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## MATHURA TO NIRBHAYA: A JOURNEY OF DIGNITY ON TRIAL

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**Abstract:**-After having been passed Anti-rape law in 2013, it is not good enough to say that the various issues requiring reforms since Mathura -they were seen prior to Mathura, it only triggered them, are set to be rest. Post -2013 laws, even after one year, no deterrence on the part of the potential violator and satisfaction on the part of various women's group is seen. Whether the issues to be addressed like rapists to get away, legal definition of rape including marital rape, marks of resistance on her body, child sexual abuse, traumatic procedural issues, medical examination of victim including most archaic forensic procedures and capital punishment for rapists e.t.c. have satisfactorily been resolved, is a question to be determined on the basis of legal efficacy of Criminal justice system. Further, the moral element flowing in whole body of determination of the question like a basis of her moral character remaining at all levels as stereotypes in terms of sex and morality, changing of mindset of society towards victim whether she should be treated as a victim of rape or survivor to be seen with compassion, and sensitization of police and Courts by completely erasing re-traumatization from the system. Hence, this paper aims at to evaluate to what extent the dignity of a woman during this journey of law has been secured and is going to unearth various positive developments.

**Keywords:**rape, victim, procedure, traumatic, moral character.

### INTRODUCTION:

To live with human dignity is a dictate of human rights without exception. The guarantee lies between rights and duty-forcing balance. Sexual violence, apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It is a crime against basic human rights, and is also violative of the victim's most cherished Fundamental Right, namely, the Right to Life contained in Article 21 of the Constitution of India. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The murderer destroys the physical body of the victim; a rapist degrades the very soul of the helpless female.

Following the Supreme Court decision in Mathura rape case in September 1978, there was widespread commotion in the country and the Parliament was compelled to make amendment in existing Criminal Law. Mathura, an 18 year old Harijan orphan girl was brought along with her brother and another to the Police station, for recording statement. After statements were recorded, the accused police asked Mathura to wait in the police station and told her brother and another to move out. Immediately thereafter, one of the accused raped her in the police station and another could not rape her as he was in a highly intoxicated condition, sexually molested her. The trial Court acquitted both the accused on the ground of the tacit consent. The Bombay High Court, on appeal, reversed the trial Court's order of acquittal and held one of the accused guilty of rape, and another for molesting her. The Supreme Court, on appeal by accused, however, reversed the conviction and disbelieved Mathura's version describing it as a 'tissue of lies' and a concoction on her part. Thereafter, among other small protest, the country saw the biggest cry after 16th December, 2013 gang rape in Delhi. The criminal law was amended with a view to plug loopholes and correct imbalances so that a strong protection to the women can be extended. However, has right to live with dignity been ensured? The answer gets negative when prevalence of kangaroo Courts among other sexual assault incidences, occupy the place of front page news maker. Recently, a 20-year-old Santhal tribal woman was raped by 12 men in West Bengal on the orders of a kangaroo court called a Salishi Sabha. Her crime was to have fallen in love with a man outside her

community. The couple were tied up and “tried” and asked to pay Rs.25,000 as payment. The man was able to pay but the woman could not. The headman reportedly decreed that she could be “enjoyed” by several men and that they could “have fun” with her. Issues inside the Court like embarrassment on being forced to narrate in alien Court environment in presence of lawyers and litigants and outside the Court like a grim prospect of being ostracized, humiliations followed by the questions raised by the Police in the name of investigations, medical examinations like two finger test etc., gender neutral definition of rape, time –bound investigations, fast-track trials, protection of witnesses and harsher punishment have been addressing subject matters during this long journey legislatively as well as judicially.

#### **SECTION-**

##### **(i) Custodial Sexual Assault and Disclosure of Identity:**

Mathura decision triggered a debate as to deficiency- real or supposed - of the law relating to rape in India. However, the need of law to attend such situations was already recommended by the Law commission in 1971. But no implementation of such recommendations was seen till 1983. This fact has been acknowledged in 1980 by the Law commission itself. After five years, the Criminal law was amended and sections 376-A, 376-B, 376-C, 376-D, were added to Indian Penal Code. Section 114-A has also been added to the Indian Evidence Act which provides that on the basis of the statement of the prosecutrix that she did not consent, the court would presume so and burden shifts onto the accused to prove consent. The distinction which amended sections 376-A to 376-D brought into with that of section 376(2), was that under sec. 376(2), there is no consent at all, whereas under sections 376-A to 376-D, there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as public servant, superintendent or member of the management. Sections 376-A to 376-D, *stricto sensu*, therefore, do not deal with rape as is understood in its ordinary parlance. The notable feature of law is that the English law on the subject is limited to only those cases where a person is in a position of trust and the person under care is of 18 years or below, whereas Indian law is much wider under sections 376-B, 376-C and 376-D of IPC. The Court in such cases kept on holding not to be sympathetic towards the persons in uniform and for exemplary punishment. The Court in this case viewed the absence of resistance totally different from Mathura, on the part of the prosecutrix in the context of sense of and attached to the authority and her helplessness. On this point, in 2013, a proviso has been added to make it complete clear that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Thus, the provision of this new law provides a new qualification of the consent to be dealt in.

It is seen that in our Country, the stigma attached to a rape victim is much more than the stigma attached to a person accused of rape. To protect from such stigma, social victimization, ostracisation, from public exposure resulting in exploitation and humiliation of such helpless persons, a new section 228-A was added in 1983. It punishes the disclosure of the identity of victims of offence of rape, as defined under sections 376, 376-A, 376-B, 376-C and 376-D, IPC. The Supreme Court in *Om Prakash* instructed the subordinate Courts to avoid the prosecutrix name in record. The new legislation meant for protecting children from sexual offences prohibits the disclosure of identity of a child. Section 23 (1) to (4) of Protection of Children from Sexual Offences Act 2012 prescribes the procedure for media. In case of contravention, there is provision for punishment.

##### **(ii) Corroborative Evidentiary Value like an Accomplice:**

Section 133 of Indian evidence Act declares accomplice a competent witness for the prosecution. The accomplice/s is/are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact or persons committing, procuring or aiding and abetting. At the same time illustration (a) Section 114 of the same Act declares accomplice an unworthy of credit. The apparent contradiction or antithesis between two the Court has resolved that “...It does not seek to raise a conclusive and irrebutable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest on his uncorroborated testimony yet the Court is entitled to presume and may indeed be justified in presuming that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime...”

The victim of rape, though not termed as “accomplice”, yet her evidence was required to be corroborated the same way as that of an accomplice. The corroboration is a common point between the victim of rape and an accomplice. Therefore, her evidence was treated by the Courts on somewhat similar lines.

A new approach of treating her evidence was developed in *State of Maharashtra vs. C.K. Jain*. Ahmadi J. cautioned the Courts and said that a prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime.....the same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant. A woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. Now, it is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the basis of conviction unless corroborated in material particulars. In *Wahid Khan* the Apex Court held in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible.

#### **SECTION- II**

**(i) Two Finger Test (TFT):**

A rape victim is brutalized twice in India, first by rapist then by State. After sexual assault the victim is required to submit herself for medical examination. The evidence collected by such process plays a great role in determining the guilt of the accused. The conviction depends upon the certainty of evidence produced before Court of law whereas it is seen that several archaic forensic procedures are used to collect evidence and relied upon. One of them is two finger test (TFT) in case of offence of rape. Indian hospitals routinely subject rape survivors to forensic examinations that include the unscientific and degrading "finger" test. This test is yet another assault on rape victim, placing her at a risk of further humiliation. The opinion is formed by the doctor on the basis of number of fingers that can be admitted into the hymenal orifice. The woman is termed as one 'habituated to intercourse or not'. If the doctor forms the opinion based on such archaic, unscientific and degrading method, this is used to demolish her character and disqualify her testimony in rape trial. India Today in its issue quotes the shocking experience of rape victim. Two days after she was raped, the 18 year-old laid spread-eagled on a white sheet at Public hospital in Delhi. Her salwar was removed by nurse and kameez bunched up above her navel. Two male doctors arrived. She went stiff as, without a word, they started examining her pelvic region. All of sudden, two gloved fingers went deep inside her vagina. She cried out in pain, silent and aloof, they merely wiped their fingers on glass sides and left. They had neither asked her permission nor explained to her why they did what they did. This is two finger test (TFT)- a medical inspection of female hymen.

Section 155 (4) of the India Evidence Act, which was later on omitted, permitted evidence of immoral character of prosecutrix in the Court of law. "When a man is prosecuted for rape or an attempt to ravish, it may be shown that prosecutrix is generally a woman of immoral character". In Mathura, Dr. Shastrakar who conducted medical examination formed his opinion on vagina admitted two fingers easily, was relied upon by the Court that Mathura is habituated to sexual intercourse. In several cases, the Courts have taken into account the opinions formed by the doctors by taking resort of such degrading, inhuman and unscientific methods and founded their verdicts. In Musauddin Ahmed the Supreme Court stated the victim "appears to be a lady used to sexual intercourse and a dissolute lady." Thus, she appeared to be a woman of easy virtues.

However, in State of Punjab vs. Ramdev Singh the Supreme Court termed doctor's evidence as hypothetical and opinionative that the victim was accustomed to sexual intercourse. In State of Uttar Pradesh v. Munshi, the Court expressed its anguish and held that even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question. Even if the victim had lost her virginity earlier, it can certainly not give a licence to any person to rape her. Even a woman of easy virtue has a right to refuse to submit herself to sexual intercourse to anyone and everyone. A prosecutrix stands on a higher pedestal than an injured witness for the reason that an injured witness gets the injury on the physical form, while the prosecutrix suffers psychologically and emotionally. But in no case, the Court have seen this method as inhuman, cruel and degrading till Nirbhaya's incident. In 2013, the Supreme Court held that two finger test and its interpretation violated right of rape survivors to privacy, physical and mental integrity and dignity under article 21 of the Constitution. Thus, this test, even if report is affirmative, cannot ipso facto, be given rise to presumption of consent. The Court took into account International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 and said that rape survivors are entitled to legal recourse that does not re-traumatize them. Directing the State, the Court reminded their constitutional duty and said that the State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with her privacy.

**SECTION- III**

**(i) Scheme for Compensation and Rehabilitation:**

In 1995, Delhi Domestic Working Women's Forum filed a write petition under Article 32 before the Apex Court seeking the order for assistance and compensation for rape victim. The Court for the first time laid down the broad parameters for assisting rape victims and framing of schemes for award of compensation to victims of rape. The Court while discussing at length the plight of rape victims and the lacunae in the law and delay in disposal of such cases directed the National Commission for Women to evolve a scheme for compensation and rehabilitation of rape victims vide section 10 of the National Commission for Women Act, 1990 and the Union Government was asked to take necessary steps for implementation of the scheme. The Court indicated the following parameters:

(I) The complainants of sexual assault cases should be provided with legal representation. (ii) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her. (iii) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed. (iv) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. (v) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, the advocate would be authorized to act at the police station before leave of the Court was sought or obtained. (vi) In all rape trials anonymity of the victim must be maintained, as far

as necessary. (vii) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India, to set up the Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some for example, are too traumatized to continue in employment. (viii) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

In 2008, Code of Criminal Procedure was amended which provided for a comprehensive Victim Compensation Scheme in a new section 357-A. Clause (1) of the section envisages that “Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.” Further clauses 2 to 6 of section 357-A of the same provide that the District and State Legal Service Authority as the case may be shall decide the quantum of compensation to be awarded on the recommendation of the Court to the victim or his dependents, who have suffered loss or injury as a result of crime. The District and State Legal Authority in order to alleviate the suffering to the victim may provide immediate first-aid facility or medical benefits and award adequate compensation. In 2011 a new scheme of compensation — the Scheme for Restorative Justice - was initiated by the ministry of women and child development on the activists' recommendations. Several questions were raised appended to justice specifically procedural issues. Rape compensation in India is tied up in processes that assume the impartiality of authorities dealing with the crime — the police and the district boards tasked with determining injuries. Compensation demands 'proof' of injury for which the victim has to undergo medical examination under police supervision. If medical examination is delayed, the evidence of rape is gone. In 2010, the findings of a National Study on Sexual Assault suggested that the rape of Dalit women is “more traumatic than non-Dalits”, as for them it's a trans-generational thing and not a one-time event. Dalits welcome the new compensation package but say that without social justice and punishment of rape and sexual assault as acts of crime, money will not buy them lasting security. Thus, the justice has been seen ultimate satisfaction in the society.

After Nirbhaya, the Act of 2013 added two new sections 357-B and 357-C to the same scheme. In order to provide more assistance, section 357-B made a provision that compensation so payable shall be in addition to fine under section 326-A or section 376-D of Indian Penal Code. Section 357-C extends the medical treatment free of cost to the victims of rape in any hospital run by any government or local bodies or any private person.

(ii) Camera Trial, Video-Conferencing and Compromise in Rape cases:

In accordance with Gurmit Singh, provision for camera trial was inducted by amending the law. In this case the supreme Court said that the Courts should have the trial of rape cases in camera. This should be the rule and an open trial is an exception. The Court further directed the High Courts to impress upon the Presiding Officers to invariably hold the trial in camera. And cases of sexual assault should be tried by lady judges, if available. In the matter of cross-examination of the victim of sexual assault, it is the duty of the Court to see that she is not harassed or humiliated. The Court should not sit as a silent spectator while the victim of crime is being cross-examined by the defence and must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. Further, the Court in Sakshi has confirmed the admissibility of evidence by way of video-conferencing vis-a-vis section 273, Cr. P.C. In this case the Court took a pragmatic view that questions to be put by the accused in cross-examination to the victim or witnesses should be given in writing to the presiding officer in a language which is not embarrassing.

A trend of compromise in rape cases emerged with the times in Courts has been seen to be addressed in Shimbhu vs. State of Haryana by the Supreme Court. It is important here to mention that in most cases the rapist is well known to the victim and with the passage of time, inordinate pressure is put upon her to diminish her complaint of sexual violence. In this case the Court has taken the fact of compromise resulting in reduction of punishment very strongly and cautioned that rape is a non-compoundable offence against the society and is not a matter to be left for the parties to compromise and settle. The Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent. There is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. Acceptance of such proposition will put an additional burden on the victim.

## **CONCLUSION**

The brutal gang rape was committed in moving Bus on 16th December 2012 in the capital of India. This shook the collective conscience of the country raising various questions on the criminal justice administration system from Court to criminal and police to penalty. Neither the police nor the politicians took moral responsibility for the way the bus was driven through busy stretches of the city, reflecting the assaulters' complete lack of fear of the law. Where the demand for the complete overhauling of the system was on fire, at the same time the harsher punishment including chemical/surgical castration was suggested to deter the rapists. The proponents of death penalty also gained the ground. The harsh punishment and hard laws were the call of the time leading to the widest possible changes in rape laws in 2013 recommended by Justice Verma Committee. Though chemical castration could not make ground in penal law yet death penalty in deterrent term was placed in rape laws wherever it was thought necessary. The reason on the part of legislature not to make death penalty as punishment of rape is a fear of victim to be killed. However, what use of this deterrent punishment if the police fail to gather evidence to secure conviction. Many blame shoddy investigations, poor forensics, misogynist among the Police and the lower judiciary for failure

of justice in rape cases. Thus the low conviction rate for sexual crimes is a primary reason for the perpetrators' brazen fearlessness. A bench headed by Justice R. M. Lodha said over 90% cases end in acquittal. What is wrong with the system? The situation is going from "bad to worse". According to PRS, there are 43.2 lakh cases pending in the High Courts and 2.69 crore cases pending in the district courts. In the 30 years since Mathura, the annual crime statistics at the National or State levels have shown no reprieve for the average woman. A cursory look at the Supreme Court's judgements in the past one year shows that the legal process in rape cases have taken eight to 10 years before reaching a conclusion at the highest level.

The law based on Justice Verma Panel passed by the Parliament has provided a strong legal frame work. However, the law commission's 84th Report, 1980 and 172nd Report, 2000 relating to law and order and the National Police Commission Reports recommending autonomy and improvement in quality of police force are yet to be implemented. The implementation of time-bound investigation, fast-track trials, harsher punishment and protection of witnesses has still to be ensured even in present frame work of law.

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4. State of Punjab vs. Gurmit Singh and Others, AIR1996SC1393, 1996CriLJ1728, para. 22., Dinesh @ Buddha vs. State of Rajasthan, 2006(2)ACR1467(SC), AIR2006SC1267, (It is a crime against basic human rights, and is violative of the victim's basic human rights).
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7. The Hindu, Feb 1, 2014.
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9. Ibid, 84th Report, 1980, p. 3.
10. Criminal Law (Amendment) Act, 1983.
11. Intercourse by a man with his wife during separation.
12. Intercourse by Public servant with woman in his custody.
13. Intercourse by superintendent of jail, remand home, etc.
14. Intercourse by any member of the management or staff of a hospital with any woman in that hospital.
15. Sarkar & Justice Khastgir, Indian Penal Code, 1860, Vol. 2, kamal Law House, 2013 edition, p. 1659.
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18. Criminal Law (Amendment) Act, 1983 (Section 228-A (1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376-A, section 376-B, section 376-C or section 376-D is alleged or found to have committed shall be punished with imprisonment of either description for a term which may extend to years and shall also be liable to fine).
19. Om Prakash vs. State of Uttar Pradesh, AIR 2006 SC 2214 (2215) para 3.
20. (2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child.
21. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.
22. The court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.
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40. Sections 357-B and 357-C inserted by the Criminal Law (Amendment) Act, 2013 w.e.f. 3-2-2013.
41. Supra Note 26.
42. Cr. P. C. 1973, section 327 (2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376-A, section 376-B, section 376-C, section 376-D or section 376-E of the Indian Penal Code (45 of 1860) shall be conducted in camera.  
(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court. See also section 37 of Protection of Children from Sexual Offences Act, 2012 which has tried to erase the elements of re-traumatizing a victim woman below 18 years of age in trial. It provides that the Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence. Further the proviso attached to the section says that where the Special Court is of the opinion that the child needs to be examined at a place other than the Court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974).
43. Cr. P. C. 1973, section 327 (Provided further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate), Inserted by the Code of Criminal Procedure (Amendment) Act, 2008, w.e.f. 3-1-2009.
44. Also see State of Maharashtra vs. Chandraprakash Kewal Chand Jain (1990) 1 SCC 550; State of U. P. vs. Pappu (2005) 3 SCC 594, AIR2005SC1248; Vijay @ Chinee vs. State of U. P. (2010) 8 SCC 191, 2010(7) SCALE502.
45. Sakshi v. Union of India, (2004) 6 SCALE 15, AIR 2004 SC 3566.
46. Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the Court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused. See also section 36 (2) Protection of Children from Sexual Offences Act, 2012 which gives the provision of recording the statement of victim woman below 18 years through video conferencing or by utilizing single visibility mirrors or curtains or any other device.
47. 2013(10) SCALE595, 2014CriLJ308. Also see Kamal Kishore vs. State of H.P., (2000) 4 SCC 502; State of M.P. vs. Bala @ Balaram, (2005) 8 SCC 1.
48. Hindustan Times, December 21, 2012 (National Human Rights Commission Chairman Justice KG Balakrishnan cautioned against death penalty for rapists, saying it could expose a victim to greater risk as the tormentor/s might try to kill her.)
49. The Hindu, The rage after the rape, December, 24, 2012.
50. Hindustan Times, August 27, 2013.
51. The PRS blog, December 31st, 2012.
52. Hindustan Times, We must be more involved, January 23, 2013. Also see Pushpanjali Sahu vs. State of Orissa and Anr., AIR2013SC1119, 2012(9)SCALE441.
53. The Criminal Law (Amendment) Act, 2013.



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