

COMBATING DISCRIMINATION ON THE GROUNDS OF DISABILITY IN INTERNATIONAL AND EU LAW

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Abstract

The article provides for a critical overview of international and in particular EU human rights and non-discrimination frameworks relevant and applicable to unequal treatment of persons with disabilities. Having considered the contents and scope of relevant international human rights and non-discrimination provisions the author turns to the questions as to how these provisions might be exercised, who the rights holders and duty bearers would be and what the challenges of balancing different rights and needs are. The article also includes the definition of the concept of disability in the context of non-discrimination law and examines the dimensions of disability discrimination as defined in international and EU law. The author concludes that international and especially modern EU non-discrimination law establish a wide and inclusive legal framework for dealing with disability discrimination. However, the actual scope of the realisation of international and European legal standards on disability discrimination in each state will depend on the consistency and effectiveness of their national implementation and on the manner of putting them into practice.

Keywords: Persons with disabilities, disability discrimination, international law, EU law, EU member states' legislations

Introduction

In spite of a multitude of international, supranational and national legal and policy instruments and actions pursuing better participation and enhanced inclusion of persons with disabilities in the mainstream society, exclusion, discrimination and marginalisation of disabled people remain one of the greatest global human rights issues of our time which is still gaining importance due to the factors such as war and destruction, unhealthy living conditions and the global increase in chronic health conditions, ageing populations and the higher risk of disability in older people as well as the general absence of knowledge about disability, its

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causes, prevention and treatment. Discrimination against any person on the grounds of disability is “a violation of the inherent dignity and worth of the human person” as it is stated in the Preamble to the UN Convention on the Rights of Persons with Disabilities.

According to the 2011 World report on disability produced and published jointly by the World Health Organization and the World Bank Group disabled persons in all countries experience inequalities and are denied equal access to health care, work and employment, education, political participation, transport, public buildings and even information (World Health Organization, 2011: XI). In addition, in the General Comment No. 5 (on persons with disabilities) adopted by the Committee on Economic, Social and Cultural Rights it is stated that the consequences of the discrimination on the grounds of disability have been particularly severe also in the fields of housing, cultural life and access to public places and services.²

The overarching aim of this article is to critically analyse international and in particular EU human rights and non-discrimination frameworks and to find out whether these norms provide for the adequate legal, policy and institutional basis for dealing with problems that persons with disabilities face when it comes to their equal treatment and equal opportunities. Having considered the contents and scope of relevant international human rights and non-discrimination provisions I will turn to the questions as to how these provisions might be exercised, who the rights holders and duty bearers would be and what the challenges of balancing different rights and needs are. However, the article will not examine the existing mechanisms or institutions and procedural issues (e.g. burden of proof, remedies, sanctions, etc.) – at international, EU and national levels - for giving effect to and enforcing rights in question.

Disability-based discrimination and EU non-discrimination law

As for the EU legislation on non-discrimination, disability is explicitly included on the list of prohibited grounds of discrimination. Following the new primary legal base of Article 13, inserted in the EC Treaty in 1999 (the Treaty of Amsterdam), the EU legislative framework on non-discrimination has been substantially extended and consolidated. There are now four core EU non-discrimination directives, including the Employment Equality Directive (Directive 2000/78/EC) which prohibits also discrimination on the basis of disability (in addition to other grounds such as religion or belief, age and sexual orientation), but only in respect

² CESCR, General Comment 5, Persons with disabilities, 9. 12. 1994, para. 15.

of employment and vocational training, what is considered to be one of the major shortcomings of the advanced EU framework legislation on non-discrimination. It is not to expect any real advancement in this regard in the near future since the debates in EU institutions on Commission's proposal (known as "Horizontal Directive")³ to extend protection for these discriminatory grounds outside the labour market (i.e. to the area of accessing goods and services) have been postponed due to some other "priority issues" related to global economic crisis. The Employment Equality Directive is binding upon the EU member states. They should have transposed its provisions into their national legal systems by December 2003, except for provisions on age and disability discrimination where it was possible to extend the implementation period until 2006. Candidate member states are required to have completed national implementation of this Directive before joining the EU.

Another very important document of the EU relevant for combating disability-based discrimination is the Charter of Fundamental Rights of the European Union which became legally binding with the entry into force of the Lisbon Treaty in 2009. As a result, the EU institutions are now legally bound to observe the Charter and to comply with its provisions. The EU member states (except for Czech Republic, Poland and the UK) are also legally bound to comply with the Charter, but only when implementing (i.e. interpreting and applying) EU law. Article 21 of the Charter contains general prohibition of discrimination on various grounds, including disability, while Article 26 provides for social and occupational integration of persons with disabilities as well as for their participation in the life of the community.

What does "disability" imply?

In order to be able to identify those entitled to the international protection against discrimination on the grounds of disability it is first necessary to define more precisely what conditions the term "disability" covers in the context of international non-discrimination law. Although disability is included in the list of protected discriminatory grounds contained in the Employment Equality Directive and was recognised by the ECtHR as being covered by "other status" in Article 14 of the ECHR and Article 1 of the Protocol 12 to the ECHR, neither the Employment Equality Directive nor the ECHR case law provides a definition of the notion. However, the CRPD does provide some guidance in this respect by recognizing disability as an evolving concept which "results from the interaction

3 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2.7.2008.

between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". Furthermore, Article 1 of the CRPD determines the personal scope of this convention by defining persons with disabilities as those having "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". Given that the EU (as a regional integration organisation) is a party to the CRPD it is very likely that the CJEU will also be guided by both the convention itself and the interpretations given by the Committee on the Rights of Persons with disabilities, a specific human rights treaty body responsible for the supervision of implementation of the principles and standards enshrined in the CRPD and for their interpretation. What is more, the EU and its institutions as well as the EU member states when implementing EU law will be required to pursue such broad and inclusive approach to the interpreting the meaning of disability as it ensues from the CRPD.

It has happened many times that both in theory and practice the terms "disability" and "handicap" have been used interchangeably. However, one should be aware of the difference in their meaning. Also, the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities clearly distinguish between these two notions by ascribing to "disability" mainly medical connotation (i.e. permanent or transitory physical, intellectual or sensory impairment, medical conditions or mental illness) whereas defining "handicap" as disability in more social terms (i.e. an environmental barrier for a person to take part in life of the community on an equal footing with others). Still, there appears to be no general consensus on such an approach to these two definitions, although the term "disability" is usually employed in the context of European non-discrimination law. In addition, it is worth to note that disability can be defined as medical impairment or as social construct. The medical definition of disability is based on "a rather functional view of disability, which regards disability primarily as a physical or psychological impairment impeding someone's daily functioning in society" (Schiek, Waddington, Bell, 2007: 131). The medical model of disability is often criticised by authors for being inadequate in providing protection against disability-based discrimination because it pays too little attention to the failure of the social environment to adjust to the need and aspirations of persons with disabilities (Schiek, Waddington, Bell, 2007: 132). In contrast, the social model considers disability not so much a functional impairment but rather a social construct and explains disability discrimination as a consequence of disabling environment and impairments created by society. In order to provide an inclusion and

effective protection against disability discrimination a wide definition of disability, which is based on a social model and includes past, present and future disability, as well as assumed disability and discrimination by association, should be opted for. It must be mentioned here that the social approach to the concept of disability is also more in line with current international trends and with the EU policy instruments on disability than the purely medical approach. However, the definition of the concept of disability formulated by the CJEU in *Sonia Chacón Navas v. Eurest Colectividades SA* seems to be closer to the medical model than social model as it focuses on present disability, which is defined in a rather functional and medical manner.

Emphasizing the distinction that must be drawn between “disability” and “sickness” the CJEU produced a definition of disability which is made up of three requirements:⁴ 1.) there must be a limitation which results in particular from physical, mental or psychological impairments; 2.) the limitation must hinder the participation of the person concerned in professional life; 3.) it must be probable that the limitation will last for a long time (disability must be permanent or at least long-term in character). Such restrictive interpretation of disability given by the CJEU is somewhat surprising as its previous case law relating to the EU non-discrimination directives always tended to pursue a broad and inclusive approach to the legal protection against discrimination. It is also true that the CJEU’s definition of the term “disability” is not meant to be exhaustive and fixed. This means that the CJEU left itself enough room to further elucidate and develop this definition in favour of disability as social construct in later cases referred to it by the national courts.

The next very significant and also controversial question that pertains to the interpretation of disability as a basis for discrimination is whether “disability” should be defined in a symmetrical or asymmetrical way. The Employment Equality Directive does not provide for any implications in this regard, while the CRPD favours asymmetrical approach in many of its provisions. Various commentators and scholars seem to be divided on this issue either (e.g. Skidmore, 2001: 131 and Waddington, 2005: 115). In its first decision on the definition of disability in *Chacón Navas* case the CJEU did not touch upon this question. But it is quite obvious that a symmetrical approach is more protective of the rights of non-disabled persons. On the other hand, it is just as clear that an asymmetrical interpretation of disability in non-discrimination legislation provides better protection to persons with disabilities. Its future decisions

⁴ *Sonia Chacón Navas v. Eurest Colectividades SA*, CJEU, Case C-13/05 [2006] ECR I-6467, 11 July 2006, para. 43.

will probably show us what approach to this issue is preferred by the CJEU.

The question whether disability, as it is defined in international and EU law, can be perceived as a suspect ground for discrimination is also very relevant for defining the scope of protection against disability discrimination. Unfortunately, no answer to this question can be found in the so far case law of the CJEU and the ECtHR. However, if we take into consideration the fact that disability was included in the Employment Equality Directive's list of protected discriminatory grounds and the many legal and policy efforts made on both the international and European level we might arrive at a conclusion that a strong protection needs to be offered against disability discrimination and special accommodation measures need to be provided for to meet the needs and aspirations of persons with disabilities. Thus, in general disability can be regarded as particularly suspect ground for unequal treatment (Schiek, Waddington, Bell, 2007: 147). It is therefore to expect that the CJEU and the ECtHR will apply a relatively strict test in considering the justifiability of a distinction based on disability and that states will have on their disposal a relatively narrow margin of appreciation to decide if certain distinctions on the grounds of disability are reasonable and justifiable.

Defining dimensions of disability discrimination

In this section I will try to work out what situations, incidents and concepts are to be seen as amounting to disability discrimination under international and EU law. The most important international legal instrument on the rights of persons with disabilities, the CRPD, defines discrimination on the grounds of disability as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (Article 2). We can see that the text of this universal definition to a great extent resembles wording in similar non-discrimination provisions contained in other UN specialised human rights treaties, such as the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In addition, one should note that in principle no free-standing claim can be made under Article 2 of the CRPD. As a result, its non-discrimination clause can be invoked only in conjunction with other substantive rights provided under the CRPD as it was also pointed out by the Committee on the Rights of Persons with disabilities in its first decision adopted in the frame of individual

communications procedure under the Optional Protocol to the CRPD.⁵ The CESCRC also came up with the definition of disability-based discrimination in the context of the ICESCR. Such discrimination in its belief includes “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.⁶ On the other hand, a positive discrimination of persons with disabilities - in the form of appropriate and concrete measures - is necessary in order to do away with existing discrimination and to establish equitable opportunities for persons with disabilities. According to CESCRC such positive measures “should not be considered discriminatory in the sense of Article 2(2) of the ICESCR as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective”.⁷

The prohibition of disability-based discrimination under Article 2 of the CRPD covers all forms and types of discrimination, including denial of reasonable accommodation. However, unlike in the Employment Equality Directive, in this Article it is not specifically mentioned whether this general prohibition of discrimination on the basis of disability extends also to the concepts such as indirect discrimination, harassment, discrimination based on imputed disability, discrimination by association, instructions to discriminate and victimisation. As far as indirect discrimination is concerned, it is not disputable that this form of discrimination is covered by the CRPD’s provisions as well. A statement in support of this view can be found in *H.M. v. Sweden* where the Committee on the Rights of Persons with Disabilities allowed for the possibility that a national law, though applied in a neutral way, may lead to discriminatory consequences if the particular circumstances of the individuals to whom it is applied are disregarded. Thus, in the Committee’s view discrimination can take place when persons who are in a significantly different situation are not treated differently by the state and there is no objective and reasonable justification for such treatment in the enjoyment of rights guaranteed under the CRPD.⁸ In the same vein, the CESCRC took the position that “both de jure and de facto

5 H.M. v. Sweden, Committee on the Rights of Persons with Disabilities, Communication No. 3/2011, CRPD/C/7/D/3/2011, 21 May 2012, para. 7.3.

6 CESCRC, General Comment 5, Persons with disabilities, 9. 12. 1994, para. 15.

7 CESCRC, General Comment 5, Persons with disabilities, 9. 12. 1994, para. 18.

8 H.M. v. Sweden, Committee on the Rights of Persons with Disabilities, Communication No. 3/2011, CRPD/C/7/D/3/2011, 21 May 2012, para. 8.3.

discrimination against persons with disabilities takes various forms, which range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers".⁹

Harassment on any of the protected grounds of discrimination (including disability) is a particularly harmful and insidious type of discrimination. Therefore, it was included in the Employment Equality Directive as a specific form of unlawful discrimination which occurs when an "unwanted conduct" related to a protected ground (in our case to disability) takes place "with the purpose or effect of violating the dignity of a person and of creating an intimidating, degrading, humiliating or offensive environment" (Article 2(3)). As in the case of Employment Equality Directive, the CRPD protects persons with disabilities from harassment only in the context of work and employment (Article 27(1)(b)).¹⁰

A person may be subjected to less favourable treatment not so much because of his/her particular personal characteristic, such as disability but on the basis of assumptions relating to that characteristic. It might well happen, for instance, that employer decides not to employ a certain candidate because he thinks that he is disabled or chronically ill and therefore unable to perform his job responsibilities and tasks to employer's satisfaction. A crucial question here is whether such cases of unequal treatment are also covered by non-discrimination legislation. If we take into consideration that the primary mission of provisions on the prohibition of discrimination is to protect individuals against discrimination, this question should be answered in the affirmative. From this point of view it is completely irrelevant whether discrimination is based on real or on perceived characteristic. The Employment Equality Directive does not contain express references to discrimination on grounds of assumed characteristics. Also, it cannot be derived from its content that such discrimination is excluded from its scope. Thus, having in mind the importance of the inclusion of discrimination by assumption and the fact that relevant international instruments seem to offer protection against such discrimination, one can conclude that individuals are protected against discrimination based on assumed characteristics also under the Employment Equality Directive. International support for such a broad definition of the prohibition of discrimination can be found in the case of *Timishev v. Russia* in which the ECtHR held that Article 14

⁹ CESCR, General Comment 5, Persons with disabilities, 9. 12. 1994, para. 15.

¹⁰ The CRPD does not contain any definition of the term "harassment".

of the ECHR prohibits not only discrimination based on one's real or actual characteristics, but also discrimination based on perceived characteristics (in this case ethnicity),¹¹ i.e. discrimination by assumption. As a result, even persons who are not really, for example, disabled can enjoy the legal protection against disability discrimination if they are regarded by others as having disabilities.

Another important concept is discrimination by association which relates to the situation where someone is discriminated against not so much on account of their own characteristics, but on account of their relations with someone else. An example is that of parents who themselves are not disabled and are refused entry to the bar because they are together with their disabled child. The Employment Equality Directive does not provide a clear answer to the question whether discrimination by association is covered by its non-discrimination provisions. However, in the *Coleman* case the CJEU were afforded the opportunity to consider the concept of discrimination by association and decided that unfavourable treatment of an employee by her employer, based on the fact that her son was disabled, amounted to discrimination and harassment by association.¹² The employee's requests were refused and she was threatened with dismissal as well as receiving abusive comments relating to her child's disability.

The Employment Equality Directive regulates also two phenomena which are closely related to non-discrimination law: instructions to discriminate and victimisation. While instructions to discriminate against persons on any of the protected grounds (including disability) are treated as a specific form of discrimination (Article 2(4)), victimisation is only outlawed in general and does not constitute discrimination (Article 11). It can be noticed that Employment Equality Directive provides wider protection of individuals against instructions to discriminate on the grounds of disability than other relevant international human rights instruments (e.g. ICCPR, ECHR) as it prohibits instructions to discriminate in relation to several grounds of discrimination (including disability) and not only the acts of advocacy of or incitement to racial, national or religious hatred, discrimination, hostility or violence. However, the Employment Equality Directive and other EU core non-discrimination directives do not provide a definition of what amounts to

¹¹ *Timishev v. Russia*, ECtHR (Applications nos. 55762/00 and 55974/00), 13 December 2005, paras. 54, 56.

¹² *Coleman v. Attridge Law and Steve Law*, CJEU, Case C-303/06 [2008] I-5603, 17 July 2008.

an instruction to discriminate. The opaque formulation saying that an instruction to discriminate “shall be deemed to be discrimination” without any further explanations of the concept leaves crucial issues unresolved and to the EU member states and the CJEU to interpret.

A prohibition of victimisation in the Employment Equality Directive aims at providing protection to employees involved in a complaint of discrimination in whatever capacity (complainants, those who provide evidence or otherwise act in support of a discrimination claim, witnesses, those providing advice, information and representation) from facing adverse consequences as a result of their involvement in that claim. If people are fearful of the adverse consequences of their involvement in a discrimination claim, then enforcement of the non-discrimination law will become impossible. Protection against victimisation is thus crucial in maintaining the integrity and effectiveness of provisions contained in the Employment Equality Directive. Article 11 of the Employment Equality Directive requires the EU member states to “introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment”. It follows from that provision that the EU member states must take measures which are sufficiently effective to achieve the aim of this directive. This will also include an adequate legal and judicial protection against victimisation. The CJEU considered the scope of the concept of victimisation in *Coote v. Granada Hospitality*. In this case the CJEU recognised the importance of providing protection from victimisation by reasoning that the prohibition on victimisation includes not only dismissal but also any other measure that “may effectively deter a worker from making use of the right to judicial protection”.¹³ In addition, the CJEU emphasized in this case that the scope of protection against victimisation must be extended beyond the employment relationship and include also retaliatory measures taken by an employer in response to proceedings brought against the employer which are intended to “obstruct the dismissed employee’s attempts to find new employment”.¹⁴ In the context of disability discrimination a special attention needs to be paid to the specific concept of “reasonable accommodation”. The obligation to provide a reasonable accommodation is a relatively new

¹³ *Belina Jane Coote v. Granada Hospitality Ltd*, CJEU, C-185/97 [1997] I-5211, 22 September 1998, para.27.

¹⁴ *Belina Jane Coote v. Granada Hospitality Ltd*, CJEU, C-185/97 [1997] I-5211, 22 September 1998, para.27.

phenomenon in international and European non-discrimination law. However, the concept has quickly received global international recognition in Article 2(4) of the CRPD which defines discrimination on the grounds of disability as including a failure to make a reasonable accommodation.¹⁵ Reasonable accommodation, as defined in this provision, means “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. The issue of the reasonable accommodation is relevant also in the European context, given that the Employment Equality Directive in its Article 5 expressly requires employers to take appropriate measures and make reasonable accommodation for persons with disabilities in the field of employment and training. Such measures may include, for instance, installing a lift or a ramp or a disabled toilet in the workplace in order to allow wheelchair access. The CJEU has only briefly referred to the obligation to provide for reasonable accommodation in *Chacón Navas*¹⁶ and the concept is not expressly provided for in the ECHR or the ESC. However, according to Gerard Quinn the ECSR on several occasions interpreted Article 15 of the (revised) ESC in combination with Article E to require also reasonable accommodation (Quinn, 2005: 300).¹⁷

The Employment Equality Directive, unlike the CRPD, contains a reasonable accommodation requirement with regard to persons with disabilities only in the employment context. The purpose of the employment-related accommodation for people with disabilities is to equalize their opportunities in the labour market with non-disabled employees and job applicants. Whilst Article 5 of the Employment

¹⁵ Also, the Committee on Social, Economic and Cultural Rights adopted the approach that for the purposes of the CESCR discrimination on the grounds of disability may be defined as including “denial of reasonable accommodation”. See CESCR, General Comment 5, Persons with disabilities, 1994, para. 15.

¹⁶ The CJEU held in this case (regarding the issue of reasonable accommodation) that Employment Equality Directive prohibited dismissal of an individual with disability where, following the making of a reasonable accommodation, the individual would be competent, capable and available to perform the essential functions of the post in question. *Sonia Chacón Navas v. Eures Colectividades SA*, CJEU, Case C-13/05 [2006] ECR I-6467, 11 July 2006, paras. 49-51.

¹⁷ Quinn, Gerard (2005): The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with one common purpose. In: de Burca, Grainne and de Witte, Bruno (eds.): Social Rights in Europe. Oxford: Oxford University Press (pp. 279-304).

Equality Directive clearly locates the obligation to make a reasonable accommodation within the paradigm of equal treatment as this can be seen from the text “in order to guarantee compliance with the principle of equal treatment”, it does not explicitly define a failure to comply with the duty as a (specific) form of discrimination. Given the brevity of this article, and the scarcity of the CJEU’s case law regarding the interpretation of the concept, there remains plenty of room for further elaboration on the extent of the duty to accommodate as well as for a wide-ranging and authoritative interpretation of key terms within this provision.

When transposing the Employment Equality Directive into their domestic legislations, a vast majority of the EU member states did not go beyond the minimal requirements of the directive, for example, by extending the obligation to provide reasonable accommodation to people with disabilities also outside the employment context. Nonetheless, a limited number of member states did adopt legal measures requiring reasonable accommodation for people with disabilities who wish to access certain facilities such as goods, services and education.

Conclusion

This analytical review of the international and EU law on the prohibition of disability discrimination revealed an overwhelming advancement in the field being made in the last two decades through the adoption or amendments of relevant international and European legal instruments on human rights and non-discrimination as well as through case law and scholarship related to these instruments. Various concepts of discrimination on the grounds of disability have been extensively elaborated and elucidated. Thus, it is possible to conclude that international and especially modern EU non-discrimination law establish a wide and inclusive legal framework for dealing with disability discrimination which can take different forms in societies, ranging from direct and indirect disability discrimination and harassment to instructions to discriminate, victimisation and, last but not least, denial of reasonable accommodation. Also, the concept of “disability” in the context of non-discrimination law has been interpreted broadly in order to cover cases of discrimination based on assumed disability as well as incidents of discrimination due to association with a disabled person.

The EU member states and other European countries are under international and EU law required to develop, adopt and implement comprehensive non-discrimination legislation in relation to disability in order to eliminate all forms of disability discrimination. Such legislation should not only provide persons with disabilities with judicial remedies,

but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life. Disability policies should ensure the access of persons with disabilities to all community services. Therefore, anti-discrimination measures should be based on the principle of equal rights and equal opportunities for persons with disabilities and the non-disabled. Indeed, the actual scope of the realisation of international and European legal standards on disability discrimination in each state will depend on the consistency and effectiveness of their national implementation and on the manner of putting them into practice.

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