



Constitution Brief

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Summary

This **Constitution Brief** provides a basic guide to constitutional courts and the issues that they raise in constitution-building processes, and is intended for use by constitution-makers and other democratic actors and stakeholders in Myanmar.

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The MyConstitution project also provides opportunities for learning and dialogue on relevant constitutional issues based on the history of Myanmar and comparative experience.

About the author

Andrew Harding is a leading Asian law scholar working on Malaysia, Thailand and Myanmar, as well as comparative law and law and development. He is a former Director of the Centre for Asian Legal Studies and the Asian Law Institute at the National University of Singapore, where he is now based. He recently edited *Constitutionalism and Legal Change in Myanmar* (Hart Publishing, January 2017). He is currently co-editing, with Professor Albert Chen, a book on constitutional courts in Asia for Cambridge University Press.

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The Fundamentals of Constitutional Courts

Andrew Harding

1. What are constitutional courts?

A written constitution is generally intended to have specific and legally binding effects on citizens' rights and on political processes such as elections and legislative procedure. This is not always true: in the People's Republic of China, for example, it is clear that constitutional rights may not be enforced in courts of law and the constitution has only aspirational, not juridical, effects.

If a constitution is intended to be binding there must be some means of enforcing it by deciding when an act or decision is contrary to the constitution and providing some remedy where this occurs. We call this process 'constitutional review'. Constitutions across the world have devised broadly two types of constitutional review, carried out either by a specialized constitutional court or by courts of general legal jurisdiction. There are however many variations on each model, and some systems are even said to be 'hybrid'.

A constitutional court (sometimes called a 'constitutional tribunal' or 'constitutional council') is a special type of court that exercises only the power of constitutional review. It is defined by Alec Stone Sweet as 'a constitutionally-established, independent organ of the state whose central purpose is to defend the normative superiority of constitutional law within the juridical order'. In other words, its role is to review laws, and usually also executive acts and decisions, to decide whether they are constitutionally valid and provide a remedy in cases where they are not. It exercises this power exclusively: no other court or body can engage in constitutional review. Bodies of this kind exist in about 85 countries around the world—that is, a majority of countries that have a system of constitutional review.

Since constitutional courts exercise exclusive jurisdiction over constitutional matters, this system is often called the 'centralized' system of constitutional review. It also called the 'European' system given that it was invented by the Austrian legal scholar Hans Kelsen and is found in European states such as Austria, Germany, Italy and Spain, and those influenced by them, such as Colombia, Russia, Republic of Korea, Turkey and Taiwan.

This centralized system contrasts with systems in which constitutional review is carried out by a court with general jurisdiction over all questions of civil, criminal and public law—not just constitutional questions. In such systems, any court can engage in constitutional review. Typically in this system the power to decide constitutional questions with finality lies with the highest (apex) court, usually the supreme court, indicating its primacy over other courts. Since this latter

Box 1. Constitutional courts and abstract review

Constitutional courts are often empowered to decide on abstract questions. For instance, a constitutional court may have power to examine the constitutionality of a law before it is passed. A group of members of parliament, for example, may be able to bring a case on this basis, alleging a potential violation of individual rights or democratic process, without any concrete application of the law to examine. This is impossible in a diffused system, which recognizes concrete review rather than abstract review.

system is not centralized and was prominently developed in the United States, it is sometimes called the ‘diffused’ or ‘American’ system. Examples may also be seen in Argentina, Australia, Canada, India, Japan and the Philippines.

Most countries that have a constitutional court also have a supreme court, but the latter does not have jurisdiction over constitutional questions. Constitutional courts, unlike courts of general jurisdiction, do not preside over civil or criminal litigation. Furthermore, unlike general courts they are often empowered to decide abstract questions that do not arise as a set of facts giving rise to a specific or ‘concrete’ legal dispute between parties (see Box 1).

Most states with a constitutional court have created it (or have dramatically reformed an existing institution, as in Taiwan) as part of a constitution-making or constitutional-reform exercise within the last 30 years. The constitutional court is usually seen as an essential mechanism to achieve and entrench democratic reforms, such as instituting multiparty democracy. States that have created constitutional courts have done so largely because they see the court as a necessary guardian of democratic institutions, constitutionalism and fundamental rights following a period of military dictatorship or totalitarian government.

Accordingly, unlike the generality of courts in a diffused system, constitutional courts are specifically charged with deciding political questions—although, obviously, they have to do so with great care and judgement. In general, constitutional courts have decided cases in such a way as to encourage democratic politics and dialogue between different organs of the state. As multiparty democracy and constitutional government have diffused globally, most constitution-makers have preferred the centralized model to the diffused model of constitutional review. Consequently, in the 1990s the centralized model already well established in Western Europe spread rapidly across Eastern and Central Europe, West Africa, South America, East Asia and elsewhere.

Constitutional courts are more typical of civil law countries than common law countries. Most European and Asian countries use the civil law system. In the British Commonwealth, which consists almost entirely of common-law countries, the diffused model is almost universal (South Africa is a notable exception). Francophone West African and Middle Eastern countries invariably use the centralized model. Some civil law countries (e.g. Japan) use the diffused system, while some common law countries (e.g. Myanmar) use the centralized system.

Prominent and influential examples of the centralized system around the world include Colombia, France, Germany, Indonesia, Republic of Korea, Spain and Taiwan (all civil law countries), and South Africa (which displays a mix of common and civil law). However, not all civil law countries use the centralized system (Argentina, Japan and Sweden, for example, do not). Prominent examples of the diffused system include the Australia, Canada, India, Malaysia, Nigeria, the United Kingdom and the United States (all common law countries). The United Kingdom does not have a unified written constitution, but its high courts and newly reformed supreme court decide questions of constitutional significance.

The main motivation in establishing a constitutional court is to create a strong and specialized judicial-type body capable of enforcing a new constitution or a new constitutional deal. Reforming an existing apex court or giving it powers of constitutional review, as in the diffused system, has not generally been considered adequate to the task. A major and influential example is Germany’s Federal Constitutional Court, established in 1949 under the post-war Basic Law. However, constitutional courts have also played an important part in encouraging elements of democratization, even under authoritarian regimes (e.g. in Egypt both before and after the Arab Spring).

2. What are the powers of constitutional courts?

Apart from exercising exclusive jurisdiction over constitutional questions, there are in fact virtually no powers that all constitutional courts have in common (apart

from the constitutional review of legislation, and even this power is variable in its scope and effect). Nevertheless, contemporary constitutional courts possess the following four main types of power:

1. *Constitution-drafting jurisdiction (controlling the constitution itself):*
 - adjudicating issues arising in the constitution-making process; and
 - reviewing the constitutionality of constitutional amendments (e.g. as in Niger, Senegal and South Africa)
2. *Judicial review of legislative acts (controlling the legislature):*
 - reviewing the constitutionality of laws in advance of legislation (*ante factum*);
 - reviewing the constitutionality of laws after legislation (*ex post facto*);
 - reviewing the constitutionality of decisions by the legislature; and
 - initiating or requiring legislation
3. *Jurisdiction over officials and agencies (controlling the executive):*
 - reviewing the constitutionality of executive actions and decisions;
 - hearing impeachment proceedings against holders of public office;
 - consideration of criminal or civil cases in respect of official corruption;
 - consideration of qualifications of individuals to hold or continue to hold public office;
 - adjudication of appointment of office-holders under the constitution;
 - adjudication of disputes as to the competence of organs of state; and
 - adjudication of disputes between organs of state
4. *Jurisdiction over political parties and elections (controlling elections):*
 - adjudication of the dissolution or merger of political parties and control over constitutionality of their actions;
 - examining the legality of elections and election results at any level; and
 - hearing electoral petitions

No constitutional court possesses all four of these powers. The list simply denotes the range of possible choices constitutional designers may face. Note also that in some systems (e.g. in France, Germany and Indonesia) there are separate, specialized administrative courts, which exercise exclusive jurisdiction over the legality of administrative (executive) actions and decisions, including delegated (or subsidiary) legislation (i.e. regulations and orders). In these systems, the administrative court rather than the constitutional court usually determines the constitutionality of acts, decisions and laws made by executive powers. This may be problematic, as an interpretation of the constitution by the constitutional court may not in practice enjoy finality: that is, the administrative court may disagree.

In exercising its jurisdiction, especially under the second power described above, an important aspect of the work of a constitutional court is to provide a remedy where a law or executive action violates fundamental or human rights.

3. How are constitutional court judges selected?

The selection of constitutional judges is a highly problematic and potentially controversial area. Given the political importance of the constitutional court, there is much interest in who is selected, what the qualifications for selection are, and who has the power to select. As may be seen from the selection of United States Supreme Court justices, these questions may also arise in diffused systems. The problem is how to ensure that no person or group controls areas of uncertainty in constitutional interpretation by dominating or orchestrating the selection process in their favour. Again, practice varies enormously across contemporary constitutional courts. One obvious point unique to constitutional judges is that the system for their selection does not resemble that for ordinary judges. The latter are career judges normally appointed until retirement and enjoying independence in terms of protection of their tenure, salaries and pensions. Constitutional judges are

Box 2. Examples of constitutional court selection mechanisms

Selection by the executive and the legislature

In the Czech Republic 15 judges are appointed for a renewable term of 10 years; the President makes appointments with the approval of the Senate.

Selection by the legislature

Germany's Federal Constitutional Court consists of two 'Senates', each having eight judges whose terms amount to 12 years. Four judges in each Senate are elected by each of the Bundestag (lower house) and Bundesrat (upper house). Each appointment must be supported by two-thirds of the members of the relevant house.

Selection by the executive, the legislature and the judiciary

The Italian Constitutional Court consists of 15 judges who each serve a nine-year term. Five are appointed by the President, five are elected by parliament and five elected by the ordinary and administrative supreme courts.

Selection by a special commission

In South Africa the president is required to act in harness with the Judicial Services Commission (JSC) in first appointing the Chief Justice and Deputy Chief Justice, but then the JSC also provides nominees for the other appointments to the court. To limit the politicization of the process the president, after exercising a duty to consult, cannot simply reject nominees without submitting reasons, and any such rejection requires the JSC and not the president to submit a supplemental list of names.

selected for the task appropriate to a specialized court, normally for a fixed term (amounting to 3, 6, 9 or sometimes 12 years), with shorter terms being renewable only once. We can divide selection mechanisms into four categories (see Box 2 for examples), plus one smaller category.

1. *Selection by the executive and the legislature.* One of the most widely adopted approaches divides the task of selection between the executive and legislative organs of the state. Typically, such a process involves nomination by the president but appointment requires approval from the legislature. Prior to a confirmation by ballot, confirmation hearings often provide democratic scrutiny by allowing examination of the personal suitability and ideological stances of potential candidates. As seen in the United States, these hearings are prone to become highly politicized, especially if the political persuasion of the president differs from that of the governing party in the legislature.
2. *Selection by the legislature.* The legislature may be solely responsible for making the final selection. Again, such an approach introduces a central element of democratic scrutiny, but clearly a simple majority would result in only the nominees of the ruling party being appointed. In order to prevent this from happening, nominations will often require approval by a 'supermajority', for example two-thirds (Germany) or three-fifths (Spain). This ensures that opposition parties have some say in selections.
3. *Selection by the executive, the legislature and the judiciary.* Another alternative is to give to each of the three branches of the state (e.g. the president, both houses of the legislature and senior judges) the power to nominate a specified quota of the constitutional court's membership (as occurs in Italy, Republic of Korea and Indonesia). A danger here might be a divided panel where judges may be sympathetic to the institutional interest that selected them. In Myanmar, judges are even required to report to the institution that appointed them. This model has the great merit of tending to avoid controversy over choosing the selection mechanism and over the individual candidates. It can thereby forestall the possibility of one branch of the state dominating the selection process.
4. *Selection by a special commission.* In many systems, a commission (as in South Africa) or specially dedicated selection committee (as in Thailand) makes an important contribution to the selection process before the candidates are finally endorsed. An obvious problem with these systems is deciding who should be qualified to sit on the commission and what method of selection would prevent this body becoming a forum for elected politicians. One approach has been to professionalize the membership by reserving a majority of places to serving judges and members of the legal profession. The leader of the opposition is sometimes required to be a member.
5. *Appointment by the executive.* In a small number of cases, the appointments are completely within the powers of the executive branch. This is not recommended, as it gives the executive the power to control the constitutional court through the appointment system.

Rules about qualifications also vary, and the selection process will usually result in the selection of highly qualified lawyers, former officials, political figures or legal scholars, who are not career judges but have sufficient standing and credibility. By contrast, ordinary judges are usually selected from the ranks of legal practitioners (in common law systems) or are career judges (in civil law systems). In Thailand, it has been accepted that some judges may be selected from the ranks of academic social or political scientists, but these are balanced by judges selected directly from the ordinary or administrative judiciary.

In general, constitutional court judges have a fixed term which may or may not be renewable once. Therefore, their tenure does not depend on executive approval of their performance. This insulates them from external pressure and protects their independence.

Box 3. Constitutional interpretation

An accused person may argue that the law justifying the charge against him is invalid because it is unconstitutional. A case where the prosecution brings a charge against somebody based on a law that was passed after the accused's relevant acts would fall into this category.

4. Who can bring a case to a constitutional court?

Cases may come before a constitutional court in different ways. The rules of standing to refer a case vary across the various models of constitutional court. There are essentially four different types of reference to a constitutional court.

1. *Official reference.* Here, the constitutional court hears a case referred directly by a named official or agency such as the speaker, the ombudsman, the president, the corruption commission, the human rights commission, the election commission or other independent agency. In some cases, such a person or body may be able to bring a case on behalf of an individual or group of persons.
2. *Legislative reference.* Here, a member or stated number or proportion of members of the legislature, or of either house thereof, may bring a petition to the court.
3. *Judicial reference.* Here, a court hearing a civil or criminal case refers an issue of constitutional interpretation to the constitutional court, and is usually bound by the latter's opinion on that issue when the matter is referred back to the court (see Section 5).
4. *Individual direct petition.* In such a case every citizen (or possibly even every legal person, including foreigners, non-governmental organizations and companies) has standing to raise a constitutional question before the constitutional court (e.g. actual or potential violation of her/his or another's constitutional rights). This may include a civil society organization bringing a case as public interest litigation. Whether a constitutional court will allow standing to challenge a law will depend on whether individual petitions are allowed at all and sometimes the substance of the issue raised will be relevant.

Cases falling under categories 1, 2 and 4 might involve purely abstract review (see Section 1); but in cases falling under category 3 there will be a current concrete dispute between parties that is before a court of law. In this latter type of case, questions of constitutional interpretation may arise incidentally in the course of criminal or civil proceedings (see Box 3).

5. What is the relationship between the constitutional court and the ordinary courts?

Referrals by judges raise issues concerning the relationship between the constitutional court and the ordinary courts. Constitutional courts do not adjudicate in ordinary civil or criminal litigation. Normally the judge in the ordinary civil or criminal court will frame and refer to the constitutional court the question that has arisen, and will need to be satisfied that the constitutional issue is material (i.e. will affect the outcome) and that there is a real doubt as to the constitutionality of the law or decision involved. The constitutional court will then decide the question, and the matter is then returned to the court from which it came. The judge will then decide the criminal or civil matter at hand by applying the judgment of the constitutional court. In such cases, the constitution or the law creating the constitutional court will specify the procedure and powers involved.

This situation can become very complicated. What if, for example, the judge wrongly decides that no constitutional question arises, or frames the constitutional question misleadingly, or decides wrongly that the constitutional argument is highly unlikely to succeed and therefore refuses to refer the matter? Will the ordinary courts in effect decide the constitutional question? What if the constitutional court disagrees? Constitutional court decisions are normally supposed to be final, and therefore binding on all other organs of state, including the ordinary courts. But what if the constitutional court has no opportunity to

Box 4. Advantages of having a constitutional court

A constitutional court is typically set up in order to provide a strong enforcer for a new constitution (e.g. as in Germany in 1949, Italy in 1956 or South Africa in 1996) or far-reaching constitutional changes (e.g. Indonesia in 2003). This task may be given to the higher courts in a diffused system (e.g. as in Japan in 1946, or the Philippines in 1987). Where this is not done, it may be because the existing judiciary has a poor record in constitutional interpretation or enforcement. In the South African case the Constitutional Court played an important role in the transition from the interim (1993) to permanent (1996) constitution.

decide the question due to obstruction by the ordinary courts?

Practice and principle differ greatly on these issues. Some systems incorporate a judicial discretion to refer a case to the constitutional court, while others make such reference mandatory. Conflict between the constitutional court and the ordinary judiciary is not unheard of. Often the ordinary judiciary considers that it, not the constitutional court, should have been given the power of constitutional review and may assert its powers in an unhelpful manner. In some jurisdictions, such as Italy, the ordinary courts are still able to assert a constitutional role, albeit by acting within the interstices between constitutional and general jurisdiction.

6. What sort of procedure is to be expected and what actual verdicts and remedies do constitutional courts have at their disposal?

A preliminary issue here is how far the constitutional court has discretion over these matters, and to what extent the constitution or the organic law establishing the constitutional court predetermines them.

Process in constitutional courts is rendered relatively simple by the fact that there is usually neither a trial of facts nor an appeal process. The constitutional court may initially have to determine whether a petition is properly framed or that the person petitioning has the right to do so. In the early stages of development, a constitutional court may have to make many decisions of this kind until the main principles have been asserted and widely understood. For example, it may be a question of whether NGOs have standing to apply to the court; or how abstract or concrete a case may have to be; or in what precise circumstances a judge may or must refer a question to the constitutional court.

Practice also varies regarding the delivery of judgments. In many civil law jurisdictions, judgments tend to be short and factual, with little reasoning to explain the decision. Some systems allow individual and even dissenting judgments, while others allow only a decision of the court as a whole.

Remedies stem from a finding of unconstitutionality. While it might seem obvious that such a finding simply invalidates the law or act or decision in question, in fact there is much doctrinal technicality around the issue of what choices are open to constitutional courts in this situation. For example, in some systems the constitutional court has discretion to suspend the operation of a judgment nullifying a law, allowing the legislature space to address the problem. Successful constitutional courts appear to enjoy flexibility in the granting of remedies (as in Germany and Italy).

7. What are the advantages and disadvantages of having a constitutional court?

Advantages

A constitutional court is typically set up in order to provide a strong enforcer for a new constitution (see Box 4). A constitutional court provides the easiest way to achieve finality and uniformity in constitutional interpretation which may not be forthcoming in a diffused system, where different courts at the same or different levels may decide on a different interpretation of the constitution. In diffused systems, finality and uniformity are only achieved where the highest court hears an appeal and decides in a way that binds lower courts according to the doctrine of precedent (courts are bound by the decisions of higher courts, and even by their own previous decisions).

A constitutional court allows for the selection of judges who are either specialized in constitutional law, or are thought to bring more general expertise or representative capacity to the bench. It is expected that such specialized judges will be both more independent than ordinary judges and exercise more wisdom or competence regarding the sensitive political questions that are involved in

Web resources on constitutional courts

ConstitutionNet, <<http://www.constitutionnet.org>>

International IDEA's Constitution-Building Primer series, <<http://www.constitutionnet.org/primers>>

Venice Commission (contains links to websites of constitutional courts around the world), <<http://www.venice.coe.int/webforms/courts/?lang=EN>>

Conference of European Constitution Courts, <<http://www.confueconstco.org/en/common/home.html>>

Conference of Constitutional Jurisdictions of Africa, <<http://www.cjca-conf.org/>>

Association of Constitutional Courts Using the French Language, <<http://www.constcourt.md/pageview.php?l=en&id=220&idc=54>>

Association of Asian Constitutional Courts and Equivalent Institutions, <<http://www.constitutionalcourt.gov.tr/inlinepages/constitutionalcourt/ForeignRelations/MembershiptoInternationalOrganizations/>>

constitutional interpretation. This of course raises questions about the desired qualifications of constitutional court judges. It also raises a question whether, in terms of the separation of powers, a constitutional court is in essence a fourth branch of government distinct from the legislature, the executive and the ordinary judiciary. It can act as a powerful facilitator in maintaining, or transition to, democracy and constitutional government. The constitution, in this model, would not be exposed to the will of a parliamentary majority or a ruthless president.

Disadvantages

Since a constitutional court exercises powers that are often crucial from a political perspective, there is a danger that it might be threatened with retaliatory action such as reduction or abolition of its powers or even dismissal (e.g. in Myanmar, Niger and Poland) or might be subject to its independence being compromised via the appointment process (see Section 3). Alternatively, the constitutional court may not appear to be impartial in its decisions (e.g. as in Thailand). These eventualities are less of a danger, it is sometimes argued, with a powerfully independent court exercising general legal jurisdiction.

In common-law countries constitutional questions are seen as paradigmatically legal questions, and there is on this view no case for a specialized court or a specialized form of judiciary. Judicial independence in these systems is supported by the legal profession at large, from whose ranks judges are appointed. However, it is also argued that, even in diffused systems, judicial independence can be compromised and judicial appointments politicized. In centralized systems there is no court of first instance. Therefore there is only one chance to make the correct decision: in the constitutional court itself. In a diffused system, the highest court can potentially have the benefit of decisions by lower courts in the same case or different cases. This raises the question as to whether in either system a 'final' decision that is inconvenient, or shown to be wrong in principle or effects, can be overruled. Practice on this matter varies across both types of system.

8. What is the international experience of constitutional courts? How can constitutional courts contribute to democratization?

Given the number of constitutional courts and the difficulties involved in assessing their performance, as well as the difficulty of deciding what the benchmarks of success might be, these questions are often debated. For example, if a constitutional court manages to maintain its independence successfully but makes decisions that are problematical or inconsistent, is it successful or unsuccessful? Alternatively, what if its decisions are seen as excellently reasoned and have beneficial effects, but the constitutional court sees its powers limited by a powerful president or an outraged parliament?

Alec Stone Sweet's three benchmarks are a good general indicator: 'constitutional review can be said to be effective to the extent that the important constitutional disputes arising in a polity are brought to the [constitutional court] on a regular basis, that the judges who resolve these disputes give reasons for their findings, and that those who are governed by the constitutional law accept that the court's rulings have some precedential effect' (2012: 10). Apart from this, the success of the court (or the attribution of its success to a particular factor) in one jurisdiction does not mean that this success or factor can be replicated in another. For example, while apportioning nomination of judges between the three branches may well diffuse tension where contestation between the three branches is intense, it may not work or even be acceptable in a different polity.

Another factor that militates against proper assessment is that one cannot know in advance how the constitutional court's case load will turn out. Indeed, courts are at the mercy of litigants with regard to their caseload, both in quantity and subject matter. In some cases the constitutional court has been overloaded with

International IDEA in Myanmar

International IDEA works with democratic stakeholders to consolidate the transition to democracy, contributing in particular to electoral processes, democratic oversight of the parliament, and strengthening of constitutional expertise in the country. International IDEA established its country presence in Myanmar in 2012 and now has offices in Yangon and Naypyitaw.

Contact us

International IDEA Myanmar
68B Sayar San Road
Bahan Township
Yangon, Myanmar
Email: info-myanmar@idea.int
Tel: +95 9 263 128104
Fax: +95 1 556407

www.idea.int

electoral cases (as in Senegal and Indonesia), whereas in others it has prominently dealt with the dissolution of political parties (as in Thailand and Turkey), or disputes concerning regional devolution (as in Spain). Whether it has been successful in such major areas does not indicate whether other courts would be successful, or even whether the concentration on one or two major areas would be repeated. This depends on the configuration of national politics, the inclinations of litigants and the precedents that have been laid down.

It is usually thought that a constitutional court has a preeminent duty to maintain its independence in spite of any adverse reactions from the executive, other agencies, the media, civil society or particular interest groups. Some observers maintain that a new constitutional court must be proactive in explaining its role and its decisions to society. Some go further to argue that a constitutional court should not decide against a powerful leader such as a president with an electoral majority. Others argue that it is in precisely such instances that the constitutional court's independence and value will be recognized.

What we can learn from experience is that the dangers of compromised independence are always present, and that constitutional courts have to be aware of the public perception of their decisions. We can learn also that if the constitutional court's decisions are not carefully reasoned they may be seen as arbitrary. Above all, the constitutional court must be consistent in its decisions and moderate in the employment of the armoury of remedies at its disposal.

The diffusion of multiparty democracy has gone hand in hand with that of the constitutional court as a powerful democratic mechanism. It entrenches democratic rights, encourages dialogue with and between other organs of state (including the president, parliament and regional governments). Above all, it enforces the notions of free and fair elections and the protection of civil liberties of citizens and human rights in general.

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