The 21st Century Ombudsman Enterprise[1]

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In the early years of the 21st century many ombudsman schemes have been required to react to increased demands placed upon them by developments in the wider administrative justice system. In response, many ombudsman schemes have demonstrated a widespread willingness to engage creatively with the implementation of both the 'redress' (grievance handling) and the 'control' (promotion of good practice) aspects of their role. This evolution in the ombudsman enterprise has been largely positive but many challenges remain, in particular the implications of the economic crisis of the second decade of the 21st century. In addition, bolder institutions attract more questions. Can the claims that have been made for the office be verified? It is questionable whether the improved accountability, trust and justice that the ombudsman enterprise purports to promote have ever been fully evidenced by either the practitioner or the academic community. Thus in amongst the challenges facing current ombudsman schemes, finding fresh ways to verify and test the impact of the office is one of the most important.

Introduction

The choice of venue for this year's International Ombudsman Institute (IOI) conference could hardly be bettered. Fifty years ago, the passing of the Parliamentary Commissioner (Ombudsman) Act 1962 in New Zealand[3] was to become one of the most important stepping stones in the growth of the ombudsman idea around the world. Before that time, the ombudsman was largely confined to the Nordic world, but its whole hearted adoption by a country in a different hemisphere and with a very different legal and cultural history, helped trigger a gradual rise in the number of ombudsman schemes globally.[4] The Anglo-Saxon world, above all, owes a debt to the example provided by New Zealand in proving that the ombudsman idea belongs in the common law system of justice (Elwood 2009).

Today, the ombudsman model is not at all novel. The IOI has members from over 150 different countries[5] and within many of those countries ombudsman schemes have proliferated, being set up to cover a range of jurisdictions within and across the public and private economy. Such is the diversity that it is difficult to talk of one ombudsman model. Indeed, if there is one unifying credential of the ombudsman idea it is its inherent flexibility

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[3] Parliamentary Commissioner (Ombudsman) Act 1962.

[4] Care needs to be taken in attributing full credit for the evolution of the ombudsman model. In the then West Germany an ombudsman for military affairs was introduced in 1954 and debates about the ombudsman idea were well under way in other countries before the New Zealand scheme was put in place. But undoubtedly the introduction of a Parliamentary Ombudsman in New Zealand helped ease developments elsewhere, see Rowat 1965 for a collection of essays on the evolution of ombudsman schemes in the 1950s and 60s.

[5] See the IOI website, http://www.theioi.org/the-i-o-i/about-the-i-o-i

which has allowed very different countries to design ombudsman schemes suitable for their needs. Thus, for instance, some ombudsman schemes have at their core the goal of promoting human rights (eg Reif 2011) whilst for others the emphasis is placed on investigating maladministration (Buck et al 2011); some operate alongside parliament, others solely within the private sector; some employ predominantly soft law methods, whilst others have powers to contest laws in court or start legal proceedings against civil servants.[6] Notwithstanding the sheer diversity encapsulated within the ombudsman enterprise, this paper retraces the great potential that is often claimed for it and argues that much success has been achieved. However, there has always been a pressure for ombudsman schemes to demonstrate their worth, none more so than currently. Hence the paper will conclude with a few challenges for the ombudsman community of 2012.

The ombudsman enterprise in the 21st century

In many respects, the ambitious claims made in favour of the ombudsman model in those exciting years before and after the New Zealand Ombudsman was first introduced were, unsurprisingly, very similar to those made today. Great emphasis was placed on the ombudsman as a citizen's defender and a grievance handler, capable of 'shining a light' on the workings of government and where necessary facilitating redress and bringing public power to account (eg Whyatt 1962; Rowat 1965). Ideally, it was hoped that the ombudsman would promote trust in government as well (Rowat 1973, p.10).

Intriguingly, the legislation for ombudsman schemes did not always specify any further function beyond the investigation of complaints. Despite the legislative emphasis on complaints handling, there is now a myriad of studies and ombudsman speeches to support the assertion that the ombudsman has a twofold function (eg Buck et al 2011), a dichotomy that has been referred to as redress and control (eg Seneviratne 2002, p.17) or fire-fighting and fire-watching (Harlow 1978). Thus ombudsman schemes commonly aspire not only to resolve complaints, but they use a spectrum of different tools to work with the administrative bodies they investigate to prevent breaches of our various expectations of good governance occurring in the first place. The understanding that the ombudsman has a duty to feedback his or her findings to improve administrative systems for the future has been at the forefront of ombudsman thinking for many years (eg Owen 1990). It is one of the key aspects of administrative justice which it is often argued that the ombudsman is better equipped to deliver than other institutions and is potentially one of the institution's most attractive selling points (eg Marin 2009). Getting decisions right first time is, after all, perhaps the most important task of any administrative justice system (AJTC 2011).

But although the wider potential of the ombudsman has long been understood, the output of the institution has not always attracted wide attention (eg Snell 2000). In this paper, however, I will argue that the context in which the dual aspiration to provide redress and control has changed to the advantage of the ombudsman in at least two key respects: an improved

[6] See for instance, Kucsko-Stadlmayer's (2008) study on European Ombudsman schemes.

understanding of the role of the ombudsman and growing innovation in the way ombudsman schemes operate. It will be further argued that this changed context has led to the ombudsman enterprise becoming much more sophisticated than the redress/control model implies.

Greater acceptance and understanding of the ombudsman's worth

The need and demand for the ombudsman is, if anything, greater today than it was fifty years ago. As this modern age of the ombudsman began, not all believed that the solution to administrative error lay in a new form of dispute resolution. When the UK belatedly decided to follow the wisdom of the New Zealanders and introduced its first ombudsman,[7] whilst some ascribed to the office the potential to solve all ills, there was also a mixture of concern and disinterest in some very well read circles. Alongside the usual ombudsmouse allegations, one of the country's leading public lawyers described it as an 'irrelevance', arguing vehemently that this reform was a distraction from the much more important need to increase the potential for judicial remedies in public law (Mitchell 1965).

By contrast, today very few administrative lawyers argue that courts and tribunals alone are capable of resolving all administrative disputes. Partly this shift in attitude is about the passage of time. Past holders of the post have generally been very successful in gaining the acceptance of a cross-section of relevant interests, albeit on occasion this may have been begrudging. But, in addition, many of the key arguments in favour of the ombudsman have been strengthened through experience.

What might be described as the 'legal method' clearly has a key role to play, if not the key role, in the control of administrative activity. Amongst many examples, the power of administrative law has been demonstrated by the pioneering work of US administrative lawyers under the Administrative Procedure Act 1946 and the widespread adoption of freedom of information legislation globally. But at the same time, there are clear intellectual limits to the capacity of hard law to capture the nuanced manner in which administrators can err. A good example of these limits is provided in a thoughtful paper by Le Protecteur du Citoyen in Quebec, Canada (2004). In the paper Le Protecteur compares her mandate, as outlined in the Public Protector Act, to Article 846 of the Code of Civil Procedure which lists the grounds available for judicial review in the province. On the face of it, she argues, the legislative remit of the courts and Le Protecteur are incontestably linked and hard to tell apart (Le Protecteur du Citoyen 2004, p. 3). Following a detailed analysis of a serried of investigations, the difference she goes on to conclude, lies in the manner in which the Le Protecteur's methodology allows the office to investigate in an equitable manner the application of the law. As the former Ombudsman for British Columbia once wrote, there are many acts of unfairness 'which may be impractical, inappropriate, or impossible to challenge at law' (Owen 1990, p. 672). The difficulties the legal method faces are particularly stark where it is the conduct of the administrator or administrative system that is at stake (Brenninkmeijer 2006). Such a line of logic chimes with the EU Ombudsman's reference to 'life beyond legality' (Diamandouros 2007). It is the ability to provide justice in this grey area beyond hard law, as well as applying more standard legal instruments, which makes the

[7] Parliamentary Commissioners Act 1967.

ombudsman such a powerful institution. An enhanced recognition of the strength of this argument amongst lawyers means that the ombudsman method is now widely understood and accepted as one of the key ways of expanding the ability of the citizen to pursue grievances.[8]

In any event, politicians and administrators, responsible as they are for managing the public purse, jealously protect their discretionary power and are generally very resistant to allowing the law to encroach any further into administrative practice than it currently does.[9] It is unsurprising, therefore, that nowadays when new grievance procedures are accepted as necessary, it is as likely for the legislature to add a new jurisdiction to an existing ombudsman scheme as it is to create a separate legal remedy.[10]

The ombudsman's claims to contemporary relevance are also strongly linked to the arguments in favour of a right to administrative justice for the citizen (eg Bradley 1995). Rights cannot exist in a vacuum, to be effective there must also be a realistic route by which any breach can be remedied. In this respect, a key idea that captures the role of the ombudsman within the wider administrative justice system is the concept of proportional dispute resolution. What this means varies, but amongst other things it entails that there is a need for an administrative justice system to have the capacity to provide a range of suitable dispute resolution methods appropriate for the range of grievances that may occur. Here, as is well known, there are many practical advantages to the citizen of the ombudsman model. It is a body with strong investigatory powers that can operate outside the formal judicial process and provide a service that is readily accessible to the individual citizen and, to the complainant at least, is inexpensive. Further, in a world which is often less deferential to authority than fifty years ago and in which the numbers of complaints against public and private authority have risen considerably, lawyers need help. Throw in the added economic pressures which much of the world is experiencing and the additional pressures which this places on government, and the need for the ombudsman looks even more incontestable than it did in 1962.

Innovation and evolution

The second way in which the context in which the ombudsman operates has evolved is in the increasing confidence with which many ombudsman schemes have taken on the model. Within the Anglo-Saxon world at least, this trend has arguably become ever more evident in recent years. By way of example, methods of dealing with complainants have become less formal, customer service has received enhanced attention, new investigative techniques have

[8] A review of standard administrative law textbooks reveals that this point about the ombudsman at least seems to have become accepted.

[9] In the UK, for instance, witness the Government's very negative response to the Law Commission's proposals to grant the courts the powers to expand the power of the courts to award damages against public authorities (Law Commission 2010).

[10] Australian Ombudsman schemes are a good example of this phenomenon, eg the New South Wales Ombudsman's remit has grown from a traditional parliamentary ombudsman scheme to one that also deals with such issues as child protection and telephone interception.

sometimes been deployed and large scale politically challenging systemic investigations have raised the profile of several ombudsman schemes.[11]

Such apparent dynamism has not always been present in the ombudsman community and all the hopes of the office may not always have been realised, as new schemes have had to fight a series of battles for credibility. But one of the greatest strengths of the ombudsman enterprise is the wide discretionary power of the individual who heads the office, as this power always leaves latent the potential for institutional renewal. Thus the ombudsman has considerable discretion to reinterpret the direction of the office to suit the prevailing needs of the administrative justice system. This flexibility is extremely important, as of all the essential demands on an ombudsman, perhaps the most important is the need to remain relevant to all stakeholders if it is to legitimate its place in the constitutional order.

This need to remain relevant is perhaps the number one objective of an ombudsman. It is a function of the office that implies that the traditional expectations of an ombudsman, such as independence, integrity and technical knowledge, can only represent some of the essential criteria for an ombudsman. Former administrators and lawyers will always be strong candidates for the post of ombudsman. But in order to maintain a wider awareness of the ombudsman's position in the constitutional order, there is also a strong argument for choosing professionals who have not been immersed in strict legal thinking all their careers and making appointments from sectors of the community unconnected to the organisations that they will ultimately investigate. After all, an ombudsman office can ordinarily afford to recruit into its organisation relevant legal and administrative expertise. What is less easy to find is an organisational leader who is capable of ensuring that the office is maximising its potential and delivering a relevant service, whilst retaining the confidence of all who come connected to the office.

On this point, I hope my own country's Parliamentary Ombudsman does not mind me recalling that on appointment she was criticised in Parliament for admitting that she lacked knowledge about what an ombudsman does (PASC 2011, Q29). Whilst this confession was probably an uncomfortable one for her at the time, her presentation to Parliament and her career background also indicated potential for fresh thinking. In my research on the ombudsman enterprise I have become increasingly impressed by the variety of characters that have been chosen for the post, usually bringing with them an injection of alternative perspectives and ideas. To give but a few examples, human rights activists, academics, journalists, a human resource director and businessmen have all been employed as an ombudsman in recent times. In my view, ideally the ombudsman should not be an establishment figure, or someone minded to play safe. If the incumbent becomes too conservative or timid in outlook there is a danger of staleness in practice, and a risk that the office can drift to the margins of the administrative justice system and public consciousness. This risk is one of the key arguments for medium length fixed terms of office for ombudsman, as opposed to full security of tenure or excessively long fixed terms. Through

[11] For a full account of this argument, see Buck et al (2011, chs 4 and 5).

regular reappointment at the top, ombudsman schemes should be forced to re-evaluate periodically their strategic approach.

To avoid becoming insignificant, the ombudsman should be bold in his or her work. The constitutional balance in the ombudsman/decision-maker relationship is safeguarded in legislation because in most ombudsman schemes the opinion of an ombudsman is not binding. Thus it is appropriate for an ombudsman to be an innovator, a harbinger of the future; [by] point[ing] to tomorrow's standards today" (Lewis 1993, p 665), a figure capable of cajoling an investigated body in a new direction if that is what is required. The office's strength lies largely in the ombudsman's power of 'moral suasion' (Marin 2009) and the limits of this capacity provides sufficient safeguard for an ombudsman overstepping the mark and being too bold.

In my, admittedly selective, research, often I believe that ombudsman schemes have met the challenge, although credit too should go to governments and parliaments for placing its faith in the institution through the introduction of new schemes and expanded mandates. Whatever the reason, there has been a steady rejuvenation of the ombudsman model since 1962. In fact, the redress and control model described above might retain its core importance, but the ombudsman enterprise has long since moved on. Consider, for instance, the following list of subsidiary issues that are majored on by one or more ombudsman schemes, or have become a core function with the passage of time:

- The promotion of human rights
- Applying freedom of information legislation
- The identification of fraud
- A first point of contact for citizens looking for help as to where to complain
- Helping the frustrated complainant find closure in their complaint
- Exercising quality control over lower level complaints handlers
- The provision of audit services
- Scrutiny of the implementation of legislation or internationally agreed standards
- Publication of guidance
- Access to constitutional courts.

And in many instances ombudsman schemes have taken on both old and evolving roles with some vigour and an enhanced willingness to take on sensitive issues, as with our host ombudsman's recent reports on bullying at a High School (New Zealand Ombudsman 2011) and self-harm in a prison (New Zealand Ombudsman 2011a). What these examples also demonstrate is that, amongst other things, the systemic investigation has become a work of art, with Gareth Jones's book on conducting investigations (Jones 2009) and the *Sharpening your teeth* course run by the Ontario Ombudsman office becoming almost compulsory features of an ombudsman's training manual. At its best, the ombudsman is capable of providing the necessary intelligence to assist the wider political process in coming to terms with serious and controversial abuses of power within administrative circles.

Overall, what we are faced with today is an institution which may still have the same core objective, protecting people from abuse of power and the violation of their rights, but it is an institution that is far removed from its 1962 version in terms of its multi-faceted potential and claim to impact the manner in which government and society operate.

Impact: real and claimed

Whilst it is still necessary for the role of the ombudsman to be explained and justified, the intellectual argument for the model has long since been won. Indeed, if anything the standard conception of the ombudsman underplays what the office often actually contributes. This latter point is important, because in my country the UK, and I suspect many others, there has become a more pressing need to evidence some of the claims made on behalf of the ombudsman. For the foreseeable future all public bodies, it would seem, will be required to operate under tighter budgets in response to global economic pressures and to work hard in justifying their continuing existence.

In this respect, what kind of evidence should ombudsman schemes be providing? This is a topic of much debate (eg ADB 2011) and I will not attempt to resolve it here. I will only note that the evidence from the academic world is both limited and mixed in its assessment of the ombudsman's impact. On the negative side, in recent times in the UK there has been research to suggest that the ombudsman is a cost ineffective service for complainants (NAO 2005) and that it has a negligible impact on administrative practice (Gill 2012). Both these studies were admittedly limited in scope, but both highlighted the dangers in over claiming the capacity of the ombudsman to make a difference without supporting evidence.

There are many approaches that could be taken towards the evaluation of the office,[12] but taking the core roles of redress and control as a focus, let me raise a few questions here that I would be asking if I was a parliamentarian genuinely interested in securing an effective service from the ombudsman.

Does the ombudsman reach a sufficient proportion of potential complainants or provide complainants with the service that they deserve?

Here are two of the central challenges for any ombudsman scheme to deliver upon. I was recently in Gibraltar observing the way the ombudsman scheme there operates. The Gibraltar Public Services Ombudsman scheme operates in almost uniquely privileged circumstances, insofar as the jurisdiction of the office in terms of geography and population size is so small. Nevertheless, the degree of connectivity between the office in Gibraltar and the local community was impressive and gave a window into the potential for ombudsman schemes to make a difference. In Gibraltar, I saw evidence to suggest that all sections of society are not only aware of the office, but make use of it. I also witnessed at first hand the degree to which complainants benefit enormously from being able to communicate face to face with

[12] As a starting point, the following papers illustrate the variety of ways of approaching the subject, Fowlie (2007), Stuhmcke (2009), Husain (2011) and Marin and Jones (2011).

ombudsman staff, with the result that even complainants that do not have their complaint upheld can be left satisfied by an independent consideration and explanation of their matter.

Of course, most ombudsman schemes can only dream of such an interactive approach to dispute resolution, despite good communication supposedly being at the heart of the ombudsman method. Absent of these natural advantages is it possible for an ombudsman office ever to connect fully with those citizens who are less politically or legally aware; or to persuade complainants their matter has been dealt with fairly even where their complaint has not been upheld? Without evidence to demonstrate a strong capacity in this regard, the potential for healthy scepticism towards the office will always be there, as is evident in the existence of a number of anti-ombudsman websites in the UK.[13]

To what extent is the ombudsman responsible for overseeing the quality of lower level complaint handlers?

I raise this as a subsidiary question, because if the scenario in which the Gibraltar Public Services Ombudsman operates cannot realistically be replicated and if communication with the complainant has to be conducted by a combination of phone, email and letters, then how is the personal touch in complaint handling to be achieved? The answer, I presume, is to rely upon the input of local complaint handlers to facilitate an easier, and hopefully engaging, route by which complainants can access the administrative justice system. Normally such complaint handlers will be connected to the organisation complained against but that does not necessarily reduce the value of this form of dispute resolution provided there is a sense of strong independent oversight. If local dispute resolution is to be a key part of the solution to the provision of a manageable complaints system, then in my view the ombudsman has an essential role to play in monitoring the quality of service provided by local complaint handlers. In turn, the importance of this role needs to be explained, advertised and its implementation evaluated. Above all, how successful can the ombudsman be in ensuring that the complex network of complaint processes that result is comprehensible to the citizen?

When an ombudsman recommends administrative reform, are changes implemented and do they make a difference in the long-term? When an ombudsman issues guidance, is it listened to?

To put the point more bluntly, when a street level bureaucrat makes a decision that affects a citizen – does the background ombudsmanprudence and the presence of the office make any difference whatsoever to the bureaucrat's thought process? Great claims have been made on behalf of the ombudsman in this regard and certainly many an ombudsman report does purport to provide evidence of influence and even financial savings to government. In the long term, however, this is one area that I suspect will become the focus of independent scrutiny of the ombudsman enterprise.

Is there any evidence to suggest that the ombudsman increases trust in government?

[13] Eg see Local Government Ombudsman Watch, http://www.ombudsmanwatch.org/ and Public Service Ombudsman Watchers, http://www.psow.co.uk/.

After many years of the ombudsman, and indeed other constitutional watchdogs, disillusionment with government remains rife. It has even been suggested that the growth of constitutional watchdogs might have added to this process of disillusionment rather than dispelling it (Flinders 2011). I personally would not subscribe to the full thrust of this argument, but is the claim to promoting trust in government a wise one for an ombudsman to make without any strong evidence to suggest that it is successful in this regard (eg Hertogh 2011)?

Accountability

In asking these questions I am of course being deliberately provocative. I believe that the ombudsman is a force for good, and my main frustration is that it could probably achieve more. The ombudsman is a vital constitutional institution, not just a provider of administrative justice (Kirkham 2009), and has a key role to play in upholding integrity in both public and private administration (Stuhmcke 2008). But although many ombudsman schemes have put significant work into finding ways to measure that performance, in terms of answering the sceptic's core concerns about the effectiveness of the organisation more can probably still be done.[14]

Unfortunately, I suspect that part of the answer here is a cosmetic challenge, namely finding the right way to present the ombudsman office to the wider public. But one area which remains fundamental to efforts to secure the integrity of the ombudsman in the public eye is the issue of accountability. Accountability should, ideally, mean an ability to defend and demonstrate the impact of the office of ombudsman as just discussed. But short of that, it entails being subject to public scrutiny on a regular basis. I am not sure to what extent the IOI can or should be part of that process, but the organisation could play an important role in describing the conditions of accountability that an ombudsman should be willing to be subject to.

By way of example of the solutions currently available, I will conclude this paper with some good examples of scrutiny.

- In the UK, the Parliamentary and Health Services Ombudsman meets annually with a select committee in Parliament and is publically questioned about a range of issues surrounding her office, which includes strategic and performance issues as well as specific detailed questions about work carried out. Admittedly, the quality of the scrutiny through Parliament depends upon the resources available, including the quality of the scrutinisers and the energy they are willing to devote to the task. When I put the argument in favour of Parliamentary scrutiny to one Australian Ombudsman a few years ago, he pointed out that you have to remember that most Parliaments do not always bat a long way down. Implying, for those non-cricket fans amongst you, that

[14] Eg see our host's work on this http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/348/original/soi12-15.pdf?1346369963

many Parliaments do not possess the numbers of quality MPs necessary to undertake meaningful scrutiny. This may be true, but the principle of parliamentary scrutiny remains a strong one, particularly as it provides the ombudsman with the opportunity to dispel some myths about the office and to expand upon the full range of services that it provides.

- In Queensland, Australia, they take the issue of scrutiny one step further. There the legislation requires that an independent strategic review is conducted at least every five years and submitted to Parliament (Ombudsman Act 2001 (Qld), ss.82-85). The strength of this model is that it is capable of providing parliament with the knowledge necessary to perform meaningful scrutiny.

- In many countries around the world the ombudsman's decisions are exposed to judicial challenge on occasion. The principle is not an uncontested one in ombudsman circles I know, but retains in the system the potential for mistakes, errors to be rectified and a degree of external pressure to foster care and attention within ombudsman schemes.

- In Scotland a few years ago, following a complaint received about the office, the ombudsman opened up an investigation process undertaken within his office to the scrutiny of an independent specialist from another ombudsman scheme. The independent reviewer described the Scottish investigation 'as the worst case of complaint handling by an Ombudsman's office that I have seen' (SPSO 2009, Annex 1). Albeit the ombudsman retained control of the process in terms of output, this was a healthy display of transparency and led to the ombudsman submitting the report to Parliament and implementing its recommendations.

- Finally, I am aware that there is a danger of over-scrutiny, hence I mention here an interesting example of a sharing of ideas. For a key part of the challenge for an ombudsman scheme is to fit appropriately into a wider system of administrative justice bodies that collectively provide an accountability service to the general public in a manner that hopefully avoids duplication, as well as identifying gaps in existing coverage. In an effort to coordinate this wider system, in Western Australia a number of watchdog bodies with similar interests formed the Western Australia Integrity Coordinating Group[15] and likewise in Tasmania a similar group, the Integrity Commission, has been formalised in statute.[16]

Conclusion

I remain convinced that the ombudsman is one of the most dynamic and potentially useful tools within the justice system in both its public and private forms. Together with the formal

[15] See the Western Australia Integrity Coordinating Group website: http://www.opssc.wa.gov.au/ICG/About_Us/ (accessed 10 September 2012).
[16] See http://www.integrity.tas.gov.au/home (accessed 10 September 2012).

legal method of dispute resolution it allows the administrative justice system to provide the necessarily tailored range of options with which to control the complexity of public and private administration. However, there is a story that at the second international ombudsman conference in 1980, Brenda Danet, who was one of the most influential of ombudsman observers back then, told us that it was time to move on from arguing what the ombudsman can do and to start finding the evidence that it does achieve its goals (Aufrecht and Hertogh 2000, 389). Thirty years later and certainly we in the academic community have still not done enough to meet this challenge – and although I appreciate that much good work is being done in this regard by many ombudsman schemes, together there remains a lot to do if the role of the ombudsman is to be safeguarded in the current economic environment and entrenched in the public mindset.

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