

Sustainability in the Real Property Law Curriculum: Why and how

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Abstract

Traditionally considered the preserve of environmental law, for the lawyer and the legal academic, sustainability does not immediately come to mind in considering the subjects of the core curriculum. Yet in light of the contemporary imperative to deal with serious ecological decline and its social and economic implications, a law degree that fails to engage with issues of sustainability will not equip students to grapple with these issues. Instead, graduates will emerge with a discipline knowledge rooted in the modes of thought of the past. This paper presents a way of understanding sustainability as a broader context for the study of law. Using the example of land law, it mounts an argument for adopting a sustainability education approach to curriculum design in law. Finally, it offers a case study of how land law might be taught within the broader context of sustainability.

Keywords

Legal education, curriculum design, sustainability education, land law, Australian higher education

Introduction

The global movement for sustainability education has arisen out of the effect of anthropogenic environmental damage including climate change (Garnaut, 2011; Intergovernmental Panel on Climate Change, 2007). It recognises that damage is not limited to the natural environment. Indeed, there is mounting evidence of the social impacts wrought by environmental damage (Loewenstein, 2013) and by climate change (United Nations Environment Program, 2007). Social and environmental damage flows on to the economy (Stern, 2007) and can ultimately affect governance as seen in the decades of civil unrest in Bougainville following the destruction wrought by the Panguna copper mine (Loewenstein, 2013). The globalised and networked world celebrated in terms of its economic and cultural advances is networked also in terms of the cost of environmental degradation.

Education for sustainable development offers the opportunity for students to develop knowledge, skills and attributes that equip them to think strategically and holistically about their discipline area. It also encourages students to think reflexively about their personal and professional role in their physical, social and economic context. It could be described as an ecological or networked approach to understanding one's place in the world – and thus the effect of any one action on all other parts of the network.

While the degradation of the environment is the catalyst for sustainability education, it is not limited to the life sciences (Reid & Petocz, 2006). For example, there is a move in social work education to adopt an expanded ecological orientation that recognises the disproportionate effect

of environmental damage on the most disadvantaged (Jones, 2012). Business education has developed its own iteration of sustainability education around corporate social responsibility and leadership (Fisher & Bonn, 2011). Likewise, the accounting profession has responded to the Enron collapse by considering a broader context for accounting education focussing on sustainability through corporate social responsibility (Alcaraz & Thiruvuttal, 2010; Evans, Burritt, & Guthrie, 2010).

Despite the considerable literature on sustainability education and the broader discourse around sustainability in higher education, the implementation of sustainability principles into higher education curricula is not universal. At the level of graduate capabilities, for example, the uptake appears to be slow relative to universities' pronouncements in support of sustainability (Thomas & Day, 2014; Young & Nagpal, 2013). Many academic staff resist engaging with the subject (Reid & Petocz, 2006; Shephard & Furnari, 2012) and there are discipline-specific issues, including for law, affecting a wider uptake in curriculum design (see, for example, Jones 2012; Jones & Galloway, 2013; Pan & Perera, 2012).

The aim of this paper is to explain the relevance and meaning of sustainability within legal education and to illustrate how sustainability education might be incorporated into the law curriculum. It first explains some of the conceptual hurdles to better engagement with sustainability in legal education before examining the particular context of real property law. It provides a case study of a property law curriculum that embraces sustainability as a learning outcome to illustrate how the conceptual hurdles can be overcome.

Sustainability and legal education

There is a strong discipline-based argument for legal education to engage with sustainability issues. Dernbach (2011a) suggested that legal education is crucial to the effort to address the challenge of sustainable development and argued cogently for the law school to play a leading role (Dernbach, 2011b). Importantly, he argued that law graduates need to be equipped to deal with contemporary and future challenges – including the breadth of environmental impacts. In Australia, the Discipline Standards for Law include knowledge of law in broader contexts as a threshold learning outcome ('TLO') (Kift, Israel, & Field, 2010). Steel (2013) included sustainability within the range of "broader contexts" relevant to teaching law.

While there is a wealth of legal scholarship engaging with various aspects of sustainability in both environmental and economic contexts, in terms of the Australian law curriculum, there appears to be far less engagement with legal education for sustainability. Galloway (2011) suggested that sustainability in the law curriculum offers a "thematic lens" through which to engage students in a deeper and more contextual understanding of the law. This integrated approach is described further in the context of a first year law curriculum using sustainability as an overarching theme (Galloway, Shircore, Corbett-Jarvis, & Bradshaw, 2012). Recognising the importance of law students engaging in sustainability within a clinical legal context, Melbourne Law School (2013) has launched a sustainability clinic. There is little in the literature, however, to suggest a widespread movement within legal education.

There are a number of possible reasons for a lack of broader engagement with sustainability within the law curriculum. These include ideological and epistemological barriers to broader contexts more generally. Shephard and Furnari (2012), for example, in their review of academics' engagement with sustainability observed that academics may "be 'for' knowledge or 'for' critical thinking but may be unhappy to be 'for' other educational constructs, particularly those involving affective elements" (p. 2). This is evident in other educational constructs in law. Efforts for a collective response to critical engagements with the law – including gender, Indigenous perspectives and sustainability – have been stifled by what has been described as a collective positivist mentality coupled with an imperative to school operatives for the corporate profession (Thornton, 2000). The positivist law school might therefore reject sustainability as ideological and inimical to the perceived objective and neutral nature of the law.

Conversely, where university policy supports sustainability – for example, through graduate attributes or Discipline Standards – the critical academic might see it as an example of neoliberal managerialism. Carrigan (2013) for example, implied that bureaucratically imposed standards are part of the machinery of the corporate university. He argued that “the anodyne generic skills listed in these objectives [of what is effectively a mandated LLB curriculum] cannot grapple with all the crucial issues that underpinned the moves to transform legal education” (Carrigan, 2013, p. 341).

Alternatively, the critical scholar who supports sustainability education might counter that all law is ideological and that sustainability can have meaning beyond a radical fringe movement. Similarly, they might see policy or standards such as the TLOs as an opportunity to engage in a critical curriculum. Paradoxically, any (or all) of these positions are in some way resistant within the complex matrix of the contemporary law school. Both those who refuse to engage in sustainability education and those who do may be enacting “hidden individual acts of resistance” (Heath & Burdon, 2013, p. 391) depending on their own context and ideological orientation. This hints at the problematic nature of a conceptual approach to the law curriculum.

On another level, academics who might subscribe to the importance of sustainability on a personal level may encounter another barrier to its uptake in teaching law: the epistemological question of its meaning in any particular subject – particularly the “Priestley 11” subjects. This relates both to structural features of the categorisation of doctrine and the lawyer’s preoccupation with meaning and definition of words.

The difficulty of conceptualising doctrine through an alternative theoretical framework is perhaps a reflection of the “text book tradition” (Sugarman, 1986, p. 26). Sugarman (1986) argued that legal thought is “embodied in categorisation of the classical period wherein legal thought was systematised” (p. 54). Thus discrete law subjects determine boundaries of thinking that are difficult to cross. For a discipline engaged in the systems thinking of justice, there is, on the surface, very little conceptual manoeuvrability between subject areas.

Reid and Petocz (2006) pointed out that teachers do not share a common language about sustainability. For lawyers, including legal academics, it is possible that the shared understanding of the meaning of “sustainability” is limited to the bounded subject of environmental law. In the textbook tradition, for scholars and teachers in the Priestley 11 subjects there is unlikely to be a natural fit between that doctrinal area and a concept “belonging” in a different context.

The lack of a traditional doctrinal meaning for sustainability need not deter the legal academic from engaging in sustainability education. The Brundtland Report (1987) stated that: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (p. 41). In simpler terms, sustainability is the capacity to endure. It recognises the connectedness of place and time and thus requires a systems thinking approach to understand consequences.

Sustainability has been conceptualised as incorporating three pillars – environmental, social and economic (for example, the United Nations *Johannesburg Declaration*, 2002). Galloway (2011) suggested governance as a fourth pillar relevant to the context of law. For any subject area, the pillar most suited to the content or context can afford a means to engage in questions of the capacity for the law to promote sustainability. Personal preferences and pedagogical goals will mean that the same subject might be designed or taught quite differently by different law teachers yet with students still achieving a “coherent body of [discipline] knowledge ... [within] a ... broader context” (Kift, et al., 2010, p. 10).

The limitations of the traditional bounded approach to law teaching and the relevance of sustainability education can be seen clearly in the context of the law of real property (“Land Law”).

Land law and sustainability

For the lawyer and legal academic, there is as much difference between environmental law and land law as there is between constitutional law and torts. It is telling, however, that students in their first lecture of land law often believe that they will be learning about world heritage and environmental protection. The divergence in understanding of land and environment as between the lawyer and layperson illustrates the abstracted concept of land in the law of real property. It encapsulates the limited capacity of the law to advance sustainability within a framework that separates meanings of land and environment, stemming from the individualism of private property.

Property as a concept within the common law is an individualistic project arising out of the philosophy of the Enlightenment period that justified private ownership based on application of human effort (Locke, 1966). This was affirmed in the law by Blackstone (1765) who likewise cited the basis for removal of land from the commons into individual ownership, as well as the exclusive nature, or dominion, of that ownership. Principles of putting land to its highest and best use validated the dispossession of Indigenous peoples worldwide, as well as promoting environmental degradation in the interests of trade and commerce.

Under the feudal doctrine of tenure the relationship between the possessor of land and the land itself was distant, mediated by the doctrine of estates. A freehold owner owned not the land itself, but an estate in the land: a legal right to possession. Compounding this legal abstraction of land is its disaggregation into a number of resources. At first, its legal meaning comprehended what the layperson might understand as “land,” except for the royal metals, silver and gold. Slowly however, the state has claimed separate ownership of minerals, water, and geothermal resources (Galloway, 2012).

Similarly, the social experience of land as home is largely ignored in real property law. “Home” is not a category known to law (Fox, 2006) and the limitations of the categorisations of real property and the law of leasing were recognised in the Poverty Inquiry (Henderson, 1975) whose recommendations resulted in residential tenancy legislation nationally. The tendency to categorise residential tenancies within Poverty Law rather than Property Law indicates the stubbornness of the classical categories of the law and the difficulty in developing an expanded conceptualisation.

For all of these reasons – individualism, dominion, and abstraction from lived experiences – Property Law maintained the dispossession of Aboriginal and Torres Strait Islander Australians until the *Mabo* decision in 1992. Within a real property framework, native title (itself usually carved out of the corpus of Property Law) has struggled to represent justice for Indigenous Australians.

At common law, land is an abstract rather than a physical idea. Its character as an ecosystem is destroyed through the categorisation of its component parts as resources for marketization and exploitation, themselves as individualised property. Thus transformed, real property – a construct of the law – ceases to bear a relationship to humans, their society, or the environment.

Real Property Law has an important story to tell about government and people, about diverse societies and environments, in both time and place. But, through a positivist lens, it simply reproduces the problems that have caused, and will continue to cause, grave environmental, social and economic harms. Failure to challenge the boundedness of thinking in land law condemns it to uphold the status quo that has done so much damage.

Despite these possibilities, a recent survey of Australian Property Law teachers reveals that there is overwhelmingly a traditional approach to designing Property Law (including Land Law) subjects in terms of content, skills, outcomes, and assessment (Carruthers, Skead, & Galloway, 2012a, 2012b; Galloway, Carruthers, & Skead, 2012). While some survey respondents indicated a desire for change, many felt constrained by the amount of complex content to be addressed in property law and a lack of support and resources. While recognising possible ideological, conceptual, and

resourcing challenges, the following section illustrates how a Land Law subject might be transformed into education for sustainability.

Teaching Land Law sustainably

This section offers a case study of curriculum design to illustrate both the underlying design approach to sustainability education in law and how this translates into the design of a law subject. The case study describes the author's approach to the design and teaching of two Land Law subjects, both compulsory second year law subjects that address most of the Priestley requirements for Property Law, at James Cook University, Australia. (A further third year subject, Commercial Law and Personal Property, addresses the remaining requirements).

Designing curricula to cater for an overarching concept or particular skills or attitudes occurs at two levels. The macro level of whole of degree (here called a "course") looks at course learning outcomes mapped to individual subjects. Reflecting the macro level, each subject in our LLB provides a "sustainability statement" informing students of how that subject fits within the four pillars of sustainability (Galloway, 2011). Through consistent use of these statements, the intention is to overcome the experience of law students of a disjointed series of independent subjects. Indeed, the use of sustainability as a "thematic lens" (Galloway, 2011; Jones & Galloway, 2013) plays exactly that role.

At the subject level, decisions need to be made about how to engage with the substantive legal content through the concept of sustainability. Shephard (2008) described strategies for embracing sustainability in higher education both cognitively and affectively. The author suggested that the approach in law is both cognitive and affective, although the cognitive aspects are not what a science course (for example) would see as "knowledge-based learning" about the environment (Shephard, 2008, p. 89). The goal for the sustainability education in the discipline of law is to promote a critical engagement with substantive law and to break down the epistemological barriers to a more contextual understanding of law. At the same time, there are desired affective outcomes designed to inform and influence students' subsequent behaviours both professionally and personally.

Cognitive approach

Arguably, any of the "broader contexts" of law referred to by Kift, et al. (2010) necessarily involve both a re-framing of the substantive law and a focus on critical thinking (James, 2011). Facione (1990) described critical thinking as "purposeful, self-regulatory judgment which results in interpretation, analysis, evaluation, and inference, as well as explanation of the evidential, conceptual, methodological, criteriological, or contextual considerations upon which that judgment is based" (p. 2). In Land Law, this outcome is achieved through developing a narrative around the substantive law that sees each module and its component threshold concepts in terms of their capacity to contribute to or inhibit the pillars of sustainability.

This narrative is introduced in the 'sustainability statement', the building block for subject design. Land Law 1 examines:

1. the distinction between an ecological and legal understanding of 'land';
2. our system of private landholding to assess how the freehold estate represents the ultimate expression of private property – and the associated tensions between economic sustainability of state and private interests; and
3. the role of land in culture.

And for Land Law 2:

... this subject's substantive focus on the Torrens system offers the opportunity to consider how this system contributes to economic and social sustainability through re-ordering the management of interests in freehold land. Torrens ... (was) designed to sustain an otherwise unwieldy system and otherwise to shore up the land market in Australian jurisdictions. ... Students will analyse the Torrens system to assess its contribution to certainty of title. The subject explores particular proprietary interests in land – mortgages, leases and covenants – in each case to assess the means by which a diversity of proprietary interests sustains the productivity of land and capital while also serving the interests of a sustainable social context for the use of land.

In a more detailed form, this narrative can be broken down into modules of substantive law indicating the emphasis on the social, economic, environmental, and governance pillars (see Table 1). Note that the structure and topics of both subjects reflect the same sequencing and substantive content as occurred without the emphasis on sustainability.

Table 1
Pillars of sustainability

Substantive law	Soc	Ec	Env	Gov	Sustainability Narrative
Meaning of Property	✓	✓	✓	✓	What does an Indigenous world-view say about the concept of property? How does a Western world-view of property affect the pillars of sustainability?
Meaning of Land		✓	✓		How does the separation of interests in resources affect economic and environmental sustainability?
Doctrine of tenure	✓			✓	What does the evolution of the doctrine of tenure say about the connection between land and sustainability of governance and society?
Doctrine of estates	✓	✓	✓	✓	What is the purpose of the mediating concept of the estate? How does it affect the endurance of society, economy, environment and governance?
Native title	✓	✓			What is the effect of native title on economic and social sustainability for traditional owners and the wider economy?
Equitable interests	✓	✓			What does the rise of equity say about the capacity of the common law to meet changing social and economic needs?
Co-ownership	✓	✓			How do the rules of co-ownership promote social cohesion and sustain good economic outcomes?
Community title	✓	✓	✓		How does community title advance co-ownership to promote social and economic sustainability? Consider its rationale in terms of environment (planning).
Torrens title		✓		✓	How does the Torrens system advance Old System title in terms of the sustainability of economy and governance? What are its limitations?
Mortgages	✓	✓			Consider the evolution of threshold concepts, e.g., equity of redemption in mortgages in terms of economic and social sustainability.
Leases	✓	✓			Using residential tenancy law explain the role of leases in upholding economic outcomes and their limitations in addressing social need.
Easements/ covenants	✓		✓		As a means of private planning, do easements and covenants address social and environmental sustainability? Is this system itself sustainable? Why/not?

Sustainability thus presents a thematic lens through which to explore the substantive content of the law (see also Galloway, 2011; Jones & Galloway, 2013). It need not drive a change to the body of discipline knowledge, nor challenge the existing interpretation of the Priestley 11 requirements. It simply offers a richer and more critical mode of engagement with the law. Warburton (2003) for example, described the capacity for sustainability education to foster deep learning, which involves “paying attention to underlying meaning” (p. 45). He contrasted this approach with surface learning strategies focussing more on “rote-learning and simple description” (Warburton, 2003, p. 46). Similarly, the lens of sustainability in legal education offers the chance for systems thinking and viewing the interconnectedness of the law itself with society, the economy, and the environment.

While this framework is cognitive, or rational, the lens of sustainability also offers the chance for affective learning. Townes O’Brien, Tang, and Hall (2011) described the lack of experiential learning in law as a source of potential harm to students’ psychological wellbeing. Through the perspective of sustainability, experiential learning becomes possible thus helping counter an exclusively rational approach to thinking like a lawyer.

Affective learning

Shephard (2008) argued that “the essence of sustainability education is a quest for affective outcomes” (p. 88). What she means by this is learning that informs and influences subsequent behaviour. She described a number of teaching and learning settings that are known to be useful in achieving affective outcomes including discussion, open debate, perspective sharing via reflection and appropriate use of multimedia to trigger responses (Shephard, 2008). The author has adopted some of these in Land Law.

Based on the timetabling of these subjects in recent years, the face-to-face component has been conducted via two, two-hour seminars per week for six weeks. Students have access to podcasts akin to a traditional lecture format that cover the materials for each module. Each seminar then commences with a brief overview of the key concepts and law for the session, although the majority of time is spent in class discussion, small group discussion, and problem solving.

The author often uses multimedia to “trigger responses” in students (as suggested by Shephard, 2008). Early in the subject, students are shown the beginning of the film *The Gods Must be Crazy* where a soft drink bottle is thrown from an aircraft, hitting a Kalahari tribesman on the head. He discovers the bottle has multiple uses for the tribe. Unfortunately it causes ructions as tribe members each want to use it for their own purposes. This of course is a culture that does not know individual property. The clip therefore provides a stimulus for class discussion about the nature of property, including its cultural and historical contingency. Students are encouraged to share their own preconceptions of property and to use this as a starting point for exploring the concept within the subject.

Similarly, to open discussion in the module on the law’s treatment of land, students view an interview with Bob Randall, a Yankunytjatjara elder and traditional owner of Uluru (Global Oneness Project, 2009). Randall explained how the connectedness of every living thing to every other living thing is a way of living for the Yankunytjatjara. The clip stimulates further discussion about the nature of property and also the conception of land. Again, it forms the foundation for exploring Anglo-Australian Land Law and provides a benchmark from which to test the law’s engagement with environment and society in the way of Aboriginal and Torres Strait Islander ways of knowing.

To further stimulate students’ questioning of their understanding of property and land, they go on a field trip around campus to identify – by photograph or in writing – parts of the campus and surrounds that they think are land. On returning to the seminar, the class shares findings and compares the layperson’s perception of whether an object is land, against what the class considers

Bob Randall might think about the object, and how the law treats it. This exercise has fundamentally shifted the way in which students learn about the law of fixtures, *fructus naturales*, water and mineral rights, roads, space, and animals. Furthermore, at each point of the discussion, the class can pause and assess the connectedness and relationships of objects and concepts thus testing the law's capacity for environmental sustainability.

This experiential approach is also adopted in the quite different context of promoting an authentic experience of the transactional aspects of legal practice. In seminars, students are invited to role-play property settlements to better understand the workings of the Torrens system. They work with antique documents, and contemporary forms sourced from the Department of Natural Resources, to appreciate the evolution of property transactions and the challenges in sustaining the integrity of a system of land registration. In modules on mortgages, leases, and easements, students are given (somewhat curtailed) instruments of mortgage, lease, and easement around which a series of increasingly challenging problems are framed. Manipulating the documents, familiarising themselves with the form and structure of the law in practice, students test the concepts spelt out in the statute and case law in a concrete way.

Students are encouraged to make meaning of the law through hands-on experiences but also through reflection. An important part of the affective learning in these subjects is weekly student reflective journaling (Shircore, Galloway, Corbett-Jarvis, & Daniel, 2013). The assessment of class preparation and participation is designed to encourage students to keep up with the pace of the subject. This assessment aims to hold students' interest weekly and to have them account for their learning. The journals form the preparation aspect, requiring students to write only a paragraph each week on something they have learned and how they have gone about learning it. The author, as subject coordinator, responds online to each student within 24 hours.

Many students start their journaling tending to follow a "script" – the examples offered in the assessment instructions. However, after receiving feedback, most seem to engage enthusiastically with this task. Student journals provide teaching staff with instant feedback on how the subject is going, whether resources are adequate, and where the troublesome knowledge lies, allowing a prompt response.

How students engage with the theme of sustainability is revealing. Comments such as "after I saw Bob Randall on that video I realised that..." or "Having learned about the Wave Hill Walk Out I'm now determined to..." demonstrate students' affective responses to the subject. The comment "I thought land law would be about the environment so I was surprised that..." is another common response to the subject. Likewise, "When I read the decision in ... I had trouble understanding the idea of fixtures but after our field trip I could see that" is another type of comment that allows teaching staff to gauge student responses to the teaching and learning settings.

Importantly for the author, what is learnt from students is that the range of resources offered, and importantly the focus on sustainability, has opened their eyes to new ways of thinking. As subject coordinator, the author would go so far as to say that this subject has evolved in students' eyes from a necessary evil to a journey of discovery.

Resources

Teaching Land Law through the lens of sustainability requires some work in collecting resources. While the reading list continues to reflect the standard cases (Carruthers et al, 2012a), additional materials are required to stimulate student thinking around sustainability. Students are therefore referred to the growing body of literature on sustainability and Land Law (for example, Carruthers, Mascher, & Skead, 2011; Christensen & Duncan, 2012; Galloway, 2012).

This reading list is supplemented through posting on the author's blog.¹ The benefits of social media in the teaching and research context are becoming more widely recognised (Galloway, Greaves, & Castan, 2012, 2013) and represent an opportunity for engagement in emerging areas. For the author's teaching, working through issues on the blog – capturing current events relevant to land law and viewing them through this lens of sustainability – assists both in engaging students, and also in clarifying personal thinking and seeding research ideas. Where there is a gap in text-based resources, the blog provides students with a model of scholarly thinking about the law within the framework of sustainability. Students frequently use the blog posts as a basis for class discussion and journal writing.

Students are encouraged to use, discuss, and share websites to stay up-to-date with the roll-out of electronic conveyancing, land and resource management, native title mapping and determinations, and dispute resolution mechanisms that exist under dividing fences or community titles legislation. These websites build on the overarching narrative of the law through the lens of sustainability and promote class discussion, particularly based on students' own experiences as traditional owners, tenants, mortgagors, and homeowners. Despite some student stress at the compressed subject, feedback on teaching indicates that students not only enjoy the format but believe that it enhances their learning.

Concluding thoughts

Despite a global movement for sustainability education as a concept, there is far from universal engagement particularly in terms of curriculum. In the case of law, there are particular structural barriers to the uptake of education for sustainability. These include the boundaries of traditional doctrinal thinking compounded by the lack of a common language of sustainability outside environmental law. Ideologically, there is likely to be resistance by positivists and critical scholars alike. Paradoxically, sustainability may be perceived simultaneously as a threat to positivism and the corporate order it represents (Thornton, 2000), and an enforcement of managerialist policies that give lip service to the latest educational fad.

Perhaps more optimistically, the author suggests that sustainability can offer a more effective way of teaching law that continues to meet doctrinal (and regulatory) requirements while also developing more outward-looking graduates with a broader skillset. It is a means of bringing legal education out of its 19th century mindset to meet contemporary needs of the profession and the society it serves.

This is particularly the case in Land Law – itself the culmination of centuries of entrenched thinking that have to a large extent failed to adapt to contemporary priorities. The fascinating story of Land Law can still be told, complete with doctrine, for a new generation of graduates faced with a new set of challenges. All that is needed is a reframing of the questions we pose as we teach, and thoughtful approaches to teaching and learning settings designed to draw out the broader context of land law.

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¹ <<http://katgallow.blogspot.com.au>>

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