

FAITH, DOCTRINE AND ROMAN CATHOLIC CANON LAW

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'It is not at all easy (humanly speaking)
to wind up an Englishman to a dogmatic level'.

This quotation is, of course, from Newman's *Apologia*, where many memorable things are said.¹ Yet, even in England, it seems inescapable to treat of faith and doctrine if we are to consider Roman Catholic canon law. As Christian believers, consequently holding certain doctrines about Christ and his Church, we have a theology of canon law and a theology in canon law. We explore the theology of canon law whenever we consider why there is canon law at all in a Church founded on the unique saving grace of Jesus Christ, and we explore the theology in canon law whenever we consider how faith and doctrine show themselves in the making and application of canon law.

I

To begin, then, with the theology of canon law. Definitions are notoriously difficult and in examining Roman Catholic canon law we have to admit that there are additional difficulties in an English context. Whatever may be the attitude of the Orthodox and the Protestant Churches to Roman Catholic canon law,² from time to time important and considered reservations have been expressed by Anglicans. The 1976 report of the Anglican-Roman Catholic international commission on the theology of marriage has a fascinating section headed 'Of reliance on law'. There it was said that in his ordinary Christian living the Anglican accepts the authority of the Church as a moral obligation; the sense of there being a law seldom occurs to him. The Roman Catholic conception of the Church's legislative authority and function was and is considerably different from this. For Roman Catholics, in so far as their life in the Church is concerned, the canon law operates as a juridical expression of the Church's doctrine about itself, and of its pastoral responsibility for bringing the faithful to the complete awareness of and response to the redemption once wrought for them by God in Christ.³

So there are reservations about the general place of canon law in Christian life – but there are also reservations about having canon law in the form of a legal code. The Archbishops' Commission on Canon Law reported in 1947 that 'we must recognise the ineradicable repugnance in the English mind and judicial tradition to the principle of codification. . . In our opinion the majority of Church

1. J.H. Newman, *Apologia Pro Vita Sua* (ed. M.J. Svaglic) (Oxford 1967) p.185.

2. Protestant, Eastern Orthodox and Anglican responses to the 1983 code can be found in *The Jurist* (1986) at p.347f,376f and 394f. *L'Année Canonique* (1987) has the responses of the French Reformed and the Orthodox at p.411f and 423f.

3. *Anglican-Roman Catholic Marriage* (Church Information Office 1976) pp.11-12.

people would prefer their law in a form which allows many things to be settled by common sense, and the judges to expound and interpret the law when necessary'.⁴ In their introduction to the 1969 Canons of the Church of England, the two Archbishops emphasised that this collection of canons was not a complete statement of the law of the Church of England, and that in this it differed to some extent from the much more comprehensive code of the Roman Catholic Church, and it followed the English secular legal tradition in its dislike of complete codification. For Roman Catholics, on the other hand, this is the century of codifications, first with a code in 1917 and now with the 1983 code. Clearly the (Latin rite) code is going to remain for some time, and a code for Eastern Catholics is near completion. Yet this kind of codification was a great innovation in the long history of canon law and it has always had its critics. No less than Cardinal Pericle Felici, who presided over the making of the new code, had hesitations about presenting canon law in the form of a code and spoke of its 'dangers and inconveniences'.⁵

Turning from reservations to explanation, a good starting point could be the classic exposition by St Thomas Aquinas, that medieval theologian also valued in the Anglican tradition. In his *Summa Theologiae*, St Thomas considers at some length the law of the Gospel.⁶ He concedes that it is the grace of the Holy Spirit, given through faith in Christ, which is predominant in the law of the New Covenant, and that in which its whole power consists. But he goes on to say that there do, however, belong to the New Law certain elements which in a way dispose us for the grace of the Holy Spirit, and some which are concerned with its exercise. These may be considered secondary in the New Law, and Christ's faithful (*fideles Christi*) had to be instructed about them both orally and in writing, both as regards matters of faith and as regards actions. Hence the New Law is first and foremost an inward law, and secondarily a written law.

A passage a little later in the *Summa* recapitulates that what is primary in the New Law is the grace of the Holy Spirit, shown in faith working through love. Now men obtain this grace through the Son of God made man; grace first filled his humanity and thence was brought to us. Thus it is fitting that the grace which overflows from the incarnate Word should be carried to us by external perceptible realities; and also that certain external perceptible works should be brought forth from this interior grace, by which flesh is made subject to spirit. St Thomas can then argue that external work can be a matter of grace in two ways. First, by drawing us in one way or another to grace. Secondly there are external works which are brought forth by the inner stirring of grace. Some of these works are necessarily in accordance with or contrary to the interior grace consisting in faith working through love; these kinds of works are enjoined or forbidden in the New Law, e.g. the confession of faith is enjoined and its denial is forbidden (cf. Mt 10:32-33). The Thomist argument then unfolds further, in saying that there are certain works which are not necessarily in accordance with, or contrary to, faith working through love. Works of this kind are not enjoined or forbidden in the

4. *The Canon Law of the Church of England* (London 1947) pp.82-83.

5. *Communicationes* (1973) 249; a convincing case for having the 1983 code is made out by E. Corecco, 'Theological Justifications of the Codification of the Latin Canon Law' in M. Theriault & J. Thorn, *Le Nouveau Code de Droit Canonique* (Ottawa 1986) I,69-96.

6. *Summa Theologiae* I-II q.106 and q.108. St. Thomas has a full treatment of divine, natural and human laws in the *Summa* at I-II qq.909-97. But see E. Corecco, "'Ordinatio Rationis' o 'Ordinatio Fidei'" *Communio* (1977) 1-22.

working through love. Works of this kind are not enjoined or forbidden in the New Law in its primitive form, but they are left by the lawyer (*legislator*) Christ, to the individual, according to his responsibility for others. Each person in authority is to ordain what his subjects are to do or avoid doing.

We should notice how St Thomas retains the primacy of grace and yet understands it in terms of the incarnation of Christ. From this total understanding of how salvation comes to us he can then make room for, among other things, law. To focus more sharply on canon law than St Thomas does, and in a modern account, we can turn to the Apostolic Constitution promulgating the new code in 1983. There John Paul II gives a sustained reflection on the theology of canon law, beginning with the question of the nature of the code. To answer this adequately, the Pope continues, one has to recall that distant legal heritage contained in the books of the Old and New Testaments from which, as from its primary sources derives the entire juridical and legislative tradition of the Church. Christ, the Lord, indeed, did not wish in the least to destroy the very rich heritage of the law and the prophets which was gradually formed from the history and experience of the people of God in the Old Testament, but he brought it to completion (cf. Mt 5:17) such that in a new and higher way it became part of the heritage of the New Testament. Therefore, although in expounding the paschal mystery, St Paul teaches that justification is not obtained by the works of the law but by means of faith (cf. Rm 3:28; Gal 2:16), he does not thereby exclude the binding force of the Decalogue (cf. Rm 13:8-10; Gal 5:13-25, 6:2) nor does he deny the importance of discipline in the Church of God (cf. 1 Cor 5 and 6). Thus, the writings of the New Testament enable us to understand even better the importance of discipline and make us see better how it is more closely connected with the saving character of the evangelical message itself. There follows a most important passage:

“This being so, it appears sufficiently clear that the Code is in no way intended as a substitute for faith, grace, charisms, and especially charity in the life of the Church and of the faithful. On the contrary, its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to love, grace and charisms, it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons who belong to it.”⁷

There is an insistence in the Apostolic Constitution that canon law is not to be severed from the mission of Christ. The text continues, that as the Church's main legislative document founded on the juridical-legislative heritage of revelation and tradition, the code is to be considered as a really necessary instrument to ensure order in both individual and social life, and also in the Church's own activity. Therefore, besides containing the fundamental elements of the hierarchical and organic structure of the Church as willed by its divine founder or as based upon apostolic, or in any case most ancient tradition, and besides the fundamental principles which govern the exercise of the threefold office entrusted to the Church itself, the code must also lay down certain rules and norms of behaviour. The Constitution will go on to say why the code is necessary for the Church. Since the Church is organised as a social and visible structure it requires norms in order:

7. This translation of the Apostolic Constitution is from the massive *The Code of Canon Law: A Text and Commentary* edited by J. A. Coriden, T. J. Green, D. E. Heintschel (London 1985).

- (i) that its hierarchical and organic structure become manifest,
- (ii) that the exercise of the functions divinely entrusted to it, especially that of sacred power and of the administration of the sacraments, may be duly organised,
- (iii) that the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals safeguarded and defined, and
- (iv) that common initiatives undertaken to live a Christian life ever more perfectly may be sustained, strengthened and fostered by canonical norms.

John Paul II emphasised how the new code could in a certain sense be understood as a great effort to translate the doctrine and ecclesiology of the Second Vatican Council (1962-5) into canonical language. The Constitution in fact speaks of a characteristic of the 1983 code being its complementarity to the teaching of the Council, in particular of its dogmatic and pastoral constitutions. As the present Pope has remarked more than once, the code is in a way the last document of Vatican II.

To draw together this Thomist and papal teaching, one might say that what is primary in the New Covenant is the grace of the Holy Spirit given through faith in Christ. In him, grace is made incarnate and so given visibility and structure. Christ did not just found the Church – he is its foundation. The Church in its way continues his saving mission in the world now. As we shall see in part II below, canon law has a variety of sources – divine, natural and human – all centred on Christ. It would betray the incarnation to sunder totally spirit and flesh, exteriority and interiority. By the canons, the life of the Church is given, as law, specific embodiment and is structured in various ways as is thought pastorally appropriate in any particular moment in the Church's history, the sacramental making present of Christ's life, death and resurrection to glory.⁸

One could go through the 1752 canons that constitute the 1983 code and fill out in detail, inductively as it were, this sketch of the theology of canon law. Instead, let us simply look at a couple of canons to see the kind of context of faith and doctrine that makes complete sense of canon law, a law that should not generally be presented without some indication of its place in the total Christian mystery. Canon 204 states that Christ's faithful are those who, inasmuch as they have been incorporated in Christ through baptism, have been constituted as the people of God; for this reason, since they have become sharers in Christ's priestly, prophetic and royal office in their own manner, they are called to exercise the mission which God had entrusted to the Church to fulfil in the world, in accord with the condition proper to each one. This Church, constituted and organised as a society in this world, subsists in the Catholic Church, governed by the successor of Peter and the bishops in communion with him. Canon 205 will be even more specific. Those baptised, it says, are fully in communion with the Catholic Church on this earth, who are joined with Christ in its visible structure by the bonds of profession of faith, of the sacraments and of ecclesiastical government. In these

8. The connection between sacramentality and canon law would repay further reflection: R. Ombres, 'Why then the Law?' *New Blackfriars* (1974) 296-304; A. Rouco Varela & E. Corecco, *Sacramento e Diritto: Antinomia nella Chiesa?* (Milan 1971); G. Feliciani, *Le Basi del Diritto Canonico* (Bologna 1979) p.57f. The matter was raised in the drafting of the new code and taken up by Pope Paul VI: *Communiciones* (1969) 79, 97f and (1973) 14f.

two canons we see the centrality of Christ, and the protagonists of the code are not described as 'subjects of the law' or anything like that but 'Christ's faithful' (*Christifideles*), the same expression that St Thomas used in the passage quoted earlier. Notice, too, how baptism both incorporates individuals into Christ and constitutes them as the people of God – grace made visible. Yves Congar has written that the social and even the juridical structure of the transmission and acceptance of faith is like the sacrament of the most mystical and spiritual reality.⁹

II

The theology in canon law can be explored by way of its sources, the code apart, using in a general way the classification adopted by Cardinal Amleto Cicognani in his well-established treatise.¹⁰ Contemporary canonists would modify the some details of his scheme but it should serve our purpose today, as might his definition of canon law as the body of laws made by the lawful ecclesiastical authority for the government of the Church. As we proceed, this definition will be filled out in various ways. For Cicognani, and this is important, the science of canon law is a *theological* science. This by reason of its sources, as we shall see, but also because of the object (namely divine and ecclesiastical laws relating to the constitution, government and discipline of the Church, and also the rights and duties of the faithful) and because of its end (which is the government of the Church and the guidance of the faithful to sanctification and ultimately to life eternal). There survives a whole cluster of medieval literature discussing the differences between theology and canon law, and the specific contribution of each to the life of christians. Canonists seem to be perpetually poised between theologians and civil lawyers, now veering more to one side now to the other.

Among the primary sources of canon law are the *fontes existentiae*, the formal causes of the existence of a law, i.e. the lawmakers or authors of laws. And here Cicognani begins with Christ himself. He goes on to mention, among others, the Apostles, the Roman Pontiffs, Councils, bishops and the Roman Congregations. A word concerning the Supreme Pontiff, really the only legislator of canon law at the universal level. In terms of the present code, there are obviously many canons dealing explicitly with the hierarchical constitution of the Church. At the head of that set of canons, and prior to dealing with the Roman Pontiff and the College of Bishops, there comes canon 330, combining Pontiff and College. It states that just as by the decree of the Lord, Saint Peter and the rest of the Apostles form one college, so for a like reason the Roman Pontiff, the successor of Peter, and the bishops, the successors of the Apostles, are united. The next canon will affirm how the bishop of the Church of Rome in virtue of his office enjoys supreme, full, immediate and universal ordinary power in the Church. But this is said after the crucial statement of canon 330. There was no equivalent to that canon in the 1917 code. It is worth underlining that, despite widespread usage, the 1983

9. Y. Congar, *Tradition and Traditions* (ET London 1966) p.14.

10. A. G. Cicognani, *Canon Law* (Maryland, 1934).

code never uses the term 'Pope', and it is important not to make exclusive use of the term because it camouflages the need to distinguish the **variety** of titles available for use (Supreme Pontiff, bishop of the Church of Rome, Patriarch of the West and so on) and the need to understand the scope of each.¹¹

Perhaps something should also be added about the nature of the Roman Curia, whose dicasteries, although they are not lawmakers in the full sense, can make laws in particular cases with the Supreme Pontiff's approval. The curial powers are generally more in the administrative/executive sphere. Curiously enough there has not been much sustained theological reflection on the nature of the Roman Curia, although there is now available the rich preamble to the 1988 Apostolic Constitution, *Pastor Bonus*, reorganising that Curia. It would be over-reductionistic to consider the Roman Congregations, councils, tribunals etc as basically the Vatican bureaucracy, its civil servants. Canon 360 gives the beginning of a better account in stating that the Supreme Pontiff usually conducts the business of the universal Church through the Roman Curia, which acts in his name and with his authority for the good and for the service of the churches. In essence the Roman Curia contributes to the unity of the faith and to communion.¹²

The second kind of primary sources are the *fontes essentiae*, that is, the laws themselves. They include the precepts of the natural and the positive divine law, the Apostolic laws, the canons and decrees of Councils, traditions, customs and so on. Again, one notices the integration of man-made, human laws in the total sweep of God's plan. Viewed in outline, natural law is a source of law in those cases where its precepts are common to all mankind. It is also the root and rule of canon law, for ecclesiastical laws are determinations of the natural law. Natural law has God as its author and so in its own way is a kind of divine law. As for the divine law established by God and made known to us by revelation, that can be divided into the Old Law (chiefly the Old Testament) and the New Law (Scripture and Tradition). In the 1983 code there are references to both natural law and to divine law. The last of the primary sources are the *fontes cognitionis*, the principles, documents and texts from which a knowledge of the law is obtained. Here too the Scriptures figure.

The Scriptures have been mentioned in various ways and they are basic to a proper understanding of canon law. It would not be unfair to say, however, that since 1917 Roman Catholic canonists have not as a group been renowned for giving a strong biblical imprint to their work. Almost immediately after the 1917 code was promulgated, its chief architect, Cardinal Pietro Gasparri, saw to it that editions were available giving a list of references to the main sources of most of the canons. Scripture was not included. So far, the sources of the 1983 code have not been published. A first task would be to go through the canons one by one noting any more or less explicit biblical foundation. Some examples would be the reference to Ephesians where in canon 1061 the spouses are said to become 'one flesh' or the use of 1 Corinthians 7 in canon 1143 and following. The Pastoral Epistles must have shaped many of the canons on clerics.

11. Y. Congar 'Titres donnés au Pape' *Droit Ancien et Structures Ecclésiales* (Variorum repr. London 1982) chpt vi.

12. 'Pastor Bonus' *Acta Apostolicae Sedis* (1988) 841-934; N. Del Re, *La Curia Romana* (Rome 1970).

In outline, these are the three classes of primary sources of canon law, giving it a derivation in faith and doctrine. Chancellor Garth Moore sums it up in reflecting that the canonist can never be simply a lawyer. He must always be in some measure a theologian and he will frequently require the assistance of historians.¹³ As for the secondary sources of canon law, as systematised by Cicognani, there are the *fontes exemplares*, the principles or laws of another character which the Church has used as a model in establishing certain of her laws. These sources are also called the material sources because from them the Church took material for ecclesiastical laws, e.g. Mosaic legislation on the religious side and Roman law on the secular. Here we encounter one of the most emphatically *Roman* dimensions of Roman Catholicism. Codification was adopted at the beginning of this century in imitation of civil law systems and both the 1917 and the 1983 codes keep elements of Roman law.¹⁴ An English observer will be struck by the minor place assigned to precedent, case law etc. Canon 16(3) establishes that an interpretation contained in a judicial decision in a particular matter does not have the force of law and binds only the persons and affects only those matters for which it was given.

Other secondary sources are the *fontes suppletorii*, the principles which the Church adopts for supplying what is wanting in its own legislation (cf canon 19), and there are also the *fontes adminiculares*, those sources that are helpful in studying canon law. The subsidiary sciences, such as history, and everything that has any bearing on canon law can furnish this aid. The final set of sources are the *fontes interpretationis*, the principles and the means which enable us to interpret the law. Here there is a place for the commentators and writers on canon law, as well as (canon 6) the canonical tradition itself. It is explicitly said that the new code is to be understood in the light of the Second Vatican Council. Canon 20 provides that laws are authentically interpreted by the legislator and by the one to whom the legislator has granted power to interpret. An authentic interpretation communicated in the form of a law has the same force as the law itself and must be promulgated. Both the 1917 and the 1983 codes were provided with a group of expert canonists to interpret authentically. There have already been various such interpretations of the 1983 code – of absolute terseness, with no reasons given for the interpretation favoured.

III

Roman Catholic canon law can therefore be seen as the product of faith and doctrine. The pivotal doctrines are those of Christ's incarnation, the nature of sacramentality and the meaning of the Church. Many of the canons in the code are very specific, functional and detailed but they all relate to the more doctrinal kind of canons. Canon law is to be judged in its *totality*. Much could be said about the place of justice and equity in the canonical system, combining to give it a

13. E. Garth Moore & T. Briden, *Moore's Introduction to English Canon Law* (London & Oxford 1985) p.1; cf the remarks of Cardinal Felici in *Communications* (1973) 246.

14. A. Gauthier, 'La Part du droit Romain dans le Code de Droit Canonique de 1983' in M. Theriault & J. Thorn op.cit. pp.131-140. It used to be said that '*Ecclesia vivit lege Romana*'.

specific nature different from secular legal systems. There are also the characteristics of pastoral concern and the ultimate salvation of souls that make canon law a thoroughly Christian law substantially different from secular law.¹⁵ In terms of what the Church considers herself to have a proper and exclusive right to adjudicate on (canon 1401); there are first of all the cases concerning spiritual matters or what is connected with them. Then there are violations of ecclesiastical laws and all those cases in which sin is involved, with respect to the determining of culpability and the imposition of ecclesiastical penalties. Echoes of the Becket controversy!

Canon 375 selects for emphasis three tasks of bishops. They are constituted pastors to be the teachers of doctrine, the priests of sacred worship and the ministers of governance. These three areas – doctrine, worship, government – are also part of the life and mission of every member of the Church, each in appropriate ways. So far, we have largely considered the effects of faith and doctrine on canon law. Looking at it the other way round, canon law itself has an effect on faith and doctrine and it is possible, in a fallen world and among Christians with their share of sin, for the element of government and law to become distorted and so damage not only its own rightful activity in the Church but also doctrine, worship and other aspects of Christian life. Put crudely, clarity and order can be bought at too high a price.

It is imperative to maintain the primacy of grace and charity, to trace how purely ecclesiastical laws differ from divine/natural norms, and to examine constantly the operation and effects of canon law. This for a number of reasons. First, so as not to claim too much for human law. Secondly, because the history of the Church shows that canon law does not, and need not, play the same part in Christian life. Thirdly, because the canons are wide-ranging in the areas they regulate, and their obligation on Roman Catholics is difficult to avoid. There persists (cf canon 11) the tradition that those who have come into full communion are not able to withdraw from the Church's law. A contrary view, as expressed by J. Klein, would see the Church as a '*Kirche der Freiegefolgschaft*' which anyone could leave at will. This view was rejected as faulty ecclesiology and leading to absurd conclusions.¹⁶

There are two topical, important and controversial examples of the need to avoid conflating divine and ecclesiastical law: mixed marriages and the ministerial ordination of women. The 1983 code is as categorical as the 1917 one that only males can be validly ordained. For canonists commenting on the old code it seemed beyond discussion that this was a matter of divine law. The learned

15. V. Fagiolo, *Il Codice del Post-Concilio: Introduzione* (Roma 1984); V. Bertolone, *La Salus Animarum nell' Ordinamento Giuridico della Chiesa* (Roma 1987); R. Ombres, 'Justice and Equity in the 1983 Code' *Priests & People* (1987) 143-148.

16. *Communicationes* (1982) 133; Coriden, Green & Heintschel op.cit.p. 129; V.Fagiolo op.cit.p.8

American Benedictine canonist, Dom Charles Augustine, wrote that women were debarred from the sanctuary by divine positive law, if not by the natural law, according to reason.¹⁷ Interestingly, the major instruction from the Congregation for the Doctrine of the Faith on this subject, *Inter Insigniores* of 1976, does not actually use the expression 'divine law' in its reaffirmation of the exclusion of women.

Very many Roman Catholics in this country are involved in 'mixed marriages' and the topic has seen great legal changes in the last few generations. To select only one aspect, by canon 1125,(1), the Catholic party has (i) to declare he or she is prepared to remove dangers of falling away from the faith, and (ii) to make a sincere promise to do all in his or her power to have all the children baptised and brought up in the Catholic Church. The Roman Catholic bishops of England and Wales issued in 1977 a set of reflections and norms based on the Apostolic Letter that preceded the provisions of the 1983 code, and they drew attention to a number of principles that had to be respected and reconciled: the right to marry; the conscientious obligation of Catholics to do nothing that would imperil their own faith; to do all they can to pass on that faith to their children; to respect the conscientious convictions of their partner in marriage. In this whole matter one has to discern which obligations arise from God's law and which from the Church's law, not least because the Church can and does waive the laws she makes. The Church can never waive the laws of God.

As for the first part of the obligations quoted from canon 1125, the Church could never make it right for a Roman Catholic to enter into a marriage which he or she knew would constitute a proximate danger of losing the faith. This is divine law and it is absolute. On the other hand, continued the bishops, decisions as to when and in what form people are to acknowledge that this divine law applies to them rests with the Church. As for the obligation concerning the children of a mixed marriage, this too is of divine law. It is beyond the Church's power ever to dispense a Roman Catholic from it. What is of Church law, and therefore able to be modified or dispensed, is the manner in which the Catholic must formally undertake to fulfil this already existing obligation.¹⁸

From this frequently occurring example, we can see the importance of identifying and understanding properly what precisely is of divine law. The term *jus divinum* has been the subject of theological debate and its relevance to ecumenical advances is obvious. The term was not used in the documents of the Second Vatican Council but it does occur in the 1983 code – as where canon 24(1) stipulates that no custom can have the force of law if it is contrary to divine law.¹⁹

I conclude by concurring with the Pope's prayer in promulgating the 1983 legislation, that God may grant that joy and peace, with justice and obedience, obtain favour for this Code.

17. C. Augustine, *A Commentary on Canon Law* (London 1920) IV,445; Wernz-Vidal, *Jus Canonium* (Rome 1934) IV,261.

18. *Mixed Marriages: A Revised Directory* (CTS London 1977). The bishops mentioned that over the past few years an average of just under 65% of all marriages celebrated in Catholic Churches in England and Wales involved a non-Catholic.

19. Y. Congar, 'Jus Divinum' *Droit Ancien* op.cit. chpt ii. Even where *jus divinum* does apply there can be flexibility in its concrete expression; K. Rahner, 'Structural Change in the Church of the Future' *Theological Investigations* (ET London 1981) XX p.122.

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