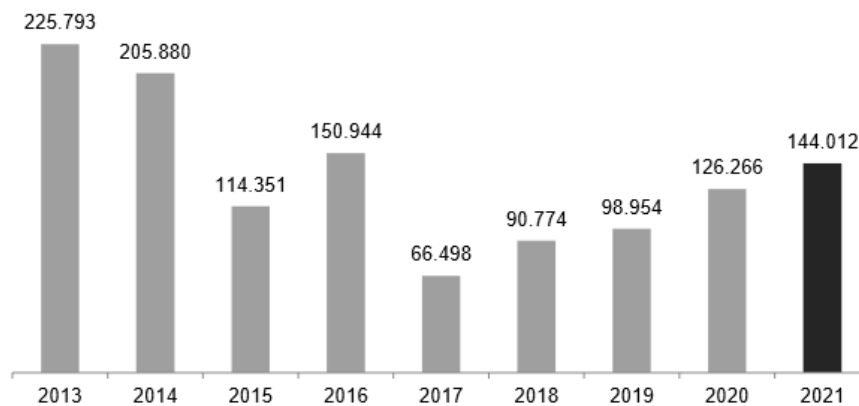
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## 1. The problem of immigration in Spain

According to the Ministry of Inclusion, Social Security and Migrations (MISSM), which deals with immigration in Spain, there were more than six million registered foreigners in Spain in mid-2022, which is more than 13% of the Spanish population in total. This number will probably increase significantly if foreigners residing in Spain illegally are included. The influx of foreigners in Spain increased at the beginning of the 21st century and is constantly increasing (Kocan 2015). The largest percentage of this number are Romanians (over 1 million), Moroccans (almost 830,000), British (over 400,000) and Italians (almost 380,000). The law of the Kingdom of Spain applies to foreigners, with some exceptions provided by private international law. However, the legal situation of citizens of the member states of European Union (EU) and European Economic Area (EEA) differs from other foreigners. Among the latter, the most numerous groups are the already mentioned Moroccans and the British, as well as the Chinese, Ukrainians, whose growth is due to the Russian-Ukrainian war, Venezuelans, Ecuadorians and Colombians. In the case of the latter, however, the number applies only to those who have only their citizenship.

In fact, there are many more Ibero-American citizens living in Spain, but many of them have dual citizenship, which is guaranteed by the Spanish constitution (Article 11.3 CE). The case of Latin-American immigration to Spain has been widely covered by Ayuso & Pinyol (ed., 2010). According to the Spanish National Institute of Statistics (INE) between 2013 and 2021, more than 1.2 million foreigners were granted Spanish citizenship. This shows how a large percentage of people with Spanish citizenship are now of non-Hispanic origin. In the figure below it is shown the number of acquisitions of Spanish nationality by foreigner residents during last years.

**Figure 1: number of acquisitions of Spanish nationality by foreigner residents (2013-2021)**



Source: [https://www.ine.es/prensa/aner\\_2021.pdf](https://www.ine.es/prensa/aner_2021.pdf)

## 2. Sources of law regarding the situation of foreigners in Spain

The legal situation of the foreigners in Spain is regulated in a number of normative acts. The seriousness with which foreigners are treated in Spain is evidenced by the fact that the protection of their fundamental rights is guaranteed in the Constitution (CE), and at the very beginning. It provides that foreigners in Spain will enjoy the public liberties guaranteed by the constitution, treaties and laws (art. 13.1 CE). This means that the application of the rights and freedoms constitutionally guaranteed to Spanish citizens extends to foreigners. However, there are exceptions to this rule – foreigners are, of course, excluded from matters related to the acquisition, possession and loss of Spanish citizenship (art. 11.1 CE), as well as from most political rights (art. 23 CE), with one exception, which will be discussed later in this article, and the right and obligation to defend Spain (art. 30 CE). In addition, the fundamental rights and freedoms of foreigners are regulated by the Organic Law 4/2000, commonly known as the Law of Foreigners (LODLEx), amended by the Organic Law 8/2000 and the Royal Decree of 2001 (RD 2001) which is the implementing act of LODLEx. Once again in this case the Spanish legislator expressed the essence of the status of foreigners by enacting in this case an organic law, which is also called a constitutional law, constituting the foundation of the state system and being higher in the hierarchy of legal acts than an ordinary law.

The problem of migration at the turn of the 20th and 21st centuries did not concern only Spain, but the entire European Union. Hence, the adoption of the above organic act was the implementation of the postulates contained at the Tampere European Council meeting in October 1999, when a number of important declarations were made in the area of migration policy and when the heads of the member states agreed to transform the EU into an area of freedom, security and justice (Kicinger & Saczuk, 2004, p. 14).

Of course, the status of foreigners in Spain is also regulated by other normative acts of the Spanish legal system. Very important regulations regarding foreigners in the field of private law are contained in the Civil Code (CC) and the Commercial Code (CCo). Those are of great importance due to all private law activities carried out by foreigners in Spain, such as the purchase or rental of real estate, car rental, setting up businesses and others.

Due to the nature of this article, however, the discourse will be limited only to constitutional and administrative issues regarding the status of a foreigner in Spain.

### 3. Legal definition of a foreigner

A foreigner, according to the Law of Foreigners, in Spain is anyone who does not have Spanish citizenship. The exception are citizens of EU Member States who are not subject to the Law of Foreigners. Their status is regulated by EU treaties, primarily the Treaty establishing the European Economic Community, the so-called Treaty of Rome, which provides for "any discrimination on grounds of nationality shall be prohibited" among Member States (art. 7 EEC Treaty), as well as freedom of movement and residence within the territory of the Member States (art. 18-21 of the EEC Treaty), limited only in justified cases for sanitary, safety or public order reasons. It is emphasized that the above-mentioned treaty grants citizens of the Member States European citizenship, which over time, apart from economic, also acquired a political and social dimension (Śledzińska-Simon 2011, p. 46). In the Spanish literature on the subject, great importance is attached to the principle of non-discrimination on the basis of origin (García Añón et al. 2013, pp. 56-73). This was also expressed by the Constitutional Court in its judgment against Rosalind Williams Lecraft and others, when it was recognized the responsibility of the Spanish state for discrimination against citizens of other countries on the basis of their race and origin (STC 2001).

In the Spanish legal system, the issue of the status of citizens of the EU Member States and EEA citizens who are not treated as foreigners according to the Organic Law of 2000 was resolved by the Royal Decree of 2007 (RD 2007). It regulates the entry, the movement and the settlement in Spain of both citizens of EU and EEA Member States. In addition, diplomatic representatives of foreign countries are excluded from the provisions of the Law of Foreigners. Other foreigners, i.e. citizens of non-EU and EEA countries, as well as stateless persons remain in Spain under the jurisdiction of the Law of Foreigners.

### 4. Fundamental rights and freedoms for foreigners in Spain

As indicated above, foreigners in Spain enjoy the same rights and freedoms as Spanish citizens. Almost all fundamental rights listed in the Spanish Constitution are also applied for foreigners. Spanish constitutional law experts divide fundamental rights into three groups: rights of a personal nature, fundamental rights of the public sphere, economic, social and cultural rights (Molas 2006, pp. 303-342). The first group includes the right to life and physical and moral integrity, which entails the prohibition of torture or punishment or inhuman or degrading treatment (art. 15 CE). In addition, the freedom of ideology, religion and worship is guaranteed to Spanish citizens without restrictions (art. 16 CE). Among the personal nature rights is situated the freedom of personal self-determination, which includes the freedom and security of a person (art. 17 CE) and the right to move freely within the national territory and to choose their place of residence, as well as the possibility of freely enter and leave Spain (art. 19 CE). Finally, Spanish citizens are the subject of rights to a personal sphere of life among which it stand out the right to honour, personal and family intimacy and one's own image (art. 18 CE).

The second group of fundamental rights are those of the public sphere. They are aimed at guaranteeing citizens' participation in the democratic system of the state (Molas 2006, p. 315). Not all of them apply equally to Spanish citizens and foreigners. Among the universal

ones that apply to all persons under the rule of Spanish law, regardless of its nationality, there are the free expression of thoughts, ideas and opinions, the protection of literary, artistic, scientific and technical creation, the academic freedom and the right to information (art. 20 CE). The right to assembly and association are also included in the list of fundamental rights in the Spanish Constitution (art. 21-22 CE) as well as the right of individual and collective petition (art. 29 CE).

The group of economic, social and cultural rights remains the most extensive among fundamental rights. Among the laws of an economic nature remains the right to private property and inheritance (art. 33 CE) and the freedom of enterprise (art. 38 CE), available to foreigners only after fulfilling the conditions provided for in the regulations on self-employment, but in accordance with the principle of equality between Spanish citizens and foreigners expressed in the Commercial Code (art. 15 CCo). Employment-related fundamental rights are available to foreigners to the same extent as to Spanish citizens, but again subject to the fulfilment of the criteria required for foreigners to take up employment in Spain, which will be discussed later in this article. The most important employee right remains the right to work. This is the principle expressed in art. 35 CE. In addition, the constitution guarantees the right to freedom of association in trade unions (art. 28.1 CE), the right to strike (art. 28.2 CE), to collective labour bargaining (art. 37.1 CE), and adoption of collective conflict measures (art. 37.2 CE). Among the most important social and economic rights listed by the Spanish Constitution remains the social, economic and legal protection of the family (art. 39 CE), the right to education (art. 27 CE), the right to health protection (art. 43.1 CE), the right to a public social security system (art. 41 CE), the right to adequate and regularly updated pensions (art. 50). The Constitution also devotes a place to effective judicial protection and fair punishment only for acts that are crimes recognized by the Spanish law (art. 24-25 CE).

Also, almost all civil rights and freedoms that the Constitution provides for Spanish citizens apply to foreigners. This concerns participation in the support of public expenditures (art. 31 CE), the right to get married on equal terms regardless of the gender of the spouses (art. 32 CE), the establishment of foundations (art. 34 CE), and also free choice of profession and professional training (art. 36 CE).

The Law of Foreigners enumerates the fundamental rights and freedoms of foreigners in Spain. The basic rule is that foreigners exercise the rights recognized by this law in conditions of equality with Spanish citizens (Article 3.1 LODLEx). Therefore, foreigners are entitled to the same rights as Spanish citizens in the broad sense of human dignity. This category includes, among others: the right to life, freedom of opinion and religion, the right to personal and family privacy (Aparicio 1994, p. 101). All of the above result from universally applicable natural human rights. In addition, foreigners residing in Spain have the right to possess identity documents (art. 4 LODLEx); the right to freedom of movement and residence (art. 5 LODLEx), the right of assembly, demonstration and association (art. 7-8 LODLEx); access to public education (art. 9 LODLEx); the right to work and to join the public social security system and access to social services (art. 10 & art. 14 LODLEx). The latter also entails the right to form trade unions and the right to strike (art. 11 LODLEx). Foreigners are entitled to public healthcare (art. 12 LODLEx). Foreigners who are residents have the right to apply for the access to public housing assistance systems (art. 13 LODLEx). Of course, foreigners are also obliged to pay the same taxes as Spanish citizens (art. 15 LODLEx). It is emphasized that the above rights are available only to foreigners whose stay in Spain has been recognized as legal (Nieto Martín 2001, p. 23).

As the above analysis shows, foreigners possess very similar fundamental rights as Spanish citizens. The exception to the rights entitled by Spaniards is the access of foreigners to political rights, which are largely reserved for Spanish citizens. Foreigners have the right to public participation, but only in the case of passive and active right to participate in municipal elections (art. 6.1 LODLEx). To obtain this prerogative, they must fulfil the obligation of registration in a given municipality, in order to then be able to participate in equal rights with Spanish citizens under the General Electoral Law (LRBRL). A precondition for the granting of municipal suffrage to foreigners is that the municipality registration of the foreigners without permanent residence authorization must be subject to periodic renewal every two years (art. 16 LRBRL). Foreigners are excluded from participation in parliamentary elections.

Similarly to participation in municipal elections, foreigners residing in a given municipality are entitled to participate in a local referendum at the municipal level (Ibañez Macías 2005, p. 73; Carrasco Durán 2013, p. 27). The participation in a referendum by foreigners at the supra-municipal level is excluded. An exception to this rule was allowing foreigners living in Catalonia to vote on the independence referendum in 2014 and in 2017. However, both referendums were declared illegal, so the situation will not constitute a precedent in Spanish electoral law (Dankowski 2017).

## 5. Entering and leaving Spain by a foreigner

One of the most important legal and administrative issues concerning a foreigner is a legal entry and exit to the territory of the host country. In order to legally cross the Spanish border, a foreigner must have a passport, validly issued and in force and cross the border in a designated place (art. 25.1 LODLEx). Minors under sixteen years of age may be included in the passport of their father, mother or guardian, when they have the same nationality as the holder of the passport and travel with it (art. 19 RD 1996). It may happen that a national identity document, identification card or any other valid document that proves the identity of the foreigner and that is considered valid for entry into Spanish territory, by virtue of international commitments assumed by Spain may be enough to enter Spain. This is the case, for example, for citizens of EU and EEA Member States (art. 4.1 RD 2007). Except in cases where the contrary is established in the international agreements signed by Spain or in the regulations of the EU, a visa will also be required for foreigners to enter into Spanish territory. Therefore, possession of a visa is the rule among the required documentation when foreigners enter Spain, but there are important exceptions to this rule. They include e.g. citizens of countries with which their deletion has been agreed, including citizens of EU Member States who, in order to cross the Spanish border, only need to have a valid identity document, i.e. an ID card or passport, and do not need a visa. The situation of foreigners who have refugee status and are documented as such is regulated in a similar way. No visa is required from members of the crews of foreign passenger and commercial ships, when they are in possession of a seafarer's identity document and also foreign commercial aircraft crew members with the appropriate documentation (Campuzano Díaz 2005, p. 137). A visa is generally obtained after submitting an application to a Spanish diplomatic mission or consulate in the country competent for the applicant's residence (art. 27.1 LODLEx). However, as rightly pointed out by Campuzano Díaz (2005, p. 137), it should be borne in mind that diplomatic missions or consulates of other EU Member States may issue a visa to a foreigner, which will also be valid in Spain.

There is a list of seven types of visa: transit, short-stay, residence, residence and work, residence and seasonal work, study, research work (art. 25 bis LODLEx). All the above documents must be valid for a minimum of three months after the expected date of departure from the Schengen Area and must have been issued within the ten years prior to the date of entry. This is an entry requirement for all Schengen countries, which results from EU regulations (REU 2016).

A foreigner may enter in Spain through transit, with the assumption that a long-stay in this country is not intended, but only to move to the territory of a third country (Rodríguez Benot & Ybarra Bores 2005). This happens, for example, in the case of a transfer between airplane flights. Foreigners who have entered the Spanish territory solely for the purpose of transit, with appropriate documentation attesting to this fact, will have to leave Spain with such documentation, and must do so within the period for which transit was authorized (art. 20.3 RD 2011).

If a foreigner intends to make a short visit to Spain for tourist or commercial reasons or wishes to visit relatives, then he has the right to stay (*estancia*) time not higher than 90 days per semester from the date of the first entry, without prejudice to the provisions for admission for study purposes, student mobility, non-labor practices or volunteer services. After this time, to stay in Spain it will be necessary to obtain an extension of stay or a residence permit (art. 30 LODLEx).

Finally, if a foreigner intends to stay in Spain for a period longer than 90 days, it is required to obtain a temporary residence permit (*residencia temporal*), lasting up to five years. A foreigner who is authorized to stay in Spain for a period of more than 90 days and less than five years is in a situation of temporary residence, without prejudice to the provisions regarding stay for studies, student mobility, internships employment or volunteer services (art. 31 LODLEx). In the case that foreign citizens do not intend to work in Spain, they are required to provide sufficient means of subsistence for themselves and for their family members if they come with them (art. 31.2 LODLEx). In order to obtain a temporary residence permit, a number of requirements specified in the Law of Foreigners must be fulfilled. First of all, the foreigner must not possess previously a criminal record, either in Spain or in third countries, for acts that remain crimes under Spanish criminal law (art. 31.5 LODLEx). Foreigners are also obliged to notify the Spanish authorities of any changes regarding their citizenship, marital status and residence (art. 31.6 LODLEx). The administrative authorities have the right to grant a temporary residence permit due to a social and working rooted situation, as well as for humanitarian reasons, collaboration with the Justice or other exceptional circumstances that are determined by any applicable regulation. In these cases, the foreigner's visa requirement is waived (art. 31.3 LODLEx).

In addition to ordinary temporary residence, the Spanish legislator also distinguished temporary and work residence (art. 31.4 LODLEx). It concerns those foreigners who come to Spain with the intention of working but not settling permanently. In 2009, a very important regulation was added to the Law of Foreigners. It concerns temporary residence and work for foreign women victims of gender violence or sexual violence (art. 31 bis LODLEx). This is related to the increasing violence against women who come to Spain from other countries and become victims of sexual violence or are forced into prostitution. The law will make it easier for such a woman to obtain the right to reside and work for exceptional reasons (Álvarez Cuesta 2023, pp. 36-37).

The initial permit of temporary residence and work will have a duration of one year and will be limited, in relation to the exercise of labour activity and except in the cases provided for by the law and international agreements signed by Spain, to a geographical area and occupation. The renewal of temporary residence and work permit must be requested, in an official form, during the 60 calendar days prior to the expiration date of the authorization. Extension of the temporary residence permit depends on issuing a positive administrative decision in this case. When considering an application for extension of a temporary residence permit, account is taken in particular of possible criminal record that took place with the foreigner's participation and fulfilment of his tax and social security obligations, as well as his efforts in the field of integration confirmed by a report issued by the Autonomous Community competent for the place of residence of the foreigner (art. 31.7 LODLEx).

If the stay of a foreigner with the intention of settling down is to be a long-term (*residencia de larga duración*), the holders of the right of permanent residence are citizens of a Member State of the EU or of a state party to the agreement on the EEA, and family members who are not citizens of one of said states, who have legally resided in Spain for a continuous period of five years (art. 32.1 LODLEx). The continuous nature of the stay is very important, because if it is interrupted, the period starts again, however, it also includes stay in other EU Member States. Of course, the deadline is not interrupted if the foreigner has temporarily left the territory of the state for holiday purposes or for other important reasons (art. 32.2 LODLEx). However, it is not possible to obtain a long-term residence permit if the same was issued in another EU Member State. In order to obtain a long-term residence permit in Spain, it is necessary to demonstrate that an own or third party account activity have been undertaken (Article 32.3 LODLEx). As Campuzano Díaz (2005, p. 164) points out, persons who can prove their special bond with Spain are excluded from the procedure of applying for a long-term residence permit. This applies primarily to residents who receive pensions recognized by the Spanish social security system; people born in Spain who have lost their Spanish citizenship for any reason; refugees who have been granted such status; foreigners who have contributed economically, scientifically or culturally to the development of Spain or its worldwide fame.

Other terms also apply to students who intend to study at Spanish universities or go there on the basis of an international student exchange, foreigners coming for non-employment internships or volunteering in Spain. Then the formalities for the entry and stay in Spain of such a person are minimized, but they are closely related to the length and nature of the purpose for which that person came to Spain (art. 33, LODLEx). Distinct provisions regulate the entry and residence in Spain of non-documented persons, undocumented persons and refugees (art. 34, LODLEx). The latter can apply for asylum under Law 12/2009 (LRDAPS), which regulates the right to asylum and the protection of refugees.

Foreigners are generally free to leave Spain at their will, except for cases provided in the Criminal Code and for important reasons of national security or public safety (art. 28.2 LODLEx). For the reasons provided for in the Criminal Code, a foreigner may be forcibly expelled from Spanish territory by a court sentence, while in other cases it is done by an administrative decision. However, there are a number of restrictions preventing the expulsion of a foreigner from Spain, such as protection of the welfare of a minor or the principle of ensuring the maintenance of family unity (Quicios Molina 2014).

## 6. Administrative prerequisites for the full exercises of rights and freedoms by foreigners in Spain

Other rights and freedoms that apply to foreigners on an equal footing with Spanish citizens may depend on their administrative situation. Any foreigner who receives a residence permit in Spain for more than six months is obliged to apply for a foreigner's identity card (*Tarjeta de Identidad del Extranjero*) within one month of crossing the state border. This does not apply to persons with a residence visa for seasonal work (art. 4.2 LODLEx). It is indicated that the above-mentioned document should be sufficient to identify a foreigner by the Spanish public administration authorities authorized to do so (Sánchez Barrilao 2002, p. 230). Often, however, in practice, a foreigner is required in addition to a document issued by the Spanish administration, also an identity document, usually a passport, from the country of origin (Lora Crovetto 2017, p. 202-203).

One of the most important duties of foreigners coming to Spain to settle or work is fulfilling the obligations imposed on the foreigner upon arrival in the Kingdom of Spain, such as reporting the stay and receiving the Foreigner's Identity Number (*Número de Identidad del Extranjero*, NIE). The standards for NIE are regulated in art. 206 (RD 2011). It provides that foreigners in whose favour a procedure is initiated to obtain a document that enables them to remain in Spanish territory other than a visa, those for whom an administrative file has been initiated by virtue of the regulations on immigration and those who are related to Spain due to their economic, professional or social interests will be provided, for identification purposes, with a personal, unique and exclusive number, of a sequential nature. This personal number will be the identifier of the foreigner, which must appear on all the documents that are issued or processed, as well as the procedures that are stamped on their passport or similar document, except for visas. Generally the NIE must be granted, *ex officio*, by the General Directorate of the Police (*Dirección General de la Policía*). Although seemingly facilitating the operation of public administration in the field of protection of foreigners' rights, it is NIE an example of the overly extensive bureaucracy of the Spanish system. Guevara i Serrano (2014, p. 152) point to the long waiting time for the NIE, which causes tax complications for the foreigner. It is no better in other areas of life in a country that only seemingly tries to be friendly and inclusive to foreigners, but in reality it is not so.

In order to take up work in Spain by a foreigner, it is also necessary to register with the compulsory social insurance (*Seguridad Social*). According to art. 1.2 (LGS) foreign citizens who have established their residence in the territory of Spain are holders of the right to health protection and health care on the same terms as Spanish citizens.

After fulfilling the above conditions, foreigners, on a par with Spanish citizens, have the right to, among others: freedom of movement, meetings and demonstrations, work and social security, join trade unions and strike. In order to work, foreigners from countries outside the EU must have a work permit.

In addition, to work, a foreigner must be at least 16 years old or 18 if want to be self-employed, obtain an authorization to stay and work in Spain, upon the application submitted by the future employer, and have a visa authorizing to at least a temporary residence and work. Citizens of the EU and EEA Member States are excluded from the obligation to have a work permit due to the principle of free movement of workers in force in the EU expressed in (RD 2007), which act was criticized by the Spanish doctrine (Ortega Giménez 2012).



## 7. Conclusions

The status of foreigners in Spain in the context of constitutional and administrative law is elaborated in detail. The extensive procedures that foreigners from outside of the EU and EEA countries, who want to settle and work in Spain are subject to are noteworthy. On the one hand, this is understandable due to the large influx of foreigners to the Iberian Peninsula in the 21st century. On the other hand, bureaucratic problems certainly do not facilitate the assimilation and inclusion of foreigners in Spanish society. The norms regarding foreigners in the Constitution of Spain are scarce. This is related to the moment when the Spanish Basic Law was passed and a completely different geopolitical situation of the world at that time. Works on extending the provisions of the Constitution regarding the status of foreigners in the Spanish legal system lasted over 20 years. LODLEx is an act amended many times, but passed at the turn of the 20th and 21st centuries, which means that many of the solutions proposed therein are outdated today and cannot keep up with the dynamically changing reality. In 2000, the European Union consisted of only 15 countries, Europe did not witness a mass influx of migrants from Africa and other parts of the world, there was no war in Ukraine. In addition, LODLEx is not fully compatible with EU rules for citizens of Member States. LODLEx was adopted in completely different times and requires consideration whether, like the Constitution of Spain, it does not need a thorough change or replacement with a new law corresponding to the contemporary political, economic and social situation of Spain in the third decade of the 21st century.

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