



HOMOPARENTAL ADOPTION IN ECUADOR: PRINCIPLES OF EQUALITY AND BEST INTERESTS OF CHILDREN.

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Abstract:

The principle of equality, in addition to being part of the ius cogens in international law, is in Ecuador a primary duty of the State that must be applied in the exercise of all constitutionally and conventionally recognized rights, however, the Constitution itself prohibits homoparental adoption. By virtue of that, the objective of this article was to determine if there is observance of the principle of equality in the constitutional prohibition regarding the adoption of minors by people of the same sex. Thus, survey and interview techniques were used, collecting important results. Therefore, it was concluded that the correct comprehensive development of children and adolescents, through the teaching of values and the exercise of their constitutional rights, largely depends on the family protection they may have, but not on whether their family is made up of a heterosexual or homosexual couple, since to consider that as the fundamental premise to support the prohibition of homoparental adoption, the capacity of homosexual people to care for and accompany in the upbringing would be ignored solely because of their sexual orientation, before which there is a limit called the principle of equality and non-discrimination.

Keywords: Principle of equality, homoparental adoption, principle of the best interest of the child, control of conventionality.

INTRODUCTION:

The Constitution of a country regulates the structure and direction of the State in general, as well as the recognition of rights, principles and duties. In Ecuador, the Constitution of 2008 (hereinafter CRE), recognizes a State of rights and social justice, a change that is carried out within the advance of neo-constitutionalism in Latin American countries. (Asamblea Constituyente, 2008)

With regard to the differentiation between constitutional rights and principles, it is appropriate to mention that the former are "conditions that make it possible to create an integrated relationship between the person and society, which allows individuals to be persons, identifying themselves and others", that is, they can be exercised, some being optional. Meanwhile, the principles are considered by Robert Alexy as "optimization mandates", because they contain the requirement that something be done practically entirely within the legal and real possibilities. (González, 2018, p. 206)(1993)(p. 86)

In addition to this, the CRE conceives equality as a principle and a right. Considering its distinction for the purposes of developing this work, it should be noted that the right to equality is recognized in article 66.4, as "Right to formal equality, material equality and non-discrimination", with respect to which, the CCE in its Judgment No. 019-16-SIN-CC, explained that the formal dimension is equality before legal regulations, that is, the way in which the law is applied, while the material one, obeys "[...](2016) to the particularities of the subjects, groups or collectives, who must be treated equally if they are within similar factual circumstances, prohibiting any discriminatory act". (p. 13)

With regard to the principle of equality and non-discrimination, it is guaranteed in article 11, paragraph 2, of the supreme norm, which states:

2. All persons are equal and shall enjoy the same rights, duties and opportunities.



No one may be discriminated against [...] gender identity [...]; nor by any other distinction, personal or collective, temporary or permanent, that has the purpose or result of impairing or nullifying the recognition, enjoyment or exercise of rights. The law shall punish all forms of discrimination. (Asamblea Constituyente, 2008)

On this principle, the Constitutional Court of Ecuador (hereinafter CCE), through its Judgment No. 11-18-CN-19, specified "(2019)[...] By this principle, the State and all its organs have a special duty to eradicate, *iure* or *de facto*, any rule, action or practice that generates, maintains, favours or perpetuates inequality and discrimination". (p. 18)

Doctrinally this principle is defined as one that "determines that legal norms must be applied to all persons, without distinction". It must be observed and applied in all constitutional provisions and international human rights instruments, including the recognition of the family in its various types. The principle of equality was highly respected by international human rights law, which incorporates the prohibition of deliberately discriminatory policies, attitudes and practices - including those directed at homosexual persons. Therefore, this work will address equality as a principle. (Sosa, Campoverde, & Sánchez, 2019, p. 436)(Montenegro & Cadena, 2020)

On the other hand, the concept of adoption is defined by article 314 of the Ecuadorian Civil Code as "an institution by virtue of which a person, called the adopter, acquires the rights and contracts the obligations of father or mother, indicated in this Title, with respect to a minor who is called adopted". Its purpose, according to the Children and Adolescents Code, is "to guarantee a suitable, permanent and definitive family for children or adolescents who are socially and legally fit to be adopted". (2021)(2021)(Article 151).

Thus, the right of children and adolescents to have a family arises in protection of the principle of their best interests, determined in article 44 of the CRE and on which the CCE has been reiterative in mentioning, through its various judgments, including No. 202-19-JH/21 that, "[...] (2021)When there are several options to choose from in relation to children and adolescents, according to the circumstances of each case, the best interests require opting for the one that most favors the exercise of rights of children and adolescents.(p. 32) It has also been mentioned that this principle finds its basis in the dignity of children, as well as in the characteristics and needs of this priority group.(Sentencia No.2691-18-EP/21, 2021)

At the same time, equality of conditions in the adoption process without excluding same-sex couples is a limited issue that is difficult to understand due to multiple factors, especially since its prohibition has been provided for in the Constitution, according to the second paragraph of article 68 "Adoption shall correspond only to opposite-sex couples". (Asamblea Constituyente, 2008)

Therefore, the importance of this research lies in the problem that gives rise, which arises from the non-observance of the principle of equality in adoption by same-sex couples, leaving aside even international human rights instruments, which have the character of mandatory for the Ecuadorian legal system, violating in turn the principle of the best interests of the child, by not allowing children who are waiting to be adopted to have greater opportunities to be part of a family. In this context, the present research aims to determine whether there is observance of the principles of equality and the best interests of the child, in the constitutional prohibition regarding adoption by persons of the same sex.

METHODS:

The research was developed using a qualitative-quantitative approach. The first was reflected in the theoretical foundations after the study of the principle of equality in adoption by same-sex couples and the interviews carried out. On the other hand, the quantitative approach was externalized in the results section, through the data provided after the completion of the survey and the statistics compiled from the website of the Ministry of Economic and Social Inclusion (MIES).

Regarding the types of research, the documentary was used to compile various relevant information that rested on books, websites and scientific journals; and, the field allowed to obtain information through interviews and surveys, in order to obtain updated and original data. Regarding the scope of the research, it was descriptive, since the principles of equality, best interests of the child and



adoption were analyzed, as well as the relationship of these with other figures such as conventionality control.

On the methods of the theoretical level of knowledge, the analytical-synthetic was used, in such a way, a decomposition of the parts and qualities of several topics related to the principle of equality in homoparental adoption was carried out, to determine the violations to said principle. In turn, regarding the methods of the empirical level of knowledge, documentary analysis was used to process the information contained in the files of the MIES website, regarding the reports related to the current situation of adoptions during the period of June 2018 - August 2021.

The interview technique was applied to collect specialized criteria on homoparental adoption, these were addressed to: A judge of the Judicial Unit of Family, Women, Children and Adolescents based in the canton of Santo Domingo; a master's degree in Constitutional Law; and, a psychologist specializing in family. Similarly, the survey technique was used, for which the universe likely to be investigated were all the judges of the Judicial Unit of Family, Women, Children and Adolescents based in the canton of Santo Domingo, that is, use was made of what the literature has called a convenience sampling.

RESULTS:

Board 1. Survey of judges of the Judicial Unit for the Family, Women, Children and Adolescents based in the canton of Santo Domingo.

Prepared by: The authors.

1. What is adoption in the Ecuadorian legal system?
1. It is a protective measure whereby a family provides for a child who has been declared abandoned.
2. It is to grant a home to a child or adolescent so that he has parents to a child who is not his own, and thus establish a paternal-filial bond, granting them the same rights as a father and mother.
3. It consists of granting the child, parents, through a voluntary process, to welcome the child into their home.
4. The concept of adoption includes granting the child parents, through a voluntary process at their request, to welcome the child into their home as their real child, giving them their surnames.
5. It states that its purpose is to guarantee a suitable, permanent and stable family for the integral development of minors and their environment.
6. Under article 151 of CONA, the purpose of adoption is to ensure a suitable and permanent family for a child fit for adoption.
7. According to article 314 of the Civil Code, adoption is an institution by virtue of which a person, called an adopter, acquires the rights and contracts the obligations of a father or mother, in respect of a minor who is called adopted.
8. Guarantee a permanent and definitive suitable family.
9. Figure in which the adopter acquires the rights and contracts the obligations of father or mother, with respect to a minor who is called adopted.
10. Give a permanent and definitive suitable family to a child who is in the process of adoption.

Board 2. Survey of judges of the Judicial Unit for the Family, Women, Children and Adolescents based in the canton of Santo Domingo.

Prepared by: The authors.

2. What is the principle of equality recognized in the Constitution of the Republic of Ecuador (CRE)?
1. That no one can be discriminated against for any reason.
2. It is that all without exception are equal in rights.



3. All people must be treated equally, no one may be discriminated against on any grounds of ethnicity, place of birth, age, etc.
4. All persons must be treated equally, without any discrimination, on the basis of colour, race, ethnicity, etc.
5. Guiding principle in the exercise of rights, indicates that individuals within society enjoy the same rights.
6. It is that we are all equal before the law, we can not be treated differently, there is formal and material equality.
7. The principle of equality according to our constitutional norm states in its article 11, number 2, that all persons are equal and enjoy the same rights and opportunities without any discrimination (suspect categories).
8. That we are all equal before the law with equal rights, freedoms and opportunities without discrimination.
9. We are all equal, without any discrimination of any kind.
10. It is the equality of people before the law, so that no one is discriminated against under any condition or circumstance.

3. Do you consider that the prohibition referred to in the second paragraph of Article 68 of the CRE violates the principle of equality?

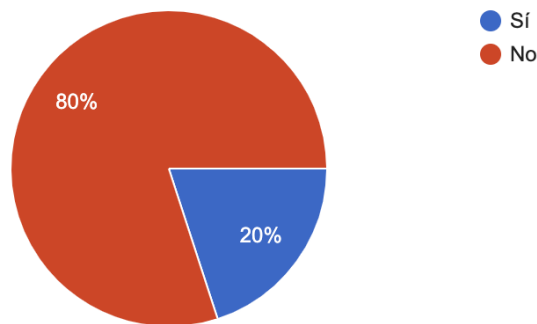


Figure 1. Survey judges of the Judicial Unit for the Family, Women, Children and Adolescents based in the canton of Santo Domingo.

Prepared by: The authors.

4. Do you consider that the prohibition referred to in the second paragraph of Article 68 of the CRE violates the principle of the best interests of the child?

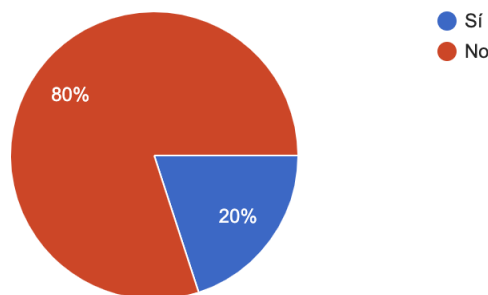


Figure 2. Survey judges of the Judicial Unit for the Family, Women, Children and Adolescents based in the canton of Santo Domingo.

Prepared by: The authors.

5. Do you consider that the prohibition contemplated in the second paragraph of Article 68 of the CRE is compatible with the American Convention on Human Rights?

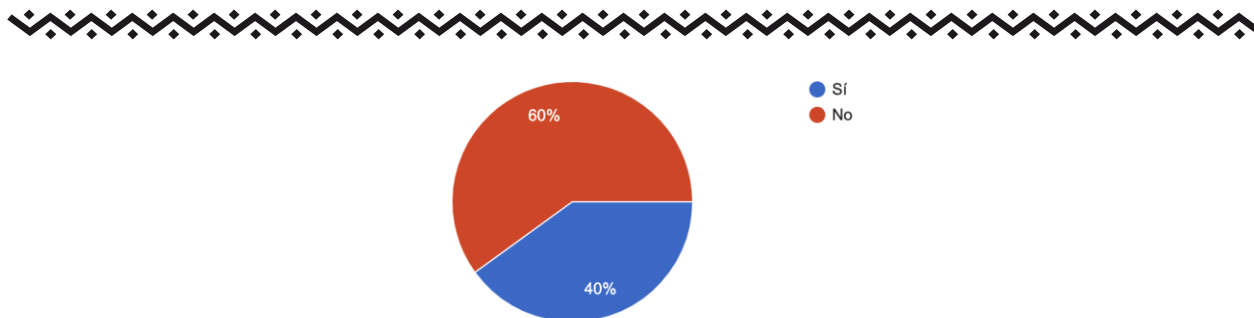


Figure 3. Survey judges of the Judicial Unit for the Family, Women, Children and Adolescents based in the canton of Santo Domingo.

Prepared by: The authors.

Interview with the judge of the Judicial Unit for the Family, Women, Children and Adolescents based in the canton of Santo Domingo: The prohibition in article 68 of the CRE does violate the principle of equality and the best interests of children, since: (1) there is no objective and reasonable justification for its existence; and, 2) the CRE recognizes children and adolescents as part of the priority attention groups, establishing norms where the State, society and the family are guarantors of the safeguarding of their rights. So same-sex couples with a social and psychological follow-up could adopt without any problem. In addition, it states that Article 68 is not compatible with the provisions of the American Convention on Human Rights, and the Ecuadorian State fails to comply with its duty to respect and guarantee the full and free exercise of the rights and freedoms recognized therein without any discrimination. Emphasizing that the Inter-American Court has specified the need to evaluate and determine in each specific case the adoption of the child from a psychosocial perspective, without excluding homoparental adoption.

Interview with Magister in Constitutional Law: When questioned about whether the second paragraph of article 68 of the CRE violates the principle of equality, he explained that yes, because although the Ecuadorian State has recognized marriage between same-sex couples, not the adoption of homoparental couples, thus contradicting the principle of formal and material equality, There is discriminatory treatment of this group of people. As to whether the aforementioned constitutional regulations violate the principle of the best interests of the child, he mentioned that yes, since the CRE recognizes the family in its various types, however, in practice this principle continues to deny the possibility to children and adolescents to access a home, a family, a dignified life and a promising future. When asked if the second paragraph of Article 68 of the CRE is conventional, he replied that it was not, since, according to the American Convention on Human Rights, it is the obligation of the State to guarantee treatment without discrimination.

Interview with Psychologist specialized in family: Explains that Psychology does not have a precise definition of family, since this is widely understood as the environment where the individual feels cared for, without the need to have ties or direct kinship relationship. As for whether he considers that homoparental adoption ensures the well-being and proper development of an adopted child, his professional criterion is no, because adoption has nothing to do with the sexuality of adults, but with the abilities to care, respect, love and take responsibility for the life of someone else. Regarding whether homoparental adoption would affect the well-being and proper development of a child, he explains that no, because the fact that the parents are of a certain sexual orientation does not determine the inclination of the children, since the well-being and correct psychological development of the children depends on the validation, upbringing and teaching of the people who are in charge. Finally, when asked if as a psychologist she considers that homoparental adoption should be allowed in Ecuador, she answers yes, emphasizing that the idea that the best family for a child is one that has a traditional structure must be eradicated, even more so if it is considered that the reality of many heterosexual families is of violence and mistreatment towards their children. leaving aside respect for the proper development of children. He reflects indicating that, being amazed by the path that adoption by homosexual couples takes, he dismisses the progressive incorporation of the rights of people to sexual self-determination.

Then, after applying the method of documentary analysis carried out to the files contained in the MIES, regarding the reports related to the current situation of adoptions, the following statistics are obtained:

Board 3. Situation of children and adolescents during the period 2018-2021.

Source: Ministry of Economic and Social Inclusion.

SITUATION OF CHILDREN AND ADOLESCENTS				
YEAR	ADOPTIONS	INSTITUTIONALIZED	IN THE PROCESS OF ADOPTION	IN LEGAL CAPACITY
2018	84	2252	348	239
2019	110	DOES NOT REFLECT	DOES NOT REFLECT	148
2020	78	DOES NOT REFLECT	DOES NOT REFLECT	265
2021	50	DOES NOT REFLECT	DOES NOT REFLECT	289

Board 4. Situation of adopters during the period 2018-2021.

Source: Ministry of Economic and Social Inclusion.

ADOPTIVE SITUATION				
YEAR	INITIAL INTERVIEW	APPLICATION FOR ADOPTION	FAMILIES DECLARED SUITABLE	FAMILIES WHO JOINED THE FAMILY ALLOWANCE COMMITTEE
2018	331	126	100	98
2019	393	160	103	104
2020	17	15	10	8
2021	241	83	69	77

Discussion:

The control of conventionality requires of each of the States Parties to the American Convention on Human Rights (hereinafter ACHR), the observance and application of all its provisions and that of the international instruments derived from it. Duty that they undertake to fulfill, with special attention to the principle of equality and non-discrimination (art. 1.1) of the aforementioned ACHR "(1977)1. The States Parties to this Convention undertake to respect the rights and freedoms recognized therein and to guarantee their free and full exercise to all persons subject to their jurisdiction, without discrimination of any kind [...]".

This international standard, in article 17.1, guarantees special protection to the family, which is required of society and of each State Party. In accordance with article 67 of the CRE that recognizes the family in its various types, interpreted by the CEC, stating that "[...] The Ecuadorian Constituent recognized and guaranteed the family in its various types; This precept incorporates the element of diversity in the family conception. [...]" . (2018)(p. 81)

In Ecuador, the control of conventionality is a duty that must be applied preventively, ex officio and in a diffuse manner, by all its public, administrative and judicial servants. For this, it is required that they have an adequate preparation that allows them to have knowledge about the controlling and controlled material, in order to give a useful effect to the ACHR and other applicable instruments. On that, Marcelo Trucco, asserts that this control is aimed at reaffirming:(2013)

[...] the primacy of international human rights law, demanding in national judges, not only to weigh the legality of a norm in terms of its adequacy with the National Constitution (control of constitutionality), but now, to analyze its conformity with those conventional and jurisprudential parameters derived from the international system. (p. 2)

From the results reflected in the previous section, it should be mentioned that 6 out of 10 judges consider that the constitutional provision prohibiting homoparental adoption is conventional according to the ACHR, which, despite the arguments set out above. Such a result may be the product of the omission of the highest constitutional control body, the CCE, to give through its judgments, resolutions or opinions, the value of the control of conventionality and the way it is exercised, having focused mostly on the block of constitutionality.



In addition to this, 8 of 10 Judges affirm that the provision of the second paragraph of Article 68 CRE is consistent with the criteria issued by the Inter-American Court. Thus ignoring Advisory Opinion OC-24/17, as material controlling the control of conventionality and result of an interpretative exercise carried out by the official interpreter of the ACHR. It is also an international human rights instrument, which should be applied directly in Ecuador (art. 11. 3 and 426 CRE).

On the other hand, the interviews carried out show that both the Judge and the Magister in Constitutional Law share similar criteria. Emphasizing that both consider that the constitutional norm included in the second paragraph of Article 68 is not conventional with the ACHR, nor with the criteria issued by the Inter-American Court, emphasizing the repercussions that this has for the principles in question.

Considering that this research involves the rights of children and adolescents and therefore the principle of their best interests must be observed in any legal analysis, it was important to have the appreciation of the psychology professional, who through the interview determined that heterosexual adoption alone will not guarantee the rights of the adoptee, as well as that, homoparental adoption would not restrict or impair the rights of children. Criterion consistent with the legal position adopted by the Inter-American Court in Advisory Opinion OC-24/17, holding that:(2017)

[...] Unquestionably, adoption is a social institution that allows, in certain circumstances, two or more people who do not know each other to become family. Likewise, in accordance with what is expressed in Chapter VII of this opinion, a family can also be made up of people with diverse gender identities and/or sexual orientation. All these modalities require protection by society and the State, since, as mentioned above, the Convention does not protect a single or specific model of family. (pp. 74-75)

In addition, the Inter-American Court was clear in answering that:(2014)

States must guarantee access to all existing concepts in domestic legal systems, in order to ensure the protection of all the rights of families made up of same-sex couples, without discrimination with respect to those formed by heterosexual couples. (p. 86)

Although there have been arguments by States Parties to the ACHR that advisory opinions are not binding on the States that did not promote them, such consideration is unfounded from Advisory Opinion 21/14, since which the Inter-American Court has been reiterative in affirming:(2014)

[...] considers it necessary to recall that, under international law, when a State is a party to an international treaty, such as the American Convention on Human Rights, that treaty binds all its organs, including the judicial and legislative branches, so that violation by any of those organs generates international responsibility for that State. It is for this reason that it considers it necessary that the various organs of the State carry out the corresponding control of conventionality, also on the basis of what it indicates in the exercise of its non-contentious competence or Advisory. (p. 13)

In this regard, the national doctrine validates the above considerations in the following sense:

These advisory opinions have a legal effect in all the States Parties that have signed and ratified the ACHR, since they are international instruments that are part of the constitutionality block, they are also part of the controlling material that must be considered for the exercise of an effective control of conventionality. (Cacpata, 2022)

Within this framework, given the interpretation of the Inter-American Court regarding the rights established in the ACHR, specifically Article 17.2, according to which:(1977)

The right of men and women to marry and found a family is recognized if they are of the age and conditions required for this purpose by domestic laws, insofar as these do not affect the principle of non-discrimination established in this Convention.

Thus, it is important to carry out the following analysis, the ACHR does not establish that the right to marriage is exclusively attributed to heterosexual couples, this consideration was already addressed by the CCE; Along with the right to marriage, the right to form a family is enshrined, against which the evolution of the concept of the family must be considered, as well as the aspirations of those who decide to start it and its members; and, although the ACHR points out that the



requirements are included in the internal legal norms of each country, it immediately establishes as a limit the principle of equality and non-discrimination. (Sentencia Nro. 11-18-CN/19, 2019)

As for the statistical data collected from the official website of the MIES and presented in the results, it reflects high numbers of institutionalized children and waiting families. After 2018, the MIES does not show concrete information on the number of institutionalized children. Regarding these statistics, Ramiro Ávila, former judge of the CCE, through a vote saved to Opinion No. 8-09-IC, said "from these figures two consequences are established that draw attention: adoption is exceptional and the rule is institutionalization". (2021)(p. 16)

From the above, it follows that homoparental adoption should be a reality, not only to comply with the obligation assumed by the Ecuadorian State when ratifying the ACHR, but also because of the importance and impact on institutionalized children waiting to exercise their right to the family. The Inter-American Court has said that the family "seeks to realize longings for security, connection and refuge that express the best nature of the human race", Ávila complements this criterion (which is quite close to a legal definition of "family" based on the principle of equality and non-discrimination), stating: (2017)(p. 73)(2021)

The important thing is that children have a family environment in which they can develop their rights. This environment can be affected by domestic violence and the violation of rights by those who owe care for children. The care or violation of rights does not depend nor can it be presumed that it derives from the sexual orientation of people but from their behaviors. Both a heterosexual couple, a single-parent or homosexual family, can guarantee or violate rights. (p. 18)

Finally, society is constantly evolving, certainly faster than the law and probably future generations will find it incomprehensible that even having criteria issued by the high international courts, rights continued to be restricted by the sexual orientation of people, just as current generations would find it foolish to know that at some point in history, It was considered legitimate to make legal distinctions between children conceived in wedlock and those born out of wedlock.

Conclusions:

In the present investigation, the unconventionality and violation of the principle of equality was demonstrated, due to the constitutional prohibition that exists, regarding homoparental adoption. This is because, Ecuador is obliged to observe and comply with all the principles and rights that have been recognized and guaranteed in the ACHR and that have been developed through interpretations made by the Inter-American Court, under penalty of incurring international responsibility before any discriminatory treatment.

Adoption is a legal figure, through which it is intended that two or more people become a family, a figure that in Ecuador restricts precisely the right to the family, both for homosexual couples, and for children who are waiting to be adopted, in attention to the principle of their best interests.

The application of the techniques showed the lack of updating of knowledge by most of the judges surveyed regarding what is established in the ACHR, as well as the criteria issued by the Inter-American Court. At the same time, important opinions were obtained, such as those issued by the psychologist interviewed, who highlighted the importance of homoparental adoption, so that the exercise of the right of people to sexual self-determination does not entail the restriction of other rights.

As for the problem that gave rise to the research, it can be inferred that the correct integral development of children, in large part depends on the family protection they may have, but not on whether their family is made up of a hetero or homosexual couple, since considering that as the fundamental premise to support the prohibition incorporated in the CRE, the ability of homosexual people to care for and accompany the upbringing of a child would be ignored, solely because of their sexual orientation.

The exercise of control of conventionality is not the power of the State or those who represent it, since it is an obligation derived from the subscription and ratification that Ecuador made of the ACHR, in use of the principles of voluntariness and good faith. Therefore, it is obliged to comply with it and

the interpretations that the Inter-American Court has made of it as an authentic interpreter, not only in contentious cases, but also in addition to any consultation that is carried out, being prohibited from invoking provisions of its domestic law, as justification for non-compliance with the aforementioned international norm.

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