

Hungarian Legal Ethnography from the Perspective of Theoretical Legal Thought

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ABSTRACT

The object of folk law research are the customs that prevail in areas covered, or theoretically covered, by state law, which effectively ensure permanent respect for them, largely in a less formalized way. In the respective historical stratum, (folk) legal customs fulfil functions equivalent to the law where, due to the logic of historical development or for other specific reasons, (a) there is a lack of state and legal organization; (b) the state and legal organization fails to reach significant social groups due to its paucity and indifference; or (c) the law fails to be transformed into practice that would lead to the fulfillment of its true functions. In its present-day version, a legal (folk) custom emerges when the state and legal organization has wholly fulfilled the functions in question, and it survives merely within the framework and vestiges of that organization, as a component of the ongoing system of customs, as a complement and embellishment to the state and legal organization, and perhaps with content of only symbolic significance. Against a background of a living peasant society, this was, and to some extent remains, a peculiarity of Central Europe, while in other contexts, starting from different traditions, the related research comes under the domain of legal anthropology, legal ethnology, and legal pluralism. Legal ethnography contributes to the investigation of social ethnographic issues by examining the instruments and institutions of the social order and the way they function. However, in terms of jurisprudence it is simultaneously both strong and weak, since although the idea of living law has revolutionized legal thought, European legal mentality, which rests on the rule-based objectification of modern formal law, nevertheless seeks to reject both the openness that characterizes the primordial quest for peace and the formlessness familiar to peoples living close to nature. In any case, an ethnography with social-theoretical foundations, which would take into account not only legal anthropology but also the socio-ethnographic lessons of legal ethnography, remains a task for the future.

KEYWORDS

legal anthropology, legal ethnology, legal pluralism, custom, living law

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The beginnings of philosophical reflection on law can be traced back to the genesis of law and the very first manifestations of its prototypes,¹ while the germs of today's legal ethnography can be perceived as emerging from the description and contemplation of the *mores*, the traditional forms of behavior that can and should serve as examples, and in particular from the emergence as a discipline of the systematic comparative historical and contemporary studies made possible by modern science. Of course, it was able to become an independent discipline only once ethnography, and then specifically socio-ethnography, had spread its academic wings a couple of centuries ago. Unsurprisingly, this coincided with the expansion of modern formal law, when it was able to achieve autonomy by defining its own, distinct boundaries (VARGA 1984). However, having become an isolated entity, any reflection within it was necessarily limited to the analysis of enacted law. A void thus emerged around it, wherever its customary predecessor had previously successfully organized — reflecting and at the same time shaping by its own means — the idealism of the *ordo* necessary for social coexistence: its ideals, techniques, and institutions.

DISCIPLINES

Those whose academic interests were shaped during the Socialist period in Hungary following the Second World War may have become accustomed to the fact that while, on the one hand, some kind of legal ethnography exists — and continues to send disruptive messages from the background — on the other hand it is situated in an intermediate “neutral ground,” in which neither we, as practitioners of legal scholarship, nor ethnographers practicing ethnography, have any real competence (VARGA 2010:81–84).

In our attempts to identify *legal ethnography*, an intuitive approach would perhaps appear to be most effective. According to this approach, the object of the quest is the prevalent system of customs that survives in the presence of state law, on its periphery, although largely, or theoretically, covered by it, which effectively ensures constant respect for those customs, largely in a less formalized way. If we continue to pay heed to our intuition and are willing to assume the stigma of unprofessionalism, we might simply characterize it as that stratum of the customary system of the predominantly peasant population of Central Europe (engaged in mountain silviculture, lowland agriculture, animal husbandry or fishing) that displays the most real or apparent parallels with the state law by which they are governed in principle.

As soon as we envision behind it the Hungarian peasantry or the shepherds who once dwelt in Hungary's mountains, we immediately encounter a demarcation with *legal anthropology*, a discipline specifically created by Western colonizers to describe the conditions found in their colonies. At the same time, once the mostly Germanic and French researchers were no longer concerned with the description of their own (historical or contemporary) folk customs but rather with changes in the forms of behavior of peoples in general, and above all with the types and means of the creation of order, *ordo*, in individual civilizations, they referred to it as *legal ethnology*. Newfound interest in *legal pluralism*, as a development in recent decades, does not differ greatly from its predecessors. Historical and contemporary overviews and analyses deal

¹Western approaches tend to use the Homeric legal worldview as their starting point, although heading eastwards — whether to Egypt, the Fertile Crescent, or further afield to China — we can expect to encounter law-related consciousness from earlier millennia.



largely with competing norms and types of norms that are organized according to a different (folk, religious, moral, vocational, political, or other) principle in a community that acknowledges and enforces state law — and with their coexistence, conflicts, and practical functioning. However, what lends them their relative distinction is that they are in fact discussed as a normative system (a means of *soziale Normierung*), competing against state law in their own spheres.

(In the interests of completeness, we should also mention the indigenous rights research movement that has taken shape within the cult of global human rights in recent decades, albeit more out of a need for some kind of reparation, but which is nevertheless gradually assuming an academic form. Since then, the main leaven for the examination of *aboriginal law* has been partly a guilty conscience rooted in Christianity and partly a political movement for the protection of real rights and claims,² naturally from perspectives that are open towards the future, which may even lead eventually to the formulation of its own dogmatics.)

Speaking now from my own field, the spectrum of theoretical legal thought, it would appear trivial to state that no legal theory has yet been built on legal ethnography, within which either the ethnographic or the legal historical homeland remains decisive, while in the meantime it sees its task in a similar way, essentially as description — collecting, recording, interpretation, and then classification.

This statement should, of course, lead immediately to a self-critical observation — namely, that although in our profession we have taken seriously the need for the anthropological foundations of law for several decades (VARGA 1988), we have not yet drawn a great deal from the generalized/generalizable lessons of social ethnography itself.

The historical approach to legal ethnography that has been cultivated in Hungary to date may perhaps have some role to play in this omission. As becomes apparent from a historical perspective (BOGNÁR 2016; NAGY 2021), in the great periods of Hungary's development to date — the turn of the century, the interwar period, and some experimentation following the Second World War — its role has been explicitly that of service provision. Notably, it regarded as its task the promotion of a possible synthesis between the wisdom of experience inherent in folk tradition and the rationally constructed architecture of modern legislation, at a time when the legal world was still in the process of the comprehensive codification of civil law.

Ernő Tárkány Szűcs, who pioneered the rebirth of the discipline, can scarcely be blamed for the fact that, when he consolidated his life's work in one huge volume, despite the unfavorable climate of Socialism (VARGA 2021), as a lone warrior and with very little support, he first and foremost summarized, systematized, and incorporated facts — that is, previous collections of data — into a *corpus*. Thus, he did precisely the same thing that Béla Bartók, Zoltán Kodály, and their disciples had done with folk songs, that János Berze Nagy had done with folk tales, and that others had done with other things: he typified and systematized — in other words, he organized empirical material as components of a single, great unity, then further interpreted it, enabling him to pass it on to posterity as a meaningful whole.

²In opposition to the fact that, for example, shrewd American businesses have collected the knowledge of Native Americans that can now be used on a global scale as pharmaceutical, cosmetic, and food industrial products, and have then, as if such things had been invented by the collectors, turned these into trademarked business goods for their own profit.



THE RELEVANCE OF LEGAL INQUIRY

Is it nostalgia, romanticism, or perhaps obligatory respect for the nation-building aspects of our communal past that lay the foundations for the interest shown in legal ethnography on the part of theoretical legal thought? They may all contribute, in my opinion, although in the long term, and in society in general, they can scarcely be decisive. According to the only answer that can be academically justified, legal theoreticians see in the workings of legal ethnography the very same thing that they see in history in general, the history of law in particular, and the research of symbols, or even in literature or works of art: raw material, allegories, interpreted lessons — that is, partial data that have matured elsewhere but with quasi-empirical authenticity — for its future standing within its own field, that of the sources of legal anthropology³ or ethnology to be elaborated in legal science.

The most obvious contribution of legal ethnography to social ethnography is the exploration of the elements of the *ordo* — that is, the content (goals and instrumental behaviors) inherent in the respective folk customs and the explanation of the insights (values and practicalities) they contain. For legal ethnography, therefore, the legal folk custom is nothing other than an organizing response to some challenge of existence that can be distilled as a rule: *know-how*, the endorsement of which can become the guarantee of certain preferences known to have beneficial effects. For theoretical jurisprudence, however, the conversion of these elements of order into an authentic order — that is, the mechanism and dynamics of their operation — will be a specific lesson, as a description of how secondary normative systems are formed and function, and how they are incorporated into the framework drawn up by state law.⁴

In both, however, there emerges a problematic core that goes beyond specific positions, and this is the actual depth of the mutual interaction between the divergent systems of norms operating in society. On the one hand, “custom,” “folk custom,” and “legal folk custom” have “existed” since we named and described them, thereby “problematizing” their existence as driving forces. On the other hand, the more we talk about the objects of knowledge concealed in formal objectifications and displayed as regulating the materialized functioning of institutional systems, the stronger the inclination to presume that their nominalized autonomy is now an authentic determining force. It is well known that even enacted law and its official operation are not an independent, truly decisive force in society: even formalized normative systems are predominantly integrated into the overall actual processes of movement merely by the formers’ own movements that arise from their unceasing interactions.

LAW AND/OR LAWS

Starting from its ancient roots, jurisprudential thought has taken shape from the normative growth destined to expose the ideal of the *ordo* inherent in the created world itself and further moulded in state form (VARGA 2012). But how do tribal customs or the conventions followed by the lowland peasants and mountain shepherds come into the picture? How did something that is in itself largely cultural anthropology or ethnology become a part of jurisprudence? What will be

³Greek *-logiā* (meaning ‘word, speech’), from the Greek *logos*.

⁴TWINING 1972–1973:576, on the other hand, and justifiably from his own point of view, sees the anthropologist as process oriented, in contrast to the rule centeredness of the lawyer.



of legal relevance is that aspect whose functionality coincides with that of the law — in the given circumstances in terms of its place and time. After all, functionality that can be described as legal can also be realized by factors that have taken shape independently, and perhaps not even in relation to that which emphasizes and distinguishes itself as “law.”

Eugen Ehrlich did not recognize the role played by *lebendes Recht* as an organizing principle only, even in his own day. He later referred to its background strength as well, for example by drawing attention (EHRlich 1918:291) to the fact that “Das Strafrecht ist machtlos, soweit es Kräfte wecken soll, die in der Gesellschaft fehlen; jedes Strafgesetz wird nur das leisten, was es mit den vorhandenen Massentrieben zu leisten vermag.” [Criminal law is powerless insofar as it is intended to awaken forces that are lacking in society; every penal law will only achieve what it can among the existing mass instincts.]

What, after all, is to be called law? — When? And, in particular, for what reason? As a scientific methodology, one renowned anthropologist (POSPÍŠIL 1971:39) stated that: “Law as a theoretical and analytical device is a concept which embraces a category of phenomena (ethnographic facts) selected according to the criteria the concept specifies. Although it is composed of a set of individual phenomena, the category itself is not a phenomenon — it does not exist in the outer world. The term of ‘law’ is consequently applied to a construct of the human mind for the sake of convenience. The justification of a concept does not reside in its existence outside the human mind, but in its value as an analytical, heuristic device.”

In other words, by observation we uncover a phenomenon with a concrete aspect that makes it suitable for us to form a certain category from it and from things that resemble it. Our goal, however, is clearly to analyze normative systems that substitute or compete with the law in specific historical formations, in parallel (conceptually and/or methodologically) with the law.

Various criteria have been developed as a foundation for the expansion of the classical concept of law. There has been sociology of law, which summarized, in the form of *la juridique*, the *nucleus*, or elemental components of legal existence by way of *juristicum* (LÉVY-BRUHL 1950). There has been legal anthropology, which, in its normative analysis of the unity/diversity of the regulatory forces of society, suggested “the self-regulation of a ‘semi-autonomous social field’” (GRIFFITHS 1986:38) as the basis for describing the capacity of self-generation and self-operation in self-regeneration as a *sine qua non* minimum. There is legal philosophy, according to which “Boundaries of law are one among many structures that law itself produces under the pressure of its social environment” (TEUBNER 1992:1442). In other words, normative systems compete in real life, and among them the environment necessitates self-determination, which it subsequently calls legal. And, while others express it even more precisely, what we are in fact concerned with here is “a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force” (SANTOS 1995:114–115). The common ground is thus a relatively independent and efficient system creation based on orderliness and the possibility of sanctions.

And the result? Precisely that which established the notion of a “global Bukowina” re-inspired by the conceptual limitlessness of Ehrlich’s *lebendes Recht*, since it “has proved hopeless to search for a criterion delineating social norms from legal norms” (TEUBNER 1997:13).

However, among the various phenomena, those that are able to justify themselves within the sphere of *legality* are those that are open to the processing of external information but closed in the course of this processing, since they proceed according to their own criteria and in a self-



closing manner at every step of the way. To be more precise: “Legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal” (TEUBNER 1997:14–15). Its specificity does not therefore lie in its constituent structure or social operation, but in the principle of operation itself.

It is thus no coincidence that many scholars have already expressed concerns about limitlessness, the ominous prospect of sinking into meaninglessness, since “this very broad conception of law can easily lead to the total trivialization of law — if law is everywhere it is nowhere” (SANTOS 1995:429).

As a way out, there is scarcely anything left apart from *functionality*: the fact that, explored within the overall social frameworks of the examined phenomenon and in the interdependencies of interactions perceived as tending to recur, we identify functions in accordance with the law — if we do so at all. In this sense, “(1) Law is a global phenomenon embracing society as a whole. (2) Law is a phenomenon able to settle conflicts of interests that emerge in social practice as fundamental. (3) Law is a phenomenon prevailing as the supreme controlling factor in society” (VARGA 2012:311–312, following VARGA 1988).

Such a claim is also to be found in the international literature. It talks, for example, of how the existence of legal pluralism can be meaningfully conceived only within the sweep of comprehensive historical processes (BENDA-BECKMANN 1994, 2002:72), in the place where those acting on behalf of the so-called law themselves experience their conformity in the spirit of that which establishes and forces their conformity — precisely, their background law. However, according to everyday common sense, this gives rise to the definition that “Law is whatever people identify and treat through their social practices as ‘law’ (or *Recht*, or *droit*, and so on)” (TAMANHA 2000:313).

All this, however, also implies that “What is law?” and “In what context is it permissible and worth talking about law?” are merely secondary questions: responses to them will by no means be guided by the eternal universality of some kind of *sine ira et studio* but will in fact be one of the positions adopted in the ongoing academic debates. Whatever name or conceptualization we accept today, tomorrow there will be a swing or a transition, a narrowing or an expansion, followed by a counter-conceptualization the day after. This is precisely what is happening today. And if the pendulum has so far swung towards the monism of the exclusivity of state law, the next stand taken in support of pluralism will be *bravado*, although as soon as this happens, we will be tempted to make a move towards a new opposing side.⁵

THE VISION OF ANCIENT SOCIETIES BASED ON CUSTOMARY ORDER

At the inauguration of sociology and the launch of ethnological and anthropological research alike, the way in which jurisprudence handled the object of its research, making it inaccessible to any other approach, was scandalous in its self-isolation.⁶ It is thus no coincidence that, with the

⁵Among others, BELLEY 1997. The debate with respect to legal options can naturally be repeated from the standpoint of worth. Perhaps in his last work, by way of conclusion and a certain atavistic abhorrence, POSPIŠIL (2016) clearly named legalism as the weakest link in civilizations’s pursuit of justice.

⁶“Their craft is amazingly shielded behind a curtain of technical jabberwocky. It is parochialism which sets up a conception of law in terms of the specialized characteristics of law in western civilization,” wrote the classic HOEBEL (1945–1946:836).



elimination of all further augmentation, it has been left to these other disciplines to investigate the non-state antecedents of the law, and thus its essential foundation.

In light of all this, ancient societies based on customary order may have been almost the direct imprints and parts of the prevailing social totality. “Of all things, custom is king,” the Greek poet supposedly said 2,500 years ago,⁷ proclaiming nothing other than the complete pervasiveness of society by custom. Symbolically, this already implied its acknowledgement as a force for social integration, as well as the certainty that it rested on the development of a sufficient degree of social trust (FUKUYAMA 1995) and loyalty (FLETCHER 1993) as the background medium *sine qua non*. And it was precisely this supposedly rudimentary, primitive state that was able to ensure the survival of society, the maintenance of its proper order (an *ordo* necessary then and there) — in itself, or, more precisely, in its organic integration into the entirety of society and its processes of movement. Indeed, the statement that follows is not about this, but about the successor that was torn from it: “It is state law that is dependent on these other sources of social order if it is to have a chance of exerting an influence” (TAMANAH 2001:224).

It is no coincidence, then, that the classic figure of legal anthropology (HOEBEL 1945–1946:835) integrated precisely this truth, already recognized for half a century but still little exploited to this day (HOLMES 1899:444), as the motto of his programmatic writing: “It is perfectly proper to regard and study the law simply as a great anthropological document.” Nor is it a coincidence that this statement was made at a time when the idea for the international declaration of human rights had already been formulated with the establishment of the United Nations. So what was he saying? For me, his message was that, as an organizing center, the law stands in the focus of the normatives prevalent in the given social context, while at the same time providing an authentically accurate and profound picture of the society in question (VARGA 2018).

FROM FOLK LEGAL CUSTOMS TO LEGAL FOLKWAYS

Returning to the new and most recent problems in Hungary and in Central and Eastern Europe more broadly — and thus to the monumental theme of Ernő Tárkány Szűcs and our folk law research — for four decades I have been endeavoring to clarify the correlations covered by the phenomena under investigation, and the kind of categorization they might require.

As a basic principle, I have been able to establish that within these, as a range of “phenomena outside the main direction of development,” which are to be considered “as (a) a historical antecedent, then (b) a frame, and finally (c) a supplement of enacted written law,” such normatives provide the object of investigation, in connection with which the fact that they exist on the margins of state law does not in itself exclude them from legality, since “the quality of the law as law is but the result of a self-qualification directed to state activity: law is what appears as such in the actual practice of state organs” (VARGA 1983:457). In other words, to say that “assessment and restitution of what is customary as the factor legitimating state power and its legal machinery; customary law as the compass, framework and basis of reference of legislation; adherence to all that is traditional, i.e. deducible from the ‘good, old law’ as the primary source

⁷HERODOTUS 2014 (3.38) quotes Pindar, in HERODOTUS 1921 *λόμος ὁ πάντων βασιλεὺς θνητῶν τε καὶ ἀθανάτων*, that is “use and wont is lord of all.” HUMPHREYS (1987) interprets the *nomos* using the trinity of law/custom/culture.



of legal validity: the ordering role they may all have played for more than thirty centuries seems to shrink to mere ideological reference as compared with the some centuries past of the organization of modern statehood and its formal law” (VARGA 1983:455) makes a statement not about their real qualities but merely about the claim to authority of state law. Because in every aspect it is “an ontological category, a function of being, and thanks to its unchanged nature, it is a function that is passed on to next generations” (VARGA 1981:882).

So then, legal ethnography first takes into account the historical antecedents, so that, with the completion of their catalogue — their accessible, exhaustive collection of examples — it can then look for traces that may be pointed to (because they continue to exist) in the present day. This is expressed by a double conceptualization, according to which the “*legal custom* is to fulfil basically the same functions in those societies and developmental phases in which, due to the logic of historical process and/or to special reasons, (a) there is no state and law organization proper; (b) it does not touch considerable social groups because of the low level or the indifference of organization; or (c) it fails in its actual implementation into practice” (VARGA 1983:457).

Secondly, “a legal custom is transformed into a *legal folkway* as the state and law organization assumes and fulfils the functions concerned in their entirety and it continues existing only within these frames as one of the surviving folkways, as a colouring supplement of the state and law organization, holding perhaps symbolic significance only” (VARGA 1983:457).

In today’s world, the object of Hungarian folk law research has few counterparts in the so-called legal anthropology and ethnography of the Euro-Atlantic region — regardless of whether the field of their investigation is domestic or extends globally.

Methodologically, however, it may be worth us considering the American position, which is rooted in the legal perspective of Anglo-American *common law*, as a projection of their own empirical process. In contrast to the continental concept of law, they argue that the touchstone, the crystallization, and the ultimate test of the message of the law, and indeed its real confessor, is not formal foresight made rigid in an abstract rule but the judicial decision itself.⁸ Is it therefore litigation? Burdened with the randomness of one standard deviation or another? And, furthermore, as the products of a peasant community, operating on the basis of transhumance? Well, not this exactly, but precisely the methods and cases used for resolving or deciding a conflict, as they occurred in a place and at a time that can still be recalled.⁹ The message is therefore nothing more than that, when drawing the map of the normative order, the effort to reconstruct the rule must be supplemented by exemplification that recalls the equivalents of the *judicial event* at that time and in that place.¹⁰

⁸The following view is expressed by HOEBEL: “As a canon of realistic law it may be said, and this is particularly important for anthropologists, that unless a dispute arises to test the principles of law in the crucible of litigation, there can be no certainty as to the precise rule of law for a particular situation, no matter what is said as to what will or should be done. A ‘law’ that is never broken may be nothing more than an omnipotent custom, for one will never know more than this until it is sustained in a legal action with a legal sanction” (HOEBEL 1945–1946:847).

⁹“But there is an infallible test for recognizing whether an imagined course of conduct is lawful or unlawful. This infallible test, in our system” — argues the legal historian RADIN (1938:1145) — “is to submit the question to the judgment of a court. In other systems, exactly the same test will be used, but it is often difficult to recognize the court. None the less, although difficult, it can be done in almost every system at any time.”

¹⁰This implicitly involves achieving a reflective equilibrium. To this end, RAWLS (1970) contrasted moral principles with practical examples in order to obtain empirically proven rather than speculative knowledge of the content of the principles.



However, a notable difference is the fact that there is no “system of articulated rules” in a tribal situation, for example in Africa, only an openness to mutual willingness to compromise in order to maintain the common peace, so that “the feeling of a balance will be something spontaneous and self-evident.”¹¹ Including the potential arbitrator, no one in this context thus thought in terms of rules — with the exception of later generations of us, the obsessive West, who, while struggling to describe them, were unable to escape their own spell.¹² On the other hand, on European soil, the study of folk law comes face to face with clearly rule-based formulations — which, for the anthropologist, indicate the presence of a certain literacy and thus an inclination towards abstraction in the folk medium (MACCORMACK 1979).

An innocent comment, originally made in a contemporary assessment of Ehrlich’s movement that gave its name to living law, may suggest further research perspectives. According to this comment, what was pioneering in the breakthrough lay not simply in the demonstration of a parallelism in the legal sources, but in the evidence that there is no end to the development of law, because it is never, under any circumstances, interrupted. In other words, should any state monopoly or other invention wish to impose a restraint on it, the work of law creation will always, ceaselessly, continue.¹³

RECAPITULATION

Folk law research is tantamount to owning a great national treasure. With its historical stratum that requires permanent updating, it is a source of knowledge for the more authentic redrawing of the image of the own past, while with its investigations into the present it takes forward knowledge of legal compliance and legal change as the actual mediums for the preservation of law.

In its inter- and infra-disciplinarity, legal ethnography is part of both of its mother disciplines, jurisprudence and ethnography. The fact that, in the field of theoretical jurisprudence, it is only the need for a major synthesis of social theory that has arisen as yet is merely the indication of a lack rather than a contradiction (VARGA 1986), although a major synthesis of this kind can scarcely take shape without the lessons of social ethnography and historical jurisprudence.

¹¹Thus, according to the Hungarian-rooted researcher of Africa, NEKAM (1967:47–48) — cf. VARGA 2015 —, their only law was “a system of keeping the balance, of arriving at satisfactory results (...) geared not to intellectual persuasion but to emotional approval, not to decision imposed, but to acceptable solutions.”

¹²Which, according to the colonial Dutch HOLLEMAN (1950:63), should be understood as meaning that no matter what “great unanimity” surrounded a question of law, “when it came to the practical application of these principles as revealed through actual cases, the diversity was so great that it was sometimes hard to acknowledge the existence of any principle at all.”

¹³“Legal history did not end” (PAGE 1914:62). To take just one example, it is striking proof that even where “official customary law” happens to be the rule, there are also masses of unofficial so-called living laws taking shape on a daily basis (BENNETT 2010).



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