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THE MONARCH: SILENT GUARDIAN OF THE UNITED KINGDOM CONSTITUTION?

OLIVER GARNER



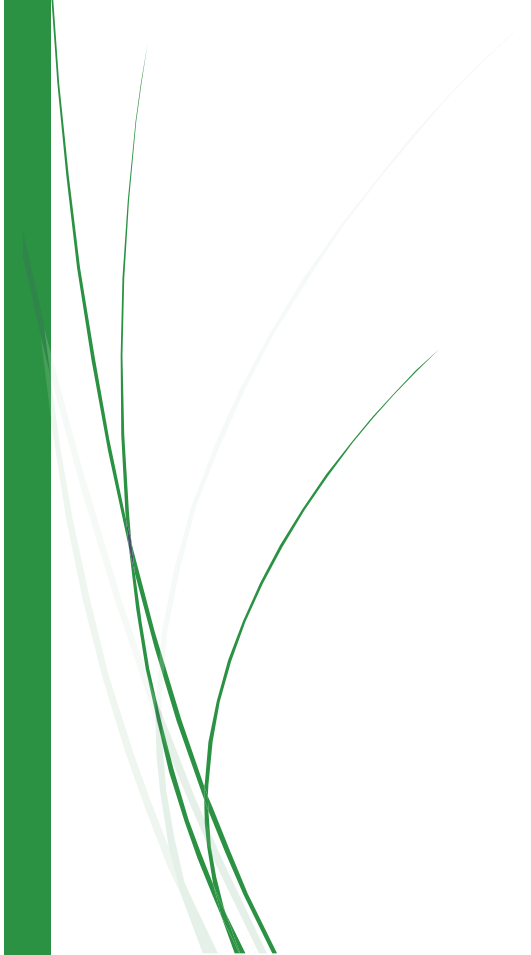
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TABLE OF CONTENTS

ABSTRACT.....	4
INTRODUCTION: ONCE IN A GENERATION	5
THE NORMATIVE ARGUMENTS	6
<i>THE SYMBOLIC SEPARATION OF POWERS</i>	<i>6</i>
<i>THE SILENT ACCOUNTABILITY FUNCTION OF THE MONARCH</i>	<i>9</i>
CRITIQUE FROM REPUBLICANISM	14
CONCLUSION	17

ABSTRACT

The death of Queen Elizabeth II and the coronation of King Charles III may mark a renewal of the constitutional identity of the United Kingdom. This Working Paper considers the role of the monarch in the modern constitution. It argues that the hereditary head of state provides two normatively desirable functions: first, the monarchy means that there is a symbolic separation of power between *de facto* and *de jure* power, and spiritual power. Secondly, the monarch provides a silent accountability function through the regular meetings with the Prime Minister. The article concludes by arguing that, if the United Kingdom ever were to transition to a republic, then it should aim to replicate these functions of the monarchy in the new position of head of state.

KEYWORDS

Monarchy, constitutionalism, separation of powers, accountability

INTRODUCTION: ONCE IN A GENERATION¹

The United Kingdom is in a period of constitutional transition. The death of Queen Elizabeth II and elevation to the throne of King Charles III may be regarded as a renewal and regeneration of the polity's "constitutional identity" as embodied in its sovereign. This generational moment brings back to the surface of public attention aspects of the constitutional role of the monarchy that may have become submerged in the continuity of a seven-decade reign.²

This article makes two normative claims regarding the monarch in the modern British constitution. First, it is argued that the retention of the monarch as the Head of State contributes to a "symbolic separation of powers" that preserves stability through an equilibrium between "material" *de facto* and *de jure* power, on one hand, and "symbolic" or "spiritual" power, on the other. Secondly, a specific effect of this separation is considered: the claim is made that the monarch plays a "silent accountability" function through the regular private meetings with the Prime Minister. The transition from Queen Elizabeth II to King Charles III, and the future accession of the Prince of Wales, may contribute to a renewal of this function.

¹ This is an English language version of an article that has appeared in French as "*Le Monarque: Gardien Silencieux de la Constitution du Royaume-Uni?*" in *Les Cahiers Portalis* No. 11, "*Formes contemporaines de l'abus de droit*" < <https://www.cairn.info/revue-les-cahiers-portalis-2024-1.htm> > last accessed 6 July 2023.

² For a fictional "future history" play dramatizing how this transition could lead to constitutional crisis see Mike Bartlett, *King Charles III* (NHB Modern Plays, 2014).

The piece concludes with critical reflection on these functions, and speculates upon whether a divinely anointed monarch is necessary to achieve such stability, or instead whether these functions could be achieved successfully through a secular head of state in a republic.

THE NORMATIVE ARGUMENTS

THE SYMBOLIC SEPARATION OF POWERS

Anne Twomey argues in her authoritative 2018 treatise on the monarchy that “[...]the head of state is not only the symbolic guardian of the relevant nation’s constitution, but the one person with powers of last resort reserved for its protection”.³ Whereas Twomey analyses the *de jure* legal powers of monarchs in such situations of constitutional crisis, the argument made here is that the monarch contributes to the protection and stability of the constitutional system passively regardless of any such powers. This equilibrium is preserved through a dilution of who holds both the *de facto* and *de jure* power within the system, and also who is *seen* to hold spiritual or symbolic power. The monarch functions as the *de jure* sovereign with the ultimate legal power to approve legislation through Royal Assent. Monarchs were required to provide their accord in person within Parliament before the Royal Assent by Commission Act 1541. This statute enabled

³ Anne Twomey, *The Veiled Sceptre* (Cambridge University Press, 2018), p.1.

the appointment of Commissioners for the purpose of granting assent. This power is now given statutory form by the Royal Assent Act 1967.⁴

A gradual historical process of democratization has seen conventions arise whereby the monarch does not exercise such a power, but instead follows the advice of its government.⁵ The courts drove this process through determinations of the necessity of the role of Parliament to change the law of the land.⁶ The last occasion on which a monarch refused to provide Royal Assent was in 1708 when Queen Anne withheld her consent to the Scottish Militia Bill.⁷ By contrast to the formal *de jure* role of the monarch in law-making, the office of Prime Minister has been argued to be “a creature entirely of constitutional convention”.⁸ Yet, again, through a process of incremental development the leader of the political party that can command the confidence of the House of Commons has come to wield *de facto* power.⁹ The limiting effects of this arrangement upon the exercise of power in the United Kingdom are evident from a comparison to presidential

⁴ The Royal Assent by Commission Act 1541, repealed by the Royal Assent Act 1967.

⁵ Twomey, *The Veiled Sceptre* (n 2), chapter 2 “Advice to and from the Head of State”.

⁶ For example, the dicta holding that “the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them: also *malum aut est malum in se, aut prohibitum*, that which is against common law is *malum in se*, *malum prohibitum* is such an offence as is prohibited by Act of Parliament, and not by proclamation” in *Case of Proclamations* [1610] EWHC KB J22.

⁷ William Everett, ‘The Last Royal Veto’ (December 1903, *The Atlantic*) <<https://www.theatlantic.com/magazine/archive/1903/12/the-last-royal-veto/637560/>> last accessed 20 March 2023.

⁸ Michael Foran, ‘Prime Ministers, Party Members, and the Efficient Secret’ (26 October 2022, *UKCLA Blog*) <<https://ukconstitutionallaw.org/2022/10/26/michael-foran-prime-ministers-party-members-and-the-efficient-secret/>> last accessed 20 March 2023.

⁹ Andrew Blick and George Jones, ‘The Institution of Prime Minister’ (1 January 2012, *Gov.UK History of Government Blog*), <<https://history.blog.gov.uk/2012/01/01/the-institution-of-prime-minister/>> last accessed 20 March 2023.

systems in which an elected politician acts as Head of State.¹⁰ The current political crisis in France over the raising of the pensions age was precipitated by President Macron using special constitutional powers in order to avoid a vote in Parliament.¹¹ Within the United Kingdom, there is no way for a Prime Minister to pass legislation without the support of the majority of the House of Commons. Any “special constitutional powers” over legislation are beyond the reach of the Prime Minister, and instead are limited to the negative veto that is theoretically in the hands of the monarch through refusal to grant Royal Assent.¹²

The separation of power goes beyond this *de jure* and *de facto* legal function. It also extends to the *symbolism* of power. The Prime Minister does not command any ceremonial significance in formal constitutional proceedings, and their official residence and office remains a house – albeit one that is subject to full security – on a terraced street. By contrast, the monarch continues to enjoy the full pomp and circumstance of royalty, including palaces and regalia. The situation may be contrasted, for example, to the French constitutional order, in which the President of the Republic commands not only *de facto* and *de jure* power, but also the symbolic power of the *Elysée* as their official residence, and the other trappings of the former monarchy. The concentration of symbolic power in a hereditary monarch not only ensures their own acceptability in a modern democracy, but also *bolsters* the legitimacy of the Prime Minister. The latter remains grounded as

¹⁰ I thank Théo Fournier for raising this comparison.

¹¹ Romain Imbach and Romain Geoffroy, ‘Comment fonctionne l’article 49.3, utilise pour la onzième fois par Elisabeth Borne?’ (17 March 2023, *Le Monde*) < https://www.lemonde.fr/les-decodeurs/article/2023/03/17/comment-fonctionne-l-article-49-3-utilise-pour-la-onzieme-fois-par-elisabeth-borne_6146430_4355771.html > last accessed 20 March 2023.

¹² For recent further discussion, see Robert Craig, ‘Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?’, (22 January 2019, *UKCLA Blog*), <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> last accessed 20 March 2023.

a representative of grassroots concerns channeled through the policy generating machines of political parties.

Prime Ministers are barred from being able to make claims to transcendental authority – which may place them beyond the reach of accountability to Parliament, party, and people – by the role occupied by the monarch. It may be argued that this functions as a bulwark in the United Kingdom constitutional order against any “normal” politician seeking to fill the vacuum left behind by the foreclosure or weakening of monarchy. No British politician could claim to represent the will of the people – akin to the *Führer* in the Third Reich¹³ – whilst the Monarch remains as the symbolic and spiritual embodiment of the United Kingdom’s constitutional identity.

THE SILENT ACCOUNTABILITY FUNCTION OF THE MONARCH

The second normative claim regarding how the Monarch contributes to the good functioning of constitutionalism within the United Kingdom relates to a more quotidian phenomenon than the structural claim that the symbolic separation of powers contributes to the equilibrium of the system. It is an established convention that the Prime Minister and the Monarch will meet weekly during the “Audience” in order for the elected head of government to update the head of

¹³ Although it should be noted that King Emmanuel Vittorio III remained as Monarch through Benito Mussolini’s fascist dictatorship in Italy. See Richard Brunies, ‘The Fascist King: Victor Emmanuel III of Italy’ (14 July 2021, *The National WWII Museum*), <<https://www.nationalww2museum.org/war/articles/fascist-king-victor-emmanuel-iii-italy>> last accessed 20 March 2023.

state on the state of affairs in the country. The official Royal Family website states that “The King holds a weekly Audience with the Prime Minister to discuss Government matters. The Audience is entirely private. Though The King remains politically neutral on all matters, he is able to ‘advise and warn’ his ministers – including his Prime Minister – when necessary.”¹⁴ Michelle Clement opines that these audiences “underpin” the relationship between the Prime Minister and the Monarch, and thus are “quietly pivotal” within the UK constitution.¹⁵

These meetings have been a great muse for fictionalizations of the Monarchy precisely because their contents must remain private and off the public record.¹⁶ This functions as a compliment to the absolutely public accountability spectacle of Prime Minister’s Questions in the House of Commons. The latter confronts the Prime Minister with the MPs in whom they command confidence and to whose constituents they must ultimately be responsible – a bottom-down grassroots dimension. By contrast, the former forces the Prime Minister to justify their policies as being in the interests of the state and the constitutional system in general to the individual who wields silent symbolic authority as head of state and embodiment of the United Kingdom’s constitutional identity. This combination ensures that the Prime Minister is able to address both the short-term quotidian and the long-term enduring concerns in the weekly routine of governance. When a Prime Minister is called upon to take decisions that may affect the state existentially – such as decisions to go to war – they will be compelled to justify the

¹⁴ The Royal Family, ‘Audiences’, (*Royal.UK*), <<https://www.royal.uk/audiences>> last accessed 20 March 2023.

¹⁵ Michelle Clement, ‘The Queen and her Prime Ministers’, (1 June 2022, *Gov.UK History of Government blog*) <<https://history.blog.gov.uk/2022/06/01/the-queen-and-her-prime-ministers/>> last accessed 20 March 2023.

¹⁶ Most popularly the Netflix television series *The Crown* (2016-present) but also more specifically in the play by one of the show’s creators Peter Morgan, *The Audience* (Faber & Faber, 2015).

reasons for this course of action to a living embodiment of the polity, as well as the representatives of the citizens of the nation.

A crucial feature of the silent accountability role is the personality of the individual that holds the role as Monarch. This is an example of a situation in which psychological factors may influence constitutional functioning. For the last decades, the Prime Minister has been required to justify decisions to an increasingly elderly woman in Queen Elizabeth II; by contrast at the start of her reign Prime Ministers were confronted with a very young Monarch after Elizabeth took the throne at 25 years old with her first Prime Minister being the indomitable figure of Winston Churchill. Further research may be required on the effects of the relational differences in age, experience, and gender between Prime Minister and Monarch, but anecdotally it may be noted that the greatest reported supposition over tensions between the head of government and head of state occurred during the premiership of Margaret Thatcher, born within 12 months of Queen Elizabeth.¹⁷ As the Queen moved towards what would be retirement age for ordinary citizens, the reputation of the monarchy improved dramatically following the nadir of the "*annus horribilis*" in 1992,¹⁸ leading to the death of

¹⁷ Philippe Bernard, 'The Queen and Maggie: Two rivals for power', (9 September 2022, *Le Monde*) < https://www.lemonde.fr/en/international/article/2022/09/09/the-queen-and-maggie-two-rivals-for-power_5996376_4.html > last accessed 20 March 2023.

¹⁸ Queen Elizabeth II, 'A speech by The Queen on the 40th Anniversary of her succession (Annus horribilis speech)', (24 November 1992, *Royal.UK*), < <https://www.royal.uk/annus-horribilis-speech> > last accessed 20 March 2023; Eliana Dockterman, 'The Crown Depicts 1992 as the Queen's 'Annus Horribilis.' Here's What Happened That Year' (9 November 2022, *Time*) < <https://time.com/6227232/annus-horribilis-divorce-the-crown/> > last accessed 20 March 2023.

Princess Diana in 1997¹⁹ and the Queen Mother in 2002,²⁰ before the improvements in reputation throughout the two decades following the Golden Jubilee in the same year, albeit with declines in the extent of support in the last decade.²¹ The improvements from 1992 onwards coincided with a relaxation in governance style of the Prime Minister, with the so-called “sofa government” of the Tony Blair administration.²²

It may be speculated that the change in the individual who holds the Crown may also induce developments in how effective the silent accountability role could be. King Charles III takes the throne following a decades long career as Prince of Wales in which he engaged in public engagement on his particular policy views – most prominently on the environment and conservation.²³ During the ‘black spider memos’ episode, this activism led to accusations of attempts to influence government ministers.²⁴ The perception of Charles as more politically active than his mother may inevitably and unconsciously influence how a Prime Minister

¹⁹ Queen Elizabeth II, ‘The Queen’s message following the death of Diana, Princess of Wales’, (5 September 1997, *Royal.UK*), < <https://www.royal.uk/queens-message-following-death-diana-princess-wales> > last accessed 20 March 2023.

²⁰ Queen Elizabeth II, ‘The death of Queen Elizabeth, The Queen Mother’, (8 April 2002, *Royal.UK*), <<https://www.royal.uk/death-queen-elizabeth-queen-mother-8-april-2002?page=17>> last accessed 20 March 2023.

²¹ Isabelle Kirk, ‘Platinum Jubilee: where does public opinion stand on the monarchy?’, (1 June 2022, *YouGov*), <<https://yougov.co.uk/topics/society/articles-reports/2022/06/01/platinum-jubilee-where-does-public-opinion-stand-m>> last accessed 20 March 2023.

²² Jill Sherman, ‘Sofa style of government kept ministers in the dark’ (7 July 2016, *The Times*) < <https://www.thetimes.co.uk/article/sofa-style-of-government-kept-ministers-in-the-dark-h9hg2sts9> > last accessed 20 March 2023.

²³ Jonathan Manning, ‘Prince Charles was an environment radical. What happens now he’s King?’, (23 September 2022, *National Geographic*), <<https://www.nationalgeographic.co.uk/environment-and-conservation/2022/09/prince-charles-was-an-environment-radical-what-happens-now-hes-king>> last accessed 20 March 2023.

²⁴ Robert Booth and Matthew Taylor, ‘Prince Charles’s ‘black spider memos’ show lobbying at highest political level’, (13 May 2015, *The Guardian*), <<https://www.theguardian.com/uk-news/2015/may/13/prince-charles-black-spider-memos-lobbying-ministers-tony-blair>> last accessed 20 March 2023.

could seek to present and justify policies to the King which relate to the areas in which he has a track record of engagement and interest. An example of this phenomenon may already have emerged in the early months of Charles' reign with the reported disagreement with Prime Minister Rishi Sunak over his attendance at the COP27 environmental summit, with the Prime Minister eventually attending alone.²⁵ Charles also takes the throne as a younger man than his mother in her final decades, which may affect the interlocution on policy issues with Prime Ministers in the weekly audiences.

But perhaps the most telling possible transformation in the silent accountability role of the Monarch may come upon the accession to the throne of the current Prince of Wales and heir to the throne William. It may be assumed that William will become the King at some point in his middle-age before becoming an elderly man. In addition to the spiritual power that he will wield by virtue of his official position as Monarch, he will also command moral authority through the reputation he enjoys with the United Kingdom population by virtue of the childhood tragedy of the death of his mother, his service in the armed forces, and the stability of his marriage to the Duchess of Cambridge.²⁶ Future Prime Ministers will be required to justify their decisions to a man in the prime of his life

²⁵ Rowena Mason and Helena Horton, 'Rishi Sunak U-turns on decision not to attend Cop27 climate summit', (2 November 2022, *The Guardian*), <<https://www.theguardian.com/environment/2022/nov/02/rishi-sunak-u-turns-decision-not-to-attend-cop27-climate-summit>> last accessed 20 March 2023.

²⁶ Prince Williams currently holds a popularity rating of 67%, with only 13% of those polled stating they dislike him. 'William, Prince of Wales', (*YouGov*), <https://yougov.co.uk/topics/politics/explore/public_figure/William_Prince_of_Wales>, last accessed 20 March 2023.

and career who carries the support of the country, and can therefore exercise formidable powers of silent accountability.

CRITIQUE FROM REPUBLICANISM

A broader question arises over whether the claims about how the monarchy contributes to stability in the United Kingdom constitution can have any salience for republican systems that have dispensed with unelected heads of state. It is unfathomable that the genie could be placed back into the bottle and that monarchies could be established in countries that have undergone revolutions that have deposed monarchs and instituted elected heads of state: this would violate the constitutional guarantees for a republican form of government and also the equality between citizens in a post-monarchical environment.²⁷ The conundrum therefore arises as to whether it is possible to replicate the stability provided by the UK's separation of symbolic and material power without the requirement of an appeal to transcendental legitimacy.

The tentative response to this dilemma is the claim that if the head of state can represent the symbolic, spiritual, and cultural power of the *society as a whole*, as opposed to representing a particular constituency or political party, then this could help to fulfil a similar role as the King or Queen in a constitutional monarchy. The desiderata would be for the candidate for Head of State to be an individual who has achieved exceptional standing in culture, art, sports, or community service within the country. An example of a current acting head of state who may

²⁷ For a controversial possible argument in favor of such theocratic reinstatement, see discussion of Adrian Vermeule in James Chappel, 'Nudging Towards Theocracy: Adrian Vermeule's War on Liberalism', (Spring 2020, *Dissent Magazine*), <<https://www.dissentmagazine.org/article/nudging-towards-theocracy>>, last accessed 21 March 2023.

be regarded as fulfilling these criteria is Michael D. Higgins, current President of Ireland. The Irish constitution's guidelines on the election of the President see it fit the mould of a political appointment – the President is directly elected by the citizens, after being nominated by members of both houses of Parliament.²⁸ However, Higgins' occupation aside from his political career as a poet and the manner in which he has conducted the role and the support he enjoys from the population have seem him functioning as a representative of Irish culture and society.²⁹

The demarcation of the head of state from the realm of ordinary politics would arguably achieve the form of symbolic separation of powers is present in the United Kingdom. It also acts as a statement of the holistic telos of politics, which is a purpose that transcends its own *praxis* and *habitus*. Politics itself can influence the psychology of its practitioners through its relentless focus on competition between individuals, both intra- and cross-party, in terms of its throughput method of dialectic contestation and its focus on zero-sum distribution of resources as its output. However, this practice is embedded in broader processes of preservation and continuation of both the ideal and symbolism of a society and community, and the quotidian practices that concretize its realization within a specific geographical territory. If the head of state were explicitly designed to represent this transcendental ideal of society, it may be suggested that not only would this ensure their separation from the ordinary realm of politics, but that it

²⁸ Constitution of Ireland, Enacted by the People 1st July, 1973, In operation as from 29th December, 1937, Article 12.

²⁹ Siobhán Doyle, 'Why so many Irish people dote on President Michael D Higgins', (8 July 2022, *RTÉ*), <<https://www.rte.ie/brainstorm/2022/0111/1272955-michael-d-higgins-celebrity-politician-social-media-image/>> last accessed 21 March 2023.

may serve to orient and guide those who act as head of government as to the bigger picture and true purpose behind their everyday competitive practices in the political realm.

The question arises as to whether a system of appointment of a head of state who acts as a representative of society may not serve as a better system than constitutional monarchy for the United Kingdom itself. One argument that may be ventured is that *if* the United Kingdom were to engage in a republican reformation, then it would be desirable if the functioning of the new head of state were preserved to be as close as the role of the monarch as possible in order to ensure continuity in constitutional identity. I would suggest that the means to achieve this would indeed be through an appointed representative of the society and culture as head of state who is divorced from parliamentary politics, rather than anything approximating a presidential system. One can envisage multiple models for how the head of state would be appointed other than direct elections: the current system of a non-partisan independent body for the nomination of 'cross-bench' Peers to the House of Lords is one option.³⁰ Such a system of nomination could also be extended to the public at large. A system whereby individuals are nominated by an independent body or by individuals would help to ensure they are not pursuing the usual careerist demands of politics. Substantive criteria could also be enacted in an attempt to ensure a representative of the society, for example through making it explicit that the candidate must have achieved standing and esteem in a particular field.

³⁰ 'The House of Lords Appointments Commission'
<<https://lordsappointments.independent.gov.uk/#:~:text=The%20House%20of%20Lords%20Appointments%20Commission%20was%20established%20in%202000,candidates%20for%20party%20political%20membership>> , last accessed 21 March 2023.

The substantive question of whether this is desirable in the place of monarchy is one to be left to the constituent population and/or their representatives in Parliament, depending upon whether the decision is made that there should be a referendum on the issue. The decision may hinge on consideration of whether, in the 21st century, it is more fitting with modern constitutional values for a head of state to be a manifestation of *meritocracy* rather than ordained primogeniture. One may suggest, tentatively, that the origins of the aristocracy were found in such a meritocracy, with those who had demonstrated merit being afforded title. Inheritance may have weakened this link, yet to return to the arguments as to the accountability power that a future King William may wield, it may be suggested that a synthesis of the two ideals may best fit the United Kingdom: found in a hereditary monarch, but one who *earns* the position of representative of society through their public service in their years as heir.

CONCLUSION

The United Kingdom may be regarded as a paradox in modern constitutionalism. It boasts the 'mother of all Parliaments' which is sovereign in law-making, yet it still has a hereditary unelected monarch as the head of state. This article has sought to argue that this apparent paradox actually contributes to stability within the system through the limitations it imposes upon both the head of government and the head of state. Looking to the future, the passing of Queen Elizabeth II marks a turning point at which the desirability of the monarchy as an institution may come under scrutiny. It is impossible to present whether the monarchy will survive the 21st century. Normatively, however, the argument is forwarded here that if the United Kingdom were to transition to a republic, then it should seek to

preserve as closely as possible the role of a head of state that is beyond the fray of normal politics and functions as a representative of the society at large.

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