

How flexible are the United Nations drug conventions?☆

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There are currently three United Nations drug conventions in force: the Single Convention on Narcotic Drugs of 1961, as amended in 1972; the Convention on Psychotropic Substances of 1971 and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

All of these conventions take a clearly prohibitionist approach to the drug problem. Indeed, prohibitionist drug policies around the world have been modelled after these international conventions. The initial prototype for current drug policies was the 1912 Hague opium convention; current UN conventions only continue the approach started before World War I. There should be no doubt that the purpose of these conventions is to introduce some sort of global prohibition. Moreover, they are perceived as a serious obstacle to the reform of current drug policies, making impossible not only the legalisation of any drugs, including cannabis, but also the adoption of measures to depenalise or decriminalise consumption or implement harm reduction strategies. In other words, the UN conventions impose very serious limitations on the signatories' development of unique national drug policies. The

chances of changing this situation, repealing or substantially amending these conventions are extremely slim. However, there are still possibilities for the reform or liberalisation of current drug policies.

The most important thing to realise is that there are more than two radical solutions, full scale, 'hard' prohibition, or complete legalisation. For change to occur, we have to learn to accept not only that society will never be completely drug-free, as many anti-prohibitionists rightly stress, but also that, at least for the time being, some prohibitionist policies will remain in tact. Rather than completely dismissing prohibition, we might support some sort of 'soft' prohibition, attempting to limit and reduce the damage resulting from strict prohibitionist policies. In other words, using terminology proposed by Reuter (1992), instead of choosing between the attitudes of 'hawks' and 'doves' we should opt for the middle of the road approach of an 'owl'. There is some latitude for such an approach under the current UN conventions, even if they do not really go far enough.

From a purely legal point of view, there are at least three alternatives to full-scale prohibition. The first is complete legalisation. Such a scheme would not limit drugs to

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medical and scientific uses but rather make them fully legal substances. Thus, administrative provisions prohibiting extra-medical uses of drugs would be lifted and both supply of and demand for drugs decriminalised or made fully legal. Some administrative controls and regulations might be retained and even supported by criminal sanctions, as is currently done to control alcohol and tobacco in almost all societies. Nonetheless, the use of and trade in drugs would, under given conditions, not be prohibited. The other two approaches, depenalisation and decriminalisation, are quite similar to each other, differing only in their details. Both retain the basic principle of prohibition, the illegal status of drugs, although only supply or drug trafficking is actually subject to penal sanctions. In contrast, demand or consumption, although not necessarily legal, is not subject to criminal sanctions. In the case of depenalisation, acts related to consumption, such as possession, acquisition, or cultivation of drugs for the purpose of personal consumption remain theoretically illegal but in practice, are not criminally penalised. Criminal justice agencies usually resort to various forms of non-prosecution or expediency principles, which deem petty criminal acts unworthy of strict enforcement. Decriminalisation, on the other hand, goes a step further by specifying that such acts do not constitute criminal offences. Neither solution makes consumption or drugs legal. Drugs possessed without legal grounds may be confiscated. In addition, possession, acquisition or cultivation of drugs for personal consumption may also be subject to some sort of administrative sanctions or civil fines. Yet, only supply or drug trafficking constitutes a criminal offence; demand is treated as a purely social or medical problem. As a result, harm reduction strategies can be implemented under these systems. From an anti-prohibitionist perspective, de-

penalisation or decriminalisation of consumption constitutes a minimal requirement for a rational drug policy.

Are any of the above strategies permissible under the UN drug conventions? In answering this question, we must consider drugs in general and not just cannabis as none of the UN conventions differentiates in any way between soft and hard drugs, cannabis and other drugs. We should also understand some general things about the UN conventions. The main problem with the conventions, a problem which can be used to ones advantage, is that they are formulated in a very broad, even vague manner. This vagueness is a product of the bargains and compromises made by the parties negotiating the provisions of the conventions. In addition, the provisions must be vague so that they are consistent with the sometimes very different legal systems of signatories, an issue that is particularly relevant for the interpretation of provisions that seem to impose the criminalisation of certain behaviours. While the vague wording of the conventions may be consistent with global prohibition, it also allows for latitude in interpretation. There are many different, even contradictory interpretations, of the conventions and it is often difficult, if not impossible, to determine the 'right' one. As a result, prohibitionists usually interpret the conventions in a strictly prohibitionist way, and anti-prohibitionists always find loopholes that allow flexible or liberal solutions. Interpretation based on support for a given type of drug policy is especially common with respect to the 1988 convention. While the UN Secretary General has given official commentary on the 1961 and 1971 conventions, clearing up at least some interpretative disputes, the Secretary General is still preparing commentary on the 1988 convention, the most controversial of all the conventions.

Finally we must recognise that none of the UN drug conventions are ‘self-executing’ treaties or treaties of direct applicability. They are all ‘executory’ treaties, or treaties of indirect applicability, which means that the provisions of the treaties are implemented only by incorporating them into domestic law. Thus, interpretations of the UN drug conventions must take into account the constitutional and other legal standards of every participating country. In other words, despite the primacy of international law acknowledged by many contemporary constitutions, international law cannot be implemented and applied in an unconstitutional manner or lead to unconstitutional solutions.

We should also realise that there are some conspicuous differences in the prohibitionist approaches of the different conventions. Such differences exist between both the Single Convention and the Convention on Psychotropic substances and the Vienna Convention of 1988. These differences reflect significant changes in approach to the drug problem, which occurred between the beginning of the 1970s and the end of the 1980s. The 1961 and 1971 conventions primarily contain provisions of an administrative nature (Stewart, 1990, p. 390; Woltring, 1990, p. 19), in an effort to establish an international system for controlling the legal production of and trade in narcotics and psychotropic substances. As a result, their penal provisions are of minor importance and are always stuck at the end of the conventions. For example, the scope of required criminalisation is regulated in Article 36 of a total of 51 Articles of the Single Convention and Article 22 of a total of 33 Articles of the 1971 Convention. Moreover, as will be discussed in more detail later, both conventions require application of criminal policy measures only on the supply side of the drug problem. In contrast, the 1988 convention contains almost exclusively provi-

sions related to matters of criminal law, such as offences and sanctions, jurisdiction, extradition, confiscation of the proceeds of crime, mutual legal assistance, special investigative techniques, control of the so called precursors, etc. In addition, these criminal offences and sanctions are dealt with in one of the first provisions, namely Article 3. The importance of criminal policy measures in the 1988 Convention undoubtedly results from a shift during the 1970s and 1980s towards a US style ‘war on drugs’ (Nadelmann, 1985). Nevertheless, the crucial interpretative problem is whether 1988 convention intends to apply criminal measures to combat only drug trafficking, as its title suggests, or also demand-side issues, i.e. consumption and consumers.

Some have interpreted the 1988 Convention as a drug trafficking convention, dealing exclusively with substantive and procedural criminal measures aimed at combating the illegal supply of drugs on an international and national level (National Drug Strategy, 1994, p. 31; Woltring, 1990, p. 19; Albrecht, 1998, p. 663). This suggests no change in the general approach of the 1961 and 1971 Conventions and their differentiation of the supply and demand sides of the drug problem. Unfortunately, there is some evidence that the 1988 Convention is based on the assumption that there is no supply of drugs without demand for them, and that, as a result, the latter should be subject to criminal policy measures as well (Moffit et al., 1998, p. 132). Furthermore, the preamble to the 1988 convention states that one of the goals of the Convention is “to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances...”. This means that the 1988 convention does not constitute exclusively a supply-side convention. Rather it conceives

of ‘trafficking’ in a very broad sense that includes supply and demand. If ‘drug trafficking’ is understood in a very narrow sense, then almost certainly the two above-mentioned provisions are aberrations as all the other provisions are devoted exclusively to supply side problems. Under such an interpretation, we should doubt whether these two articles really change the entire policy approach of the two previous conventions. If however ‘drug trafficking’ is understood in a broad manner, Article 3, paragraph 2 is not so out of tune with the other provisions. The solution to this riddle is by no means easy and the argument that Article 3 is somehow misplaced in the 1988 convention cannot be completely dismissed. After all, even when assuming a broad meaning of the term drug trafficking, it is hard to deny that all other provisions are devoted to the problem of drug trafficking or supply in the narrowest sense. On the other hand, it is also clear that Article 3 cannot be dismissed.

A more detailed interpretation of these provisions of the 1988 Convention requires some analysis of the criminal law provisions of the 1961 and 1971 Conventions, in particular of the permissible drug policy options. It is clear from a legal standpoint that any form of legalisation is not permissible under the current UN conventions (Albrecht, 1998, p. 677). Such an approach would contradict the general prohibitionist spirit of these conventions and the specifics of many of their provisions. For example, Article 4, item c. of the Single Convention states that one of the tasks of the Convention is “to limit exclusively to medical and scientific purposes the production, manufacture, import, distribution of, trade in, use and possession of drugs.” The phrase ‘medical and scientific purposes’ is of crucial importance, as it expresses the essence of the prohibitionist approach to drugs. In accordance with this approach and in compli-

ance with the Conventions, countries such as Switzerland that have experimented with heroin distribution programs do so only within the framework of medical and scientific experiments.

Despite their prohibitionist approaches, the 1961 and 1971 Conventions do not stipulate the methods that should be used to implement their provisions. In this way, the Conventions are rather flexible (Woltring, 1990). As mentioned earlier, they require both the introduction and implementation of some regulatory and administrative measures on both an international and national level. They also require the introduction of certain penal measures on the national level. The requirement that criminalises certain acts and behaviours related to drugs is contained in almost identical language in Article 36, paragraph 1 of the Single Convention and Article 22, paragraph 1 of the 1971 Convention. At a first glance, this requirement seems to be quite broad and to include both supply and demand but, in fact, it is quite limited. Although these provisions require criminalisation of possession, purchase and cultivation of drugs, their official interpretation, established in commentaries prepared by the UN Secretary General, suggests that this requirement does not apply to possession, purchase or cultivation of small amounts of drugs for personal consumption (Noll, 1977, pp. 44–45). This interpretation is based on the argument that neither the Single Convention nor the 1971 Convention requires criminalisation of the consumption of drugs. Criminalisation of possession, purchase or cultivation of small amounts of drugs for the purposes of personal consumption would be tantamount to criminalising consumption itself, as it is impossible to consume drugs without prior cultivation, purchase or possession (National Drug Strategy, 1994, p. 29; Albrecht, 1998, p. 680).

The Single Convention and the 1971 Convention actually differentiate between the supply and demand side of the drug problem and limit criminal policy measures in principle to the former. This distinction between the treatment of consumers and suppliers was strengthened in 1972 when paragraph 2 of Article 36 of the Single Convention was amended. The amendment provided for treatment alternatives to punishment for drug abusers. An identical provision has been introduced as item b. of Article 22, paragraph 1 of the 1971 Convention on psychotropic substances. This approach, ‘treatment instead of punishment’ means that consumers and addicts who commit criminal offences other than possession, cultivation or purchase of drugs for personal consumption, e.g. drugs-pushing, do not necessarily have to be punished. “Parties may provide either as an alternative to conviction and punishment or in addition to punishment, that such abusers undergo measures of treatment, education, aftercare, rehabilitation and social reintegration...”

Thus, any solutions adopted in national laws short of legalising access to drugs but constituting either depenalisation or decriminalisation of consumption, are permissible under the 1961 and 1971 Conventions. Consequently, full scale decriminalisation of possession, purchase or cultivation of drugs for personal consumption introduced in the 1970s and 1980s in Greece, Italy, Poland and Spain and de facto depenalisation in Denmark and Holland (Albrecht and Kalmthout, 1988) were perfectly in accord with the letter and spirit of the Conventions. Also, the European Community adopted some drug control measures in this spirit. For example, although the second treaty of Schoengen from 1990 requires application of criminal sanctions on the supply side in Article 71, paragraph 2, the treaty does not repeat this

requirement in its discussion of demand in paragraph 5 of the same Article. It requires only, with some additional reservations, application of measures preventing and counteracting demand; the choice of such measures is left explicitly to signing parties (Albrecht, 1998, pp. 670–671).

Serious problems implementing alternatives to criminalisation of demand were introduced in the 1988 Vienna Convention, in particular because of the previously mentioned Article 3. Although paragraph 1 repeats, in slightly broader language, the provisions of Article 36 of the Single Convention and Article 22 of the 1971 Convention and explicitly states (item a.iii) that only possession or purchase with the purpose of trafficking shall be a criminal offence, paragraph 2 of the same article says that “subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.” This provision seems absolutely clear, closing the ‘loophole’ existing from the prohibitionist point of view under earlier conventions, that consumption and consumers must be criminalised.

There are two common responses to Article 3, paragraph 2 of the 1988 Convention. The first, taken by some on the anti-prohibitionist side, is to just dismiss or ignore this provision. Such an approach requires interpreting drug trafficking in its narrowest sense, exclusively related to the supply of drugs. Consequently, this interpretation suggests that the Convention does not criminalise anything on the demand side and

Article 3, paragraph 2 does not require criminalising possession, purchase or cultivation of small amounts of drugs for own consumption (Kuckelsberg, 1994). This argument is not very convincing. Although it may be strange to include provisions on demand in a convention devoted in its remaining entirety to supply, the authors of the convention seem to use the term trafficking very broadly. They treat demand as a constituent of supply. In addition, it does not make sense to interpret a provision so that it no longer binds.

On the other hand, prohibitionists claim that this provision is not subject to interpretation. It is an established rule of legal interpretation that one shall not attempt to interpret clear provisions. In such situations, interpretation may serve only some partisan purposes and not help establish the real meaning of the law. In the particular case of Article 3, paragraph 2 of the 1988 Convention, some claim that any attempt to find latitude in it amounts to ‘wishful thinking’ on the side of ‘drug liberals’ (Moffit et al., 1998, p. 132 and pp. 136–138). However, despite first impressions, this provision is by no means absolutely clear and requires some interpretation. Aside from its inconsistency with the rest of the Convention, which deals exclusively with drug trafficking in the narrowest sense of the word, this provision effectively changes the entire approach to the demand side of the two previous conventions. This change cannot be entirely dismissed and, as a result, raises the question of whether Article 3, paragraph 2 really requires criminalising demand in the same way it requires criminalising the supply side. Such a question does not amount to seeking non-existent loopholes.

To answer this question we must remember that international conventions constitute not only purely legal but also political documents. The political nature of these docu-

ments is almost certain in the area of drug policy, which involve serious disputes between consumer countries (the industrialised countries of North America and Europe) and producing countries (the developing countries of South America and Asia). From this point of view, if the 1988 Convention is treated as a purely drug trafficking convention it can be perceived as a document embodying exclusively the interests of the industrialised western nations. But Article 3, paragraph 2 of the 1988 Convention, which was introduced on the motion of the Mexican delegation, does not constitute necessarily a success of the western ‘hawks’. Rather, it was an attempt to strike a political balance between the obligations of producing and consumer countries. This implies that it is not only the duty of producing countries to suppress illicit supply, but also the duty of consumer countries to suppress their domestic demand for drugs (Albrecht, 1998, p. 681). Although attempts to achieve such balance are understandable, we must distinguish the political from the purely legal aspects of the Convention.

In this context, we must further consider why supply and demand are dealt with in separate paragraphs of Article 3? If paragraph 1, dealing with supply side activities, referred also to (i) possession or purchase and (ii) cultivation, it would have been possible to explicitly specify if it related to own consumption as well as production and distribution. Paragraph 2 would have been extraneous. Furthermore, the requirements of paragraph 2 are relative, subject to limitations resulting from constitutional principles and basic concepts of the legal system of each party, while the requirements of paragraph 1 are of an absolute, mandatory character (Stewart, 1990, pp. 392–393). It is an established rule of legal interpretation, that when a lawmaker says something twice in different ways, the meaning of both provisions must

be different. In other words, the lawmaker never repeats himself unnecessarily. Thus, the demand side requirements of the Convention are different, probably less restrictive, than the supply side requirements. Such an interpretation is strengthened by the content of other provisions of the 1988 Convention, which clearly apply different, less far-reaching rules to demand side offences. Article 3, paragraph 7 mentions that only drug trafficking shall be treated as a serious offence under the domestic law of the signatories. This suggests that although possession, purchase or cultivation of drugs for personal consumption must be criminalised, as states in paragraph 2 of Article 3, they may be treated as petty offences, e.g. misdemeanours or administrative violations. Furthermore, under the other provisions of the 1988 Convention demand side offences are not subject to many other measures. For example, they do not have to be treated as extraditable offences and are not subject to provisions on mutual legal assistance. Finally Article 3, paragraph 4, item d repeats the alternatives to criminal sanctions given in earlier conventions such as treatment for addicts committing offences. The 1988 Convention clearly offers alternative ways of dealing with persons possessing, purchasing or cultivating small amounts of drugs for own consumption. As stressed in the reports of the International Narcotic Control Board, such cases can be disposed of with non-penal measures such as treatment, counselling, etc. (National Drug Strategy, 1994, p. 31).

Thus, despite *prima facie* impressions, the 1988 Convention differentiates between supply and demand activities and applies different requirements to criminalising each of them. In other words, differences in the wording of paragraphs 1 and 2 of Article 3 result not only from “difficulties encountered by the negotiators in formulating precise defi-

nitions acceptable to differing legal systems” (Stewart, 1990, p. 393) but also from differences in substance. The question then becomes one of determining the essence of this difference and the latitude for eventual decriminalisation or depenalisation of consumption. Although the possibility of latitude should not be subject to doubt, the answer to this question is by no means easy. Moreover, it cannot be answered solely by interpreting the provisions of the Convention. As mentioned in Article 3, paragraph 2 interpretation is “subject to constitutional principles and the basic concepts of its legal system.” This statement is crucial for determining the latitude the parties to the 1988 convention have in dealing with demand. At the same time, it implies that any latitude existing under this convention does not result exclusively from the Convention but also from the constitutional and other legal principles of each country. As a result, this latitude may be different for each country, depending on the particularities of its own legal system (Albrecht, 1998, p. 678). Below are some possible solutions, although not definite answers, to the problem. This list is by no mean exhaustive.

One possible constitutional argument, which may be used to relax certain requirements of Article 3, paragraph 2, is the principle, widely accepted in the literature on criminal law, that self-destructive behaviour shall not be subject to punishment. Criminal law protects certain ‘legal values’ against encroachments by third parties, but not against those who have right to dispose of those values. This does not necessarily mean that such behaviours do not constitute social or moral problems requiring some sort of state or other intervention but rather that they shall not be dealt with as criminal offences. The best example of the application of this principle is the decriminalisation of suicide in

most contemporary criminal codes at the same time that suicide is still deemed a serious social problem. This principle can also be applied to the consumption of drugs. While some may doubt, justified or not, the right to use drugs (Husak, 1992), a rational drug policy can at once decriminalise an activity that endangers or destroys one's own health while deeming it a social or medical problem. Citizens have no duty to be healthy. This argument, although very strong from the point of view of legal theory, is problematic because it is not always constitutional. Even in countries where it is constitutional, courts may interpret it in a very narrow manner. For example, in Germany, where this principle is constitutional and was acknowledged by the Constitutional Tribunal, the Tribunal in its well known 1994 'cannabis decision' confirmed that on the basis of this principle only consumption itself shall not be punished. Activities related to preparing for consumption, such as purchase, cultivation or possession, may be legitimately criminalised, as they always involve some abstract possibility of transferring cannabis to and thereby endangering the health of others (Sommer, 1997). On the other hand, the Constitutional Court of Colombia in the same year struck down a law criminalising possession of cannabis for personal consumption, and held it unconstitutional based on arguments similar to those rejected in Germany (Ambos, 1997). Thus, the principle discussed above may be valid and strong, depending on the particularities of a given legal system. Acknowledging it may facilitate decriminalisation, although not necessarily legalisation, of consumption and consumption-related behaviours of at least some drugs.

The second possible argument that can be invoked in interpreting Article 3, paragraph 2 of the 1988 Convention is the expediency principle, and the possibilities of not prose-

cuting certain cases. A good example of a country using this principle is Holland. From a purely legal standpoint, the Dutch system is quite restrictive. It criminalises supply and demand, including the possession of small amounts of drugs for personal consumption. However, these provisions, as a result of special prosecutorial guidelines, are not enforced. The Dutch legal literature claims that this solution complies in full with the 1988 Convention, as the UN Conventions require only criminalisation of certain activities but does not dictate the scope of enforcement (Silvis, 1994). This may be true, although one has to use such arguments cautiously, as in this way any provision of any convention or any other legal act could be circumvented. It would be enough to introduce certain provisions and at the same time to forget about them. As a matter of fact, the 1988 convention seems to try do deal with this problem and to preclude eventual 'abuses' of this method in Article 3 paragraph 6. At the same time, this does not mean that expediency is not permissible at all under 1988 Convention or other UN conventions. Indeed, some forms of non-prosecution and expediency may be the best way of dealing with Article 3, allowing a more flexible approach to dealing with the demand side of the drug problem. Expediency constitutes an established element of many legal systems and thus international treaties cannot completely prohibit its application. Still, resorting to expediency cannot exceed certain limits, giving the impression that there is an attempt to completely circumvent the convention. The essence of this approach rests on the rules a given legal system has for dealing with petty offences. These rules, at least in continental legal systems, usually have a more or less codified character and are based on some sort of expediency. On the one hand, they are grounded in a purely utilitarian argument, that it does not

make sense to engage the resources of criminal justice agencies in minor cases. On the other hand, more important principles, such as the rule that there shall be certain balance between an act and its consequences, may be invoked here. In other words, criminal punishment may constitute an excessive consequence for some infractions. Based on such a principle, expediency can be used to set certain limits on the use of criminal sanctions by the state, and can be applied to both criminalising behaviours by the legislator and enforcement of laws by the criminal justice agencies. International law cannot require countries to enforce provisions on minor offences without exceptions, as such a requirement would lead to unconstitutional endeavours under many legal systems. Thus, despite the content of Article 3, paragraph 2 of the 1988 Convention, possession of small quantities of drugs for personal consumption, not for transfer to others and not endangering in any way anybody but the perpetrator her/himself, may be dealt with under the domestic law of the signatories as minor offence. In other words, it can be depenalised or decriminalised to a certain extent. This argument may be even stronger, if depenalisation or decriminalisation is limited to certain low risk drugs, like cannabis.

The problem that arises is whether depenalisation or decriminalisation should take place on a case by case basis such that criminal justice agencies have to make separate decisions about eventual dismissal, or is somehow established as a general clause in the legal system. Certainly, the second approach is much better, as in such a situation at least certain groups of drugs users cease to be targeted by the police. Holland and, to a certain extent, Denmark have taken this approach. Germany also took a similar approach, as mentioned in the discussion of the decision of the Constitutional Tribunal. Al-

though it retained in principle criminalisation of all consumption-related acts including possession of cannabis, the Court ruled that such acts should not be generally prosecuted. This is of special significance, as the German legal system adheres otherwise very strongly to the legality principle. The recent Polish solution adopted in the new drug law of 1997 is quite similar. In principle, it criminalises all forms of possession of any drugs, but it also contains a general clause that exempts from punishment possession of small amounts of drugs for personal consumption. Both the German and the Polish solutions are in perfect accord with the 1988 convention (Krajewski, 1997). With regard to this approach, it should be mentioned that in order to retain the 'spirit' of the conventions, it is better to depenalise rather than decriminalise, as was done in Spain. Although the practical effects of both approaches seem usually to be identical, decriminalisation may be more prone to charges of violating the 1988 convention (Schneider, 1992). In contrast, depenalisation retains the criminal character of the acts outlined in the Convention.

To sum up, it seems that some latitude to depenalise consumption-related activities exists even under the most restrictive of the UN conventions. Is this latitude satisfactory? From the anti-prohibitionist point of view, it may be perceived as very small, much too small. On the other hand, given the current circumstances and the predominant approach to the drug problem in UN agencies, one should be happy that there is any latitude at all. Unfortunately, implementation of more rational drug policies, including not only legalisation but also decriminalisation, would probably require amending the 1988 Convention, repealing Article 3 paragraph 2. As mentioned before, such an amendment will doubtfully occur anytime in the near future.

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